THE LIMITS OF JUDICIAL INDEPENDENCE?

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Edited by
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INTRODUCTION

This publication is a result of the international conference "The Limits of Judicial Independence?" organised by the National Council of the Judiciary in Warsaw on 18–19 January 2016. The universal character of the issues raised during the conference resulted in publishing by the National Council of the Judiciary the post-conference materials both in Polish and in English.

The conference was attended by presidents and judges of courts of appeal as wells as regional and voivodeship administrative courts from all over Poland, the Supreme Court, the Supreme Administrative Court, the Constitutional Tribunal, and also representatives of academics, other legal professionals and the media. On the first day of the conference three discussion panels took place:

1. "The European perspective of the judicial independence" (in English), moderated by Judge Grzegorz Borkowski Ph.D., Head of the Office of the National Council of the Judiciary, with the participation of Lord Justice **Geoffrey Vos**, President of the European Network of Councils for the Judiciary (ENCJ); a Judge of the Supreme Court of Portugal **Orlando Afonso**, former President of the Consultative Council of European Judges (CCJE) and the European Association of Judges for Democracy and Freedom (MEDEL), Prof. **Vigintas Višinskis**, a Judge of the Court of Appeal, a Member of the Lithuanian Judicial Council; a Judge of the Court of Appeal

Horațius Dumbravă, member of the Romanian Supreme Council of the Judiciary and **Wiggo Strohaug Larssen**, a judge of the Gulating Court of Appeal in Bergen, Norway. The panel discussion was preceded by a lecture by Prof. **Gerhart Holzinger**, President of the Constitutional Court of Austria, former Head of the Conference of European Constitutional Courts.

2. "The national perspective of the judicial independence – a constitutional approach", moderated by Janusz Drachal, a Judge of the Supreme Administrative Court, a Member of the National Council of the Judiciary, with the participation of Prof. **Lech Garlicki**, retired Judge of the Constitutional Tribunal, former Judge of the European Court of Human Rights, **Adam Bodnar** Ph.D., Ombudsman, and **Ryszard Piotrowski** Ph.D. habil. of the University of Warsaw.
3. "The national perspective of the judicial independence – a focus on ethics", moderated by Katarzyna Gonera, a Judge of the Supreme Court, a Member of the National Council of the Judiciary, with the participation of Judges of the Supreme Court **Krzysztof Strzelczyk** and **Antoni Górski**, as well as Prof. **Andrzej Mączyński** of the Jagiellonian University, retired Judge of the Constitutional Tribunal and **Paweł Skuczyński** Ph.D., the University of Warsaw, President of the Legal Ethics Institute.

On the second day, the reports concerning the subject matter of the conference were presented. District Court Judge **Sławomir Pałka,** a Member the National Council of the Judiciary presented the report concerning the research on the judicial independence of the European Network of Councils for the Judiciary (ENCJ); District Court Judge **Grzegorz Borkowski** Ph.D., Head of the Office of the National Council of the Judiciary presented 18 opinions issued so far by the Consultative Council of European Judges (CCJE); **Anna Machnikowska** Ph.D. habil, Prof. of the University of Gdańsk, presented the results of the survey on judicial independence carried out among judges; and **Grzegorz Wiaderek**, President of the Institute for Law and Society (INPRIS), presented a report concerning the relations between judicial independence and the activities of the civic society organisations.

The idea of organising a conference concerning the limits of judicial independence was drawn up at the beginning of 2015. How-

ever, because of the events occurring at the end of 2015 concerning the Constitutional Tribunal's activity, it turned out that expressing the subject of the conference 'The Limits of Judicial Independence?' in the form of a question seemed to be entirely justified. The subject matter of the relations between the powers in the context of the situation concerning the Constitutional Tribunal came up in the statements of both panellists and invited guests, namely **Jerzy Stępień**, former President of the Constitutional Tribunal, **Bohdan Zdziennicki** Ph.D., former President of the Constitutional Tribunal, Prof. **Ewa Łętowska**, retired Judge of the Constitutional Tribunal, Prof. **Mirosław Wyrzykowski**, retired Judge of the Constitutional Tribunal, Judge **Łukasz Piebiak**, Undersecretary of State at the Ministry of Justice, **Dariusz Sałajewski**, a legal counsel, President of the National Council of Legal Counsels, and **Andrzej Zwara**, a barrister, President of the Supreme Bar Council.

In view of the complexity of the subject matter and the topicality of the statements, some selected materials from the conference "The independence of the judiciary as a guarantee of the rights and freedom of individuals" were also included in this publication. The conference was organised in Warsaw on 24 November 2015 by the National Council of the Judiciary, the Ombudsman and the "Themis" Judges' Association. The materials include statements by Prof. **Małgorzata Gersdorf**, a Judge of the Supreme Court, the First President of the Supreme Court, Prof. **Andrzej Zoll**, former President of the Constitutional Tribunal and former Ombudsman, Judge **Jarosław Gwizdak**, President of the Katowice-Zachód District Court, and **Tomasz Wardyński**, a barrister.

The book also comprises the presentations of specials guests of the conference: **Prof. Andrzej Rzepliński,** President of the Constitutional Tribunal and **Irena Kamińska**, judge of the Supreme Administrative Court, President of the 'Themis' Judges Association.

Hoping that you will enjoy reading this publication, the editor wishes to express his concern that the issues the book touches on, concerning the relations between the State powers and the threats connected to limiting judicial independence, will persist. What is more, those problems seem to be relevant not only in national perspective, but also, as it turns out from the statements of the invited foreign speakers, they are universal for the judiciary as such. However, in order to try to con-

clude on a positive note, we may safely assume that the aptness of the opinions expressed in this book will also remain topical.

Judge Grzegorz Borkowski, Ph.D.
Head of the Office of the National Council of the Judiciary

Krajowa Rada Sądownictwa

THE LIMITS OF JUDICIAL INDEPENDENCE?

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OPENING SPEECHES

Dariusz Zawistowski

Supreme Court Judge
President of the National Council of the Judiciary

Referring to the subject of the conference, I would like to emphasise that the issue of the judicial independence is of fundamental significance to the activities of the National Council of the Judiciary. Article 186 of the Constitution of the Republic of Poland states that the National Council of the Judiciary has a duty to safeguard the independence of courts and judges. Therefore, this issue is particularly vital for the Council.

The judicial independence constitutes one of the basic principles forming the foundation of a democratic State of law. In order to guarantee the functioning of the judiciary according to these principles, certain measures at the constitutional level were required. The Constitution of the Republic of Poland contains a number of such provisions, for example:

— Article 10 regarding the separation of powers;
— Article 173 emphasising the separation and independence of the courts from other authorities;
— Article 178 (1) directly referring to the principle of the independence of judges;
— Article 180 providing for the irremovability of judges.

In this context it is also possible to quote Article 178 (2), Article 179, and Article 181 of the Constitution. Therefore, it would seem that the independence of judges and courts, as system-founding rules, are guaranteed to a sufficient extent and in a permanent way. However, there is serious doubt as to whether this is actually the case and whether the legislative and executive power in its operation sufficiently recognises the separation of the judiciary and the independence of the judges, despite the fact that the protection of the independence of judges and courts is an obligation of these authorities. During the conference alone a number of events have taken place to substantially intensify these concerns.

There is also the issue of the perception of the judicial independence by the public. There are claims, some of which are presented in the mass media, that the independence of judges and courts is a privilege for individuals holding judicial positions and that it constitutes an obstacle to the improvement in the judiciary's functioning. These views are gravely unjustified and people expressing them fail, or refuse, to notice that the separation of the judiciary and the independence of judges are measures ensuring the real protection of the rights of individuals and the fairness of legal proceedings. The literature on the issue rightly emphasises that the independence of courts and judges is closely related to the right to trial and that system-founding guarantees play an ancillary role in the right of every individual to a fair and open trial, without unnecessary delay, by a competent, independent and impartial court- the right expressed in Article 45 of the Constitution. I hope that the conference discussions will, inter alia, address these issues.

Finally, I would like to thank all the people involved in organising the conference. The idea for the conference emerged in the spring of last year, as an outcome of the discussion among the members of the National Council of the Judiciary. For a few months the organisation of the conference was managed by the then President of the Council Professor Roman Hauser, whom I would now like to sincerely thank for his work. I would also like to extend my gratitude to all the members of the National Council of the Judiciary and the employees of the Office o the Council involved in organizing the event.

Professor Małgorzata Gersdorf, Ph.D.

The First President of the Supreme Court
Member of the National Council of the Judiciary

I would like to thank for the opportunity to deliver an introductory speech to today's conference and I would also like to refer to the issues that have recently become relevant more than ever in the last 26 years. I will share with you my thoughts on the principles of independence of courts and judges. I am especially interested in the question of where their "boundary lines" are – the lines which cannot be exceeded for the sake of the constitutional identity of the Republic of Poland.

For several months, in my public speeches, I have emphasised my concerns about public moods, not only in Poland but throughout Europe. We are experiencing another crisis of democracy in history, and a serious one at that. I now feel justified in saying, though without the slightest satisfaction, that my thesis that the judiciary would be the first victim of changes in the "political firmament" of Poland quickly found its conformation. Today, judges and courts are involved in the very epicentre of the dispute, accused of leading the opposition, hampering the government in exercising its power, being entangled politically or even corrupt. These are not merely incidental statements of individuals in power but an eristic strategy that is extremely disloyal to society. Courts will never be involved in competition between political parties,

although they may be – and, unfortunately, right before our eyes – are becoming a plaything in the hands of unrestrained (as they like to think of themselves) executive. It is a dangerous game. The powers were once separated so that the balance between them could be retained and any tyranny prevented – the latter of these eventually turns against the interests of both society and those in power who are unaware of the risks they have taken. Total and indisputable respect for the principles defined in Article 10 and 173 of the Constitution is the key to maintaining the stability of our state and protecting the condition of individual citizens.

While discussing the independence of courts and judges, the meaning of both terms has to be reminded. As is commonly known they are not the same although they are inseparably connected with each other. Independence relates to the independence of an institution and the independence of persons exercising judicial power. Both principles in the Polish legal system stem from the Constitution, Articles 173 and 178, respectively; however, in the doctrine and the body of rulings – especially of the Constitutional Tribunal (I will mention only the resolution of 30 October 2006, ref. No. S3/06) – their international aspect which results from regulations of both the European Convention on Human Rights and the UN's International Covenant on Civil and Political Rights was underlined many times. Therefore, those are invaluable values because a country which is bound by both those acts and aspires to be a democratic state cannot deny its citizens access to courts which are independent and to independent judges who issue decisions.

In the recent public discourse, attention has been drawn to formal guarantees of independence of courts and judges. I do not aim to recount them because it undoubtedly will be the subject of many detailed presentations in the course of today's meeting. Therefore, I would like to draw your attention to three chosen elements of the discussed principles.

Firstly, the structure of the judiciary should be of central concern to all participants in the public debate on its state. Neither supervision over the courts nor the organisational structure of the courts are issues that can be ignored. The decisions of the legislator and the body of rulings of the Constitutive Tribunal determined – probably for years to come – the existence of so-called external administrative su-

pervision on the part of the Minister of Justice. However, its definition or limits have apparently not been outlined. This has already resulted in several constitutional disputes, e.g. over the liquidation of "small" courts or minister's access to case records. Theoretically, supervision entails only control supported by a limited intervention on the basis of and within the law. In the meantime, however, the authority of the minister over courts is increasing and now involves direct administration (e.g. management of courts' resources, carrying out procedures other than those resulting in court decisions and development of courts IT systems), not to mention the possibility of the very flexible shaping of the structure of judicial power only through regulatory provisions (although the form of an act would by all means be appropriate here). In this, I see a danger of pressure on the courts unnoticeable to the public, e.g. by changing their seats and districts or accessing case records outside a formal inspection procedure. I do not claim such activities are being currently undertaken, but I am also able to imagine a different scenario. Competences of the presidents of courts – who are, after all, appointed and dismissed by the minister anyway – in my opinion, are weak and will become weaker. Because of the more and more often repeated opinion that it is the Minister of Justice who "bears full responsibility for the operation of the courts", we are faced with the prospect of courts losing not only external traits, but even all independence.

A very sensitive issue of financial independence of the courts is connected with the above. The current state of affairs is that the presidents of common courts do not have funds for their operation. The directors of courts subordinate to the Minister of Justice are the holders. In the opinion of the Constitutional Court, courts' financial dependence on other branches of power is acceptable on the condition that a sufficient amount of public funds to carry out normal judicial functions is preserved (the judgment of 9 November 2005, Kp 2/05). However, the issue regarding the disrupted balance between the executive and the judiciary, which may in the future adversely affect the condition of common courts, continues to give a cause for concern. In one of my recent public speeches I underlined that they have in fact as much independence as the government has good will. Taking into account the current state of the legal and financial regulations of this part of the

judiciary, with which I have contact as the First President and a judge of the Supreme Court, it would be difficult for me to call off those words.

Thirdly, in relation to the independence of judges, the great importance of guaranteeing the independence of judges in the form of an independent disciplinary jurisdiction has to be underlined. The Constitution grants judges quite a strong protection of their position necessary for uninhibited administration of justice, because of the need to issue a decision on certain disciplinary sanctions (Article 180 (2) of the Constitution), as well as criminal prosecution or imprisonment of a judge (Article 181 of the Constitution). However, it turns out that the problem lies in the insufficient precision of those provisions. We, the lawyers, rightly believe that disciplinary liability and judicial immunity do not exist in the interest of a judge, but in the interest of the office held by him. I am afraid, however, that the popular aversion to the guarantee of independence, which is regarded as unjustified privilege, is used instrumentally by politicians. Therefore, there is likelihood that they will be gradually blurred through the development of standards under which, for instance, prosecutorial functions are delegated to public prosecutors to be exercised before disciplinary courts. Bills submitted in both the fifth term and in the seventh term of the Sejm may indeed show that those concerns are not unfounded. I do hope that such solutions are not currently being discussed in parliamentary and government circles, because their introduction, without any exaggeration, would be a symbolic end of judicial independence.

Since I have brought up the topic of formal guarantee of independence, I will expand the matter of substantive importance of this principle. What does it actually mean? An independent judge makes decisions in accordance with the law and his conscience, so he is not forced – even at the level of external declarations – to adapt to the abstractly understood "conscience" of a community or even the current ruling camp. An independent judge is characterised by courage, nonconformity and the readiness to express conflicting values. The nation as a sovereign provides a judge with the mandate of confidence, believing that his properly formed conscience allows him to take a decision that will be fair and in line with the law. Thus, a historical moment when the opinion that there is a need to bring the judiciary and the nation closer together by making a judge the depositary of "people's sense of justice"

becomes popular, is a grave threat to the independence of the judiciary. Usually it is accompanied by fuelling distrust of courts and judges.

Unfortunately, there have been many moments in history when such phenomena occurred and it may be too trivial to refer to examples that are well known to us from so-called people's democracy. But there are other cases.

Therefore, I would like to draw your attention to the correlation between the crisis of democracy and the postulates of the physical and spiritual dependence of judges on the so-called extralegal (people's) factor.

In recent months, we have been witnessing not only judges being deprecated, as individuals who are supposedly detached from the rest of society (the famous case of the judgment of the District Court in Nisko, in relation to which the National Council of the Judiciary took a position)[1], but also the idea of creating a "Supreme Chamber" of the Supreme Court, which constantly returns and deserves the harshest criticism. Such an "SC within the SC" – reportedly including non-professional judges – would be the most glaring example of exceeding the limits of the independence of courts and judges. If such a project becomes a binding law, we would have to deal with a situation far removed from the standards of the separation of powers, and alarmingly close to the legal situation in an authoritarian state. I hope that this officially unconfirmed rumour is not and will not be the subject of a serious discussion. In anticipation of a possible statement on the matter I will say that, like Alexander Gorchakov, I don't believe in news that has not been denied.

To conclude my speech, let me remind you the words of the creator of the idea of separation of powers, Montesquieu, who in "The Spirit of the Laws" rightly observed the following: "In despotic governments, the prince himself may be judge. But in monarchies this cannot be; the constitution by such means would be subverted, and the

[1] The case referred to the decision of the District Court in Nisko on taking away and placing three children in an educational care centre. MEP J. Wojciechowski, who based his opinion on one-sided, unverified information, attacked on his blog the court because of the decision on taking away and separating the children. This led to a hate campaign against the judge and the whole judiciary(editor's note).

dependent intermediate powers annihilated; all set forms of judgment would cease; fear would take possession of the people's minds, and paleness spread itself over every countenance: the more confidence, honour, affection, and security in the subject, the more extended is the power of the monarch"[2]. Those words, written long before the revolution by a French aristocrat who dreamt of a constitutional monarchy, today should be referred directly to democracy, in which the nation is the sovereign. Let the words of Baron de Montesquieu be a warning for us, contemporary men. People's judge will not be a righteous nor a moral judge. He will not be independent at all.

[2] Fragment from *The Spirit of Laws,* Baron de Montesquieu, Batoche Books, Kitchener, 2011, p. 96, http://socserv2.socsci.mcmaster.ca/econ/ugcm/3ll3/montesquieu/spiritoflaws.pdf (translator's note).

KRAJOWA RADA SĄDOWNICTWA

THE LIMITS OF JUDICIAL INDEPENDENCE?

■

SPEECHES DELIVERED BY THE INVITED GUESTS

Jerzy Stępień

Retired Judge of the Constitutional Tribunal
President of the Constitutional Tribunal (2006–2008)

I find myself in a difficult situation – especially that I am to speak directly after the excellent preliminary speech. What can I say in such extraordinary circumstances? Maybe I will start with a reflection by Lieutenant Adam Korwin-Sokołowski, one of Marshal Piłsudski's adjutants with whom he traversed the whole combat trail of the Legions. On his deathbed, in Warsaw in the 1970s, he bitterly wrote in his memoirs that after the victory over the Bolsheviks he and his brothers-in-arms were convinced that independence and freedom had been regained once and for all. We also, as I suppose, probably in September, and even in October, this year, might have been convinced that the system of government which we established during those 25 years was permanent, and that maybe sometimes we would take a step back, but after that there would always be steps forward creating a reality permanently rooted in the European tradition on which all citizens would agree. I think that nowadays, like Lieutenant Korwin-Sokołowski, we feel disappointed, and at least I am the one of those persons who think that we were too credulous. We were naive, as we did not foresee such a development – this was simply not an element of our direct, yet superficial, view of reality.

What is happening now? I suppose that there are a lot of lawyers in this room who are able to analyse this situation precisely from a purely legalistic, constitutional, point of view, or in terms of international law in reference to various kinds of conventions. However, I keep thinking that this situation needs additional and different kinds of analyses. Although I do not feel fully entitled to carry out a discourse or to fully demonstrate what really is happening in Poland, because this must be considered from many angles and points of view of various disciplines, I think that every lawyer, or rather citizen, is able to analyse the phenomenon with which we have to deal at the moment.

It seems that the turning point, vital in terms of the situation which we are currently observing, is the behaviour of the President, who "pardoned" one of the members of the ruling government. As it is widely known, such a precedent had never occurred before. This had never happened. We were all taught and brought up to believe that only a person sentenced by a final and binding judgement may be pardoned. Recently in Warsaw a première of Mozart's opera *The Clemency of Titus* took place. The issue depicted in it has always occurred in the European tradition, but I find it utterly incomprehensible that it is possible to pardon an innocent person. Ultimately, Titus in the opera pardons a man who was convicted before by the Roman Senate.

The President, by granting a "pardon", added at the same time that he had decided to "rid the court of this case" through the discontinuance of the court proceedings. By this act, or rather non-act, he entered into the space reserved for the third power, i.e. the judiciary. These words were uttered in such an equivocal way that they should be considered as a sign of the beginning of a completely new reality in Poland, one which is characterised by a different procedure from what we have been familiar with until this day. From that moment other alarming facts rapidly progressed, forcing us to answer the question of the essence of the process which includes these facts. What is the essence, in the phenomenological meaning, of the President's statement? In my opinion, it was clearly indicated that there is a certain group of people in this state, more precisely, a group of politicians, which in this particular situation is above the law. Additionally, this signal aims at declaring that even if the law is broken by people connected with the ruling body, at the end of the criminal procedure there is always some-

one who will ultimately repeal its unfavourable effects. And only in this context should one consider what will happen next, and, above all, the situation related to the attack on the Constitutional Tribunal which is a fundamental guarantor of rights and civil liberties. Not only the rights of various kinds of minorities but also of every individual; also those who are connected with the Parliamentary majority or political majority. We find out that there are going to be some Parliamentary commissions – this is the breaking news. Some investigation commissions, and maybe even a people's chamber in the Supreme Court. It smells of a completely different reality. Summing up all these surprising facts and statements, nowadays we – in my opinion – are dealing with an attempt to spark off a revolution in Poland. Revolutions always take place in Parliaments unless there is no Parliament in a given state – as in Russia. We have a distorted picture of the revolution because when we hear the word "revolution" in the first instance we see the attack on the Winter Palace, but in fact revolutions happen in Parliaments. If we study the French, English or German revolutions it is clearly visible that they occur in Parliaments. The current legislation is their instrument. While the events taking place outside Parliament, in the streets, are at best the inspired action of *sans-culottes* who have different purposes to achieve. Montesquieu wrote that each power goes as far, and seizes more and more areas, as it does not meet resistance. The normal authority, in normal conditions, has a tendency to make compromises. If on the other side of a political dispute a power manifesting political resistance appears, the normal authority makes a compromise with the opponent. If we look at actions of the current governmental majority, it is clearly visible that it is unwilling to make any compromise. The world of politics lives and breathes compromise, negotiation, dialogue, looking for a common solution, and here we are dealing with a situation which is absolutely uncompromising in the world of politics. This is, in my opinion, the second argument supporting the belief that we are dealing with such a revolutionary passion of people who want to radically change our state after their own fashion, based on unclear projects and goals. What can we do in this situation? How can we, lawyers, oppose this revolutionary attack? Of course, we cannot use any other methods than those which arise from the system of law. I am personally convinced that we have enough legal instruments to

present a determined, resistant, position against the temptations of this authority which in this revolutionary passion is aiming for the re-evaluation and transformation of our whole legal and constitutional order. Of course, we cannot take any other actions than legal ones, we cannot go beyond those tools which are connected with the world of the legal system, but also we, as lawyers, are not isolated. Fortunately, the international climate is favourable for us – a large body of evidence has already been presented. We can also see that society does not sleep and will not passively wait for the development of the situation.

Ladies and gentlemen, I think that we have to assess and take proper advantage of this special period, which might not last long. I suppose that we might expect many similar surprises in the future. However, at some point this process will stop. If it is true what I am saying, we are dealing with an attempt to initiate revolutionary powers, and maybe even with a revolution in the full meaning of the word. However, we know that all revolutions end one day, and each revolution leads in a certain moment to extreme chaos and a call for power, the strong power of the individual. All revolutions ended in this way. I hope that this very difficult time, even more difficult than martial law, for Poland, and especially for such a person as I, who travelled the whole road of the "Solidarity" movement, will be remembered for gathering experience, experience which in the future, I hope not a very distant one, will enable us to establish a system which will restore order in the Republic of Poland and better protect civil liberties, as well as the rights and freedoms of the individual. I think that right now we have to document these circumstances in a very detailed way. We have to patiently answer all false allegations and react on all these games which go beyond normal discourse so the future Republic of Poland – as I believe – will soon be, in a sense, rebuilt and reconstructed, so that it becomes a better state.

Bohdan Zdziennicki, Ph.D.

Retired Judge of the Constitutional Tribunal
The President of the Constitutional Tribunal (2008–2010)

THE ROLE OF JUDGES HOLDING OFFICES IN SHAPING THE JUDICIAL SYSTEM AND SECURING THE INDEPENDENCE OF COURTS

I

1. Presidents and vice-presidents are appointed from among judges (Article 23 § 1 and § 6 and Article 24 § 1 and § 3 and Article 25 § 1 and § 3 of the Act of 27 July 2001 Law on Common Courts Organisation).

2. Hence presidents continue their own practice of issuing judicial decisions.

3.1. Notwithstanding their practice of issuing judicial decisions presidents and vice-presidents manage the process of issuing judicial decisions in their courts.

3.2. They assign cases, appoint panels and assign days for trials, summon witnesses, notify parties, etc.

3.3. They also examine the course and efficiency of proceedings and supervise the activity of secretariats managing the process of issuing judicial decisions.

3.4. Furthermore, the president's proposals for judges concerning the posts of presidents of divisions, appointing employees of these divisions, the transfer of judges between and within divisions, etc. are activities performed as part of judicial practice.

3.5. All these elements are inseparably linked with judicial power, and therefore with the competence of courts and the independence of judges.

II

1. Presidents create the atmosphere which should enable judges to fulfil their tasks in peace. This means that judges cannot be alienated, but on the contrary, they must be accepted by the judicial community. Hence, the views that a president should act as a special supervisor (a stereotypical "serf" land steward) who is not to identify with judges and withstand "the closed decision circle in the judicial community" are completely incomprehensible.

2. What should the president (vice-president) of the court be like? He/she is to be "the first among equals", i.e. a wise leader of independent judges. As is widely known, our knowledge on the essence of leadership has not evolved very much since the beginnings of human reflection on society, and this is why it simply follows common sense. Therefore, the words written ca. 600 BC by the Chinese sage Sun Tzu[1] are still very accurate.

"If the commander is wise he can react in an appropriate way to the changing conditions.

If he is sincere, his subordinates (soldiers) do not have any problems understanding his intentions and do not feel anxiety.

If he is humanitarian he loves people, he can sympathise with others, take care of their businesses [...].

If he is brave he gains victory, wearing opponents (the enemy) down without any hesitation.

[1] Sun Tzu "The Art of War", Warsaw 1994, as cited in K. Koźmiński "Ograniczone przywództwo" 2013, p.13

If he is demanding, his subordinates (troops) are disciplined because they respect him (fearing punishment)".

The necessary decisions made by judges holding offices should be deprived of procrastination, impartial and absolutely sincere.

The style of action *per se* is an individual matter, as "the population of presidents and vice-presidents of divisions" might be diversified, regardless of the style of action as any human population. One should always be a manager (the embodiment of discipline), an "artist" (a creative inspirer) and a priest, a guardian of constitutional rules and values which should be implemented by judges administering justice.

The evaluation of the president of the court should refer to the "power" of his/her competences and abilities to overcome limitations and threats to the independence of the court and the judges employed there.

III

Among all tasks of judges holding offices (presidents, presidents of divisions and spokespersons) the defence of the competence of the court and the independence of judges adjudicating in it are the most important[2].

Pursuant to Article 8 the Constitution is the supreme law of the Republic of Poland and its provisions are to be applied directly. It does not give any administrative powers combined with the supervision of the independent courts[3] either to the Minister of Justice or any other member of the Council of Ministers. Therefore, there are no doubts that the Minister of Justice (pursuant to Article 149 of the Constitution of the RP he/she is a minister directing a branch of government administration) does not have the constitutional power to direct the "administrative matters of the judiciary". Both the Act of 4 September

[2] According to the first President of the Supreme Court, Stanisław Dąbrowski, the separation and independence of the legislative and executive power constitute the essence of the court system. Hence, the attacks on such independence suspend judges in an institutional and formal vacuum which deprives them of their independence. There are no functional (jurisdictional) independence without the independence in matters.

[3] There is no functional (jurisdictional) independence without independence in organisational and financial matters.

1997 on the branches of government administration (Journal of Laws, No. 141 item 943, as amended) in the part saying that the Minister of Justice directs a branch of government administration "justice", and the Act of 27 July 2001 the Law on Common Courts Organisation, [where the Minister of Justice appears in almost 200 provisions] raise fundamental doubts about their constitutionality. Moreover, further Acts amending the Act on the Law on Common Courts Organisation are constantly strengthening the position of the Minister of Justice in respect of the independent judiciary. We are a museum of solutions received by the Second Republic of Poland as a heritage from the partitions by former absolute monarchies (the Act of 1928 on Common Courts). These solutions were later taken over by the People's Republic of Poland (the amended Act of 1928 on Common Courts was in force until 1985, when it was replaced by the Act of 1984 on Common Courts based on the same assumptions) and now they are not only being continued but also being further "developed" by the increase in the dependency of the judiciary on the Minister of Justice (the executive power) in the Third Republic of Poland [the Act of 2001, the Law on Common Courts Organisation has already been amended 69 times].

Meanwhile, the Council of Europe and the European Union speak about the "Europe of judges" and not about the "Europe of Ministers of Justice". Furthermore, there is no need to be reminded of the leading role of the European Court of Human Rights and the Court Justice of the European Union in building a united Europe.

While applying the Law on Common Courts Organisation and implementing secondary legislation thereto issued by the Minister of Justice, judges holding offices are obliged to use only pro-constitutional interpretation (Article 8 of the Constitution). In the event of more serious doubts, the appropriate adjudicating panels should address the legal question to the Constitutional Tribunal in terms of the compliance of a given norm with the Constitution which guarantees, within the framework of the separation of powers (Article 10), the separation and competence of courts (Article 173) as well as the independence of judges (Article 178 of the Constitution).

With the support and legitimacy in the Constitution adopted through a national referendum (no less a "strong" legitimacy as the election Act of the remaining two powers) with all our might we should

resist the legislative power which, contrary to the Constitution in force, sees judges as "the mechanical lips" of its passed bills. The same should be done if the executive power opts for "their lawyer-realists" who will constitute the "transmission belt" of views expressed by the ruling political class.

IV

Judges holding offices, both in their practice of issuing decisions and in managing the process of issuing decisions should implement the rules and values included in the Polish Constitution. In each hard case we directly or indirectly refer to values. The most important of them, next to truth, goodness and beauty, is justice (The Preamble of the Constitution). Article 45 of the Constitution establishes the obligation to pass fair judgement. Therefore, it is not only an ethical obligation but also a constitutional and legal one. It is about the implementing of the rule of law by judges not only in the formal sense [observing the law in terms of language] but also in the material one [implementing constitutional values and rules which are the basis of every provision]. The judge is bound by statutory law, but only when it complies with constitutional rules and values. Applying *lex* (statutory law) one has to interpret it in such a way as to not be in conflict with *ius* (Constitution). Only then a just decision may be made. The application of constitutional rules and values is not easy, as they often come into conflict with one another. Various tensions appear between liberal and community values, individualism and solidarism, equality and freedom, the realisation of the individual's interests and the realisation of collective interests, efficiency and social justice.

Hence, judges holding offices, not only through their own "exemplary" issuance of decisions, but also through the subjects of organised conferences, meetings and training, should point out that the classical methods of legal positivism are not enough, as it is often necessary to refer to the discursive model of applying the law. One has to place the so-called "balancing of values" on the traditional (subsumptive) model of applying the law, which is based on the precision of the concepts used, logics, and the so-called legal topics, when it comes to the choice between contrary, in a given situational context, values in accordance

with the proportionality rule or adoption of, if it is possible, a compromise solution.

The discursive model of applying the law in hard cases requires the full competence of the court and the creation by the judges holding offices of an appropriate atmosphere for fulfilling the mission of administering justice by independent judges. Hence, one has to oppose all political and ideological reprivatisation and restoring actions, "staff purges" non-compliant with the rules of labour law carried out after winning elections to circumvent the law in the guise of various kinds of "reorganisation". This should be one of the supreme rules observed by presidents and other judges holding offices in managing the process of issuing judicial decisions in their courts.

V

1. The competent administration of justice may be provided only by judges with the best legal (professional) preparation, high morale and appropriate personality traits, such as civil courage, the ability to make decisions, the ability to organise work on their own, prudence, empathy, the appropriate attitude to co-workers, respect for the dignity (Article 30 of the Constitution) of every human being if he/she is in the court, even if accused of committing a serious crime. The first President of the Supreme Court wrote[4] that almost as much is required of the judge as of a saint. According to R. Dworkin, the judge should be the "Hercules", a judge who apart from proclaiming eminent rules and values has an unchangeable will against various pressures on their actual implementation. He/she always chooses rules and values which are more important than private interests, political correctness or his/her own, strictly personal, preferences.

2. Judges holding offices should be role models showing how judges should behave in various life and professional situations. Keeping

[4] S. Dąbrowski, *Ustrojowa pozycja sędziego*, [in] *Aurea praxis, aurea teoria. Księga pamiątkowa ku czci profesora T. Erecińskiego* [The systemic position of jud ges, in: "Aurea praxis, aurea teoria". A Liber amicorum book in honour of Professor T. Ereciński] volume 2, Warsaw 2011.

the remembrance of eminent judges of a given court. Holding them as role models and defending these judges – The "Herculeses" – against the attacks of politicians and the press as people who in difficult cases showed not only perfect knowledge of the law but also a great courage. As far as recent history is concerned, judges *in gremium* initially refused to stand for lustration judges, pointing out that the lustration infringed the essential rules of the Constitution, the fundamental rules of criminal law and introduced fiction to court trials, in spite of the fact that in December 1997 the National Congress of Solidarity adopted a resolution under which due to the "boycott of lustration by judges" its MPs were obliged to amend the Lustration Act, so that it took charge of the administration of justice first.

Not long ago, because of a completely ill-considered close-down of the courts, which was later abandoned, judges refrained from adjudicating. This was an unprecedented event in the history of the Polish court system.

Igor Tuleya, a judge of the Regional Court in Warsaw, issued a well-known judgment, which required great professionalism, in the case of a famous cardio-surgeon, for which he was publicly insulted, his family was lustrated and he was deprived of the function of Spokesperson of the Regional Court. The court of the first instance, 2nd Criminal Division of the Regional Court Warszawa-Śródmieście in the panel consisting of 3 professional judges sentenced Mariusz Kamiński (currently appointed Minister coordinator of all special services) to 3 years' imprisonment for the abuse of powers when he acted as the chief of the Central Anticorruption Bureau (his previous post). In the case of Judge Tuleya, for the judgement of the Regional Court Warszawa-Śródmieście passed in the case of Mariusz Kamiński, the judges were and are attacked by the press and statements by politicians. Persons performing important functions in the authorities of executive and legislative powers contested in their public utterances [personally!] the authority, professionalism and moral qualifications of the adjudicating judges. This is unthinkable in the democratic rule of law, because such behaviour meets the legal definition of constitutional tort.

Judges holding offices are obliged to defend judges against such attacks, against illegal interference with the activities of the judiciary

and the violation of the constitutional exclusiveness of the courts for the administration of justice (Article 175 (1) of the Constitution).

Citizens must not be deprived of one of their most important rights – the right to a hearing before a competent, impartial and independent court (Article 45 of the Constitution). Moreover, judges holding offices are obliged not only to defend brave and independent judges but they should also hold them as role models for others.

The constant unlawful delegitimisation of the judiciary inflicts an irreparable damage on the Republic of Poland and the common good of all its citizens (Article 1 of the Constitution). Attacks on courts and judges cannot be considered as permissible criticisms of the public authorities' actions. Such attacks constitute evidence of the complete decay of legal and political culture which was initiated by the famous "Falandisation of the law"[5] during the Presidency of Lech Wałęsa.

[5] Prof. L. Falandysz – President Wałęsa's advisor. Falandisation of the law a pejorative term used in Polish journalism describing some attempts in the interpretation of the law. It refers to any form of abuse or avoidance of the law, the attempts to effect interpretation in the ad-hoc interests of the interpreter(editor's note).

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THE RELATIONSHIP BETWEEN THE SEPARATION OF POWER AND JUDICIAL INDEPENDENCE. EIGHT OBSERVATIONS

1. **The topic[1] is strongly related to the place of the judiciary in the separation of powers (Article 10 of the 1997 Constitution[2]).** This paper is devoted to this relation, which is not fully understood in Poland by politicians, the media and also, unfortunately, by lawyers.

The fact that the Constitutional Tribunal in its case – law has not given sufficient attention to the analysis and guarantee-creating role of the separation of powers in general is significant as well. References to it in the judicature of the Tribunal are limited to **decorative lip service**;

[1] In the documenting part of the elaboration I use my other earlier elaborations.

[2] Article 10. 1. The system of government of the Republic of Poland shall be based on the separation of and balance between the legislative, executive and judicial powers.

2. Legislative power shall be vested in the Sejm and the Senate, executive power shall be vested in the President of the Republic of Poland and the Council of Ministers, and the judicial power shall be vested in courts and tribunals. (bolded by E.Ł.).

especially, the connection (*iunctim*) between Article 10 and Articles 173, 178 and 186 of the Constitution is established. As a consequence, the specificity of the judiciary in the separation of powers is ignored and the hunt for its jurisdiction is seen as isolated cases and not disruptions to the functioning of the guarantee mechanism[3]. However, the situation is completely different in states with more advanced traditions of modern democracy and a rooted concept of the rule of law. The European Union recognises the state ruled by law and its institutions (which undoubtedly includes a special position of the judiciary[4]) as one of the essential values of the Union (Article 2 TEU[5]).

2. Antonin Scalia, probably the most-conservative judge in the US Supreme Court, who was not favourably disposed towards liberal views, is the author of a concise statement which is worth citing. "Justice Scalia expounded on what sets the United States apart from other countries: **not the Bill of Rights**, which 'every banana republic has,' **but the separation of powers. Americans 'should learn to love the gridlock,'** he said. 'It's there for a reason, so that the legislation that gets out will be good legislation' "[6] (emboldened by E.Ł.). In his view, without the separation of powers there is no good legislation, or law. **While in case of the existence of the separation of powers a slowdown in law is inevitable,** it refers to the process of both making and applying the law. This is nothing else than the fact which is so willingly mentioned as an example of the phenomenon defined in a highly pejorative manner: legal impossibilism and judicial mandarinism running rampart. Here in

[3] I describe these issues with more detail in another paper. Compare: E. Łętowska, *Władza sądownicza a pozostałe władze – stan równowagi czy jej zachwiania?* in: Pozycja ustrojowa sędziego, ed. R. Piotrowski, Warsaw 2015, pp. 124–165.

[4] Compare: Study No. 711/2013, of 7 December 2015, CDL-RoL (2015)001 European Commission for Democracy Through Law (Venice Commission), Draft Checklist on the Rule of Law.

[5] Article 2. The Union is founded on the values of respect for human dignity, liberty, democracy, equality, THE RULE OF LAW and respect for human rights, including the RIGHTS of persons belonging to MINORITIES. These values are common to the Member States, the societies of which are characterised by pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men. (bolded by E.Ł.)

[6] E. Huetteman, *Breyer and Scalia Testify at Senate Judiciary Hearing*, N.Y. TIMES, Oct. 6, 2011, p. A21.

the view of the American conservative the inevitable slowdown as a result of using the law as a safeguard and guarantor is an inconvenience worth suffering to retain the quality of law.

3. The key statement that the separation of powers equals slower but better shaping of the law needs to be clarified. **Shaping the law includes not only its making but also working out its application standards: the general protection level of subjective rights, which are covered by the enacted law.** In making the law, the role of a security device is mostly down to the constitutional courts. In the USA the Supreme Court performs this function. Here the criteria of "goodness" may be shaped in a wider or narrower way (only content or also the mode of preparing and enacting, e.g. consultations, opinions, efficiency of consulting procedures, etc.). It is obvious that in such a case judicial assessment is in conflict with the evaluated legislator, while the wider the competition field the more factors of constitutionality assessment come into play. At this stage judicial independence guarantees that the decisive centre of evaluation does not move towards other powers (in this case controlled by the judiciary).

4. **The judiciary is dispersed and deconcentrated; it acts exclusively through concrete decisions.** It shapes particular legal relations and at the same time decides in this way, indirectly, on the standards of the law. The performance by the judiciary of its everyday work (adjudicating in particular cases) regardless of the settlement of a particular, separate, case is shaping the standard. How it is shaped, what level it achieves, whether it is stable or not, if there is a large difference in similar cases in courts, if courts are predictable – all these factors depend on the judicature of common courts, on the functioning of the judiciary as a whole. The standard, however, is the other side, the reverse side of the contents of law enacted in an abstract way. In this respect the functioning of the judiciary, its functioning as a whole. is nothing else than the exercising of power within the framework of a part that was given to it in the separation of powers. From this point of view the action of the judiciary is not only the settlement of particular disputes or imposing particular sanctions. However, it is important to shape standards through repeatable individual judgements, in a deconcentrated

way. This also requires the independence of those who adjudicate to make their axiology and sensitivity, and not the axiology and sensitivity of the remaining powers, to generate judicial decisions.

5. Not being the power of either a pouch or a sword, the judiciary is relatively weak in comparison with the legislature and the executive which have measures to shape the conditions of the judiciary's actions. The **legislature** "cuts out" legal frameworks, also for the judiciary. The executive power creates the conditions (organisational, financial) for its functioning. But the **judiciary** possesses a different kind of power, treated by the other two as competitive and threatening to them**; it has power over the law, over its meaning.** It is the judiciary which decides on its interpretation, reading into the text to which it gives meaning thanks to the interpretation and establishing of the rules of its application. This is because in this way the judiciary has in its hand the weapon of deciding on the meaning of the law sometimes in a manner which is highly inconvenient for the other powers. The phenomenon is known to the sociology of law[7] which also emphasises the reluctance of the judiciary to show the content of its arsenal[8]. By all accounts, it is a rational strategy. On a number of occasions, in times of greater tensions between powers, the judiciary turned out to be the defender of democratic values. Then it was looking for safe havens in order to protect its own integrity against non-democratic axiology and found such a refuge in the field of abilities to give meaning to the law (which originated from the legislature), thanks to the professional and dogmatic skills of judges[9].

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[7] P. Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, "Hastings Law Journal", July 1987, pp. 805–838. Compare: also H.P. Graver, *Judges Against Justice. On Judges When the Rule of Law is Under Attack*, Berlin–Heidelberg, Springer Vlg, 2015.

[8] H. Dębska, *Władza. Symbol.Prawo. Społeczne tworzenie Trybunalu Konstytucyjnego,* Warsaw 2015, p. 50 in..

[9] Z. Kühn (The Judiciary in Central and Eastern Europe: *Mechanical Jurisprudence in Transformation?* "Law in Eastern Europe" No. 61. Martinus Nijhoff Publishers, Leiden *2011)*. In the opinion of this author, the legal culture of states based on real socialism is dominated by judicial formalism (characterised by the excessive attachment to the literal interpretation of texts at the expense of systemic and teleological interpretation. Such "ultraformalism" was a defence against the trauma of the Stalinist epoch when

6. "**Friendly cooperation" between powers** listed in Article 10 of the Constitution (referring to keeping the balance between powers, as part of the separation of powers) **is more an idealistic assumption than a description of reality.** (as is the case with Article 25 (3) in terms of "cooperation for the individual and common good" in the relations of the separation of powers between the state and churches). It is visible against the background of the current constitutional crisis and the aspiration of legislative power to an honourable place in the separation of powers which resulted in questioning the constitutional position of the Constitutional Tribunal[10]. The same perspective (reality as a fight for power, also a symbolic one, in the legal field) would support the inevitability of the well-known dispute between the Constitutional Tribunal and the Supreme Court[11] and also it would explain why relations (on the other subfield of power) between State and Church, based on the model of friendly cooperation, turn out to be more difficult than the separation model. Therefore, tensions between the judiciary, the legislature and the executive, are nothing extraordinary. One may mention here the chronic disputes in Poland between the

deformalised and politicised methods of interpretation led to the distortion of the judicial application of the law. In this situation, for lawyers in the period of the so-called thaw, formalism – also being demonstrated nowadays – has a historical background because it became a "safe haven" protecting against the excessive influence of political authority and allowing finding a minimum of professional autonomy in the post-totalitarian authoritarian state.

[10] H. Dębska, *Władza*, pp. 296–297, 299, presents from this perspective the seeds of political conflict concerning the CT which was to emerge at the turn of 2016, emphasising (p. 282) the inevitability of the opposition between the Constitutional Tribunal and the legislator: "the Constitutional Tribunal is forced to participate in the discourse (and in this way to build and sustain its identity) as the legislator's opponent who, in fact, personifies the political field".

[11] The Supreme Court may pass abstract resolutions which are not the settlement of a particular dispute but provide an interpretation to the provisions (also in the case of indeterminate phrases or general clauses and so, by the way, in the situation-oriented sphere). At the same time the Constitutional Tribunal considers the constant, common and repeatable practice of giving meaning to the provisions of the law as the basis for the conclusion that the provision in this meaning is in force and as such is subject to constitutionality control (CT of 13 September 2011, court file No. P 33/09, OTK ZU 2011, No. 7A, item 71), then the existence of the common and disputable spheres between jurisdictions is immanently programmed in the legal system.

executive (Minister of Justice) and the judiciary, concerning the scope and forms of administrative supervision over courts, while examples from history[12] include "the judiciary's striking out for independence" or, on the contrary, its collapse (under the influence of political changes in Austria in the 1930s[13]) as well as the difficulties experienced by all transforming countries in the 1990s: well-known cases of limiting and paralysing the work of the constitutional courts (Russia, Belarus, Hungary[14], nowadays Poland). In this perspective there should be seen not only an apparently doctrinal dispute on judicial activism and the limits of its permissibility, but also the issue of the interpretative invention of the courts. Explaining reality through the vision of a fight for power: the one who decides on the interpretation and rules of applying the law and its interpretation has the power over the law reveals the reasons behind the idealism of assuming the harmonic cooperation between powers.

7. **The judiciary** is **dispersed and deconcentrated**. **Acting exclusively through concrete decisions**, it directly shapes particular legal relations; **this way, it also indirectly decides about the standards of the law, i.e. what shape the law enacted by Parliament will take.** As a rule, in shaping the law the judiciary is intrinsically closer to citizens than the legislature or even the executive. But this means that its settlements cause more legitimisation problems: broader, faster and directly noticeable and located. The sluggishness of the judiciary, its callousness or excessive formalism, and the insensitivity to the need for legitimisation through transparency and intelligibility, result not only in the dissatisfaction of a party in a particular dispute but it also translates into the abuse of trust in general, weakening its social legitimisation. In this regard, the judiciary itself is not sensitive enough to the need

[12] In the USA the case *Marbury v. Madison*, 1803; this case after 50 years became the basis for granting to the judiciary the authority to assess the constitutionality of acts by the court.

[13] L. Garlicki, *Jak w latach 1933–38 likwidowano austriacki Trybunał Konstytucyjny*, [in:] *Państwo, prawo, obywatel: zbiór studiów dla uczczenia 60-lecia urodzin i 40-lecia pracy naukowej profesora Adama Łopatki*, Wrocław 1989.

[14] E. Świętochłowska, *Węgierski prawnik: nie idźcie ta drogą*, Infor-Business, 5 December 2015.

to legitimise "itself" when passing judgements, confusing the existence *ex lege* of its own competence concerning passing judgements with social legitimisation which requires constant confirmation, and anyway prevents the strengthening of the view of the judiciary as the power ignoring such a need.

8. **Contemporary democracy and its legitimisation** and the features of the judiciary. Contemporary democracy acts in a world much more complex than that of the 19th century. Globalisation and economic integration (EU) are creating a density of legal regulations (the multilayer nature of law, the multicentricity of enacting, new problems concerning ranges and conflicting relations). Judicialisation takes place on many levels, in many fields at a significantly complex level and engaging conflicting interests. This is why the mechanisms governing democracy are becoming more complicated, "too messy" for one centre of power wielding. Moreover, a "short breath" of democracy (from election to election) does not provide strategic opportunities for the long-term safeguarding of the general interests of the public in terms of the classical political authority winning the elections). It equally concerns the legislature (chosen in elections, as well as the executive). Majority democracy, which is intrinsically short-term, implemented by parliamentary majority, perhaps does not give way to, but is complemented (in Western Europe at least), by institutions of deliberative democracy. Hence the segmentation of preparatory and consultative processes and procedures. as well as the de-concentration and decentralisation of democracy among various institutions and levels of its performance (sharing the risk of power, looking for consensus and legitimisation in consultations and procedures). Legitimisation cannot be provided by exclusive reference to formal competency granted by the law. This is why attempts at different kinds of **legitimisation of power** appear[15] through **impartiality** (the creation of authorities and procedures equipped with guarantees of preserving this aspect), **reflectiveness** (authorities using procedures which balance conflicting values, among other things), finally, through **the closeness** of power towards the citizen. From this

[15] P. Rosanvallon, *La Légitimité démocratique. Impartialité, réflexivité, proximité*, Le Seuil, Paris, 2008.

point of view, **courts and the manner of exercising power by them within its separation (competent courts; independent judges "administering" justice, so "balancing" the situation of the conflict of interests; using in a deconcentrated way power over the law vested in them through settling particular disputes in cases brought by citizens) reveal especially valuable legitimisation properties**, relevant to a modern democracy. However, the problem is for the judiciary to use them in practice[16], for the common benefit and for its own social legitimisation[17], which, *nota bene*, strengthens the position of the judiciary against the remaining powers. Here one might express a number of critical remarks but this is a subject which requires a separate and much-longer paper.

[16] The related issues are described in a more detailed way in E. Łętowska, *Wirtualizacja sądowej ochrony słabszych*, [in:] *Ochrona strony słabszej stosunku prawnego. Księga jubileuszowa ofiarowana Profesorowi Adamowi Zielińskiemu*, ed. M. Boratyńska, Warsaw 2016, pp. 73–91.

[17] A study by H. Dębska (as above) writing critically about the shaping of the social legitimisation of the Constitutional Tribunal in Poland. The constitutional crisis in late 2015/early 2016 added a dramatic epilogue to these observations.

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To certain people there comes a day
when they must say the great YES or the great NO.
He who has the YES ready within him immediately reveals himself,
and saying it he follows his honor and his own conviction.
He who refuses does not repent.
Should he be asked again, he would say no again.
And yet that NO – the right NO – crushes him for the rest of his life.

Konstantinos Kawafis, *Che fece … il gran rifiuto*

The context in which courts and judges function determines the boundaries of their independence. The context of preparing this conference was different from that in which it takes place.

We are faced with an extraordinary constitutional situation, because circumstances and events have occurred that led to the infringement of the rule of law and constitutional order, while the rules of the separation of powers, the competence of the courts and the independence of the judges are being contested.

Parliament is passing bills which make the constitutional control of the law impossible, harming the efficiency of protecting the constitu-

tional order in force. In terms of the Constitution, the Act which limits the position of the Constitutional Tribunal (I will be referring to it as CT) in the political system is unacceptable. On the one hand, the legislator is obliged to develop constitutional rules and values. On the other, in a constitutional democracy it is prohibited from undertaking any actions which would result in the degradation of constitutional rules.

The Act amending the Act on CT passed in December changes the constitutional system of the Republic of Poland. The change in the system is an extraordinary situation and requires a response involving appropriate measures. Such a measure is adjudication by the CT based directly on the Constitution, as this is an appeal to the Constitution in defence of the constitutional axiology which includes the rule of common good, the democratic rule of law, the supremacy of the Constitution and the separation of powers. In such a situation the constitutional judge is obliged to directly apply the provisions of the Constitution. The problem concerns the conflict between pure legalism or even legalistic opportunism and the essence of Constitutionalism, especially the supreme role of the Constitution. Defending the status of the Tribunal is in fact defending the Constitution of the Third Republic of Poland, which is the secular bible of the whole nation for its citizens.

Incidentally, CT was put in a situation similar to that of Antigone's tragedy. On the one hand, in the case of Antigone the supreme law was the divine one and in the case of the amendment of the Act on CT it is the law of the Constitution. On the other hand, there is Creon's prohibition, and, in the discussed case, the Act amending the Act on CT. Both in Thebes and in Warsaw everything takes place within twenty-four hours.

One more remark concerning the essence of the democratic rule of law. All Acts passed in the 8th term of office come into effect the day after the announcement. *Vacatio legis* as the essence of the democratic rule of law has been forgotten. The pace, mode and contents of the passed bills makes it surprising that we still remember the term "decent legislation".

This is not only the refusal to immediately publish a CT judgement but also the refusal to enforce it and to take the oath from the judges. The list is long. Formally, it happens in the conditions of the state and under ordinary order. The Constitution recognises extraordi-

nary situations such as martial law, a state of emergency and a state of natural disaster. I am afraid that we may find ourselves on the track to the situation in which we will talk about the disaster of the democratic rule of law.

We are dealing with a growing crisis which involves the Constitutional Tribunal.

A constitutional crisis takes place (arises) when at least two constitutional authorities are involved in the problem (usually a dispute). The dispute is related to the functioning of the constitutional mechanism in such a way that it disturbs the working of the whole mechanism.

All events which were the source of the constitutional crisis stem from the abuse of power. This is usually accompanied by a change in the understanding of the fundamental rules, laws or the meaning and contents of constitutional norms. We should remind ourselves that observing power limitations by the authorities is not only a constitutional dictate. This is the essence of the constitutional order of every state and society.

Some rules are treated as axioms, as irreplaceable, let alone inviolable. Therefore, there was no need to create a reserve, appellate, recovery mechanism. There was no need to create a crisis-solving mechanism.

A solution is eventually found for every crisis, but the boundary conditions of the procedure for solving a constitutional crisis should be met.

Firstly, liberal democracy, as well as the open society (referring to Karl Popper's concept) recognise and respect the inviolability of the constitutional legal order. The Constitution is not only the guarantor of individual and community rights. It is also a fundamental moral concept.

Secondly, a crisis caused by political decisions, actions and negligence may be overcome in an appropriate way if the Constitution serves as the starting point. The constitutional crisis cannot be solved beyond the frames of the Constitution or even contrary to it.

Thirdly, due to the fact that such a crisis originates in the abuse of power by authorities it cannot be tackled by an amendment of the Constitution. This would lead to creating a permanent constitutional crisis, as the mechanism for the imposed amendment of the Constitution. And everything takes place in a situation in which the authors of the crisis do not have the qualified majority in the Sejm required to initiate a normal amendment of the Constitution effectively.

Fourthly, a crisis can be an opportunity, but a constitutional crisis is a not an opportunity for the Constitution. It is *sui generis* a test for it, but the Constitution is a value which is too precious for society and the ***raison d'état*** to be tested. It sets the boundaries of the political compromise to overcome a constitutional crisis.

The liberal democracy model allows the optimal compromise, which gives maximum benefits and reduces losses to a minimum. The constitutional compromise should be strengthened by contemporary constitutionalism, i.e. the political concept which guarantees more freedom, more democracy, more rule of law and more rights of the individual.

You're not as numbed as you think,
And even if you're like a pebble on the ground,
Together with many-other pebbles
You can change the course of an avalanche.
And, as someone else used to say,
If you can change its course, then do so.
Blunt its ferocity and savagery;
That also requires courage

Czesław Miłosz, *The Moral Treaty*

Łukasz Piebiak

Judge
Undersecretary of State at the Ministry of Justice

The independence of judges and the independence of courts which is connected with it constitute the foundation of the democratic rule of law. Article 178 (1) of the Constitution of the Republic of Poland stipulates that judges within the exercise of their office are independent, whereas Article 173 provides that courts and tribunals constitute a separate power and are independent of other branches of power.

In terms of ethics, the conference subject seems to pose the question of whether their competence and independence should be delimited at all? In the legalistic sphere it provokes the question – is demarcation possible to be carried out through normative provisions within the above-mentioned constitutional rules?

It is accepted that judicial independence is a judiciary rule, under which in settling disputes the judge is subject exclusively to the Constitution and statutes. The dimension of judicative sphere in which judges are limited only by statutes remains the key problem. Here one may observe an unavoidable conflict of values within the framework of the influence of the so-called administrative supervision. The Minister of Justice is in charge of such supervision, but in the everyday functioning of the courts the routine supervision of presidents of courts

and presidents of divisions turns out to be more important. The manner and form of their control will decisively determine the real nature of the independence of Themis' representatives. This means that in this place one could look for borderlines as mentioned in the conference subject. This shows how important it is to define court administration in a precise way in order to exclude its penetration to the jurisdiction, i.e. the judiciary. The goal which should be pursued is the model of the judge who has the apparatus for exercising his/her tasks and takes advantage of it and also is responsible for the results of his or her work. Therefore, this is about limiting the influence of external factors to an absolute minimum and at the same time to provide an efficient and effective system of the judiciary, along with guarantees that its entities will not be separated from their essential mission which is service for the benefit of citizens. Such a risk exists when certain professional groups evade social control, being distinguished by features which are unavailable for others. Hence, there is a real danger of the alienation of judges who, using their attribute of independence, might perceive their role as that of a particular class separating itself from the rest of society. This is why it is important to create control mechanisms counteracting such tendencies.

In this respect we may also talk about the boundaries limiting the independence of courts. This foundation is anchored in Montesquieu's tripartite system, while its normative form is stipulated in Article 10 of the Constitution of the Republic of Poland. The system of government of the Republic of Poland is based on the separation and balance between legislative, executive and judicial powers. The *check and balance* principle is to prevent any power from attempting to become supreme over the others. However, the problem which is extremely vital here concerns the cooperation of particular powers in such a way that cooperation for the common good prevails instead of inevitable conflicts. Shaping the relationship between these powers will influence directly the form adopted by courts in utilising their dominion. What seems more important in terms of practice is the relationship between the government administration, the authority of which is the Minister of Justice, along with his apparatus for executing his tasks which is the ministry, and particular courts and the judiciary in general. It is about such a formation of mutual relations that the courts on the one hand

are not the petitioners towards the Minister, and on the other, that the Minister who is politically responsible for the condition of the judiciary has tools enabling him to correct those actions of the judiciary which meet the opposition of the public.

This follows from the fact that, while the competency of the courts may be referred to the judicial sphere, the range of actions taken up by the courts, as an independent and separate power, is much broader. The power of the courts not only includes the above-mentioned government administration but also the sphere of the judges' work organisation and their assisting apparatus, using and allocating substantial financial outlays, self-governance, or, finally, the disciplinary responsibility of judges. Here, there is a wide spectrum of actions which must be checked and balanced by other powers. It is all the more significant if we realise that the decisions of the courts concerning this aspect will affect thousands of entities. We have to counteract the alienation of this power from society and prevent it from fraternising with the government administration.

Speaking of the competency of courts, one should bear in mind that the courts also have their authorities, which include general assemblies of judges, councils, presidents and presidents of divisions. These authorities are subject to the same mechanisms as all others. This is why it is important to consider ensuring the system of control and balance within these authorities. Such an action should provide the *de facto* independence of the courts, rather than their constituent bodies.

Coming back to the question of the boundaries of the independence of the third power, it seems that, as every power, this one also should be limited, as it is required by its serving a social role. However, it must be remembered that society itself expects an impartial and competent examination of each case which is filed with the court. Therefore, judges should be defended against influence from both the outside and the inside of the administration structures. Additionally, they have to be protected against temptations of power, providing transparency of promoting and disciplinary procedures. This task will be carried out by the Ministry of Justice.

Not all borderlines can be set by means of legal norms. Each power consists of people whose ethical attitudes give evidence of the virtues of a given office. Judges are required to be of impeccable moral

character. This is the general clause which is attempted to be filled with content by means of codes of ethics or a set of principles. The condition in which any guidelines of this kind are not necessary remains the ideal. Authority is believed to be able to defend itself unaided in the eyes of public opinion. First, however, such authority should be built and then persistently protected. This is why education is such a vital element in the discourse – education not only within the scope of awareness of the law, but as broadly perceived knowledge on the status of judges and courts in the system of government as well as on society's expectations and challenges.

This is why this conference becomes even more important as its subject inspires to reflections on the development of the judiciary in the dynamically changing reality. It seems that globalisation and its consequences will not go around the third power. This inclines one to consider how, in the face of many new challenges, to provide the effectively functioning judiciary apparatus which will still be distinguished by the features of the independence of courts and of judges. I hope that this discussion and its conclusions will serve further reform work as well as becoming a source of a fresh and lively social debate.

Dariusz Sałajewski

President of the National Council of Legal Counsels

I would like to sincerely t hank the organisers of the conference for their invitation. The very fact of my participation in this major event in the legal community is in itself a great honour and an opportunity to share my views on the matters to be discussed. As many speakers have addressed you before me, bearing in mind the element of dignity which should characterise my profession, i.e. modesty, I would not like to repeat some of the opinions expressed so far; nor would I refer to them too hastily. Therefore, I must abstract from what I have prepared and start with a metaphor that came to my mind while I listened to the eminent preceding speakers.

The First President of the Supreme Court in her speech talked about the constitutional anchor in the form of constitutional norms relating to the independence of courts and judges, frequently quoted by many of you. It would seem that the anchor guarantees the stability of the mentioned principles and prevents them from being neglected. If these principles are considered major or fundamental values, the anchor would serve as a protection against disregard for them. If this were true, the title of today's conference would not start with the word "limits", but the discussion would be focused on the independence of the courts and judges. As the conference title and agenda are formulated in such terms, one might conclude that the anchor is not sufficient,

that it is not safely fixed in the bottom of the body of water at whose wharf the ship that is the judiciary should be floating. Instead, it can be perceived as a buoy that flows just above the water's surface, and the ship, instead of being anchored, is exposed to capricious weather. If so, everyone who does not question these principles and values (I have not come across any such opinion and I don't expect that I could in the future) should understand the notions in question in the same way.

The previous speakers have already quoted a number of outstanding lawyers and talented poets. However, I would like to quote, for the purposes of this consideration, the words of Tuwim[1], who wrote, "But above all give our words, altered craftily by wheelers and dealers, their uniqueness and their truthfulness: Let the law always denote the law, and let justice mean nothing but justice".

I understand that we're going through a special period and I don't try to insist that this came from nowhere, but it's difficult not to notice the recent trends suggesting that the anchor is just a balloon.

In the legal community it is in everyone's interest for it to become an anchor, cast in the best foundry and hung on solid ropes or chains.

The communities of professional representatives, legal counsels and solicitors have always supported, and always will, the anchoring of these values – the normative value, i.e. the independence of the judiciary, and the other, already-mentioned mind set, i.e. focusing more on the attitudes and behaviour of lawyers and politicians than on legal regulations: We have done so before and we will continue our efforts. Examples of these efforts are also apparent in our recent activities, in symbols and gestures. When we were entering the room with one of our colleagues, we conceded that we were living in a reality of symbols and gestures, but perhaps historians will remember and take record of them. I would like to emphasise that our efforts are not in our own interests, i.e. the professional self-government or the legal profession. When we do it, we would like to continue our efforts, in particular for the benefit of our clients. This is our mission. It is us who want independent judges, and, consequently, impartial judgments. We would not like to experience fear and uncertainty, as in Montesquieu's quote mentioned today by Professor Ewa Łętowska.

[1] Julian Tuwim – a Polish poet (1894–1953).

Andrzej Zwara

President of the Supreme Bar Council

A summary of the speech by President Zwara, who stressed that:

The democratic process is a purely political one in which what counts is the arithmetic result – the winning majority takes over the mantle of power and the rest have to acknowledge that. We live in a democratic State in which two contradictory phenomena exist – on the one hand there is the democratic process as an element of the power struggle, and on the other there is the autonomous value of the law as referred to in the Constitution of the Republic of Poland. A conflict between these phenomena has been visible in Poland for a long time. It is not a recent invention that the authorities are testing how much they can limit the autonomy of the law. To exemplify the instrumental treatment of the courts system it is enough to refer to the interfering with the work of the small courts. Such a situation, with testing how far they could go with their activities, has emerged quite recently.

As early as in April 2015 the Polish Bar warned against the activities of politicians. At that point the Praesidium of the Supreme Bar Council adopted a resolution in which they called for the prudent and non-partisan appointment of candidates for the Constitutional Tribunal. Unfortunately, at that time nobody listened to the barristers who were predicting strong political tensions between political processes and the need to maintain the

autonomy of the law. The Polish Bar proposed that legal community and law faculties should have the right to appoint candidates for the judges of the Constitutional Tribunal, as their choice should be primarily decided not by party interests but by the prestige, work achievements and professional positions of the candidates, which would guarantee independent judgments. This proposal was rejected by the previous Parliament, and those currently in power admitted that this approach to the issue was proper.

The tensions between the law, democratic processes and pure politics have been growing for years. Yet, the legal community have not maintained due vigilance. This should be acknowledged. Since 1918 the Polish Bar has defended the interests of the rights and freedoms of an individual – this has been ascertained by the history of the Polish Bar. The law is meant to protect humanitarianism. In the contemporary world of globalisation and technocracy, ethics and law are the last virtues protecting humanitarianism. In this conflict, the institutional independence of the courts and individual judicial independence are legal tools applicable to the defence of the law *per se*. Every Polish judge is also an EU judge, and every decision must be supported by EU laws as well by Polish ones. This is another tool which can serve the protection of the individual – the citizen – against any political class. Actions taken by judges are meant to ensure the citizen's legal security, justice, and the protection of human dignity. Judges have proper legal instruments at their disposal and they must have the courage to use them. The late Judge Stanisław Dąbrowski[1] said that the most important thing in the work of a judge is his or her conscientiousness.

The principle of the separation of powers was aimed at creating a balance in monarchies. Today the law is king for us, which was pointed out by Thomas Paine during the debates over the US Constitution.

The Bar will always take the side of law, protecting the individual. It will also support the judiciary, hoping that the judges will remember about core values, and about the fact that the law is supposed to provide security and justice. The Bar has acted and will act in a legalistic way in order to demonstrate what the law should mean and what the limits of judicial independence are. Barristers do not function without courts and the courtrooms would be empty without barristers.

[1] Stanisław Dąbrowski (1947–2014) – Judge of the Supreme Court, President of the National Council of the Judiciary.

KRAJOWA RADA SĄDOWNICTWA

THE LIMITS
OF JUDICIAL INDEPENDENCE?

■

THE EUROPEAN PERSPECTIVE OF THE JUDICIAL INDEPENDENCE

Professor Gerhart Holzinger, Ph.D.

President of the Constitutional Court of the Republic of Austria

JUDICIAL INDEPENDENCE AND CONSTITUTIONAL JUSTICE

Independence of the judiciary is the most important characteristic and a cornerstone of a system governed by the rule of law. This concept is clearly reflected by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms as well as by Article 47 of the Charter of Human Rights of the EU.

In order to establish whether a court can be considered „independent", regard must be had, inter alia, to the manner of appointment of its members and their term of office, the existence of guarantees against external pressures on the part of other state organs, in particular with a view to a removal of judges, and also to the question whether the body presents an appearance of independence: „justice must not only be done, it must also be seen to be done". All these criteria contribute

to the confidence which courts in a democratic society must inspire in the public and above all in the parties to proceedings.

The idea of constitutional justice, which we owe, above all, to the famous Austrian legal theorist *Hans Kelsen*, is essentially based on the proposition that firstly all state action – including parliamentary legislation – must be based on the Constitution and must be in accordance with the Constitution as the highest-ranking norm of the legal order, and secondly, that therefore constitutional disputes, i.e. disputes on the interpretation and implementation of the Constitution, are not only political, but also legal in nature and can therefore be decided by a special court, namely the constitutional court, based on the law rather than exclusively on political considerations.

In this sense it is true that the constitutional court is the most important guardian of the Constitution, as *Hans Kelsen* put it in his works.

Thus, a smoothly running system of constitutional justice is not only an essential element of a state under the rule of law, but also an important factor for the political stability of a state.

It is no coincidence that since World War II, constitutional courts were typically established in quite a number of European countries in the course of a transformation from dictatorship to democracy; first for instance in Germany and Italy, then in Spain and Portugal and finally in Central and Eastern Europe. The purpose of setting up these courts obviously was to overcome the legacy of the previous regimes and to protect human rights violated by them. Instead of the principle of the unity of power, which had been characteristic of the former socialist states, the system of the separation of powers was introduced. The new system was based on the principle of checks and balances between different state organs. As a consequence, even Parliament has to respect the supremacy of the Constitution and can thus be controlled by other organs, especially by the constitutional court. Constitutional justice is therefore, as I mentioned already, a key component of checks and balances in a constitutional democracy. It is a catalyst in a democratic society committed to the protection of human rights and the rule of law, which is, according to the well-known Swiss legal theorist *Werner Kägi*, „an order in which a politically mature nation recognizes its own limits".

It would be a misconception to see this review function of the constitutional justice as being in contradiction with the democratic principle. On the contrary, the judicial review of norms by the constitutional court actually serves as a vehicle to implement the democratic principle: as Hans Kelsen pointed out, even a democratic majority rule would only be bearable if it were exercised lawfully, i.e., in conformity with the Constitution. Accordingly, a constitutional court exercises also a democratic function whenever it reviews Parliament's compliance with the Constitution.

The functions given to the constitutional court, in particular its jurisdiction to review the constitutionality of laws, highlight its political significance. Given its specific mandate, the constitutional court finds itself at the borderline between law and politics. On the one hand, it is a genuine court in the strict constitutional sense, that means an institutionally autonomous state body which is independent of Parliament and Government. Its judgments are based solely on the law, notably on the Constitution as the highest-ranking norm in the national legal order. On the other hand, however, the judgments delivered by the constitutional court almost inevitably have considerable political impact.

This is true in particular when it comes to its jurisdiction to review the constitutionality of laws, i.e. acts of the democratically legitimised legislator. In this respect, the constitutional court finds itself opposed to Parliament and Government and/or the political parties which form a government as well as the parliamentary majority. If the constitutional court finds a legal provision to be in contradiction with the Constitution, it must repeal it as being unconstitutional, even if this may appear to be politically inexpedient. This may of course give rise to tensions with other state organs; however, even when dealing with politically charged issues, a constitutional court must never lose sight of its mission to guarantee the primacy of the Constitution.

All this goes to show that the legitimacy of constitutional justice and its effectiveness depend essentially on its independence. Only its independence will allow a constitutional court to gain public confidence which is essential for its work. Indeed, it is the most valuable asset of a constitutional court to be sure of the confidence of the people living

in a country in the correct and unaffected way of accomplishment of its tasks, unswayable by external factors.

Another significant aspect of the independence of the judiciary is that judges cannot be removed from office but by reason of a decision of the court itself. This principle is too valuable to be sacrificed to political considerations; in particular, if the principle of irremovability of judges were put aside, this could easily undermine public confidence in the judiciary as a whole, and, in this way, cause irreversible damage to the rule of law. In this respect, the French statesman Laboulaye's 19th century quote „suspendre l'inamovibilité c'est suspendre la virginité" is still true and relevant today.

I would like to finish my address by expressing how pleased I am about the good relations between the Constitutional Tribunal of Poland and the Constitutional Court of Austria, which stretch back to the early 1990s. It's precisely because these relations are very good, however, that the Austrian Constitutional Court is seriously concerned about recent developments in constitutional justice in Poland.

It would be extremely deplorable if, as a result of these developments, constitutional justice were weakened in a lasting manner. In its 30 years of existence, the Constitutional Tribunal of Poland has acquired towering merits by safeguarding democracy and the rule of law as well as by effectively protecting human rights in Poland. Thanks to this remarkable success, the Constitutional Tribunal has become a highly respected member of the European and international community of constitutional courts, as well as an influential model for constitutional justice worldwide.

It is not for me to comment on the political situation in Poland. However, as a member of the Constitutional Court of a Member State of the EU, I would like to make the following remark:

Constitutional justice is a key element of European rule of law. If this significant achievement were damaged just in Poland, this would cause an enormous loss hitting all of us, who feel committed to democracy and the rule of law.

Therefore, I do hope that the current crisis of constitutional justice in Poland will be overcome. I would be very glad if my words and my participation in this conference, which may be seen as a sign of solidar-

ity with the judiciary in your country, in particular with my colleagues at the Constitutional Tribunal, may a little bit contribute to that end.

I wish you, Mr. Chairman, as well as all of you, dear colleagues, the very best for a successful conference in each and every respect. Thank you.

Lord Justice Geoffrey Vos

Judge of the Court of Appeal of England and Wales (the United Kingdom)
President of the European Network of Councils for the Judiciary

1. First of all, I would like to say what a great honour it is to have been invited to speak at this conference organised by the National Council of the Judiciary of Poland at this crucial time in the life of the Polish judiciary. I am most grateful to your Chairman, Judge Dariusz Zawistowski, for having asked me to come to Warsaw. This is not my first trip to Warsaw, but the last time I was here was a long time ago in 1970, and I want to assure you that I was too young then to be speaking on subjects as important as the one I am addressing today!

2. As many of you will know, the study of the "independence and accountability of the judiciary" is at the centre of the ENCJ project. We are in the course of undertaking the third year of our project on the subject, and I do not think I will be criticised if I say that some of the work we have done has been acknowledged as ground-breaking. For example, we have undertaken a survey of the opinions of nearly 6,000 judges in 20 countries as to their own independence. The results are astonishing and repay further study on the ENCJ website.

3. Against this background, I feel peculiarly well-qualified to speak about the "limits of judicial independence" from the judicial standpoint. Judges must be independent for one very simple reason. It is because they must decide issues that arise in every possible legal area between the citizen and the state. They must, therefore, be independent of the state, acting through either the executive or the legislature, if the public is to have confidence in the impartiality of their decisions.

4. But I am not sure this means, as some judges certainly think, that there is and can be no limits on judicial independence. That is because the judiciary is itself one of the three pillars of the state. Rather like the rule of law itself, judicial independence is an aspiration rather than an absolute concept. Judges can and should be functionally and practically free from influence from the executive and the legislature, but they cannot operate in a constitutional vacuum.

5. Politicians often add to what I have just said, the words "in their decision-making": i.e. that "Judges can and should be functionally and practically free from influence from the executive and the legislature in their decision-making". This qualification is explained by saying that it is not practicable for judges to be free from the peripheral influence of government decision-making when, in reality, the courts have to be financed by the government, and judicial leadership must in practice co-operate with government if the justice system is to operate within other state structures to deliver efficient high quality justice for the benefit of all those who need to have their disputes resolved by it.

6. In my view, however, the qualification is a potentially dangerous one, at least if it is taken as meaning that governments can do whatever they want in relation to judges and the justice system so long as they do not interfere with any individual decision. Of course, many government decisions can affect individual decisions indirectly. To take a well-known example, judges in the Supreme Court of the USA are appointed by a political process. If just one of the right-leaning Justices is replaced by a left-leaning one, it is a matter of historical fact that decisions on highly charged legal issues arising under the constitution, like, for example, abortion or segregation, will be fundamentally affected.

7. Likewise, in 2012, when the US Supreme Court upheld the controversial medical care reforms promulgated by President Obama under the Federal Government's authority to implement and enforce taxes, US Supreme Court Justice Roberts famously said that:-

"Members of this Court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation's elected leaders, who can be thrown out of office if the people disagree with them. **It is not our job to protect the people from the consequences of their political choices**".

8. This has been paraphrased as "elections have consequences". But where then does the balance of principle lie? As a matter of principle, when is it appropriate for judges to complain that their independence is being interfered with as a result of reforms introduced by an elected government? These are amongst the most difficult questions of our age, but I believe they can be answered simply by reference to the well-known and well-established principles promulgated by the ENCJ.

9. Three of the most important of those principles can be shortly encapsulated as follows:-

— Every citizen in a democratic society is entitled to benefit from an independent self-governing judiciary which must be and be seen to be independent of both the legislative and executive branches of government, and should be recognised by politicians, citizens and judges.
— Judges and the Council for the Judiciary should be closely involved in the formation and implementation of all plans for the reform of the judiciary and the judicial system.
— Judges should be appointed on the basis of merit and capability alone.

10. These principles set the limits on judicial independence. First, judges and Councils must be closely involved in reforms to the judicial system. Reforms should not be done to them, but equally they cannot stand out against the will of a freely elected democratic government as Justice Roberts reminded us. The involvement of civil society represent-

atives in the appointment of judges is one thing that can help reduce the deficit in their democratic legitimacy. This is something that the ENCJ is studying in one of our projects this year.

11. The principles I have mentioned also demonstrate that judges should never be appointed for political reasons. They should be appointed because and only because of their ability to take impartial decisions on the basis of the law and the evidence and without fear or favour.

12. In some situations, judges can be perceived as hostile to modernisation and reform of the justice system. This too should not be the case – provided always that the contemplated reforms are aimed at improving the quality of the justice system for the benefit of those that it serves. Judicial involvement in the reform process should provide the balance between the wishes of the elected government and need to maintain judicial impartiality and the rule of law.

13. Throughout Europe, these are challenging times for justice systems. In most countries, they have had to face reducing budgets and increasing workloads. Judges cannot stand apart from the economic realities that everyone else in their countries face. But they can and should insist on a meaningful voice in how the limited resources are deployed so as best to safeguard a high quality of justice for the citizen.

14. It is perhaps appropriate to drill down a little further into the precise terms of acceptable limitations on judicial independence. I can see no justification for any limits on the need for a wholly independent judicial appointment process, nor for any limitation on the absolute necessity for the decisions taken by individual judges and individual courts to be inviolable – they must be free from all inappropriate external influences: from politicians, the media, and any other pressure groups. The "telephone justice" prevalent in some parts of the old Soviet bloc is universally regarded with derision.

15. It is here, however, that the grey area looms into view. Some judges regard it as an infringement of their independence to be told by their court president, for example, to deal with their cases more quick-

ly or increase their caseload. I cannot agree with that approach. The reason is because judges cannot be independent unless they are also accountable. Accountability is the *quid pro quo* for independence, and judges cannot simply say that they are the final arbiters of what they do and how they do it. They need to be seen to be co-operating in the operation of an efficient justice system. Part of that co-operation is, as I have said, with the other branches of government, who will have been elected to ensure that the justice system functions properly.

16. Judges are, however, entitled to functional independence. They should not, for example, be deprived of the tools they need to do their work. Any functioning system needs physical premises, Information Technology systems and staff to operate efficiently. That does not mean that judges are entitled to better facilities than anyone else in the public service. But it does mean that the third arm of state must be provided with adequate facilities and resources.

17. I can perhaps interpose a cautionary tale from my own country. We are, in England and Wales, in the process of undergoing a major reform of the Court Service which operates and manages the courts and the deployment of judges. This will result in less physical courts, more online courts, more modern Information Technology, less staff overall and even perhaps less judges. But it is being undertaken with the co-operation of the judges. Such a reform offers the potential to interfere with the independence of the judiciary. But change does not automatically do so. The key to all such processes is, I think meaningful involvement of the judges and the Council for the Judiciary in the entire process.

18. I can then attempt to pull these threads together. The executive in all countries needs to have a clear understanding of what judicial independence and accountability entail. That is why the work of the ENCJ in this area is so important. I urge all those with a real interest in the subject to look at our last two reports on the subject in 2014 and 2015.

19. Judges also need that understanding, and need to realise that the concept of judicial independence is not an absolute one. Judges

are responsible for the effective delivery of justice, and that is a grave responsibility. To achieve it, they must work with their governments to understand the necessary barriers between the pillars of state, but first and foremost to provide what is imperative in every state – a fair and impartial decision making process, in which citizens from all parts of society and the state itself has absolute confidence. This will only happen when there is a healthy measure of mutual respect between the judiciary on the one hand and the executive and the legislature on the other hand.

20. I have no doubt that the debate today will descend to the particularity of the issues that are currently under consideration here in Warsaw. For my part, however, I would suggest that almost every issue can be resolved by a consideration of the applicable underlying principles. It is those principles that I have tried to emphasise in what I have said this morning.

21. I am sure that this conference will be a great success. I am honoured to have been invited to take part.

Orlando Afonso

Judge of Supreme Court (Portugal)
Former President of Consultative Council of European Judges (CCJE),
Former President of European Association of Magistrates for Democracy and the Freedoms (MEDEL)

THE INDEPENDENCE AND GARANTEES OF INDEPENDENCE OF JUDGES AND THE RULE OF LAW

In the beginning, I want to thank the National Council of the Judiciary Council of Poland for this invitation. It's not the first time I have been in Poland. I work all the time with Polish colleagues in Poland as well as in Portugal and we have mutual experience in both the Portuguese High Council and the National Council of Judiciary of Poland. I want to share with you a few reflections about the judicial independence.

1. The first problem to tackle a matter like this is the language.

Of course if I speak about the rule of law the concept is similar to "État de droit"; "Rechtstadt" or "Stato di diritto" but is not the same. The same it happens with the words "magistrates" and public prosecu-

tors. Those concepts are not equivalents to "magistrats" or to "ministère public". Even so, we try to speak about the same reality.

2. The second problem is in on side, speaking in a theoretical way and the other side is the results in the practice in each State, of these concepts.

Theoretically all modern States claim the independence of the judicial power and they consecrate at constitutional level the independence of judges and the separation of powers of State. The problem is how that results in practice.

Normally we say the judges are independent because in the moment of the decision nobody takes their hands to write this or that. They are free to do it. That is, of course, important, but is not enough.

3. We must be precise the things: it is usual to take in the same sense impartiality (subjective and objective) and independence. And when we talk about independence we are talking about the both concepts. But in reality we are in presence of two different things.

The judges are not fair because they are judges bur they are judges to be fair.

The first thing to be fair it's being impartial – from themselves, their loves, their hates, their commitments whoever will be (subjective impartiality). For that the judges must be objectively impartial: they cannot have any commitment with the parties in a case. The judges have no peers; without peers; above the peers. The objective or procedural impartiality is a guarantee of the subjective impartiality. And to be able to be impartial the judges must be independent: independent of the other powers of the State (legislative, executive powers): independent of any power of the society (economic, social, religious, press powers).

The independence, in this manner, is a guarantee of the impartiality of the judges. It is not a privilege of theirs but a guarantee to the society. And in that sense, it is a political guarantee.

With this understanding of the independence as guarantee we arrive to the sentence above saying: consecrating at constitutional level the independence of judges is important but is so much more important for the consecration at law and in practice the guarantee of independence.

4. Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. Judges are "charged with the ultimate decision over life, freedoms, rights, duties and property of citizens" (quotation of to United Nations basic principles, echoed in Beijing declaration; and articles 5 and 6 of the European Convention on Human Rights). The rationale of judicial independence, as stated above, provides a key by which to assess its practical implications – that is, the features which are necessary to secure it, and the mean by which it may be secured, at a constitutional or lower legal level, as well as in day-to-day practice, in individual states.

The judges are not independent in their decisions (before and after) if the independence is not guaranteed at different levels: training, appointment and promotion; irremovability and discipline; remuneration; retirement, and enforcement of the decisions by the other powers of the State.

5. The independence must be a guarantee from external undue influence: that means in the political point of view, that judges must be independent of the executive and legislative power (the obedience is only to the law). For that the governing of the judiciary must belong to an independent body (Opinion nº12 of the CCJE). That involves that the career of judges shall be in the hands of that body: the CCJE recommended (in the Opinion nº1) that the authorities responsible in member States for making and advising appointments and promotions (career) should now introduce, publish and give effect to objective criteria, with the aim of ensuring that the selection and career of the judges are "based on merit, having regard to qualifications, integrity, ability and efficiency". Once this is done, those bodies or authorities responsible for any appointment or promotion will be obliged to act accordingly, and it will then at least be possible to scrutinize the content of the criteria adopted and their practical effect.

The same independence guarantee must appear on disciplinary matters that the intervention of an independent authority, which procedures guaranteeing full rights of defence, is of particular importance in discipline. It would be useful to prepare standards defining not just the conduct which may lead to removal from office, but also all conduct

which may lead to any disciplinary steps or change of status, including for example a move to a different court or judicial area.

The appointment for life – it means the appointment till the age of retirement – and the irremovability are strong guarantees of independence. It is a fundamental tenet of judicial independence that tenure is guaranteed until a mandatory retirement age or the expiry of a fixed term of office.

The irremovability must be guaranteed to any judge. The appointment or assignment to a different office or location without consent, or the transfer to other duties may be ordered only by way of disciplinary sanction.

The existence of exceptions to irremovability, particularly those deriving from disciplinary sanctions, leads immediately to consideration of the body and method by which, judges may be disciplined.

6. The independence must be a guarantee from internal undue influence.

The fundamental point is that a judge is in the performance of his functions no-one's employee; he or she is a holder of a State office. He or she is thus servant of, and responsible only to the law. It is axiomatic that a judge deciding a case does not act on any order or instruction of a third party inside or outside the judiciary.

The lower tribunals must have only obedience to the high courts in case of appeal.

The CCJE noted the potential threat to judicial independence that might arise from an internal judicial hierarchy. It recognised that judicial independence depends not only on freedom from undue external influence, but also freedom from undue influence which might in some situations come from the attitude of other judges. "Judges, from Recommendation No. R (94) 12, should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law". The terms in which it is couched do not exclude doctrines such as that of precedent in common law countries.

The hierarchical power conferred in many legal systems on superior courts might in practice undermine individual judicial independence. One solution would be to transfer all relevant powers to a Higher Judi-

cial Council, which would then protect independence inside and outside of the judiciary (Opinion nº1 CCJE).

7. Like the freedom or the liberties there is not a half independence. The judges are either independent or not. Of course independence is not synonymous of free will.

The judicial power must be accountable.

To be accountable means to be responsible before the society; to be someone that the citizens can entrust by his (or her) competence; his ethics; his impartiality and independence.

The accountability it's not given reasoning of judgments and it is different of liability.

The liability (civil, penal or disciplinary) appears only when there is a serious misbehaviour of the judge.

Nowadays there is a tendency to treat the Courts and tribunals as an enterprise, the managerial justice, and in this sense deal with the judges as with civil servants that must obey a technocrats objectives. For modern conceptions of the society what is important is the resolution of the conflict quickly with or without justice.

That is the opposite to rule of the judges. The unique objective of the judges is to do justice without a reasonable delay.

The Courts and tribunals are not a factory of cases with the bankruptcy in view of facing the number of processes and the lack of means to resolve them.

Professor Vigintas Višinskis

Judge of the Court of Appeals
Member of the Judicial Council (Lithuania)

JUDICIAL INDEPENDENCE AND ITS RELATIONSHIP WITH THE LEGISLATIVE AND ADMINISTRATIVE POWERS – THE LITHUANIAN EXPERIENCE

Relations between the public authorities play a very important role in a democratic society. Many of us remember the past when the Communist regime consentrated legislative, executive, and judicial functions. The division and separation of powers is recognized and applied in all democratic states.

On the other hand, all governments sought to influence the judiciary as with its help it is possible to achieve political power (to challenge the election results, the impeachment procedures of political leaders, etc.).

The independence of the judicial system in the Republic of Lithuania and relations with other powers is based by three legal prisions (pillars): Constitution, Constitutional Court doctrine (CC) and laws.

The Constitution states:

In Lithuania, state power shall be executed by the Seimas, the President of the Republic and the Government, and the Judiciary.

The scope of powers shall be limited by the Constitution.

The Constitution introduced number of measures to control one state power against another and to counterbalance. Balances system does not allow for any one branch of power to dominate. A similar mechanism of the balance of powers is in the most states.

STATUTORY REGULATION

The Law on Courts echoes the constitutional provision, providing that in the administration of justice, courts shall be independent from other government institutions, officials, political parties, political and public organizations and other persons. Administering justice, judges shall be independent from the parties to the proceedings, the court administration, other judges, government institutions, officials and other persons. The same law prohibits influencing unlawfully judges in order to affect the proceedings or their decisions.

The Criminal Code of the Republic of Lithuania provides for criminal liability for those who had publicly humiliated the court or a judge due to their activity and who in any way interfered with judge's duties during the proceedings.

CONSTITUTIONAL COURT (CC) DOCTRINE

The most significant formulated doctine by CC is the independance of the judiciary. It must be recognized that CC is very influential and respected in Lithuania and has great public support. The respect and authority was deserved by the decisions of CC that were made very principled, even sometimes very unpopular.

In recent years, CC addressed very much discussed/argued issues: what is a family concept and related questions to same sex marriages, the right to government to reduce salaries and pensions and the obligation to restore them and etc.

Other powers, with the exception of judicial authorities, often discuss negatevely decisions of the CC, but in the esence execute the decisions. Although exceptions occur. Currently, there are 12 legal acts

that are recognized by the Constitutional Court as unconstitutional, but they are not changed. Next week, it will be 10 years when provisions of one law – Law on the Petitions – have been recognized unconstitutional (2006 January 26), but all these provisions still remain in that law.

CC doctrine very significantly influences and reinforces the independence of the judicial system. It's uniqueness is that adopted laws by Seimas (Parliament) or adopted resolutions by Government can be changed at any time. Constituional Court interpretes the Constitution. The process to amend/modify the Constitution in Lithuania is very complicated. Seimas even do not try to do so. When CC recognizes that laws contradict to the Constitution such laws are not valid immediately. The newly adopted laws meet the instructions and requirements from CC and in accordance with the Constitution.

I would like to offer a few theses from the CC resolutions concerning the relationship with other powers of judicial authority:

The Constitution prohibits the executive branch to interfere in the administration of justice, to influence courts „or evaluate the work of courts judicial proceedings, especialy to indicate how justice should be carried out. According to the Constitution, judicial activity is not, and cannot be regarded as management area assigned to any executive authority. The executive institutions may be established and have auhority only to enable the courts to act. The courts for its activities are not accountable to other branches of authorities or officials" (CC 1999 December 21 resolution).

The same statement was enacted by your CC. Polish Constitutional Tribunal's decision as of 1993 November 9, states that the principle of the independence of the judiciary should reflect both the organizational division and competencies, and the freedom from any interference by the executive and the legislature branches in judicial functions. The administration of justice in the courts, the activity must not feel any interference by the executive branch, but for their administration, provisions could be made by the Minister of Justice.

In Lithuania, the Constitutional Court had different position about the participation of the Minister of Justice. The Law on Courts which was adopted previously granted broad powers to the Minister of Justice. The CC decided that it is contradicting to the Constitution.

The Constitutional Court decided that provisions that were in the Law of Courts enacted in 1999 are unconstitutional and it is a violati-

on of judiciary and independedance of judiciary where the number of county judges and number of judges in the Court of Appeal civil and criminal divisions were decided by the Minister of Justice.

The CC decided that the reglamentation/provisions when Minister of Justice apointed the judges to the Judges' Court of Honour, when the Minister of Justice is able to start for the judge disciplinary proceedings, when the Minister of Justice was in charge to organize the financial support for courts, when Minister of Justice monitors the courts' and judges administrative activities, are unconstitutional.

Today, the Minister of Justice has a single task in conection with courts – he approves the anuall plans for training of judges.

Then we have a question who is administering the courts, who ensures their independence if they are not under anyones' governance?

Judicial self-governance.

Part 1 Article 186 of the Constitution of the Republic of Poland states that „National Judiciary Council shall ensure the independence of courts and judges". There is no such specific provision in the Lithuanian Constitution, but it was interpreted similary by CC. In the Law on Courts of the Republic of Lithuania which is in force is indicated that the independence of courts determines their organizational self-sufficiency which shall be realized through self-governance of courts. Judicial Council is the executive arm of the self-governing body which ensures the independence of courts and judges.

According to the interpretation of CC the National Courts Administration was established – the institution funded by the state budget to support self-governing of courts.

Up to 2006 in Lithuania, the Judicial Council members could be not only the judges but also representatives of other state authorities (the authorised representatives of the President and Cahirman of Seimas, chairmen of Seimas Legal and Budget committees, ministers of justice and finance). The procedure of formation of the Judicial Council was declared unconstitutional by the Resolution of Constitutional Court on 2006 May 9. The resolution also stated that such institution as judicial authority in general, must be composed purely from the judges, i.e., not politically, but on a professional basis. Today, the Judicial Council consists only from judges.

Funding – a very important question is the same everywhere and for everyone. We have clarification from CC:

„The principle of the independence of the judiciary include independant funding from the executive branch. This principle may be consolidated in norms of laws to ensure that the budget should be determined, and it is, how much money is spent on each of the court that adequate conditions are provided in the administration of justice". By decision of 2000 January 12, the Constitutional Court explained further that the provisions of the resolution refers to the State budget appropriations must be indicated for each court seperately. These funds must be allocated for each particular court directly, rather than through the Ministry of Justice and that Minister of Justice is not the manager of courts appropriations, so he can't decide how courts/each court should use the state budget funds allocated to their funcions.

Where do Lithuanian other government powers today have the biggest impact?

Appointment of judges and the career according to the Constitution is under the power of the President, the apointment of the judges to the Supreme Court and Court of Appeals – is under the Seimas. Any judicial appointment, transfer or exemption may be granted only with the aprroval from the Judicial Council, but the right of initiative belongs only to the President. The power of the Judicial Council is vested only in disapproval (veto) which is very limited.

GRECO commission paid attention in their recomendations about the lack of transparent procedures for apintment and career for judges. In light of the foregoing, GRECO recommends, that the Judicial Council be given a more important role in the procedure for selecting judges.

Last year, several candidates for the Supreme Court justice have not been approved by the Seimas by secret vote and no one knows why. On the other hand, the judge's dismissal or transfer is not possible without the approval from Judicial Council.

More sufficient funding would allow better to organize judicial work. Lithuanian courts (except the Lithuanian Supreme Court) does not have any (police) protection: anyone can enter to court premises without any restrictions. In smaller courts you could have access straight to the judge's chambers. In order to get few new positions or additional funding you have to convince the Minister of Finance.

Horatius Dumbravă

Judge of the Court of Appeals
Member of the Supreme Council of the Judiciary (Romania)

THE LIMITS OF THE JUDICIAL INDEPENDENCE. A ROMANIAN EXPERIENCE – CASE STUDY

You are humiliated when someone else decides for you upon a matter on which you ought and could decide for yourself

Gabriel Liiceanu
(Romanian philosopher)

The operation of the rule of law cannot be considered outside of a real independence of justice. The interdependence, the mutual connection of the two concepts it is also acknowledged by international documents of certain bodies analysing this issue: „Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial […] Their independence (the independence of judges) is

not a prerogative or privilege in their own interests, but in the interests of the rule of law and of those seeking and expecting justice[1].

I am not a political scientist, or sociologist, but just a judge. Thus, against this backdrop, I do not have the necessary tools to make a thorough analysis of the way through which the political power – mainly in the Eastern Europe, a part of the European Union – using apparently democratic means, confiscate the rule of law, including justice.

But I cannot notice, not as a judge but as a simple citizen of the United Europe, how in this area (Romania, Slovakia, Hungary, Bulgaria, maybe even in Poland) there are similarities on dominating and taking over the rule of law by the political power. There are also specific differences for each country, according to the local history and to the methods used by the elites in the political, intellectual and justice areas to observe the democratic values.

Complicities between the representatives of those elites existed and for sure will exist, complicities based on personal or group interests, that allowed, in numerous cases, to have successful actions of political power; but also firm oppositions existed, clear actions that prevented the confiscation of the rule of law by the political power.

We can talk endlessly on what is the rule of law, on the independence of justice, about the way the independence of justice ensures the functioning of the rule of law (by checking the possible abuses of the other powers) and about how the rule of law enshrines the necessity for the independence of justice.

This is an enticing and beautiful subject to be discussed within seminaries and university lectures. But, those principles must be brought outside the insulated classrooms of a university lecture. The kernel of those principles regards not only their definition and conceptual delimitation, but the effective enforcement into the real life. And the reality is most often brutally different from the academia. To this end the provisions of a European document should be recalled, that highlights: „what is critical is not the perfection of principles and, still less, the har-

[1] Opinion No 1 (2001) of the Consultative Council of European Judges (CCJE) for the attention of the Committee of Ministers of the Council of Europe on standards concerning the independence of the judiciary and the irremovability of judges, paragraph 10.

monisation of institutions; it is the putting into full effect of principles already developer"[2].

It is not my intention to enumerate international and European documents, but to underline the importance of definitions and delimitations and of their application into the real life, with a special focus on the „Romanian" situation.

1. Year 2012 was marked by important events in Romania: an important power of the Constitutional Court was amended by the Government, through an emergency ordinance (not by the Parliament, as a legislative power, but by the Government as an executive power). This power related to checking the constitutionality of the decisions passed by the Parliament.

The Constitutional Court also marked an important moment: it passed a decision on the unconstitutionality of the Emergency Ordinance adopted by the Government and thus, the abovementioned power of the Constitutional Court remained unchanged.

In the same year 2012, a majority of the Parliament decides on the temporary impeachment of the Romanian President. A referendum for the removal of the President takes place, but this ballot does not validate the request of the majority from the Parliament and the President is back into office.

Actually, the commencement of the events and the following political battle of 2012 were driven by the will to dominate the rule of law. The balance in certain moments was pushed by the persons who had more leverages of political powers (a majority in the Parliament of within the Government).

In order to achieve the mentioned goal, the agenda of the political power during 2011–2014 (when the political power was taken by several political forces, which seemed to be in apparent conflict) aimed at the amendment of the Constitution: in 2011 the project of amendment belonged to the former President of Romania (which was suspended in 2012 by the majority of Parliament) and in 2014 it was put forward by the majority of Parliament (the one that impeached the President in 2012).

[2] Idem, paragraph 6.

Justice was among the important amendments taken into account by both political forces and those changes also regarded the functioning and the componence of the Superior Council of Magistracy (which is the guarantor of the independence of Justice, according to the Romanian Constitution in force).

The project of former Romanian President failed the test of constitutionality in 2011, being overruled by the Constitutional Court, after an official decisive reaction of the Superior Council of Magistracy. That project was never put forward by the political force represented by the Romanian President.

In 2013 the Romanian Parliament resumed the idea of amending the Constitution and to this end the Parliament received another project for changes, in February 2014. Many of those proposals were declared as being not constitutional by the Constitutional Court and the Venice Commission also identified a series of serious problems within the draft text.

The project for changing the Constitution that took place during 2013–2014 is also relevant, because certain amendments are related to the judiciary and the functioning of Superior Council of Magistracy.

Again, as in the course of year 2011, Superior Council of Magistracy had a reaction and asked the Parliament to allow its access to the discussions and debates that were taking place within the Parliamentary Commissions on the process of amendment. This happened after the representatives of Venice Commission met with the presidents of the Chambers of Parliament and with the representatives of Superior Council of Magistracy.

The presence and interventions of SCM allowed the institution to mention its opinion on those paragraphs of the Constitutions that regarded Justice and were supposed to be amended.

Moreover, this project also failed the test of constitutionality. To this end, it must be mentioned that among the several texts rejected by a Decision of the Constitutional of 2014 it was one pertaining to the alteration of the componence of Superior Council of Magistracy.

It is also significant the description made to the track record of the process on amending the Romanian Constitution, as it was pictured by the European Commission in the report drafted for the Mechanism of

Cooperation and Verification[3], a document forwarded to the European Parliament on 28.01.2015: „The process of revision of the Constitution is relevant for the CVM as some amendments touch on justice and the functioning of the Superior Council of Magistracy. The stop-start process so far has been criticised for lacking in transparency, both in the timeframe and the consultation process. The involvement of the Venice Commission has however helped to focus the process, and the full participation of key institutions like the SCM would help to give confidence that any amendments would give full regard to the independence of the Judiciary"[4].

2. During all this term, 2011–2015, the Justice took over the role of cleaning the Romanian society by intensifying the fight against corruption. The targets of this fight were politicians but also judges and prosecutor. Furthermore, the number of disciplinary sanctions enforced by Superior Council of Magistracy increased.

An even clear picture of this phenomenon for the mentioned period is given by the statistics on judges and prosecutors:

— 98 judges and prosecutors were sanctioned for disciplinary offences by Superior Council of Magistracy (it must be mentioned that SCM has competencies for guaranteeing the independence both for judges and prosecutors). All those sanctions remained final after appeals lodged to the High Court of Cassation and Justice;
— Over 60 judges and prosecutors, some of them having management positions, were convicted to penalties with imprisonment for corruption.

But the judiciary undertook only the cleaning process within the justice system. Even during the difficult conditions when the political power intended to subordinate the Justice to its own interests, the Justice succeeded to bring in front of the judges – from 2011 to 2015

[3] The Cooperation and Verification Mechanism (CVM) was set up at the accession of Romania to the European Union in 2007, Commission Decision establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, 13 December 2006 (C (2006) 6569 final) and this Decision was approved by European Council on October 17 1996 (13339/06).

[4] See http://ec.europa.eu/cvm/docs/com_2015_35_en.pdf, page 5.

– many high level officials and an important part of those were subsequently convicted to harsh prison penalties:

— 11 senators and deputies;
— 5 acting ministers and former ministers;
— a former prime-minister (another prime-minister was indicted for corruption during the term in office of this position);
— 1 Member of European Parliament;
— More than 35 mayors and presidents of county councils (local administrative authorities).

In those circumstances it is obvious that the attacks against Justice rose in an exponential manner, especially from the political domain.

The political power had and still has a mass media exposure for its own use (in many cases the politicians are also the owners of media companies), so that the justice was attacked through proxies, the journalists, but also directly and was the subject of raging negative press campaigns.

Pursuant to its establishing law, Superior Council of Magistracy is bind to a sole mean of protecting the independence of justice, namely the possibility to notice if in a specific case it was infringed the independence of justice (by press statements, remarks made on social media or public declarations of politicians or of other notorious persons).

Statistics are again relevant: if in 2014 Superior Council of Magistracy noticed 12 such violations, in 2015 it noticed 28 (an increase of over 100%).

A direct consequence is the increase of the confidence of Romanian citizens into Justice: from around 20% confidence in 2011 to 44% in 2014.

A first remark on this trend: SCM has no tool for sanctioning the violations of the independence of justice. Or, more precisely, the only instrument available for SCM, that is also used, is to publish its own decision adopted on a case when it noticed the breech of independence of justice.

Here is also the comment of European Commission, from the same CVM report of 28.01.2015, which highlights both the procedure available for SCM, but also the shortcomings of this procedure: „One of the roles of the SCM is to guarantee the independence of the judiciary. Since 2012, the SCM has a procedure in place, involving the Judicial In-

spection, for defending the independence of justice and the professional reputation, independence and impartiality of magistrates. The number of requests to the SCM to trigger this procedure increased in 2014, compared to 2013 – though this could be attributed to the greater credibility of the system, rather than an increase in problems … Whilst recognising the benefits of the procedure set up by the SCM, NGOs and representatives of magistrates' organisations have noted the difficulty in securing an equivalent coverage of SCM statements, as compared to the original accusation"[5].

It is difficult to estimate the evolution on short and medium term and how justice will succeed to preserve its independence.

A series of events will surely affect this development:

— Local elections (city halls and county councils) in the summer of 2016 and parliamentary elections in autumn of 2016. From the experience of past years it comes out that justice was the main theme for electoral campaigns. Some politicians focused their attacks on the alleged abuses of justice and other tried to defence justice in order to gain more votes. It should be further noticed if the political establishment learned something from this experience so that it will no longer try to gather political benefits by using justice as theme for campaign and neglecting other important themes faced by Romanian society (education, health, economy etc.);
— Appointment into highest offices of the Judiciary – the prosecutor general of General Prosecutors Office and its deputy (two positions); the chief prosecutor of National Anticorruption Directorate. In this situation the Executive has an essential role because it propose, through the Minister of Justice, the candidates for those positions. Superior Council of Magistracy only gives his consultative opinion and the appointment is done by the President of Romania;
— Appointment of the President of High Court of Cassation and Justice and of a Vice-President of the High Court. Compared to the appointment of prosecutors into management positions, in this situation the interviews are carried out in front of the Section for

[5] Idem, page 4.

Judges of Superior Council of Magistracy and the proposal made by the Section it put forward to the President of Romania, who will make the appointments (the President of Romania can refuse only once the proposal of SCM regarding a certain person). It should be noticed that the Ministry of Justice does not have the same role as the one played in the appointments for the Prosecutors General Office and for the National Anticorruption Directorate, but, as an ex officio member of the Section for Judges, participates and votes with the other members on the proposal to be sent to the President of Romania.

Thus, is seems that Romania is not an exception from the geographic area where it is located. Still, there is a particularity that must be highlighted: through the Cooperation and Verification Mechanism, a condition accepted by Romania in order to accede to European Union, is subject to a monitoring jointly carried out with the European Commission. Pursuant to this instrument the imminent sideslips were stopped and it may be considered, with minor exceptions, that Romania stood on a fair road as regards the preservation of the rule of law and guaranteeing the independence of justice.

Wiggo Storhaug Larssen

Judge of the Gulating Court of Appeal in Bergen (Norway)

POWER POINT PRESENTATION ON THE SCANDINAVIAN APPROACH TO THE JUDICIAL INDEPENDENCE

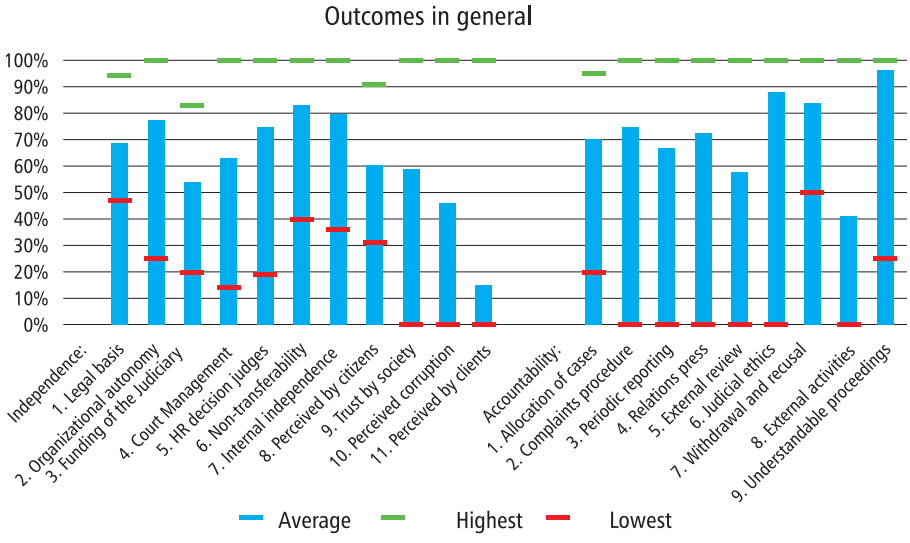
Judicial Independence

The Scandinavian approach

- Three countries – Three similar legal systems
- Common history and culture
- But also important differencies
- Current status of independence and accountability in the Scandinavian judiciaries. ENCJ project report 2014–2015:
- First: Outcome for Europe

Judicial Independence

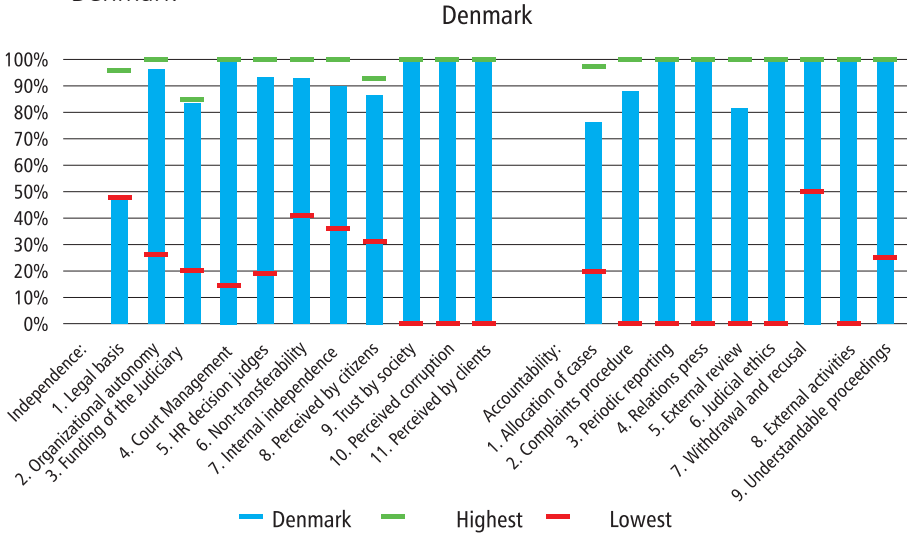
The Scandinavian approach



Judicial Independence

The Scandinavian approach

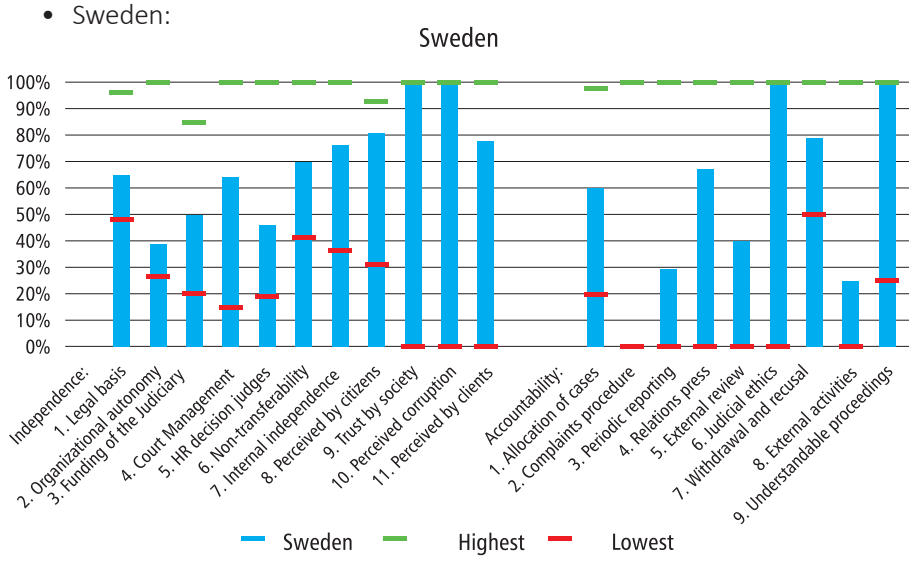
- Denmark



Judicial Independence

The Scandinavian approach

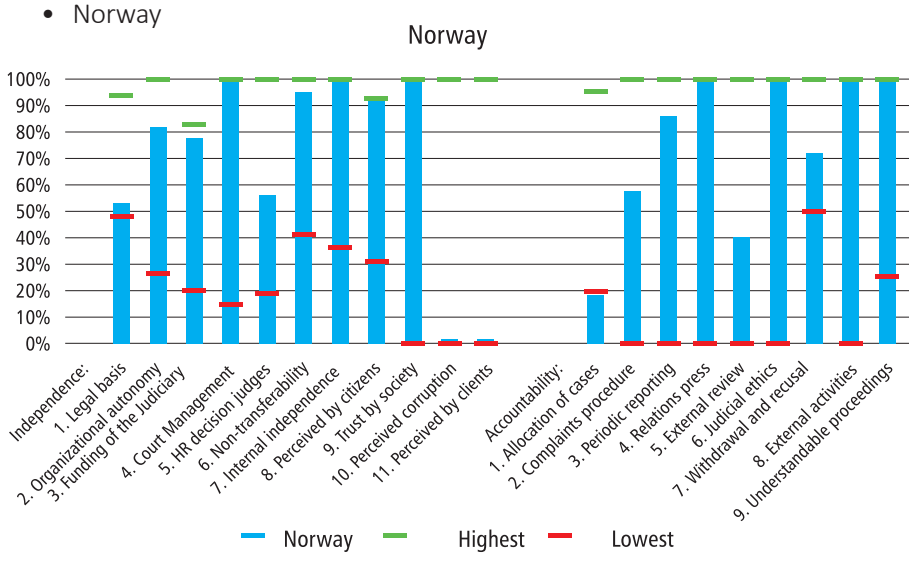
- Sweden:



Judicial Independence

The Scandinavian approach

- Norway



Judicial Independence
The Scandinavian approach

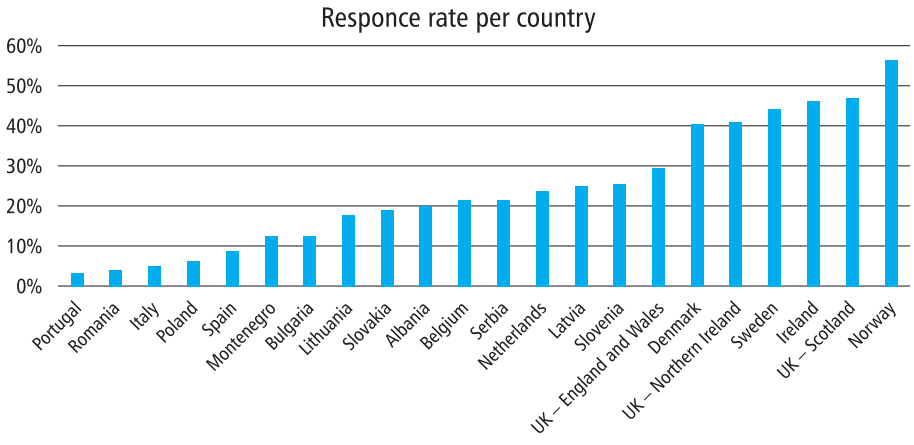
- Main conclusions:
  - The Scancinavian countries – High score on most indicators.
    - Above lowest score on all indicators, except where info is not available, corruption, client surveys (Norway).
    - High trust by the society in all three countries.
    - Relatively low score on organizatorial autonomy and legal basis for the judiciary.
    - Informal allocation of cases (Norway), complaint procedure (Sweden) are also "weak" points.

Judicial Independence
The Scandinavian approach

- Results from survey professional judges ENCJ 2014-14.
- Opinions of 5878 judges from 22 European countries.
- Responsrates differ among countries – still significant results:

Judicial Independence

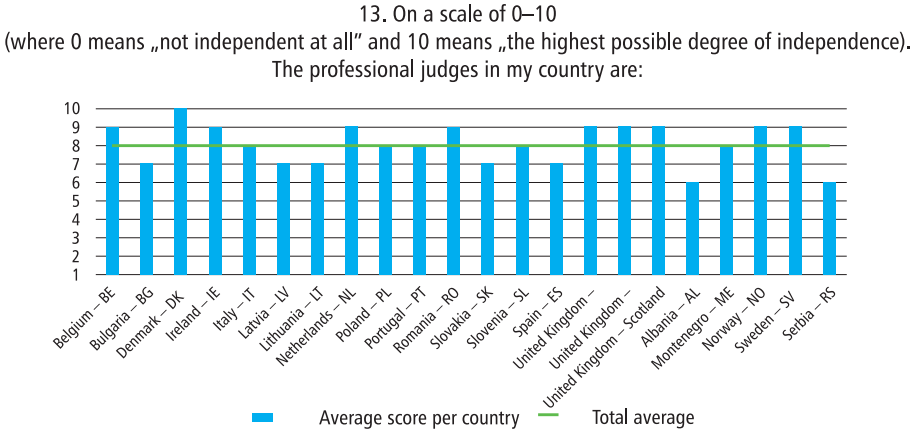
The Scandinavian approach



Judicial Independence

The Scandinavian approach

- The overall picture:



Judicial Independence

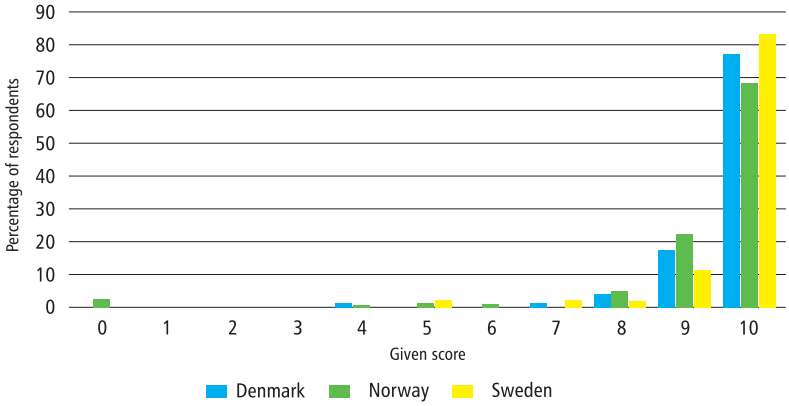
The Scandinavian approach

- Pilot survey lay judges 2015 ENCJ-Scandinavia.
  - Norway: 300 lay judges, Sweden and Denmark 200 and Sweden 100.
  - Response rate: Norway 160, Denmark 111 and Sweden 52.
  - Simplified questionaire.

Judicial Independence

The Scandinavian approach

On a scale of 0–10
(where 0 means „not independent at all" and 10 means „the highest possible degree of independence)
as a lay judge I am:



The average score for question 8 was: 9.6 (Denmark 9.7, Norway 9.4, Sweden 9.7)

Judicial Independence
The Scandinavian approach

- General conclusions survey – Scandinavia:
  - Scandinavian judges regard themselves very independent (9 and 10 on the scale).
  - A vast majority believe that individual judges have not accepted bribes as an inducement to decide cases in a particular way.
  - Hardly any judges have felt that they have been under inapprobriate pressure to take decisions in a particular way.
  - Nearly all Scandinavian judges feel that their independence is respected by their governments, parliamens and social media.
  - Lay judges and professional judges have very similar opinions.
  - Lay judges are more uncertain about their answers then professional judges, but do not feel less independent than professional judges.

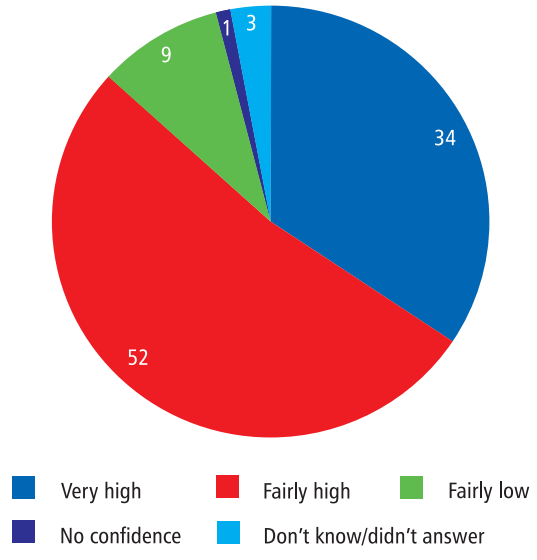
Judicial Independence
The Scandinavian approach

- Since 1996 public trust surveys in the Norwegian society.
- Generally high trust, and higher than. parliament, government and police.
- And increasing trust.

Judicial Independence

The Scandinavian approach

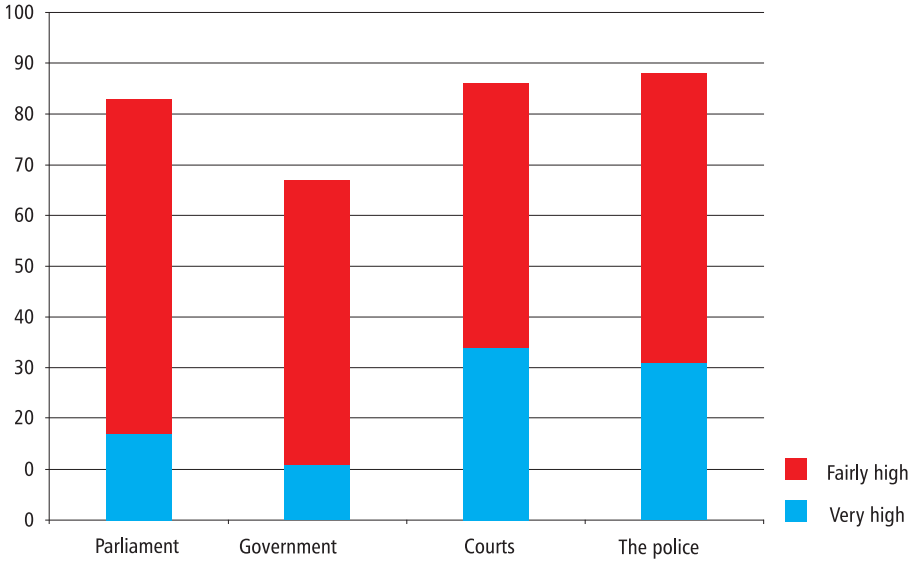
Public confidence in courts 2015



Judicial Independence

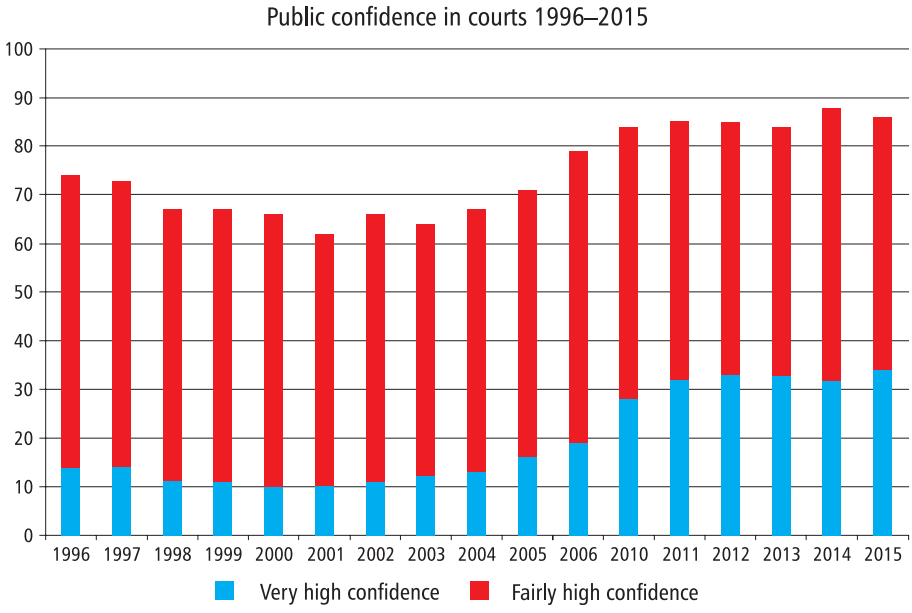
The Scandinavian approach

Confidence in courts 2015



Judicial Independence

The Scandinavian approach



Judicial Independence

The Scandinavian approach

- Why such high trust in the Judiciary?
- Transparent judiciary in all Scandinavian countries.
- Extensive participation of lay judges in criminal cases contributes to high trust.
- Long lasting legal tradition.

Niezależność sądów i niezawisłość sędziów
Podejście skandynawskie

- Future challenges for Scandinavian judiciaries
  - Insufficient formal structures in place
    - Denmark and Norway – Court adminstrations led by board, majority of judges in Denmark, not in Norway. Judges not appointed by their peers.
    - Sweden – Judiciary led by a directorate. No elected board
  - For Norway, and probably also Denmark and Sweden: The Courts Administrations have little real influence on the budget for the judiciary.
  - How the judiciary is organized is not a main issue for governements.
  - Combined by the perception of a well functioning and efficient justice system, the judiciary has a weak negotiating position.
  - Need for modernisation of the Judiciary. Digitalization, video recording of hearings (Norway) and new court buildings are key words.

KRAJOWA RADA SĄDOWNICTWA

THE LIMITS
OF JUDICIAL INDEPENDENCE?

■

THE NATIONAL PERSPECTIVE OF THE JUDICIAL INDEPENDENCE – A CONSTITUTIONAL APPROACH

Professor Lech Garlicki, Ph.D.

University of Warsaw, retired Judge of the Constitutional Tribunal
Former Judge of the European Court of Human Rights

THE LIMITS OF INDEPENDENCE: A JUDGE'S COMPLIANCE WITH 'THE CONSTITUTION AND THE LAW'

1. There is no need to delve into the definitions and elements of the principle of judicial independence; only one aspect of it is the subject of my consideration, namely a judge's compliance with the law. It is commonly known that it is traditionally included in the requirement that "judges shall be independent in performing their duties and be subject only to the law" *(*Article 77 of the Constitution of 17 March 1921, called the March Constitution). However, the Constitution of 1997 partly departed from this tradition, because its Article 178 Paragraph 1 repeated this convention, but with one essential addition, because it stated that "judges shall be subject only to the Constitution and statutes".

The legal definition of this provision has been well established in both the body of rulings and the doctrine. Generally speaking, it expresses the principle of a judge's compliance with the law, understood

as establishing a framework (limits) for their independent decisions. It is expressly stated that compliance is limited to the supreme law. In this sense, a judge's compliance with the law is of a special nature, so in the context of the current constitutional order, Article 178 Paragraph 1 should be understood as a concretisation and particularisation of Article 7, which expresses the general principle that the public authorities act on the basis of and within the limits of the law.

However, regardless of this nearly century-old approach to the independence in the Polish constitutional order, the process of its interpretation cannot be detached from the context of individual constitutions. In other words, the interpretation has to take into account the systemic approach, which significantly differentiates the various Polish constitutions. Since the principle of independence is combined with a judge's compliance with the law (the Act), the definition of the scope and nature of this compliance requires the prior determination of the substantive characteristics of the legal system, as it is formulated and understood by the current constitution.

It is a truism to recall that a constitutional approach to the legal system is based, for the most part, on the principle of the hierarchy and differentiation of the legal force of its individual elements. When it comes to the universally applicable law, the Constitution of 1997 indicated four basic categories of normative Acts (the Constitution, international and supranational law, Acts and regulations), arranged them in the shape of a pyramid and formulated a principle that Acts (regulations) at a lower level have to comply with the regulations at a higher level. The lack of such compliance results in the substantive and legal faultiness of the lower Act, depriving it of the attribute of the legitimised and lawful exercise of legislative powers. Indicating the faultiness and its effects are included in the institutional field (bodies competent to issue decisions) and procedural field (the way of instituting decision-making procedures and making ultimate decisions), yet, like all institutions and procedures, it has to be examined in the context of legal and substantive principles and serve their effective implementation and protection. The independence principle in Article 178 Paragraph 1 should also be interpreted this way, because a judge's modus operandi and competences have to be construed in the context of the general constitutional form of the legal system.

Three comments regarding this form, which seem to be necessary.

Firstly, the Constitution not only attributes the highest legal power to itself, but also (in Article 8, Paragraph 2) grants direct applicability to its provisions. This means that, if necessary, the constitutional provisions may and should be applied by courts and judges in a direct way, and not only through the application of common legislation. Otherwise, it would be pointless to refer separately to the Constitution in Article 178 Paragraph 1.

Secondly, in the hierarchy of the system of legal sources, Acts are no longer directly 'under' the Constitution, because an intermediate level has appeared, namely international agreements (if they belong to the category referred to in Article 91 Paragraph 1) and European Union law. The norms included in them are located above the common laws (but under the Constitution), they are directly applicable and (as clearly indicated in Article 91 Paragraph 2 and 3) prioritised in the event of a conflicts with Acts. Thus, although it is not mentioned in Article 178 Paragraph 1, the independence of the judge does not exclude their compliance with international (supranational) law. At the same time judges and courts may and should directly apply the provisions of this law, whenever necessary.

Thirdly, such an interpretation of the principle of constitutionalism and the role of the international (supranational) law provided Acts with a much more minor role than in the classic doctrine. An Act has to be consistent with the Acts of a higher level, the lack of such compliance results in faultiness of the Act (its provisions), which has to be reflected in the institutional and procedural solutions securing the respect for and observance of the hierarchy of the legal system. The necessity of balancing separate values arises. On the one hand, one would want to treat an Act as a legislative decision made by national representation, therefore characterised by a special legitimatisation. On the other hand, the current understanding of the principles of constitutionalism considerably restricts the freedom of action of the legislator and deprives it of the immunity of the decisions it makes. This is the dilemma that occurs in all modern democratic systems and it has to influence also the actions of judges and courts.

2. Solutions to this dilemma require moving to the institutional and procedural sphere. It should be underlined again that the implemen-

tation of a substantive and legal conclusion regarding the faultiness of Acts noncompliant with the constitution or with other higher-level Acts requires the definition of the authorised authority and appropriate procedures to make appropriate decisions. It goes without saying that granting specific rights to the judiciary is the prevailing solution in contemporary democracies. Thus, traditionally a judge's compliance with an Act assumes a complete character, provided that the Act is not faulty as a result of noncompliance with higher-level Acts.

In the majority of the countries of Continental Europe a judge is separated from the control of the constitutionality of the law, in the sense that the appropriate rights are granted on a monopoly basis to the constitutional court whose decisions are final and result in the removal of a faulty Act from the applicable legal system. The role of the remaining courts is limited to the analysis of constitutionality, as well as, when doubts arise, the initiation of proceedings before the constitutional court. It should be clearly underlined that this – initial from the procedural point of view – form of control of constitutionality is an essential element in the judicial decisions of all courts. The presumption of the correctness (constitutionality) of an Act does not relieve a judge from the obligation to consider its constitutionality and, if necessary, initiating procedures for its control. This assumption assumes an absolute character only when the lack of faults of an Act will be confirmed by a decision of the constitutional court.

Such a model was assumed also by the Constitution of 1997. The control of constitutionality was concentrated in the competence of the Constitutional Tribunal, the decisions of the Tribunal were granted finality and general applicability and the courts were provided with the possibility to refer questions of law to the Constitutional Tribunal.

This model assumes that a judge has the competence to consider the issue of the constitutionality of the applicable Acts; otherwise the separate indication of the 'Constitution' in Article 178 Paragraph 1 would make no sense. This competence includes also incidental decisions that an Act is in accordance with the Constitution so it may be applied while the case is being addressed and resolved. The approach that a judge has no competence to make independent decisions on the constitutionality of an Act and to refuse to apply it to a case has always prevailed, also in the doctrine and the body of rulings. However, con-

trary opinions were also formed (as compared especially to situations where the unconstitutionality of a provision of an Act is of an 'obvious' nature); judicial decisions supporting this point of view going in this direction have also appeared (however sporadically).

However, even assuming that the courts do not have the independent right to declare that an Act is unconstitutional, today does not entail the total exclusion of Acts from the control of courts. The principle that every court has the competence to refuse to apply a provision of national law which is in conflict with EU law was adopted, as is known, in the sphere of European Union law. Again, it should be noted that Article 91 Paragraphs 2 and 3 of the Constitution grant EU law precedence over national Acts, which creates a substantial basis for incidental control of these Acts by the courts. In other words, a judge's compliance with an ' Act' in this case is significantly limited, although it was not reflected in the wording of Article 178 Paragraph 1.

There is no clarity on whether similar rights may be granted to (any) court in relation to a situation when there is a conflict between an Act and the norms of international law. The wording of Article 188 Paragraph 2 of the Constitution may be against such a granting and establishes the jurisdiction of the Constitutional Tribunal to decide on the conformity of Acts with the highest-level international agreements. On the other hand, international law (contrary to the Constitution) is excluded from the specific knowledge of the constitutional court. Moreover, since the courts may independently refuse to apply Acts that are contrary to treaties forming EU law, the question arises of why they should be denied such competence in relation to other international agreements, especially agreements regarding human rights. The body of rulings has not yet made an authoritative attempt to resolve this issue.

3. The dominant status of the approach of refusing courts the right to independently decide on the unconstitutionality of an Act and to refuse to apply it to a case has to be kept in mind while returning to the issue of constitutionality of Acts. The recognition that the decision of the legislator to create a separate Constitutional Tribunal and to grant appropriately developed legal instruments to the Tribunal provides a sufficient guarantee that unconstitutional laws will be removed from the legal system, served as the basis of this approach. The institutional

and procedural model of the concentrated control of constitutionality was regarded as sufficient for the proper implementation of the substantive model of the hierarchy of the sources of law. The Constitutional Tribunal constituted the essential keystone of the system.

Neither the authors of the Constitution of 1997, nor its commentators givers, foresaw that the disruption of the constitutional judiciary in Poland might occur. The independence of the judiciary and the independence of the constitutional court were considered to be such obvious elements of a democratic state that it seemed their existence was free from threats. It seemed that the constitutional provisions, despite their general character, have a sufficiently impenetrable nature, so that no further guarantees in the case of the occurrence of such a threat had been foreseen or proposed.

However, the political reality extends beyond these assumptions. There is no need to engage in detailed factual presentations – after all, the situation is still characterised by a considerable degree of dynamism. Nevertheless, today it may be stated that there has been a significant distortion of the operation of the Constitutional Tribunal or, in other words, a significant instability in the legal conditions of this operation has occurred. Because the understanding of these conditions by individual constitutional authorities of the state has become far from uniform. On the one hand, this concerns the composition of the Tribunal, as a minimum conformity applies only to the status of 12 judges, and the status of the remaining three positions is at issue. On the other hand, it is connected with the statutory basis of the Tribunal's actions, because the changes introduced by the amendment of 22 December 2015 to the Act on the Constitutional Tribunal made it practically impossible to exercise abstract control and considerably limit the examination of questions of law and constitutional complaints. Moreover, a discrepancy connected with the extent to which the December amendment is fully applicable today has occurred. It is indicated, not without reason, that since the constitutionality of this amendment is questionable and is subject to consideration by the Tribunal, this examination cannot be carried out with the full application of the provisions of this amendment. Therefore, the Tribunal has to find a legal framework for their procedure or either directly in the constitutional provisions or in the reference to the text of the Act on the Constitutional Tribunal adopted in the summer of 2015.

The Constitution assumes that the explanation of those discrepancies should be in a final and generally binding way provided by the decision of the Constitutional Tribunal. However, it is impossible to predict whether this assumption will be confirmed in the current political reality. Different scenarios might be imagined. I outline them only to ask the question of what results from them for the remaining elements of the judiciary. I do not address the question of whether and to what extent some actions indicated in those scenarios would constitute a violation of the current constitution.

If in the first scenario the Tribunal decides on the compliance of the December amendment with the Constitution or accepts the compliance in any other way, the state of the binding law will be defined. However, this will not solve the problem of the personal makeup of the Tribunal and the three disputed seats. In this situation, the application of the procedural provisions of the December amendment will lead to a considerable limitation of the role of abstract control. The combination of requirements to examine all cases ("complaints") within the full court procedure, debate the panel with the participation of at least thirteen judges, comply with the order of receipt of cases and achieve the qualified majority for making the decision, might in practice lead to a paralysis of the operation of the Tribunal within the full court procedure. Whereas the power of the Tribunal to settle cases for which the amendment provides for the panel of seven people, i.e. questions of law and constitutional complaints as well as requests regarding the compliance of Acts with international agreements, will be preserved.

If the Tribunal making decisions in the panel of twelve members and referring to the principle of the direct application of the Constitution finds that the December amendment was issued in violation of the legislative procedure (it is therefore completely unconstitutional), it is possible that the decision will be ignored and its publication in the Journal of Laws refused. Such a refusal would violate the Constitution, but, within realities, preserve the unstable legal status quo. Stating that the December amendment is unconstitutional would entail for the Tribunal restoring the full application of the Act of June 2015. However, some doubts might occur whether further decisions issued within such a legal framework would also face problems when it comes to their

publication and implementation. This would considerably reduce the effectiveness of the constitutional control exercised by the Tribunal.

If the Tribunal issuing decisions in the panel of twelve people limits itself to the examination of the substantial constitutionality of the December amendment and recognises the unconstitutionality of some of its provisions, ignoring such a decision might prove to be a problem. So the unstable legal situation would persist, especially with regard to the procedure of abstract control, which would significantly limit the ability and effectiveness of decisions regarding the constitutionality of laws, whereas it would most likely not influence the provisions of the December amendment connected with the decisions by the panel of seven members, because their substantial constitutionality has not been challenged. The legal status might be decided on, which would give the Tribunal the possibility of the "normal" examination of questions of law, constitutional complaints and requests regarding the compliance of Acts with international agreements.

In each of those scenarios the power of the Tribunal to exercise control over the constitutionality of Acts will disappear, completely or partially. This would be an anti-constitutional situation, because, if the fundamental keystone of the hierarchical model of the sources of law is violated, the respect for the hierarchy will be in question. Thus, the problem will move from the institutional and procedural level also to the substantial level, because it will be possible to remain in the legal system of unconstitutional Acts, i.e. faulty Acts, the introduction of which to the legal system negates the importance of the Constitution as the supreme law of the Republic of Poland (Article 8 Paragraph 1).

4. The question arises of how the interpretation of the constitution should respond to such a special situation. Although this situation has already partly exceeded the framework of the current constitution, it cannot, however, be released from seeking constitutional solutions to emerging problems. It has to be underlined again that those issues apply also to the substantive basis of the hierarchy of the sources of the law. The preservation and protection of that hierarchy requires effective procedures and remedies. Therefore, if in the institutional and procedural sphere they decline, the search for interpretations of the Constitution, which will serve to restore the hierarchy of the sources of law only

partially, becomes legitimised. Courts may and should play a prominent role in this regard, because the character and manner of their operation provides them with the ability to impartially (apolitically) settle legal disputes.

Three proposals seem, from this perspective, to deserve consideration. The problem of the interpretation (and perhaps reinterpretation), among others, of the scope of a judge's compliance with "the Constitution and the law" appears in each of them. The common background of those proposals includes the assumption that, firstly the disruption of the normal operation of the Tribunal creates a constitutional gap that requires to be filled, and secondly, that the courts' broader reference to provisions with a higher status than Acts might contribute to the filling of this gap.

Firstly, if the legal status is decided in relation to the cases dealt with by the Tribunal in the panel of seven people, then in the event of the simultaneous disruption of the procedure of abstract control ("complaints") the more active use of the mechanism of questions of law addressed to the Constitutional Tribunal by the courts would deserve consideration. It should be kept in mind that this mechanism is available to any court, for any case and at any stage of legal proceedings, therefore, it is in no way reserved for decisions before the Supreme Court or the Supreme Administrative Court. Today a situation can occur in which those questions will have to replace, to a large extent, the procedures of abstract control, which have been exercised without the participation of the judiciary. The intensification of the use of questions of law would require increasing the readiness of the courts to consider questions whether individual legislative provisions are consistent with the Constitution. It would require a reorientation of the excessively restrictive approach of the Tribunal to the admissibility and relevance of questions of law.

Secondly, it should be considered whether the recognition that the courts may and should independently decide on the constitutionality of legislative provisions which are to serve as the basis of their decisions would be a much more effective method to fill the above-mentioned gap. Recognising the unconstitutionality of a legislative provision cannot, of course, have the *erga omnes* effect (hence the problem of the publication of a court decision in the Journal of Laws would also

not appear), but it would lead to a refusal to apply such a provision in a specific case and, depending on the status of the court, it could also become a precedent. It is true that such a proposal would entail a departure from the interpretation of the scope of competences of courts in constitutional matters. But, what has to be underlined again, the interpretation was based on the assumption that the protection of constitutionality is effectively exercised by the Constitutional Tribunal. If this assumption is undermined, the need to search for new solutions appears.

The proposed solution, in my opinion, does not go beyond the framework established by Article 178 Paragraph 1 of the Constitution. Since the wording of this provision combines judicial independence with compliance with both the Acts and the Constitution, this may be read as an obligation to base a judicial decision on both Acts. However, if there is a contradiction between the law and the Constitution, which cannot be eliminated through interpretation, the application of the Act would entail the omission of the Constitution and the nature of the Constitution as "the supreme law of the Republic of Poland" does not allow it. Thus, when there are no other effective control procedures of constitutionality, it might become necessary to apply the Constitution and omit the legislative provision which is not compliant with it.

The body of rulings of the Tribunal could remain an important indicator for the application of the Constitution by the courts, both when it comes to earlier decisions (their legal authority is not disputed) as well as decisions issued in the current legal scenario. Even if problems regarding the recognition of the binding force of those decisions arise, the interpretation of the constitution contained in them would constitute a legal fact, indicating the appropriate content and importance of individual constitutional provisions to the courts.

The incidental control of constitutionality would be difficult, in many cases exceeding the everyday workload of a judge as well as delayed, because it entails a court case. It should be treated as a kind of *ultima ratio*, but remaining within the jurisprudence of the courts and initiated by independent decisions of individual judges.

Thirdly, it is probably the time to determine the full extent to which the judge may exercise control over the conformity of the provisions with international and supranational law. Especially in the sphere

of fundamental rights protection, those provisions coincide to a large extent with the constitutional regulations and, taking into consideration their status higher than Acts, may serve as a substitute control model during the application of the Act. I have mentioned that the right of any court to refuse to apply a provision of national law which is contrary to EU law is undisputed in the light of EU law as well as the provision of Article 91 of the Constitution. This also applies to the guarantees of fundamental rights included in this law, but the limits arising from the so-called Polish-British Protocol adopted by signing the Treaty of Lisbon cannot be omitted. Polish courts have not fully explained the issue yet.

It is a fact that Poland is fully bound by guarantees of fundamental rights included in the European Charter of Human Rights (hereinafter ECHR) and other international agreements. It has been also established in the body of rulings that in the application of those guarantees, Polish courts "take into account" the supranational courts' body of rulings, especially the ECtHR. Currently courts might have to consider whether in case of a conflict between a Polish Act and the provisions of the ECHR, they have to limit themselves only to the possible referral of the appropriate question of law to the Constitutional Tribunal. Courts might probably be encouraged to apply reasoning analogous to the proposed one regarding the incidental control of the constitutionality of Acts, i.e. to assume that any court may refuse to apply the provisions of an Act which is not compatible with the provisions of the ECHR or other international agreements carrying as much weight.

5. Perhaps it is still too early to predict the future of the Polish constitutional judiciary and consider specific proposals. Those proposals, as any remedies referred to anti-systemic situations, have to be far from perfect and may raise legitimate concerns. However, two conclusions may be presented today.

Firstly, the constitutional interpretation of the hierarchy of the sources of law will become only virtual if it is not accompanied by adequate institutional and procedural guarantees. In a situation where the role of the Constitutional Tribunal is undermined in the system, it is necessary to search for alternative solutions within the regulations of the Constitution of 1997.

Secondly, all aspects of the principle of a judge's compliance with "the Constitution and the law" as referred to in Article 178 Paragraph 1 should be considered in the course of this search. The limits it imposes on the independent decisions of judges in exercising independent control of constitutionality and the "conventionality" of Acts should also be considered.

Adam Bodnar, Ph.D.

Ombudsman

IN SEARCH OF LOST CONSTITUTIONAL VALUES

Crises are an inseparable part of political life. Still, this is no excuse for those responsible for them, especially if they are primarily guided by their party's interests and the lust for power. This is not an excuse for them when they exploit misunderstandings, ineffectiveness, or the sense of dissatisfaction or frustration for their immediate political gains. Yet, it is possible to learn from crises, draw conclusions and seek solutions which are going to limit the causes of crises in the future. This also applies to the current problems related to the Polish legal and judicial system.

FOR WHOM IS INDEPENDENCE CRUCIAL?

Doubtless, the independence of judges and courts are crucial values from the point of view of protecting an individual's rights and laws. Without independent judges it is difficult to imagine the exercise of the right to go to court, which after all should be independent. All limits on judicial independence and the independence of courts disrupt impartiality, and, consequently, the main role of judges, i.e. administering

justice. This is the sense of the guarantees resulting from Article 45 of the Constitution of the Republic of Poland, or Article 6 of the European Convention on Human Rights.

It is worth mentioning, though, that in the everyday life of the state's citizens there is no public awareness of what judicial independence is, what it really depends on, why securing it is so important, and what the independence of courts from the other authorities should mean. I am certain that for many citizens these are abstract notions, not translatable into realities – i.e. to the existence of a specific sense of justice administered by an impartial judge directed solely by law and acting within a structure characterised by total independence. It is possible that the thinking is similar to that referring to individual freedoms. As long as we are able to freely decide about our lives, make independent choices and solve our own dilemmas, we are not aware of our freedom – we take it for granted. Therefore, if for years the courts have fulfilled the standards of independence and so have the judges, we cease to be aware of the importance of these constitutional values, or of their significance for our daily lives. Then only a crisis and a threat can wake us up from this state of dormancy.

It is difficult for us to defend abstract ideas. Notions such as judicial independence and the independence of the courts still belong to the realm of somewhat secretive, elitist knowledge, and so does the notion of constitutional courts. Luckily, the history of the 3rd Republic of Poland has allowed those who have gained this secretive knowledge to consistently forge guarantees of judicial independence. It is worth remembering the achievements of the studies of doctrine (Professor Andrzej Rzepliński, *Sądownictwo PRL*[1]), as well as works fundamental to shaping judge's ethos (Adam Strzembosz, Maria Staniewska, *Sędziowie warszawscy w czasie próby 1981–1988*[2]). Precisely the guardians of historical memory were the ones who have taught the new generations of judges how to use those guarantees and how to translate them into constitutional guarantees and into the language of binding laws.

[1] A. Rzepliński, *Sądownictwo PRL* [the Judiciary of the Polish People's Republic], London 1990.

[2] A. Strzembosz, M. Stanowska, *Sędziowie warszawscy w czasie próby 1981–1988* [Warsaw judges in testing times 1981–1988], Warsaw 2005.

Yet, the question arises whether this forging of legal standards and practical rules of conduct has affected the public awareness of their significance in the lives of the state and society, as well as for the protection of our rights. Have we not focused too much in the daily rush on issues related to the effectiveness of the courts' work while we have considered the instilling of constitutional standards of independence to be an unneeded effort?

THE EQUALLY ABSTRACT IDEA OF CONSTITUTIONAL TRIBUNALS

Almost the same applied to the Constitutional Tribunal. Are we aware of the daily significance of constitutional tribunals for the citizen, or of what the respective constitutional motions or complaints mean for him or her in practice? This problem has been aptly reflected in the words of the young politician Marcelina Zawisza. "To all those who are now crying out that they are denying our freedom and damaging democracy, I would like to politely ask you – where were you when they destroyed our employees' rights? When they kept offering us civil-law contracts without the right to health insurance? Where were you when they fired us from work for founding trade unions? Where were you when the authorities did everything to make us more loose and disorganised?"[3]

The above words were not particularly accurate with regard to the legal element, as it is possible to point out a few significant rulings of the Constitutional Tribunal where it spoke in favour of broadly understood social rights. Yet, Zawisza's statement was not really about this but about the bitter sense of defeat with regard to the general functioning of the state, which translates into the perception of its institutions by the young generation.

It is, therefore, time to pose new questions: have not elementary education and the formation of the citizen's legal awareness been ne-

[3] A. Gaafer, *Marcelina Zawisza krytykuje liberałów* [Marcelina Zawisza criticises liberals], the natemat.pl web portal, 27 November 2015, http://natemat.pl/163341,marcelina-zawisza-krytykuje-liberalow-gdzie-byliscie-gdy-lamali-nasze-prawa-pracownicze [last accessed: 30 March 2016].

glected or even abandoned? Are we capable now – as lawyers – of descending from the pedestal, stepping down from the heights of secretive knowledge, and devoting our time to explaining the rationale behind all those rules, their significance for the state's development, and – in particular – their indispensability as part of the democratic order.

A LESSON IN HUMILITY

In my opinion, the lesson of those winter months of 2015/2016 has been not only about the fight for the rule of law. This has also been a lesson in humility for lawyers' circles in relation to the rest of society. We have to patiently instruct, explain and demonstrate what the above-mentioned constitutional values stand for, optimally with the use of clear examples and a consistent message. Without this educational effort values become alienated from the life of society.

Let us consider the example of the state's liability for damages. We have grown accustomed to courts' – relatively often – declaring the state's liability for actions not congruent with the law. We have doubts as to the details of the functioning of the system; during seminars and conferences – or in publications – we discuss the framework for claiming damages, the notion of fault, and the effectiveness of particular mechanisms. Yet, as a rule, the system is functional and offers real guarantees of the protection of the individual's rights (Article 77 of the Constitution).

But will this always be true? If one day politicians claim that awarding damages from the state does not serve the state's interests, will judges continue making decisions based solely on Parliamentary Acts and the Constitution? What will judges do with instructions that a judge should consider the interests of the state in the realities of a financial crisis? Going further, will not a threat addressed to a particular judge – deceptively called "transparency of the promotion and disciplinary procedures" – influence the judgment? Or, will a trainee judge – waiting for the president's nomination to the Bar Association – be independent in cases involving damages if the president is not only the announcer of judges' nominations but an active advocate of a political option? In the end, it will be the citizen who loses, deprived of rightful damages, treated unfairly, and not covered by legal protection having suffered an obvious harm.

This can happen as a result of the so-called "freezing effect" – when various external factors (combined with a lack of popular dissent and ambiguous regulations allowing the arbitrariness of the authorities' decisions) will slowly but gradually affect the level of independence. Consequently, citizens will end up like the characters in the Russian film *Leviathan* directed by Andrey Zvyagintsev[4]. There will be the law, there will be formulas, even an attorney will be there, yet the result will be disastrous for the sense of justice and very painful for the citizen and his or her rights.

We have to go deeper than to just say that it is worth fighting for judicial independence and the courts' independence but also explain what these values consist of, what is their application to the daily functioning in the court's work, and what is going to happen when a judge loses independence. What will be the consequences for the individual, his or her rights and relations with the authorities? And more precisely – how will this affect a criminal lawsuit or a claim for damages filed by a citizen?

To be honest, we should not keep repeating that independence is the only guarantee of people's rights and freedoms. How much does this independence matter if the court excessively prolongs the proceedings and acts ineffectively so that the case takes years to reach its conclusion? The guarantees under Article 45 of the Constitution ("Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court") should be read as one and not separately. Independence must not be viewed as a separate value but as a value which may be fully attained only within a well-functioning judicial system. Here comes another lesson in humility – prolonged proceedings and court mistakes. Every case tried in the wrong way is like a thorn undermining the legitimacy of the judiciary. Certainly, the causes are diverse and not always dependent on the judges themselves (an inefficient system, the faulty organisation of work, problems with expert witnesses etc), but the figures and statistics in this area must raise great concern.

[4] M. Gessen, *Russia: Man vs. System*, New York Review of Books, 26 December 2014 r., the film's review available on http://www.nybooks.com/daily/2014/12/26/leviathan-russia-man-vs-system [last accessed: 30 March 2016].

The paradox of this situation lies in the fact that the courts would willingly eradicate many systemic and organisational problems but they do not have enough power and political, as well as organisational, sway. They have to rely on the Ministry of Justice, his or her willingness to adopt changes and its ability to implement the needed reforms. Unfortunately, experience demonstrates that this arrangement is in practice ineffective, dysfunctional, and sometimes even humiliating, as it leads to treating the courts as clients and not partners.

So, maybe this is the best time to start looking for alternative solutions for our legal system and the judiciary? Maybe it is also necessary to develop a new cooperation formula for all the judicial players: judges, public prosecutors, defence attorneys, legal counsels, academic law teachers and activists of non-government organisations?

To defend democracy should also mean to be willing to take responsibility for its future. If today we limit ourselves to deterring attacks against the independence of the Constitutional Tribunal, or the independence of judges or courts, we will not be certain that the crisis is not going to be repeated soon as its main causes will persist. Therefore, we should seize the opportunity and attempt to create a new value, a new vision for the legal system in Poland which will not only be more efficient and effective but will also be resistant to the political winds of change. And one which will be accompanied by a common civic education worthy of its name. No one is going to defend our values and our democracy more effectively than the citizens themselves.

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Discussing the issue of the independence of judges and courts requires defining these key terms, which are undoubtedly fundamental attributes of the judiciary in contemporary states. Their attributes determine the position of the third power in the political system and the professional status of "the priests of Themis", and, finally – which is intrinsic and no less significant – the condition of the individual's right to a fair trial. The latter is of a multifaceted nature: it is not only one of the many human rights (cf. Article 45 of the Constitution of the Republic of Poland and Article 6 of ECHR), but also the basic, original or final means of the protection of human and citizens' rights, and, therefore it is such an important political and governmental element of the judiciary.

As we know, independence is of the highest – constitutional – legal importance; however, obviously its remains rather undefined in the constitution. Hence, we are left with a vast space for reflections and achievements in the doctrinal and judicial fields. An attempt to review the scientific and judicial attainments in this respect would be pointless, as it would be too extensive, and these findings are rather well known.

A deliberation on the boundaries of independence assumes that it is a measurable phenomenon that can be determined and explicitly indicated. Indeed, first the notion of a "limit" should be understood in

lexical terms, i.e. as a line enclosing or separating a given area – an extreme, contour or outline. Interestingly, further designations of the notion of a boundary appearing in dictionaries refer to a specific, limited range, measure of something permitted, established; an end, limit, possibility[1]. Obviously, at this conference we are rather aiming at indicating the definitional criteria, i.e. the limits acting as the division line, or factors useful in the distinguishing of the independence of judges and the independence of courts, rather than at treating them as the limit to the capacities of courts and judges. However, it is important that they highlight the "range" notion, i.e. a given scope of the phenomena, as, from the logical point of view, the scope is simply a set of designations of a given word, the word's denotation[2].

Still, in a sense, contrary to these semantic and logical assumptions, I am willing to state that the independence of courts is, out of necessity, subjective, changeable and gradable, while the independence of judges is of a non-reducible and absolute nature. Furthermore, the two types of independence do not have to always appear in conjunction. As I understand it, even in the event of the lack (for any reason) of full independence of the court as a body, the judge can remain independent and *vice versa*: even in the case of a totally independent court it is conceivable that a judge could betray the principle of independence. Is it thus the case that the independence of the court as a body and the adjudicating panel, mentioned among the constitutional attributes of the right to a fair trial (Article 45 (1) of the Constitution), are not homogenous in nature and are equally important and reliable foundations of the justice system and the protection of human rights?

I did not say that; however, I do think that, while it would be naive to absolutise the independence of courts, there must be no concessions, compromises, exceptions or limits in respect of the personal independence of judges. Now we can ask whether such an approach is corroborated in the decisions of the Polish constitutional court.

In one of its more recent judgments (of 19 July 2005, case No. K 28/04, OTK ZU 2005/7A/81), the Constitutional Tribunal stated that

[1] Cf. W. Doroszewski (ed.), *Słownik języka polskiego*, vol. II, Warsaw 1965 (reprint 1996), pp. 1286–1287.

[2] Ibidem, vol. X, Warsaw 1968 (reprint 1997), p. 571.

the essence of the judicial power in the constitutional sense assumes that it is performed by courts acting as bodies of jurisdiction; however, the Tribunal highlighted (following L. Garlicki) that the position of the judicial power within the principle of the separation of powers is largely based on the separation, or even isolation, of the judicature, since among the fundamental rules of the democratic rule of law there is the exclusiveness of the justice system. Here we are dealing with a completely different model of relations than in relations between the legislative and the executive powers, where some "intersections of competences are not only possible, but even necessary". According to the Tribunal separation of powers understood in such a way not only does not eliminate the connections between the powers completely. This is manifested by the fact that courts act on the basis of acts of Parliament, i.e. legislature, judges are appointed by the President as an executive body, and the Minister of Justice, who is a member of the main executive body, exercises administrative supervision over common courts. These relations must not, however, violate the autonomy of the judicature, which, according to the Constitutional Tribunal, means that the remaining powers cannot be entrusted with the justice system.

In the same document the Tribunal explained (again based on the views of L. Garlicki) its understanding of the independence of judges, which in order to become reality, must be subject to constitutional and statutory protection. Its guarantees are perceived by the Tribunal in a dualist way: in their personal and substantive aspects. The former concerns the rights and obligations of the judge, including the stabilisation of the post of the judge (Article 179 of the Constitution), the non-removability and non-transferability of judges (Article 180 (1) and (2)), judicial immunity (Article 181), disciplinary responsibility only before courts (in this respect the Tribunal has not specified the constitutional legal basis – author's note), the prohibition of holding jointly the mandate of the judge with the mandate of an MP or Senator (Article 103 (2)), apoliticism (Article 178 (3)) and material status and remuneration rules (Article 178 (2)). On the other hand, the substantive aspect of the independence of judges means that a judge, apart from being subject only to the law, i.e. Constitution and statutes (Article 178 (1)), may be subject only to directions indicated in a decision issued by a higher court, in line with the procedures in force. We should also

add, however, that an independent Polish judge is subject not only to the Constitution and statutes, but in fact also to ratified international agreements and EU secondary legislation, which takes precedence over statutes (Article 178 (1) in conjunction with Article 9 and Article 91 of the Constitution). According to the Tribunal the principle of independence applies only to the applicable jurisdiction, and (sharing the view of K. Piasecki) the basis for the independence of the judiciary is the independence of the justice system in respect of its jurisdictional functions.

The above appears to mean that, in the Tribunal's opinion, although the independence of courts is not of an absolute nature, it substantially determines the condition and actual shape of the independence of judges.

This thought is also present in a well-known judgment concerning assistant judges (of 24 October 2007, case No. SK 7/06, OTK ZU 2007/9A/108), in which the Tribunal, developing and complementing its jurisprudence to date, stated that the constitutional right to a fair trial included not only the right to launch court proceedings, to an appropriately devised court procedure, in line with the principles of justice, transparency and the two-tiered system, and to a binding decision (the judgment of 9 June 1998, case No. K 28/97, OTK ZU 1998/4/50 and of 24 July 2006, case No. SK 8/06, OTK ZU 2006/7A/84), but also a fourth, very crucial element. This is the right to an appropriately shaped political system and the position of bodies considering court cases, as "there can be no independent court without independent people". The highlighted, obvious *iunctim* of both these values, by no means makes it easier to reconstruct them accurately.

The Constitutional Tribunal, in the context of the principle of the separation of powers, accentuated (in the judgment of 18 February 2004, case No. K 12/03, OTK ZU 2004/2A/8) the necessity for all powers to preserve the "core competences" that the remaining powers cannot access, which would mean the destruction of the separation principle. Furthermore, the mechanism of restraining and balancing, which provides for the possibility of interfering in the scope of the judiciary, must not affect the independence of judges in respect of their holding office, and any encroachment on the activities and organisation of the judiciary, in fields not covered by the unconditional principle of independence, may be done only in special circumstances and must

be sufficiently and substantially justified. Interestingly, in this case the Tribunal analysed the problem of the independence of judges in the context of its guarantee stipulated in the Constitution as the first one, i.e. the appropriate level of remuneration for judges. We should add here that although according to our constitutional court this matter is a condition for the correct functioning of the judicature and has its functional dimension, i.e. building the authority of the judiciary, always connected with the State's interests and the well-being of the justice system, and not with the pursuit of professional or group interests of judges, it would be unsubstantiated to conclude that judges' remuneration should be successively and constantly raised, whatever the State's financial situation. On the contrary: a serious decline in the public finances can even justify a proportional decrease in remuneration for "those especially strongly protected in the Constitution" but only if it is necessary to launch remedial procedures in the case of public debt's exceeding 3/5 of the value of the annual gross domestic product (Article 216 (5) of the Constitution).

I have mentioned this for two reasons. First, undoubtedly, the issue of remuneration for judges is a very sensitive matter, and not without reason, because as early as in the period of the provisional political system (before 1997), it was the subject of several judicial initiatives for controlling the constitutionality of acts of law. Second, however, and maybe more importantly, the financial sphere, i.e. the lack of full budgetary autonomy, can constitute an important element in the determination of the boundaries of the independence of courts, or, in other words, a platform and mechanism for potential threats to this independence posed by Parliament and the government, having a substantial impact on the shape of the State's budget, including courts. The point is that an expectation for the function of the justice system to be carried out on the basis of the "self-funding" principle, so that litigation costs incurred by the parties and participants in proceedings covered all the costs and expenditures of the third power (including possible remuneration for judges), would be absurd! The postulates of privatising the justice system, and any other ideas of radical savings in this field, should be categorised in a similar way. Putting it bluntly, in a democratic country that takes human rights seriously and respects them, it is not worth saving on the justice system. Similarly, it would

not be worth entrusting legislative functions only to amateur politicians, eliminating professional legislators, under the banner of respecting the choice made by the sovereign, i.e. the Nation.

There is also one more statement by the Tribunal included in the recent high-profile decision concerning the new Act on the Constitutional Tribunal (judgment of 3 December 2015, case No. K 34/15, OTK ZU 2015/11A/185). The Tribunal emphasised that the notion of the independence of judges focused on the lack of judicial dependence, in their decision-making, on other factors than those resulting from the law. The independence of all judges (including those of the Tribunal) is to include many elements: impartiality towards participants in proceedings, independence from non-judicial bodies (institutions), judges' independence in respect of the authorities and other judicial bodies, independence from political factors, and the internal independence of judges. At the same time, the Tribunal highlighted (invoking its judgment of 24 June 1998, case No. K 3/98, OTK ZU 1998/4/52) "the independence of judges is not only their right, but also a constitutional duty, and the constitutional duty of the legislator and the judicial administration is the protection of the independence of judges".

The most valuable is the last sentence of the Tribunal's statement, which forms the *clou* of the problem (to which I will return later); however, there are some visible drawbacks in the defining of the independence of judges, linked to or even mixed with the notions of independence and impartiality. It appears that we may propose a much simpler description of these concepts, and, at the same time, of constitutional values.

The independence of courts is an obvious requirement of the rule of law, as it stems from the separation of powers, and is corroborated in Article 173 of the Constitution, in the light of which all courts (and Tribunals) constitute a separate power and shall be independent of other branches of power. This separation concerns both the organisation and functions of courts, which constitute a separate segment of public authorities and exclusively implement the administration of justice (Article 175 (1)). On the other hand, the crux of the matter in respect of the independence of courts consists of its being inadmissible to influence the content of court decisions, i.e. change or reverse them by non-judicial bodies, and the only method of verifying or modifying

such decisions is by way of a decision of a higher court, made as a result of appeal proceedings or by way of challenging final judgments on the grounds of their unlawfulness. At the same time, courts remain in principle dependent on the normative grounds of their operation. Specifying the limits of the legislator's freedom in the regulation of courts' structure, competence and procedures is not an easy task; surely, however, the inflation of regulations and legislative experiments in this field (e.g. with the model of criminal proceedings and the role of the judge in such proceedings) should not be condoned.

We must not equate the separate (also on constitutional grounds), however interrelated, concepts of the impartiality and independence of judges. *Impartiality* means an unbiased, objective attitude by the judge acting as an arbiter of a suit (proceedings), not participating in the dispute, and thus free of personal interest and stances favouring or disqualifying anybody. On the other hand, *independence* is an absolute, non-gradual and unlimited freedom of the judge of any influence (in the form of any encroachment, such as pressure, threats, pleas, incentives, corruption or suggestions) on his/her decision in the case in question or any external factors, except for the law in force and judge's conscience, and separate from the conclusions, evidence and arguments presented in the suit by its participants.

Both these values are clearly correlated: should a judge violate the principle of independence, clearly his/her judgments will not be impartial, which is not so obvious the other way round. The lack of impartiality can result from the violation of independence, be it an effect intended by the parties to a delictual contract, or even from a criminal act or participation in such an act, as well as the effect of the judge's "own" prejudice uninspired by any external factor. The independence of judges is not only a constitutional matter, – it is also the subject of statutory regulations – the Law on the System of Common Courts. Whereas the issue of impartiality is the domain of court procedure regulations, providing for two reasons for excluding a judge from participation in the examination of the case: *iudex inhabilis* and *iudex suspectus*. The legislator reacts in two ways to threats to the impartiality of a judge: eliminating those threats and their results *a priori* by way of exclusion by virtue of the law, or on request. *Nota bene*: in practice, requests for the recusal of judges are very rare, which might be a result

of several different reasons: the lack of actual and legal premises for such a request, the inability to see, or underestimating, the problem, or because of some peculiarly understood courtesy, or even from a practical "calculation" showing that irrespective of grounds, a submission by a lawyer of (indeed an exceptional) request for the exclusion of the judge is considered only sporadic, and almost always entails a kind of ostracism and the "professional death" of the requesting party.

The independence and impartiality of judges is a very sensitive matter, which, however, should be treated very strictly, because in the case of violating any of these principles, the judge will lose the constitutional authority to exercise judicial powers. However, while in the event of violating the requirement of impartiality the judge should be excluded from participation in the given case, violating the principle of independence should result in the judge's being deprived of his/her right to serve as a judge. This results from the essence of the right to a fair trial, which is designed to protect human rights and freedoms, i.e. the most treasured values of people's existence. The thing is that the right to a fair trial is not the right to "any" trial, but a trial that meets the highest legal and ethical standards.

And thus we reach the conclusion. Although established law overwhelmingly determines the condition of the justice system as such, and judges' service, in particular by creating a number of guarantees and factors facilitating the observance of independence, it is not the law that ultimately decides about the behaviour of individual judges. A judge may not be forced by the law, a minister, the President, a liked or disliked politician, relative or anybody else, to be independent or be devoid of such independence against his/her will. This is solely his/her moral choice, made not in the name of the law, but rather by following his/her righteous conscience. Given that the conscience of the judge is also a legal category, as, in the light of the Act of 27 July 2001 – Law on the System of Common Courts (Journal of Laws of 2013, item 427, as amended), during their appointment, judges swear before the President of the Republic of Poland, by saying the following oath "As a common court judge I hereby swear to faithfully serve the Republic of Poland, uphold the law, conscientiously fulfil the obligations of a judge, serve justice in line with the rule of law and impartially, follow my own conscience, keep legally protected secrets, and follow the

principles of dignity and honesty in proceedings"; to which the judge may also add the following sentence: "So help me God" (Article 66). Making this vow is a constitutive (though not constitutional) premise conditioning the acquisition of the status of a judge.

Therefore, finally, the real limit of the independence of courts is the independence of judges, and its pillar and shield are composed of the good will and freedom of conscience of the person in the judge's gown who performs a public service, rather than the sword and blindfold covering the eyes of the mythical Themis.

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The role of the courts in the system of government will expand further if the role of the Constitutional Tribunal is diminished. This might also result from the changes made in the draft amendment to the Constitution filed with the Sejm. In this context it is important to emphasise the importance of courts' and judges' independence as a constitutional value. Unfortunately, as also seen in the body of decisions of the Constitutional Tribunal, this particular value was not duly appreciated and its fundamental meaning for implementing the rules of the system of government was disregarded, and especially the rules concerning the democratic rule of law and the rule of the separation of powers. The Constitutional Tribunal considered the external supervision of the Minister of Justice over the common courts as one of the constitutionally acceptable solutions. At the same time, however, it released the legislative power of the obligation to look for an organisational formula which would be more conducive to the independence of the courts and the judges, such a formula would be closer to the Constitution than the existing model, which is being changed almost all the time – since 2001 the Law on Common Courts' Organisation has been amended over 50 times. Article 173 of the Constitution, which stipulates that courts and tribunals constitute a separate power which

is independent of other branches of power, was in practice transformed in such a manner as to reduce this independence and separation down to the right to adjudicate only.

From the linguistic point of view, Article 173 of the Constitution explicitly separates judicial power from the others on the assumption that it constitutes an independent and integrated entity. Therefore, the rule of the separation and balance of powers stipulated in Article 10 of the Constitution should be understood in reference to judicial power in such a way as its "separation and independence" are duly respected. The argument according to which taking due account of the balance of powers is conducive to allowing the impact of the executive and legislative powers on the judiciary needs to be analysed in the context of the constitutional rule of maintaining the separation and independence of these powers. The inference of executive and legislative power in the operational sphere of judicial power is possible only within the scope permissible by the Constitution. The rule of the separation of the powers stipulated in the Constitution is understood in the doctrine and jurisprudence as the constitutional expression of presumptions of competence which cannot be prevented by the provisions of ordinary statutes. The presumption of competence arising from Article 10 of the Constitution becomes strengthened in the reference to the power of the courts and tribunals in Article 173 of the Constitution. Even more so, then, it cannot be prevented by the provisions of an ordinary statute, which has happened many times in practice.

The activities of the executive power in the sphere of the judiciary has for long been granted permission which, in light of the Constitution, is incomprehensible. After all, it makes the independence of the courts and the judges a foundation stone of constitutional democracy, which was defined by the Constitutional Tribunal as the limitation of the power of the parliamentary majority to avoid experiences known from history. It was the lack of – also lawyers' – imagination allowing the assumption that the problem concerning the limits of the power of the majority will become up to date.

The independence of the courts and the judges is especially prone to being ignored by the legislative and executive powers. These values are coessential to law understood as the art of adjudicating what is good and equitable. At the same time, however, they are generally in

contrast to the nature of the political power which manifests itself in the constant striving for expansion, concentration, and at the same time for the destruction, of everything that resists it. This tendency was also present in our political and legal culture, especially in the period of the Second Republic of Poland[1], but also during the past 25 years. Nowadays it manifests itself in the fundamental questioning of the Polish Constitution in force, even by those who made a solemn vow to be faithful to its provisions, but they made this vow to become entitled to contest the Constitution. Due to this fact the independence of the courts and the judges is endangered.

It is worth paying attention to the Danish experiences mentioned during today's conference, in the light of which it turns out that the conviction of the independence of the judges is connected with the high level of their life satisfaction, the meaning of social capital, and the role of civil society. If – as was thought especially in the 18th century – the system of government aims at providing citizens with happiness, maybe the independence of judges and courts is worth protecting.

However, if we consider that the Constitution and human rights do not restrict sovereignty, then in the system based on such a presupposition there is no place for independent judges or also for constitutional judiciary, which in the concept of democracy leads to the rejection of the assumption concerning the unlimited range of that sovereignty's will, similarly to judicial independence.

In contemporary democratic states the role of the judiciary is increasing. We are dealing with the phenomenon described as judicial democracy.

One of the main reasons for the increase in the importance of judicial power in Poland is the occurrence of the penetration the legal culture of the enacted law into the judicial law connected with the process of European integration. The significance of this power is increasing also because less and less unambiguous and more and more complex laws require its intervention. The legislator entrusts courts with legitimising the actions of the executive power in the spheres especially sensitive in terms of the rights and freedoms of the individual. Judges

[1] The term refer to the period of 1918–1939.

become the representatives of interests which are not stood for or they are stood for in the wrong way.

The right to have rights becomes the paradigm of the democratic system of government. This right is ineffective without independent judges.

At the same time almost every public affair can become the subject of the judicial power's impact. Judgements are not indifferent to legislative and executive powers. Apolitical judges issue decisions which can influence the result of elections, and also the financing of political parties from public sources. Politicians are not able to accept that apolitical judges made political decisions. The independence of the courts and the judges means the existence of power which is beyond control of politicians. There is a possibility that this power will become the representative of the unrepresented – so, e.g., all those who do not feel represented by a parliament in which the majority is supported by twenty per cent of the eligible voting population. Our election system was designed in such a way as to make the minority of citizens become the majority in both chambers of parliament and personifies itself with sovereignty. However, at the same time this majority perceives the state's existing before the elections as the enemy if the member of the government chosen in the election states in his or her speech for the press "we won the democratic elections, in an extremely unfavourable situation, without any impact on the institutions of state, with extreme media bias, with the foreign environment reluctant to change and directing almost the whole state apparatus against us". Those who governed before the election treated the independence of the courts and the judges as a vital threat to the state. One of the former Prime Ministers calling in the Sejm for a vote against an Act on court circuits, which aimed at slightly increasing the independence of the judiciary, warned that "neither today nor in a year's time, nor in 5 years' time, will we change the Polish judiciary if you surrender to a pressure which is understandable, but inadequate to the real problem, in such a fairly small case. We will not succeed in it, maybe because the majority will surrender, capitulate under that pressure, but you will see that the consequences of this fact will be suffered for many, many years. None of you will ever make an effective attempt to reform the judiciary because it will clearly require more courage than this first modest step. If courage fails this Parliament and the clubs, it means that you have

lost a chance for many, many years. This is why this fight is much more important than only the prestige of more than a dozen local communities" (Ad verbatim report of the 39th session of the Sejm of 10 May 2010, 7th term of office, p. 288). It is not clear what further reforms of the judiciary were – and such ones as demand considerable courage, so sparking a potential objection in its very intention – planned by the government in the Sejm's previous term of office. It is worth noting that in the case of establishing court circuits in its Resolution the Constitutional Tribunal shared the government's view and in this way it upheld the concept expressed in the decree of the Polish Committee of National Liberation (PKWN) of 1944. The competence of the courts and independence of the judges as a constitutional value did not play an important part in this issue.

The suprasystem utility of the model which constitutes the heritage of the partitions deserves to be emphasised. It allows one to charge the government with administering the judiciary, which assumes the permissibility of a kind of governing of the judiciary. This model was applied in the conditions of the separation of the powers and the unity of the powers. The decree of 4 November 1944 issued by the Polish Committee of National Liberation stipulated that "until setting the new boundaries of court circuits on the territory of the whole state, the Director of the Ministry of Justice may issue a decree on the establishing and abolishing of the courts […], determining new seats of courts and the change of their circuit boundaries" (Article 1) – this eliminated the rules in force in the inter-war period, pursuant to which the establishment and abolition of the courts was conducted by way of an act. The solution introduced by PKWN was respected in the conditions of the unity of the powers in the People's Republic of Poland, and after 1989. In this way this model of the system of government was supported. It was difficult to reconcile with the axiology of the democratic rule of law in the provisions of the Constitution.

The Polish Constitution does not stipulate the supervision impact of the government on the judiciary, and especially of the Minister of Justice. The permission for such an impact does not arise either from the tasks of the Council of Ministers (Article 146 of the Constitution) or the Prime Minister (Article 148 of the Constitution), or the provisions of the Constitution concerning the Minister of Justice (Article

187 stipulates that the Minister of Justice is included in the National Council of the Judiciary; as a member of this Council he/she is meant to uphold the independence of the courts and the judges which is his/her constitutional task). Pursuant to Article 173, such an interpretation of the Constitution which by means of this presupposition would creates a competent opportunity for the government to violate the separation and independence of the judiciary, should be considered as impermissible. Drawing out the powers in respect of the judiciary from the pre-established view of the Minister of Justice means that the Constitution in force is to be interpreted in terms of values which are absolutely alien to it and connected with a completely different system of government from the democratic rule of law. The Sejm in the previous term of office created for the Minister of Justice special opportunities for supervision over the judges in his special role of IT-systems administrator. Maybe it was considered as vital for carrying out the concept of creating a kind of corps composed of judges. Combining the function of Minister of Justice and General Public Prosecutor being operated in the current term of office changes in a vital way the possibilities for exercising the right to go to court. When in 2009 these functions were separated, the Minister of Justice did not have such significant tools of impact on the courts as nowadays. In my opinion, the Constitution does not allow the combining of the functions of Minister of Justice and General Public Prosecutor, especially nowadays when whoever is in charge of the Public Prosecutor's Office has an important impact on the functioning of the judiciary, and this raises doubts as to the relations between parties in trials. The head of public prosecutors is almost the head of judges. He/she has a special department of internal affairs in the National Public Prosecutor's Office at his/her disposal. This department is competent to conduct preparatory proceedings in cases concerning the most serious offences commited by judges and public prosecutors. The decisions of the European Court of Human Rights in Strasbourg are evidence of pathologies in the judiciary. When we read some decisions we might ask ourselves a question – how was this possible in Poland? Unfortunately, it was possible also because we educate people to prepare for various legal training examinations so most of all we educate memory, and not imagination and characters. And then the educated graduates pass judgements which become grounds to issue decisions by the Court

in Strasbourg. As a result, in a society in which 46% of respondents trust the judiciary, and 39% declare their distrust, a civil movement of judicial victims emerges. The fundamental purpose of this movement, formulated during the recent conference in the Sejm, is to cause judges not to take side of the strong against the weak. The department of internal affairs mentioned above responds to these expectations but it does not constitute a solution allowing the removal of pathologies from the judiciary.

Independence based on fear is not worth much. However, in the Law on Common Courts' Organisation we in fact deal with the culture of negative cooperation, which poses a threat to judicial independence. A similar danger is connected with the consequences of a kind of informational totalitarianism in the conditions of more and more broad surveillance due to the development of digital information technologies and increased care for security. These consequences, which are indicated by the Panoptykon Foundation, including those arising from the amended Act on the police and referring to monitoring and surveillance via the Internet, involve judges as well. The respect for judges' privacy is an important guarantee of their independence which constitutes a basis of trust of the judiciary. Privacy belongs to the foundations of the individual's dignity. Constitutional guarantees of the independence of the judges and the courts are fully respected by all the powers, but they do not replace the skill described by Solomon, who in his dream asked God for a gift to settle court disputes – a truly divine ability to differentiate good from evil. And then God gave him a heart full of reason.

KRAJOWA RADA SĄDOWNICTWA

THE LIMITS
OF JUDICIAL INDEPENDENCE?

■

THE NATIONAL PERSPECTIVE OF THE JUDICIAL INDEPENDENCE – A FOCUS ON ETHICS

Krzysztof Strzelczyk

Judge of the Supreme Court
President of the National Council of the Judiciary (2004–2006)

THE BEHAVIOUR OF JUDGES AND THEIR PUBLIC PERCEPTION

Judges, by virtue of their office, have to meet the highest standards. They should adhere to the principles of integrity, dignity, and honour, and have a sense of duty and standards of morality. As Professor Ewa Łętowska rightly pointed out: "Exercise of judicial office is connected not only with privileges, but especially with obligations and limitations".

Therefore, the ability to respect those requirements, in addition to expertise, is significant at the stage of filling the positions of judges. Judge Orlando Afonso referred to those issues in his speech. The importance of the appropriate selection of judges is reflected in the adopted legislative solutions.

According to Article 57 and Paragraph 1 of the Act of 27 July 2001 the Law on Common Courts' Organisation (consolidated text of the Journal of Laws of 2015, item 133, as amended – hereinafter referred to as **the CCO**) while assessing the candidate's qualifications

for the vacant position of judge, the predispositions and personality of the candidate to the profession of judge and his compliance with the rules of ethics of the profession, are taken into consideration. A judge should follow those principles during the performance of his/her functions and after retiring. Whereas, according to Article 57 b Paragraph 1 of CCO the assessment of the candidate's qualifications in the position of judge of a common court, judge of an administrative court and judge of a military court includes the evaluation of the level of expertise on the body of rulings as well as the efficiency and effectiveness of the performed activities and the organisation of work during the examination of cases or performing other assigned tasks and functions, including the workload of the tasks and their complexity, the implementation of the process of professional training, and the rules of conduct for the office as the workplace, including the personal etiquette and the culture of the organisation of work and respect for the rights of the parties or participants in the proceedings during the examination of cases or carrying out other assigned tasks or functions.

Of course, regardless of the adopted method of selecting judges, as in any social group, sometimes people who do not meet the relevant requirements are appointed. As Professor Ryszard Piotrowski said "Pathologies occur everywhere; the world is not perfect".

I will present my views in this field from the perspective of a judge with over thirty years' experience, from the perspective of the National Judiciary Council, whose Vice-President and President I was in the period from 2002 until 2006.

The adoption of the Collection of Professional Ethics Standards of Judges on 19 February 2003 was significant at that time. The adopted regulations are intended to draw judges' attention to their behaviour in the context of the obligation to establish the authority of the judicial office and the authority of the courts. Judges play the most important role in shaping public opinion about the judiciary through holding office as well as in private life.

I am pleased with the return to the practice of handing the Collection of Professional Ethics Standards to judges on their appointment. It contains 22 paragraphs and is divided into the general section and sections regulating the principles of service and rules of procedure of the judge after work.

1) **judge's behaviour on duty**, which may be divided into
   a) behaviour in relation to participants in proceedings in the course of sittings
   b) carrying out duties connected with judicial administration.
2) **judge's off-duty behaviour after work**

Ad 1a) Social evaluation may refer to judge's behaviour in the course of a sitting as well as to decisions issued in the makeups of one or many persons.

According to the Collection of Professional Ethics Standards a judge should maintain order and the proper course, as well as an appropriate level of applied procedures. In respect of the parties he/she should have a dignified attitude, patience, courtesy, and should require such behaviour from participants in proceedings. The behaviour of the judge in the session chamber and in the courthouse is observed mainly by parties and their de-facto attorneys. Opinions on his/her work may also be expressed by other persons present in the session chamber. The role of the court is to resolve social conflicts that might arise in the context of the interpretation and application of legal norms. Therefore, both sides in a conflict are rarely satisfied with the final decision. It is important that any dissatisfaction is only juridical and not the result of a negative assessment of judge's behaviour and running of the court's creating a sense of injustice. Opinions on the work of the judge and the court of persons who are direct participants in those events are very important. In the current legal system recording hearings significantly contributes to the respect for the rules of proceeding.

The role of the representatives of the press, radio and television, who are more and more often present at court hearings, narrate their course, and present and explain the motives for decisions should also be recognised. The media have a significant impact on shaping public opinion on the courts. Unfortunately, these relationships are not always objective and based on facts. The saying *'fine feathers make fine birds'* not always applies. Some journalists had extreme reactions under the guise of misinterpreted freedom of speech. Such a spectacular reception by a journalist of the decision on the short-term imprisonment of another journalist connected with his refusal to comply with another court

decision, led to a public protest in defence of the supposedly persecuted journalist, during which protesters locked themselves in a cage.

The opinion about the operation of judges and courts is shaped not only by the media. Politicians also play an important role. In this field there has always been and still is much to be done because the role of the courts is still defined by representatives of legislative and executive authority. Meanwhile, the independence of the judiciary should be perceived by other authorities as a value that has to be respected and protected. Politicians' comments may be recalled in this regard; they openly announce that they would not respect the decisions issued against them, and would search for other, non-legal motives which served as the basis of the specific decision of the court. Today, some of those comments go even further. They refer to judges' lives. They contain unfounded threats to initiate disciplinary proceedings against the judges.

Such an attitude to the judiciary is confirmed by the current actions against the Constitutional Tribunal, the attempts to refuse to publish its decisions, and outright comments declaring disregard for the judgment of the Constitutional Tribunal. Those actions undermine not only the authority of the Constitutional Tribunal, but also the authority of the judiciary; they undermine confidence in judges and the courts. Therefore, it is difficult to agree with Judge Łukasz Piebiak – Under Secretary of State at the Ministry of Justice, that the issue of the independence of the judges of the Constitutional Tribunal was a matter for the Tribunal only and should not be included in the subject matter of today's conference.

The judge exercising justice should care about the authority of his/her office. A judge has to be free from any influence compromising his/her independence (Paragraph 9 point 1 of the Collection of Professional Ethics Standards). The proper understanding of this obligation is illustrated by the example of a judge of the District Court in Warsaw, who was interrogated as a witness by the prosecutor on 31 May 2004. The interrogation was connected with an examination of a complaint regarding the arrest of a suspected person carried out by the judge. During the interrogation the prosecutor informed the judge about the criminal responsibility for the refusal to answer questions about the confidentiality of a council meeting. The judge refused to answer and

notified the National Judicial Council, which on 20 October 2004 took a strong stand against this unprecedented attack on the independence of the judiciary.

Ad 1b In the workplace judges cooperate with one another and with the judicial administration staff members, with representatives of other legal professions. Judges should require impeccable behaviour from other judges and to follow the principles of professional ethics and should respond appropriately to reprehensible behaviour in their surroundings (Paragraph 6 of the Collection of Professional Ethics Standards).

Such concise regulations, of course, do not cover all situations provided for in the Collection of Professional Ethics Standards. Therefore, Paragraph 7 allowed amendments or supplements of its provisions and making interpretations of them. On 16 September 2004 the National Judiciary Council adopted an interpretation according to which the acquisition of any personal property or real property at auctions conducted by debt collectors by judges is improper. Judges should also ensure that members of their families do not participate in such activities.

Ad 2 Judges should have good manners, and should be a model for the compliance with the law. In the judgment of 11 December 2011 (Case ref. No. SNO 60/14) in a case regarding a judge pulled over by a police patrol because he had exceeded the speed limit, who behaved arrogantly towards the police officer, the Supreme Court – the Disciplinary Court – emphasised that a judge should at all times behave culturally, politely, respectfully, without irritation and emotional expressions, especially when he/she has violated the law and brought about the intervention of police officers.

Judges should avoid personal contact and any economic relationships with other entities if they raise doubts regarding the impartial performance of their duties, or undermine the prestige of and confidence in the judicial office (Paragraph 17 of the Collection of Professional Ethics Standards).

Also according to Paragraph 18 of the Collection, a judge should be characterised by unambiguous reliability in financial matters and scrupulousness in fulfilling his/her relevant duties. The duties of a judge in this field are connected with completing statements of assets, which

are subject to a special, double verification: by the board of the court of appeal and the relevant tax authority (Article 87 Paragraph 3 and 8 of CCO). This procedure is connected with the attempt of the Supreme Audit Office in 2005 to control judges' statements of assets. The National Judicial Council opposed it in its resolution of 17 June 2005 for constitutional reasons and the statutory authorisations of certain entities to carry out those verifications. This issue is being addressed again now through the preparation of a draft Act allowing the publication of statements of the assets of all judges. We have concerns as to whether judges' transparency of assets in the situation of increased controls of their statements of assets should be understood that way.

The behaviour of a judge after service is referred to in the prohibition on the provision of legal services in Paragraph 21 of the Collection of Professional Ethics Standards and the interpretation of this provision in the resolution of the National Judicial Council of 9 April 2003 allowing retired judges to provide free legal advice, according to the principles of charities to those who cannot afford legal services.

In conclusion, it has to be underlined again how important a role in shaping public opinion about the judiciary is played by journalists and politicians. Apart from the appropriate responses to unfair assessments, the proper behaviour of judges has to be kept in mind at any time and in any situation. One of the measures which contributes to the achievement of this goal is the possibility to initiate disciplinary proceedings against a judge. However, taking into account the statistical data of the National Judicial Council on disciplinary proceedings initiated against judges each year, it is difficult to find a justification for plans to establish a special unit within the organisational framework of the Prosecutor's Office or the Ministry of Justice for combatting fraud among judges.

Antoni Górski

Judge of the Supreme Court
President of the National Council of the Judiciary (2010–2014)

OBSERVATIONS ON THE INTERNAL THREATS TO THE JUDICIARY

The threats to judicial independence primarily emanate from outside, and they are rightly being highlighted and indicated as particularly dangerous ones, especially if they come from representatives of the other powers and the press. Recently these threats have been widely discussed and this conference is to a great extent devoted to them. Yet it should not be overlooked that certain threats also exist within the judiciary, where they take the form described as the abuse of judicial power. Let me devote more attention precisely to this issue. For I do not share the opinion that when in the fact of this adverse atmosphere for the judiciary it is improper to criticise our shortcomings at work and in the judges' attitudes.

I will start with a quotation, just altering the grammar forms. It goes: "Judges, especially in the large cities, are becoming anonymous functionaries rather than judges. Some of them believe that they remain unpunishable with regard to issues subject to their jurisdiction they can adjourn hearings where a sentence could be pronounced, discon-

tinue proceedings or reject triable lawsuits without good reasons. Such conduct is an abuse of judicial independence constituting an excess leading to distortion of the judiciary." These bitter and stern words did not come from a politician unfriendly towards us or from a journalist. They were said four years ago in this hall by Stanisław Dąbrowski, the late President of the Supreme Court, during a conference on a similar subject. The widespread acclaim enjoyed by him resulted, *inter alia*, from the fact that with all his benevolence towards judges he did not idealise us, but he could be critical sometimes. He believed that this was a prerequisite of fair judgment and that wise criticism was productive and had a healing power. We may not dismiss these remarks by saying that they only refer to the margins of our activities or to excuse the indicated shortcomings by being constantly overworked.

It appears to me that the threat of the abuse of power rests in an improper way of interpreting, and – even more – practising the unique and rightly privileged status of the office of the judge shaped constitutionally by the fundamental principles of independence. This consists of a failure to afford equal treatment to the two main provisions which define the essence of the office of a judge and specify his or her duties, i.e. Article 178 (1) and Article 45 (1) of the Constitution. The first of these guarantees independence, which is our core privilege, indispensible for serving justice. The other formulates the requirement regarding the manner and quality of performing our work, i.e. it specifies how our right to independence should be exercised. The structure of this provision consists of listing the rightful expectations and demands of citizens towards courts and judges. However, this should also be construed and interpreted as simultaneously indicating our judicial duties which correspond to those entitlements and expectations. Taking account of the contents of both these provisions leads to the conclusion that, with reference to the judges, the constitutional legislator has attempted to maintain a balance between the entitlements of our position and the duties, which some of us seem to overlook. Briefly and simply I could say that my colleagues' reasoning is as follows: "This is me, acting in the capacity of a judge, who embodies the judiciary. Since Article 178 (1) of the Constitution guarantees me independence in the performance of my office, subjecting it only to the Constitution and ordinary statutes, then no supervisor has any competence over me with

regard to the issues subject to my actions. In particular, he or she is not allowed to decide whether a case has matured for scheduling, or to examine or assess the grounds for an adjourning a hearing or suspending proceedings, or to try to establish the reasons for the suspension, not to mention criticising me for any inappropriateness of conduct".

This perception of independence results in its being used as a shield which might be intended to conceal poor quality of work or improper conduct. This is, *inter alia*, what is largely being faced by Judge Katarzyna Gonera, the head of the judicial ethics committee of the National Council of the Judiciary. In her challenging job, which touches on delicate matters, it is generally not enough to refer in her submissions to the provisions of the law on the court system which provide legal grounds for the president of a court to control the effectiveness of proceedings. Often it is necessary to balance the stylistics so as not to hurt a judge whose posture or conduct raises justified objections. The lack of self-criticism and the over-sensitiveness of some of our colleagues to any negative supervisory remarks are so profound that lawsuits have been filed with the Supreme Court over breaches of personal dignity allegedly resulting from the admonishment of a judge for issues related to his or her jurisdiction.

It is being said that cases of improper attitude towards the entitlements and duties of a judge primarily regard the most junior colleagues. If this is the case, reasons for this state of affairs should be examined, and proper remedies and precautions instituted. Already now I will let myself remark on this. Well, at the times of my recent work at the Council, with some surprise and concern I observed the phenomenon of loosening or even severing of the master-student relationship which has always been the foundation of rearing proper attitudes in any circles, including judicial ones. In my generation it was a natural and commonly practiced thing that an assistant or probationary judge turned for legal advice to a more experienced colleague, usually the head of a division or a inspecting judge. Up till now I have been remembering with gratitude my teachers and guides in the difficult art of serving justice. It suffices to recollect here one of the most prominent of these, Inspecting Judge, the late Antoni Filcek, who later moved on to become a judge of the Supreme Court, President of the Civil Chamber and a judge of the Constitutional Tribunal. It happened that we would liter-

ally pass each other in the doorway of this admirable man and lawyer, each of us leaving with a piece of advice and a clarification of the presented issues. In urgent cases we would approach him by phone; some would come from distant courts carrying case files. It never occurred to any of us that this might somehow infringe on judicial independence. Although so many years have passed, the memory of our Master has remained. Two years ago in the Appellate Court in Białystok a ceremony was held at which his name was officially given to a conference room, following an initiative of his students and courtesy of the support and involvement of President Bogusław Dobrowolski.

I would also like to add that those of our senior colleagues who enjoyed real personal and professional recognition in our circle shared with us more than just their experience. They offered us something of genuine value: the role models of judges, which resulted in that it just not appropriate to act in breach of judicial ethics. It appears that the now visible atomisation of judicial circles has been one of the reasons for the failures in the conduct of some of us. Thus the postulate of assuming the task of restoring and reconstructing the good relationships of co-operation and assistance mentioned here. This is not going to be easy, especially in large cities. However, the effort should pay off, as it may be one of the methods of improving not only the standard of work but also the ethos of the judge.

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THE ATTITUDES OF LAWYERS TOWARDS THE CONSTITUTIONAL CRISIS AND THE INDEPENDENCE OF THE JUDICIARY

INTRODUCTION

It is hard to imagine theoretical considerations concerning the professional ethics of judges which would leave aside the problem of their independence. It means that it is universal in its nature and every concept of judicial ethics, or broader – the role of the judge – has to be based on some kind of understanding of the term, more or less explicitly formulated. However, at the same time, and maybe above all, their independence is also an essential element in their practice. Therefore, its sense is largely determined by the manner of using this concept in the practice of issuing decisions and non-contentious proceedings, and also in the postulates and expectations towards the authorities of the judiciary. One can also say that above the universal dimension it also has a so-called local meaning. Its analysis, in comparison with

general considerations on independence in universal terms, might direct people's attention to problems which have not been noticed so far. The reason for such an approach to the analysis is mostly dictated by the constitutional crisis, which is full of conflicts related to the general understanding of independence, with expectations and allegations directed to judges by the legislative and executive authorities. These conflicts, despite referring mostly to the judges of the Constitutional Tribunal, have provided much more than sufficient material for analysis.

Before the problems concerning the independence of judges which arise from the constitutional crisis are presented, it is necessary to present how judicial independence is understood in general. There is neither the possibility nor the need to do so at this point in a detailed way. It is enough to include the following remarks. Above all, judicial independence is connected with the essence of the judiciary and the administration of justice. It should be then considered in the context of the principles concerning the independence of courts[1] and judicial impartiality[2]. While the first one means the organisational and functional separation of courts as State authorities responsible for the administration of justice, the principle of independence is addressed to judges as persons holding office. It may be described as the individual independence of the judge in the administration of justice. In the Constitution of the Republic of Poland it is mainly expressed in Article 178 (1), pursuant to which "Judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes".

As far as this provision is concerned, it can be stated that independence has a positive aspect, which lies in the fact that judges holding their position are subject only to the Constitution and acts of law. As a consequence, one can draw a conclusion concerning its negative aspect, i.e. they are not subject to any other directive of administering

[1] See, i.a., S. Dąbrowski, *Ustrojowa pozycja sędziego* [in:] J. Gudowski, K. Weitz (ed.), *Aurea Praxis. Aurea Theoria. Księga pamiątkowa ku czci Profesora Tadeusza Erecińskiego,* Warsaw 2011 and T. Wardyński, M. Niziołek (ed.), *Niezależność sądownictwa i zawodów prawniczych jako fundamenty państwa prawa. Wyzwania współczesności,* Warsaw 2009.

[2] See, i.a., W. Jasiński, *Bezstronność sądu i jej gwarancje w polskim procesie karnym*, Warsaw 2009, and W. Jasiński, *Uwagi o interpretacji zasady bezstronności sądu* [in:] H. Izdebski, P. Skuczyński, *Etyka prawnicza. Stanowiska i perspektywy 3*, Warsaw 2013.

justice, e.g. orders, instructions or circulars[3]. Therefore, the rule of independence cannot simply be associated with legalism ordering all public authorities to act pursuant to and within the limits of law. Not being subject to other directives than constitutional and statutory norms also has two aspects. The first can be described as external independence, which means the lack of formal binding by any orders or instructions; the second can be referred to as internal independence, i.e. the judge's not being bound by any orders or instructions, even those formulated towards him/her. The latter is related to the existence of the independence guarantee system, such as formal immunity or irremovability of judges. It cannot be discussed here[4], however, undoubtedly, in the constitutional crisis it also becomes important, according to the well-known statement that independence in the legal sense is as broad as the guarantees enabling unrestricted resistance against attempts to impact on judges. If there are no such guarantees, independence becomes most of all a matter of professional ethics and the individual attitude of the judge.

It must be emphasised that in its essence independence is difficult to be normatively described in a more precise way. Each attempt of its specification which is different than the provisions of the Constitution or other acts of law would be irreconcilable with its constitutional understanding as not being subject within the exercise of their office to other directives of conduct than those arising from the normative acts mentioned above. In particular, it creates problems for the codes of professional ethics, such as the Code of Professional Ethics for Judg-

[3] B. Wojciechowski, *Niezawisłość sędziowska,* [in:] P. Skuczyński, S. Sykuna (ed.), *Leksykon etyki prawniczej. 100 podstawowych pojęć,* Warsaw 2013, p. 241. See also M. Safjan, *Etyka zawodu sędziowskiego,* [in:] E. Łojko (ed.), *Etyka prawnika. Etyka nauczyciela zawodu prawniczego,* Warsaw 2006, pp. 47–52.

[4] It is worth paying attention to the meaning assigned to guarantees of independence in international documents, see e.g. Recommendation No. R(94)12 of 13 October 1994 issued by the Committee of Ministers of the Council of Europe on the independence, efficiency and role of judges, the European Charter of the Statute for Judges of 18 July 1998, Opinion No. 1 of 23 November 2001 of the Consultative Council of European Judges on standards concerning the independence of the judiciary and irremovability of judges and Opinion No. 3 of 19 November 2002 of the Consultative Council of European Judges concerning rules and norms governing the professional conduct of judges, in particular ethics, improper conduct and impartiality.

es[5] ecause they have to be limited in this scope to the repetition of general provisions. It seems impermissible not only, e.g., to define a concept of independence in the code of ethics, but also to regulate the sphere which it covers in general[6]. This is why the provisions of the Code concern the issue of independence in § 9, Section 1 of which stipulates that "the Judge cannot surrender to any influence violating his independence regardless of their source or cause", while Section 2 states that "in the circumstances which may threaten the independent exercise of the office, the judge is obliged to notify an appropriate superior immediately". The normative *novum* included in the Code comes down to the obligation of notifying the superior about threats for independence. Although it may be doubtful whether in terms of independence one can at all speak about the fact that the judge may respond to superiors, one must remember that the Constitution in Article 186 (1) stipulates that the National Council of the Judiciary shall safeguard the independence of courts and judges. So, there is an appropriate authority, the tasks of which include reacting to threats to independence and judges are not left without any assistance.

Although the normative specification of the discussed rule is not possible, this does not exclude its philosophical analysis. In this paper I would like to make an attempt at a partial analysis and present three interlinked theses. Firstly, in the face of the constitutional crisis, lawyers take three main types of attitudes, which can be described in a simplified way as positivist, political and civil. Secondly, the reference of this typology concerning lawyers to judicial independence in general reveals its performative nature. This is usually unnoticeable in such analyses. Thirdly, such a formulation of independence allows one to understand better, and maybe even solve, some problems related to the constitutional crisis, e.g. those concerning the limits on criticism directed to the public authority and the reaction to criticism expressed by these authorities. The aim of this article is not to consider the possibility of interpreting the constitutional crisis through the prism of the constitu-

[5] Resolution of 19 February 2003, as amended, by the National Council of the Judiciary.

[6] Cf.: J.R. Kubiak, *Wokół idei kodeksu etyki zawodowej sędziów*, "Palestra" 1995, 3–4 oraz T. Romer, M. Najda, *Etyka dla sędziów. Rozważania*, Warsaw 2007, p. 151 et seq.

tional court paradigm[7] and the judiciary with the opposing positions – from H. Kelsen to R. Alexy and from Montesqieu to R. Dworkin. The purpose of the paper is much less ambitious and is limited first of all to building a typology of lawyers' attitudes through their relativisation to the spheres in which they operate, i.e. the autonomy of the law perceived in a positivist way, the political aspect of the law and the civil public sphere.

THE THREE TYPES OF ATTITUDES TOWARDS THE CONSTITUTIONAL CRISIS

The first of these attitudes may be described as a positivist one. It is mostly based on assumptions characteristic of legal and philosophical positivism. In particular, lawyers showing it are supporters of the strong autonomy of the law and the legal sciences. In accordance with this trend, the law is distinguishable from other spheres as a concept, including politics and morality, although various functional connections might take place between them. It means that to evaluate certain actions only legal arguments which are supported by the adopted concept of sources of law are useful, while possible political or moral arguments may be used only at the stage of creating or applying the law in relation to establishing its legal consequences. In the cases concerning constitutional opinion, the lawyer-positivist will only make legal evaluations limited to stating whose conduct violates the regulations in force and whose not, and permit actions serving to enforce compliance with the law provided for only in forms and mode stipulated in the regulations. According to such a lawyer, any other attitude leads to the politicisation or moralising of the law, i.e. to the replacement of the certainty related to the settlement of disputes based on principles with entering into disputes undecidable in their nature, in which the decisions are not based on legal arguments, but, e.g., the will of the majority or the individual sense of rightness.

The reference of positivist assumptions concerning the autonomy of the law to judicial independence consists of the acknowledgement

[7] See A. Sulikowski, *Współczesny paradygmat sądownictwa konstytucyjnego wobec kryzysu nowoczesności,* Wrocław 2008, p. 55 et seq.

that the latter is the implementation of the first. Judges in the Polish legal system are subject only to the Constitution and acts of law, so by virtue of the law they are not bound by any extralegal arguments, unless regulations themselves require them to take them into account. However, according to this view, independence does not exhaust itself in the external aspect, so it consists not only in the fact that the judge has a possibility of refusal to take into account any such arguments if there is no legal basis for it. This is because its internal aspect is equally important, which means that the judge is really not guided by these arguments. It is possible to say that in the work of the judge independence should manifest itself through the consequent use of legal argumentation and rejecting extralegal arguments. Such a rejection in an explicit way is a particularly important and independent action, which often requires having a strong character. Any different approach would constitute the abuse of powers, and entering into a dispute by means of a political or moral argumentation would be contradictory to the autonomy of law and form a basis for the allegation of politicisation.

The constitutional crisis is not different in this perspective from other legal problems. If caused by extralegal factors, it may be assessed by judges only in the legalistic categories and within the appropriate procedures. The statement concerning the violation of the law cannot be subject to any compromises and judges cannot be party to any negotiations in this field. It is also not their role to enforce compliance with the law or to propose solutions, unless these regulations determine explicit competence norms which authorise them to do so. According to the discussed point of view, any participation of judges in public debates is not permissible, unless it goes beyond the explanation of legal status and arguments for particular decisions, e.g. judgments. All the more, any protests or petitions would be a violation of independence due to the fact that they contained explicit reference to political and moral arguments, so they would manifest dependence on the particular views of groups representing political interests. Such an involvement would further enable them to refute allegations concerning the politicisation of the courts and betraying the idea of the autonomy of the law by judges. In other words, one should respond to threats to the rule of law and to judicial independence itself by actions justified exclusively by legal arguments and more independent ones.

The second attitude was described hereinabove as political, but first of all, it must be indicated that it is about the concept of the political, which originates in Carl Schmitt's philosophy, so it cannot be associated with the so-called current politics or that practised by the party. It is also broader than the political functions of the constitution, which were described by the author in his papers on the philosophy of the law[8]. They should be understood in line with his political philosophy, i.e. as a kind of universal category describing social relations from the perspective of domination. The existence of all differences and contradictions is the most fundamental in the understanding of the concept of the political. It will apply there where they occur to the greatest extent and where they are the most intensive. Admittedly, differences and contradictions may be expressed by means of various concepts but it is possible to recognise them as political due to their purpose, which is always polemical. If one introduces certain categorisations of reality and juxtaposes the oppositions existing in them to in order to prove the superiority of one of its parts, this is a political action, even if it does not take place at all in frameworks typical of political institutions. The author cited above generalised this situation as a metaphor for friend and foe. The political always begins with defining them[9].

The application of the discussed concept of judicial independence has many consequences. The two most important ones should be highlighted here. First of all, they allow one to interpret legal concepts as political categories, by means of which differences and contradictions are created in social life and in this way a particular social order is reproduced. In other words, the political allows the criticism of the positivist perception of independence due to the fact that it conceals the real function of judges' confinement to the legal argumentation. Such criticism is characteristic of the supporters of the *Critical Legal Studies* trend, among other things, for which the assumptions of formalism and

[8] See, e.g., K.J. Kaleta, K. Koźmiński, *Charakter władzy suwerennej w koncepcjach ładu konstytucyjnego Hansa Kelsena i Carla Schmitta*, "Filozofia Publiczna i Edukacja Demokratyczna" 2013, 2, p. 155 et seq.

[9] C. Schmitt, *Pojęcie polityczności,* [in:] *Teologia polityczna i inne pisma*, Warsaw 2012, pp. 253–260.

objectivism at the very heart of judicial reasoning may be connected with liberal philosophy, which in normal legal practice remains concealed[10]. It is possible to say that the autonomy of the law understood in a positivist way creates the conditions for the making of substantial political and moral decisions by judges, but at the same time for presenting them as formally justified and objective[11].

Furthermore, apart from the negative consequence of the application of the political for the positivist concept of independence, it is possible to also identify a positive one. It does not mean the destruction of judicial independence or its rejection. On the contrary, it becomes strengthened, because, as a political concept, it is based on the difference and contrast between the independent decisions of judges and politicians subject to party discipline[12]. Taking into account political and moral arguments in legal reasoning in a transparent way – being based on standards or balancing values – is much more reflexive in the case of judges than the current politics. At the same time, this transparency will override the conservatism of formalism. Therefore, it is possible to say that the perception of independence through the prism of the political means the strengthening of the judiciary, which is not only understood as Montesquieu's execution of power through the application of laws, but as equal to the legislative and executive powers, but still contrastive with them or apolitical in the sense of the current politics. In this way – thanks to the political – also the immanent tension rooted in the concept of the democratic rule of law becomes visible, i.e. between the liberal and democratic elements of the system and between the individual's rights and the will of the majority. The political of the judicial independence consists of the legal protection of individuals against the majority – securing them against "the tyranny of the majority".

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[10] R.M. Unger, *Ruch studiów krytycznych nad prawem*, Warsaw 2005, pp. 5–11. See also D. Kennedy, *The Rise and Fall of Classical Legal Thought*, Washington 2006.

[11] Also K. Kelsen realised this; he wrote "One cannot fail to notice the fact that also professionals – consciously or subconsciously – are guided by the political", H. Kelsen, *Istota i rozwój sądownictwa konstytucyjnego,* Warsaw 2009, p. 42.

[12] C. Schmitt himself wrote that the purpose of judicial independence was the exclusion of the political – "Everything that the judge does as a judge is *normatively* defined and is different from the existentiality of the political sphere" – C. Schmitt, *Nauka o konstytucji,* Warsaw 2013, p. 434.

For the constitutional crisis it mostly means that the judge cannot be neutral towards it. It is impossible to stay away from the dispute due to both structural and functional reasons. First of all, one should bear in mind that the political is not a certain sphere within which one can stay but also which can be left. This is why one can say that it is a social totality in such a philosophical sense as all situations in every field of life can be always analysed in the categories of political domination and reproduction. Therefore, not taking a stance on the matter or continuing the ordinary course of proceedings is also a certain response. Its seeming neutrality may be interpreted as permission. The structure of the political on its own does not allow one to be above it. Furthermore, it is not possible to stay away from the dispute if one became its party and was defined as enemy according to Schmitt's concept. The performance of this function is not dependent on will and its avoidance through the positivist closing in the system of rules is not possible. In such a situation the protection of independence itself and its guarantees are not possible by means of legal argumentation referring exclusively to legal regulations. It is essential to prove in a political way the superiority of the application of the law by independent judges over issuing decisions within the current politics and the concept of the democratic rule of law over other visions of the system of government. In the constitutional crisis it is the political which justifies judicial activism[13].

The civil attitude is the third of the possibilities. It refers to the understanding of civil society as an intermediate sphere between privacy and politics. It is possible to distinguish two aspects of this concept which are related to each other. The first describes its institutional understanding as consisting of various kinds of associations, including local government and non-governmental organisations belonging to the so-called third sector[14]. The second concerns the public debate between citizens. According to J. Habermas, if such a debate is unrestrained, i.e. free from any kind of constraint, with the respect of the equality of all

[13] The concept of judicial activism and passivism opposing to it see T. Stawecki, *Aktywizm i pasywizm sędziowski,* [in:] P. Skuczyński, S. Sykuna (ed.), *Leksykon etyki prawniczej. 100 podstawowych pojęć,* Warsaw 2013, pp. 5–17.

[14] H. Izdebski, *Z dziejów terminu „społeczeństwo obywatelskie"*, [in:] *Prawo i ład społeczny. Księga Jubileuszowa dedykowana Profesor Annie Turskiej,* Warsaw 2000, pp. 379 et seq.

of its participants and honest attitude of citizens, then the public sphere is created[15]. It should be distinguished from the political sphere and discourses of the state authority – parliamentary, administrative and judicial – although maybe it should strongly influence them. Its function is to transform the subjective and private convictions of citizens into the objective political will. It can be stated that the latter is formulated in the public sphere through the debate in which all points of view and interests are represented. They are justified by means of the best possible arguments, and in consequence broad and authentic consensus is built. The power of democracy determined in this view as deliberative is the power of the public sphere, which, in turn, is the involvement of citizens in public affairs.

With reference to judicial independence it means that the separation of performing two different roles – official and civil – by the judge is essential. As everyone, they are entitled to participate in the public debate and in this scope use their freedom of expression, assembly, etc. In issuing decisions judges should be confined exclusively to legal arguments, but apart from this it is necessary for them use their experience and knowledge of public affairs as well as express their views in the extralegal sphere, and in this way manifest their independence. Furthermore, it is vital that these roles are separated and the public activity of the judge should not violate other principles of judicial ethics, e.g. undermining the trust for him/her or arising suspicions concerning his/her impartiality. This is why it would be better if everything would take place in particular institutional forms. They include mainly the professional self-government equipped with the functions of representing the judicial community and all kinds of voluntary associations. The participation of the judicial self-government in the public debate has the advantages of reducing the risk of conflict between official responsibilities and the role of the judge as a citizen. It is an external function of judicial self-government, which may be performed independently of internal tasks consisting of the organisation of the judicial community[16].

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[15] See especially J. Habermas, *Strukturalne przeobrażenia sfery publicznej*, Warsaw 2007, in particular chapter IV.

[16] See, i.a., P. Sarnecki, *Zagadnienia samorządu sędziowskiego*, [in:] *Ratio est anima legis. Księga jubileuszowa ku czci Profesora Janusza Trzcińskiego,* Warsaw 2007.

The constitutional crisis in the discussed perspective is a typical situation in which judges should be active in the public sphere, as it concerns fundamental public affairs belonging to the scope of their interest. In particular, when the range of independence and its guarantees become the subject of dispute it is natural to express one's opinion on it. Being involved in the protection of independence is at the same time a manifestation through paying attention to problems which are connected with it and also revealing such features of judges as courage, the sense of responsibility or the readiness to defend one's arguments. However, as a rule it should take place beyond the sphere covered by independence itself, i.e. when the judge appears in the role of citizen. Both areas of activity should be separated and the activity in the public sphere should not influence the performance of duties in the everyday practice of issuing decisions.

THE PERFORMATIVE NATURE OF INDEPENDENCE

The abovementioned typology allows one to pose a question on the possibility of the closer philosophical characteristic of judicial independence. It should be started by paying attention to the equivocality of the concept. Firstly, it is obvious that independence is understood first of all as a principle, with both a constitutional as well as an ethical and professional status. On the constitutional level it is addressed not only to judges but also to all public authorities, and in this aspect it requires refraining from all kinds of interference within this sphere. Secondly, independence can be understood as a certain group of conditions enabling the judge to settle disputes on the basis of the law, in the situation he/she operates in. The existence of such a situation is the consequence of providing the guarantee of independence. Thirdly, it can be understood as a feature of the judge – his/her character trait or a professional virtue. It consists of the constant readiness to independently issue decisions and is related to such virtues as courage, selflessness, honesty, etc.

It seems that there is a possible fourth understanding of independence, revealed by the above-mentioned typology concerning the attitudes of lawyers. It may be also perceived as a feature of judges' activities, especially in the decisions which he/she issues. In this sense

one can talk about independent judicature when decisions are issued in the way which does not violate the principle of independence in the situation fulfilling the conditions of independence and by an independent judge. However, a very important question arises as to whether such a characteristic is only formal or whether it has any positive content. In other words, whether independence is a concept denoting only the normative and factual freedom of the judge from the extralegal influence on his/her decisions, or if it says anything about what decisions should be like at the substantial level. To answer this question attention must be paid to the fact that in each type of attitude of lawyers described above, when referring to judicial independence, the postulate of social communication or even the manifestation of independence was present. This would indicate the necessity of referring it also to the content of the decision and not only to the form of its issuance.

It could be explained through an assumption that the independence of a decision cannot be perceived simply in terms of presence or absence. This would mean that except for independent decisions also dependent ones are possible, which maybe contain a certain flaw but remain decisions. Undoubtedly, in the formal sense they *are* decisions. However, from the point of view of philosophical analysis such a conclusion cannot be considered satisfactory. A decision which lacks the feature of independence – issued under the influence of external factors, e.g. on the basis of orders, instructions or expected rewards or punishments – as a rule is deprived of the substantial examination of the case. Paradoxical as it may seem, the closing of proceedings by such a decision ends it formally, but the case is not still settled because there is no independent court. In other words, one can say that the concept of independence referred to the judicature has a categorising function, i.e. it allows one to assess whether we are dealing with a substantive examination of the case at all. Therefore, it does not only qualify decisions as independent and those which are not independent. It means that independence is constitutive for the judicature.

The necessity of communicating the independence of decisions, and its constitutive nature, together form the premises for claiming that it is performative. This may be interpreted in two ways. Firstly, in the most basic sense it means that issuing a decision which is an action of legal importance may be philosophically interpreted as a performative utter-

ance, so an act of speech of a performative dimension, the efficiency of which depends on fulfilling the appropriate conditions determined by social norms. Independence would be one of such conditions. This interpretation is quite obvious. Furthermore, it seems to be based on the formal understanding of the independence of the decision, i.e. to assume that the efficiency of the decision as a performative utterance depends on the external circumstances which influence it – implementing the principle of independence and the characteristics of judges. Secondly, it is also understanding the performative function of the decision in a way which is closer to the contemporary philosophy of identity. It adopts a more general assumption that senses are socially constituted through action and if it meets with social appreciation, a performative identity is created[17]. Adopting such an interpretation would mean the necessity of proving the independence of a decision in a clear and socially accepted way.

This conclusion should be complemented with a few reservations and remarks. First of all, it must be remembered that it is mostly based on philosophical argumentation and it should not be understood as postulating additional formal requirements of the judicature. It deals with the social establishment of the identity and authority of the judiciary rather than the manner of proceeding[18]. It indicates that the content of the decision has to convince people in some way that it is independent and in this sense independence is performative. It also has to meet social acceptance but it is not possible to settle here which of the judicial attitudes will provide it. Furthermore, the way of indicating independence of the content of decisions is in itself subject to independence can be helpful in this respect. There cannot be differences, as the practice of issuing decisions by the judge is mentioned and – as discussed at the beginning of this paper – the positive regulation of independence seems to be impossible. Therefore, it depends on the judge which way to prove his/her independence he/she adopts, taking into account all circumstances of the case and possibly elements that could threaten

[17] A. Burzyńska, *Dekonstrukcja, polityka i performatyka*, Kraków 2013, in particular part III.

[18] Cf. M. Zirk-Sadowski, *Trzecia władza w procesie autonomizacji prawa,* [in:] M. Pichlak (ed.), *Profesjonalna kultura prawnicza*, Warsaw 2012. See also P. Skuczyński, M. Zirk-Sadowski, *Dwa wymiary etyki zawodowej sędziów*, Kwartalnik „Krajowa Rada Sądownictwa" 2012, 1.

his/her social appreciation. Ultimately, it is the judge who adopts the attitude described above.

INDEPENDENCE AND THE PROBLEM OF JUDICIAL CRITICISM

The assumption that the administration of justice without independence is impossible and the element of the performatively and socially constituted identity of the judiciary is maybe in its essence not very original, but the way in which it manifests itself in the constitutional crisis and the way in which it was interpreted above allows the consideration of more detailed issues. The problem of judicial criticism seems to be the most valid in this respect. One should understand this issue as the judicial criticism of actions taken by the legislative and executive powers as well as the polemic reaction to such actions addressed to courts, judges and the judicature. Criticising itself has to be perceived as an objection connected with expressing a negative opinion. Therefore, informing of court's activity, explaining misunderstandings or making corrections will not be judicial criticism. These problems will not be taken into account in these considerations. It must be also clearly stated that one cannot associate judicial criticism with the negative legal evaluation concerning particular actions of the legislative and executive power. It is about formulating additional valuations going beyond the legal categorisation, e.g. pointing out the errors of the political authority or formulating explanations concerning the reasons for such errors in moral categories.

To answer the question of the permissibility and limitations of judicial criticism it is necessary to introduce the differentiation of two situations in which it might take place. On the one hand it is possible in the framework of the statement of the grounds or oral justifications, and on the other it might be extrajudicial. When it comes to the first issue, although there are many different perspectives on perceiving the statement of grounds, the assumption that it is covered by the right to a fair trial seems to be the most appropriate for these considerations. This is due to the fact that the essential element of the latter – next to access to the court, the fairness of the trial and the appropriate formation of judicial authorities – is the right to a reasoned judgment. This right takes care

of both the interests of the party, and the principle of public trial[19], and it is connected with the principle of efficiency of the protection of these rights[20]. If it is vital for the protection of the interests and the rights of the party to the proceedings, the judicial criticism of the political authority is not only permissible but also necessary. The reason for this is the fact that it is the right of the party and cannot be avoided on the basis of the principle of independence. Obviously it is subject to limitations, most of which result from the principle of objectivity (understood in a substantial way as an objective need – see § 11 (2) of the Code of Professional Ethics for Judges) and the principle of restraint (understood in a functional way as a consequence of the tripartite of powers)[21].

This problem seems to look different when it comes to extrajudicial criticism. One might have serious doubts if its subject to guarantees of independence due to the fact that it does not belong to the scope of administering justice and it is not covered by the right to a fair trial. At the same time there arise reservations from the point of view of the impartiality principle, and especially its objective aspect, i.e. the obligation of such conduct by the judge which does not raise doubts as to his/her impartiality. Bearing this fact in mind, § 10 stipulates that "the Judge should avoid any behaviour which would undermine trust in his/her independence and impartiality", whereas §13 that "the Judge should not express in public his/her opinion on proceedings which are pending or are to be pending". However, here the question may be posed of whether such criticism can justify the need to answer allegations formulated against the judge or court. In this respect the freedom of expression may be limited to a varying extent depending on who formulates such allegations.

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[19] See L. Garlicki (ed.), *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Tom I*, Warsaw 2010, p. 348–349 and decisions cited there, especially in cases Hadjianastassiou v. Greece of 16 December 1992, complaint No. 12945/87, Ruiz Torija v. Spain of 9 December 1994, complaint No. 18390/91 and Tatishvili v. Russia of 22 February 2007, complaint No. 1509/02.

[20] L. Garlicki (ed.), *Konwencja*…, p. 16, where it was mentioned as one of the bases of the European Charter of Human Rights, next to such rules as the cooperation of states, democracy, the rule of law and human dignity.

[21] See P. Skuczyński, *Powściągliwość sędziowska jako zasada etyki sędziowskiej,* [in:] T. Stawecki, W. Staśkiewicz (ed.), *Dyskrecjonalność w prawie*, Warsaw 2010, pp. 290–301.

If they are formulated by the parties to the proceedings such a limitation may be far-reaching, because the court is obliged to hear all their arguments and has the possibility to take a position on them within the proceedings. One might consider that extrajudicial criticism of even the most serious allegations is impermissible[22]. If their sources are the public opinion or the media, then a response might be needed due to the necessity of guaranteeing the fairness of the proceedings. However, it should be limited to informing and correcting the facts, and cannot turn into criticism, which also in this case should be considered impermissible. The official formulations of allegations towards judges is possible as well – in the framework of the procedures laid down and pursuant to legal regulations, e.g. in court or legislative proceedings. Then the answer may be given also in a way provided for by the law, e.g. taking a position, formulating an opinion, etc. within the performed functions or by the authorities appointed for such a function, e.g. the National Council of the Judiciary, so extrajudicial criticism in the meaning adopted in this case is impermissible as well.

However, in terms of the constitutional crisis, the problem of responding to the political criticism expressed by the representatives of the legislative and executive powers seems to be the most important. It must be remembered that particular freedom of political statements is the standard. Such a freedom which – similarly to the case of artistic and scientific statements – can be limited only in a way justified by the protection of the principles of democracy and human dignity[23]. Due to this fact, also in this case, as a rule the extrajudicial statements of judges concerning information or correction seems to be permissible, whereas the criticism of the political authority – although such a view may be unpopular – as a rule is excluded. However, it must be indicated that it concerns only the exclusion of criticism as a rule because it is possible to formulate an exception related to special or extraordinary situations. Reaction in the form of criticism to the allegations from political authority seems permissible and necessary in such situations in

[22] L. Garlicki (ed.), *Konwencja*…, p. 324, especially the decision in the case Buscemi v. Italy of 16 September 1999.

[23] L. Garlicki (ed.), *Konwencja*…, p. 621,especially the decision in the case Sürek v. Turkey of 8 July 1999.

which judicial independence and its guarantee system are endangered. Such a claim is justified in the light of the two following arguments.

Firstly, it seems natural that the limitation of judicial independence, i.e. in fact the opportunities to administer justice, cannot be stopped only from the inside – simply through its further independent administering. The limitation of independence serves to make such an issuance of decisions impossible. Activities outside this sphere – especially including extrajudicial criticism expressed by judges – will be indispensable. Furthermore, it becomes impossible to prove the independence of the decision as to its content and to gain social appreciation due to its violent questioning by the political authority, it is justified to prove it through the extrajudicial criticism. Secondly, in the situations of legal crises[24] which undoubtedly include the constitutional crisis – the role of the judge needs to reinterpreted. G. Radbruch's vision might constitute a perfect example. The evolution of his philosophical and legal views is interpreted differently. However, it is possible to interpret them in such a way that the national and socialist times, as a period of a deep crisis of the law in Germany, required the transformation of the standard perception of the professional role of the judge in the categories of the absolute obligation of being subject to acts of law in the obligation of considering the problem related to the fairness of acts of law and making a reference between law and universal values which are the grounds of the concept of the law[25]. In other words, the times of crisis require non-standard solutions.

CONCLUSIONS

The considerations included in this paper present neither the full concept of judicial independence nor a detailed analysis of the anatomy of the constitutional crisis. They are only a discussion of three

[24] The recurrence of such phenomena only increases the validity of seemingly strictly historical elaborations, see e.g. G. Ławnikowicz, *Idea niezawisłości sędziowskiej w porządku prawnym i myśli prawniczej II Rzeczypospolitej*, Toruń 2009 and M. Stanowska, A. Strzembosz, *Sędziowie warszawscy w czasie próby 1981–1988,* Warsaw 2005.

[25] See P. Skuczyński, *Czy grozi nam kryzys prawa? Rozważania na tle problemu tzw. roszczenia do słuszności*, "Archiwum Filozofii Prawa i Filozofii Społecznej" 2011, 2(3), pp. 61–75 and the literature cited there.

basic theses which arise due to the comparison of the above-mentioned problems. This comparison is a methodological procedure based on the assumption that independence has two dimensions – universal and local – while general ideas on it should be confronted with practice. These theses concern types of lawyers' attitudes towards the constitutional crisis, the performative nature of judicial independence, the limits of judicial criticism of political power and the reaction of political authorities to the criticism. Each of them is formulated on a slightly different level and can constitute a starting point for further detailed analyses. It should be emphasised that the concluding of these considerations through building an unambiguous model of judicial conduct as a reaction to the constitutional crisis is not possible. Due to this fact this paper is limited only to indicating certain possible meanings of the general concept of independence in its particular circumstances.

KRAJOWA RADA SĄDOWNICTWA

THE LIMITS OF JUDICIAL INDEPENDENCE?

■

SPECIAL SPEECHES

Professor Andrzej Rzepliński, Ph.D.

President of the Constitutional Tribunal

TO BE A JUDGE*

Being a Judge is equally beautiful and utterly absorbing as being a doctor or being a scholar. The profession of a judge is not a good career for persons who do not possess a sufficiently well-established sense of personal and professional dignity, the virtue of personal integrity, impeccable past, professional and practical knowledge, social and family maturity, and personal maturity to be able to assume full responsibility for each ruling passed in accordance with the law and with their own conscience.

Each judge must be equipped with good work organisation skills so that any acts of neglect do not tempt him to pacify either "the superiors" or one of the parties.

A judge must have the courage not only to make decisions but also moral courage to judge specific persons. This causes that that judging belongs to "one of the most fundamental functions in each society"[1].

* Keynote speech delivered during the official opening ceremony of the judicial year in the European Court of Human Rights, Strasbourg, 29 January 2016.

The importance that societies have always attached to selecting the possibly best persons to these posts is best demonstrated by the requirements posed for the future judges by the ancient Jewish law which included first of all "the knowledge of law, combined with general education" and "the impeccability of character combined with piety, gentleness and kind-heartedness"[2]. A judge – in the Christian doctrine, according to St Thomas Aquinas – is a man who should live in "a state of perfection, that is in truth." Judges "should by virtue of their office be the guardians of truth in the judiciary", like scholars in science, "A lie in a court or against science is a deadly sin"[3].

Worlds apart from the values that a judge must represent in a state ruled by law, was a judge called to life by Vladimir Lenin who by virtue of his absolute authority issued orders to judges to openly sow terror with their rulings, and to justify and legitimize it "in a principle-based manner, without any falsehood and beautification". In civil cases, judges were to pass orders of confiscation and requisition, to exercise supervision over merchants and entrepreneurs, and not to recognize any private ownership. From criminal court judges he demanded his two favourite punishments: either a death by a firing squad or deportation for forced labour. The punishments should be "merciless", the courts should be "militant", "the proletariat's courts" "should know what to allow"[4].

Within the system of a totalitarian state, there was no room for an independent judge. Even if the regime gradually softened, and the judiciary terror subsided accordingly, the subsequent generations of judges were prepared to a judge's service by judges who through their rulings destroyed the lives of tens of thousands of people. In a totalitarian state, for the purposes of a ruthless fight with the political opposition, it was always easy to find judges who did not mind being used

[1] I. Drapkin, *The Art of Sentencing: Some Criminological Considerations*, "Reports of UNAFEI" 1979, No. 16, p. 53.

[2] S. Ladier, *Proces karny w Talmudzie* [A Penal Trial in the Talmud], Lwów, Jaeger, 1933, p. 46.

[3] Tomasz z Akwinu, 1972, Cnoty społeczne pokrewne sprawiedliwości (Treatise on Justice), transl. F.W. Bednarski, Londyn, Veritas, qu.110, 4, 5.

[4] W.I. Lenin, *Dzieła wszystkie* [The Collected Works], Warszawa 1989, vol. 44, pp. 317, 379, 394.

to spread institutionalised, legal terror, in the name of law. A specific award for them was a sense of total impunity. They were protected by the communist party, their party. The judiciary was permeated with political corruption through and through. Hitler was just as efficient in demoralizing judges as Lenin[5].

After 1948, judges behind the Iron Curtain worked in toxic conditions. The departure after 1956–1960 from the exercise of power by mass intimidation of society opened up a margin of independence for most judges. Extraordinary courage was no longer required. What was required was internal honesty. Nonetheless, regimes still needed judges, also in the periods of these regimes' decline, to maintain control over society. Admittedly, it was already done at a lesser expense. It is hard to govern with bayonets. The control of people was exercised using relatively soft measures. This created a niche for most judges. Particularly the judges who preserved some institutional memory of the pre-Communist or pre-nazi times.

Many judges then had pre-revolutionary publications in their home libraries.

Few managed to get hold of uncensored books published in free countries.

Most of the judges were aware of the standards binding in the countries of free Europe.

These circumstances helped the transformation of the judiciary, started in 1989–1990. This transformation required and still requires time, requires painstaking practice, good, stable law, respect for the separateness of the judiciary on the part of the subsequent political parties after they win the parliamentary elections.

For the transformation of the judiciary to be fully completed, it is necessary that after the years of the transformation the new judges are prepared to being a judge by older colleagues who adjudicated the whole life in a state ruled by law where the separation of powers is a well-established and unquestioned principle. This means tens of years

[5] I. Müller, *Hitler's Justice. The Courts of the Third Reich*, Harvard University Press 1991; Helmut Ortne, *Der Hinrichter: Roland Freisler – Mörder im Dienste Hitlers*, Nomen 2009.

of practice, like in the Bible's 40 years of the exodus from the Egyptian slavery. You cannot buy time.

Just like throughout the centuries, also at present, societies demand judges who are men of integrity, have adequate intellectual capabilities, good work organization skills and solid knowledge of law and its application[6]. Not every lawyer who has passed a judge's exam is able to meet such requirements.

I have devoted 30 years to research on the history of the judiciary, to analysing the essence and challenges of a judge's authority[7], to the formation of the system of courts guaranteeing the separation of the three powers in Poland and in other countries, and furthermore, to active defence of judges against attacks, as well as to monitoring the procedures of the judges' appointment to their office and to monitoring the quality of the courts' and judges' work.

I have held the office of a judge of the Constitutional Tribunal for more than eight years; soon my nine-years' term of office will come to an end. Having the experience of these years of a judge's practice, I can attempt to answer the fundamental question that I asked myself when in September 2015 I accepted the kind invitation of the President of the European Court of Human Rights, Professor Guido Raimondi, to deliver a speech before such a particularly dignified assembly, so uniquely important for over 800 million Europeans – the assembly of outstanding judges, judges of these millions of people, also my judges. I decided to ask myself this question expressed in the title: what does it mean to be

[6] The 8th principle on the independence of the judiciary of the UN from 1985 reads that "judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary", whereas from the 10th principle it follows that judges shall be "individuals of integrity and ability, with appropriate training and qualifications in law", see A. Rzepliński, 1981, Niezawisłość sądownictwa w świetle norm ONZ (The Independence of the Judiciary in the Light of the UN Norms), "Tygodnik Powszechny", 1987, No. 33. Similar is the wording of the international norms taken over by the International Commission of Jurists and by the Law Association of Asia and Western Pacific (cf. The World Conference On the Independence of Justice, Working Documents, Montreal, June 5–10, 1983).

[7] A. Rzepliński, *Die Justiz in der Volksrepublik Polen*, Dieter Simon (Vorwort), Frankfurt am Main 1996.

a judge? For the needs of my today's speech I have gathered thoughts that came to my mind at various stages of holding the office of a judge and my research on the judiciary.

Referring to the concept of antinomy of the idea of law by Gustav Radbruch[8], I would say that a judge's public function is to realise the idea of law which comprises legal security, common good and justice. In the case of a constitutional judge, it means the assessment of the conformity of normative acts with the Constitution in a manner which at the same time protects the stability of law, eliminates instances of injustice from it (e. g. unjustified interference with the liberties and rights of a man and citizen) and realises the idea of common good, i. e. the idea of a state in which the decisions are made by way of agreement and cooperation, and not imposition, a state which does not exclude anyone and for which all citizens hold responsibility. It is an extremely difficult task, requiring no small competences and skills and a specific attitude which is why not everyone can undertake it. To perform this task thoroughly one has to be very well prepared in terms of substantive knowledge, and apart from that, one must be characterised – at the very least – by fairness, independence, courage, sensitivity and – a quality which is often forgotten – humility.

Speaking of the necessity of very good preparation in terms of substantive knowledge, one may say that to be a judge means to be a craftsman and to have the ambition to be a craft artist, like Italian craftsmen, artists of luxury goods, so admired worldwide. A wise, fair judgment is a work of a craftsman – an artist of law. This term may be used for a judge who is an expert in the dogmatics of law, understands law, perceives it as a structure, as a certain mechanism, i. e. who knows and "feels" "how law is built, what rules govern or should govern its construction, functioning and interpretation"[9]. The knowledge and understanding of law require from a judge that he keeps his mind in constant motion. He does not stop being a judge the moment he leaves

[8] Cf. G. Radbruch, *Filozofia prawa* [Rechtsphilosophie], transl. E. Nowak, Warszawa 2012, pp. 79–84, 241–243.

[9] E. Łętowska, *Prawo bywa bardzo piękne* [The Law is Sometimes Very Beautiful], an interview in Channel Three of the Polish Radio of February 27, 2011.

the building of the court. Some judges are better in the art of judging, some are worse. Each judge being a rapporteur of a case in which there is and in which he will notice an important legal issue, a constitutional issue, an issue important from the perspective of the European Convention may actually out-play the first violin, like in a chamber symphonic orchestra. But just like in an orchestra, nearly each work of art that a unprecedented judgment, referred to for years to come, undoubtedly is, is a common achievement of other artists of law, those who brought the case to the court, presented new, challenging arguments and those who in a court dispute submitted in an equally brilliant manner their counter-arguments and – which is an equally salient point – is the work of all other judges adjudicating upon this case. Poor is the judge who will not notice the potential of such a case for jurisprudence. A wise and fair judgment multiplies the satisfaction of being a judge. Such a judge must possess a skill to bridge law and life. This is a challenge of special importance when the IT revolution changes, twists and redefines eternal values. The bar has been raised very high. Not without a reason did Ronald Dworkin present in his works the character of the judge Hercules[10]. To be a judge, one has to, more often than not, demonstrate the strength that comparable with the strength of a Greek hero.

In order to thoroughly fulfil the public function of a judge, i. e. – like I mentioned above – to realise the idea of the law which comprises legal security, common good and justice, what is indispensable is not only expertise in the craft and art of law, but also a certain attitude of a judge as a man. A judge must possess certain traits of character and personality. Among the most important ones, like I said at the beginning, I would list fairness, independence, courage, sensitivity and humility.

A fair judge is a judge who gives everyone his rightful due. Such a definition of a fair judge requires a specification of a criterion whereby he assesses what is rightfully due to whom. For constitutional judges such a criterion is the Constitution, confirming the fundamental values

[10] Cf. R. Dworkin, *Biorąc prawa poważnie* [Taking Laws Seriously], Warszawa 1998; R. Dworkin, *Imperium prawa* [Law's Empire], Warszawa 2006.

and rights, setting forth the competences of individual constitutional bodies. A fair judge must apply the criterion of giving everyone his due in a consistent manner, i. e. must treat equals the same way, and those who are not equal he must treat differently. Only such a judge will be a fair judge, and thereby also an impartial one.

The constitution as a criterion of giving everyone his due, or another objective criterion, is linked with another indispensable trait of a judge as a man, i. e. with his independence. An independent judge is a judge who is well-prepared in terms of substantive knowledge – this is where a yet another role of good substantive preparation comes into the foreground, i. e. as a condition of a judge's independence – and is able to think critically, i. e. is intellectually independent. In a different case, he is dependent on the knowledge and views of other people, e.g. other judges or his assistants. An independent judge is also someone who is internally independent, i. e. adjudicates not on the basis of his views and postulates, but on the basis of he criterion of adjudication given to him by law[11]. In the case of constitutional judges, this criterion is the Constitution.

A judge must also be a sensitive man. Just like a doctor must remember that a patient is a human being and not a medical case, a judge must also remember that a person appearing in a specific legal situation is a human being and not a subjective element of a case. This also applies to constitutional judges. The decisions of a constitutional court shape people's lives, sometimes the life of all inhabitants of the country. To be a constitutional judge is to remember that behind a judgment on the hierarchical conformity of the legal norms to the Constitution there are specific situations involving many people and this fact needs to be taken into account in adjudicating upon a case.

The fundamental traits of a judge, determining the reliable holding of a public function entrusted to him, include also humility. This is an oft-forgotten trait. Meanwhile, the awareness of one's own imperfectness, and – by the same token – fallibility, is a judge's indispensable tool that makes him able to choose the best solutions which won't

[11] Cf. M. Safjan, *Wyzwania dla państwa prawa* [Challenges for a State Ruled by Law], Warszawa 2007, pp. 81–82.

always be the ones invented by himself. Humility will also be necessary to be able to accept reasonable criticism of the decisions made – both on the part of professionals and public opinion the voice whereof in a democratic state ruled by law a judge cannot discard.

Therefore, a judge must thoroughly justify his decisions in order to explain to others, including public opinion, the reason for a particular decision, and thereby to account for the authority he has been entrusted with. A judge is there for people, and not vice versa. Respect for public opinion, treating it as an empowered subject, care for being understood by it should not be confused with yielding to its demands.

So it means that a judge must be independent also of public opinion. It is not by accident that a provision in one of the Roman constitutions read that "the hollow and vain voices of the mob should not be heeded" (*Vanae voces populi non sunt audiendae*)[12]. If a judge followed them – as Professor Juliusz Makarewicz said – "we would probably still be burning witches at the stake"[13].

To be a judge is also to offer the parties of the proceedings one's moderate temperament, to be equally loyal towards each participant of the proceedings. It means to understand people, their emotions, interests and hopes. Here a judge must be able, in difficult moments, when a case is heard, to skilfully use his authority, not to lecture, and, in particular, not to treat people in an arrogant manner[14]. Because if a judge cannot do this, then what is the worth of his respect for the dignity of every person, be he even the worst man?

To be able to thoroughly hold a public office entrusted to him, a judge must also be a courageous person. He has to have the courage to take a different stand than others, including other members of the bench, if he is convinced that there are more arguments for his opinion than for others' opinions.

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[12] Cf. A. Kacprzak, J. Krzynówek, W. Wołodkiewicz, *Rugulae iuris. Łacińskie inskrypcje na kolumnach Sądu Najwyższego Rzeczypospolitej Polskiej* [Rugulae iuris. Latins Inscriptions on the Columns of the Supreme Court of the Republic of Poland], Warszawa 2006, pp. 92–93.

[13] L. Gardocki, *Naprawdę jesteśmy trzecią władzą* [We Really Are the Third Power], Warszawa 2008, p. 119.

[14] A. Barak, *The Judge In a Democracy*, Princeton 2006, p. 311.

Courage is also indispensable for a judge to perform his duty of being independent. He who lacks courage will yield to all kinds of pressure put on him, be it political, community-related or ideological. A courageous judge applies the law in a manner independent of what others expect of him. A dignified example of this are judges adjudicating during martial law in Poland in matters of political crimes. Next to obedient judges, being part of the apparatus of political repression, there were also those who acquitted the initiators of a peaceful opposition against the regime[15]. The courage of those judges restored the law's authority and dignity. In their hands the law was what it was supposed to be, i. e. a tool allowing to protect people against the abuse of public authority.

A courageous judge must also be able to step down, to depart from the profession – if his presence in the corps of judges would legitimize an authoritarian regime. A Polish judge who in 1980 joined the peaceful movement of "Solidarity", about a dozen months later when the communist party declared a war against society, when interrogated by military supervisors, could either withdraw from "Solidarity" and condemn his political "error", or could defend his attitude and the principles of a freedom-loving movement and sentence himself to departure from the judiciary. Each of those judges was faithful to a judge's oath that he made: to conscientiously guard the law. The decree on martial law of December 1981 was an unlawful act, also in the light of the Communist constitution. Every courageous judge who departed from the court or was removed from the judiciary delegitimized the regime and throughout the 1980s was a role model for the judges who stayed on the sidelines and for the judges that just entered the profession. A regime usually steps back in front of a courageous judge[16]. There is some power in the profession of a judge that holds back even political hooligans.

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[15] See e. g. M. Stanowska, A. Strzembosz, *Sędziowie warszawscy w czasie próby 1981–1988* (Warsaw – Based Judges During the Time of Test, 1981–1988), Warszawa 2005, pp. 255–257.

[16] Ibidem; H.P. Graver, *Judges Against Justice. On Judges When the Rule of Law is Under Attack*, Berlin–Heidelberg 2015, pp. 259–270.

A judge of the supreme court or a judge of the constitutional tribunal is often, even against his will and against his temperament, a public person. Judges of these tribunals have an essential impact on the quality of constitutional democracy. Through their judgments, they shape the boundaries of this democracy and the values that govern it, while protecting the fundamental rights of each human being. It happens that it causes irritation of political leaders demonstrating an authoritarian inclination. They perceive such a state of affairs as a threat to their authority. Their irritation focuses usually on the presidents of the supreme court or the constitutional tribunal. That these judges are guardians of the value of constitutional democracy they perceive as an intolerable state of affairs. Such leaders try either themselves or through their adjutants to force the president of the court to resign, by fair means or foul. The mere fact of not succumbing to the pressure they perceive – rather erroneously – as delegitimization of their authority. History of such tensions shows that judges-presidents of such courts had sufficient courage and determination to protect the integrity of their courts. Usually, the best solution to a tension was to develop a better understanding of the authorities and their functions. A well-organised state, with a strong legislative and a strong executive authority, requires equally strong courts.

To be able to be a judge – a good judge – you have to constantly demand a lot from yourself. It is, however worth the trouble, because he who is an expert lawyer and, as it also happens several times in judge's career, an artist of law, is an important actor – which particularly applies to a constitutional judge – in the protection of constitutional democracy, protection of its foundations. To be a judge means to be a man who is – at the very least – fair, independent, courageous, sensitive, humble and kind, and who is constantly learning, and, for that matter, not only from the books of law. Such a judge is – to quote Cicero – entitled to say "let arms yield to the toga" (*Cedant arma togae*)[17], and – by the same token – demand that strength and violence yield to law.

Let us then pose a question what kind of satisfaction may a judge expect from meeting these tough requirements, from subordinating his

[17] A. Kacprzak, J. Krzynówek, W. Wołodkiewicz, op.cit., s. 103.

life to the profession of a judge? There is no doubt that a good judge may seek interest in expecting reverence that will surround him, in personal satisfaction on account of his impartiality in the application of the law, and in the ensured high material status. The less heroism a specific system of law or a social system demands of a judge, the better are both this law and this system.

Irena Kamińska

Judge of the Supreme Administrative Court
President of the Judges' Association "Themis"

I have had another great opportunity to listen to the deliberations by Professor Piotrowski on the actual position of the judiciary and the solutions in this respect provided for in the Constitution of the Republic of Poland.

I agree with the statement that constitutional provisions do not entitle the Minister of Justice to perform any form of supervision over common courts. Unfortunately, nobody in this country in recent decades has seriously taken into consideration the provisions of Articles 10 and 173 of the Constitution. This applies to legislative and executive power as well as to the Constitutional Tribunal, which fact is demonstrated in its judgments on the Minister's supervision. The recent amendment to the Law on the common courts system included some sort of deal. In return for turning courts into managerial companies and making court directors independent of court presidents, we were placed under the so-called "external supervision" of the Minister of Justice, which was to involve a number of restrictions. The purpose was to ensure court independence, as a skilful director would manage the court's financial matters, and the Minister, through inspecting judges and presidents of appellate courts, would perform "external" supervision. Conse-

quently, there is a dual power system in courts and every new minister is willing to acquire more and more power over the courts. The model in which the courts function without the supervision of the executive power exists and prospers. It is worth remembering about this when claims appear that such a model is not possible.

I would also like to return to the issue of the Constitutional Tribunal and point to some aspects which are particularly important for judges and citizens alike. The oath-taking ceremony of the Constitutional Tribunal judges has always been an event of great importance and prestige. People who agreed to their nominations despite the securing judgment passed by the Constitutional Tribunal, also agreed to turn the ceremony into a travesty taking place in the middle of the night. For many of us their impartiality and objectivity are questionable, especially taking into consideration their previous involvement in politics. One of the new "judges" made a comment on the Internet on the death of Professor Bartoszewski of a nature that is disgraceful for every decent person. There might be more such judges. How can a judge submitting a question to the Constitutional Tribunal be certain that its members are independent in their judgments, objective and impartial? It might turn out that all the answers are known before asking any questions. As a judge of the Supreme Administrative Court I can take the liberty to inspect the compliance of a given Act of law with the Constitution. However, we are all subject to the judgments of the Constitutional Tribunal, even in cases where they are not compliant with the Constitution, but are consistent with the law as interpreted by the Sejm majority. Minister Piebiak claimed that the promotion and disciplinary procedures are transparent. This remains to be seen, especially when the disciplinary procedure will be carried out by the body functioning in the President's Chancellery. There are a million ways to intimidate, gain control over judges and make them obedient. We have been taught about the independence from any power. But an individual does not stand a chance in a clash with a tank.

We have Acts on the Public Prosecution Service, on the Police, surveillance, provocation and other similar measures. We must take into account that perhaps we will have to deal with this issue, which is why everyone of us, in court or in private life, must remember about the nature of our service. We must retain our solidarity as a community, but

not with those who are a disgrace to us. They should be removed from the community as soon as possible. We also cannot create divisions, but support one another when in need and speak in one voice about what is the most important for the judiciary. Politicians come and go, their power vanishes, and it depends on us whether Polish citizens can count on impartial and independent courts.

KRAJOWA RADA SĄDOWNICTWA

THE LIMITS OF JUDICIAL INDEPENDENCE?

■

PRESENTATIONS OF REPORTS

Sławomir Pałka

Judge

Member of the National Council of the Judiciary

AN EXAMINATION OF THE INDEPENDENCE OF THE JUDICIARY AS AN IMPLEMENTATION OF THE OBJECTIVES AND TASKS OF THE EUROPEAN NETWORK OF COUNCILS FOR THE JUDICIARY

The European Network of Councils for the Judiciary (ENCJ) was established in 2004 in Rome. The Network's founders consisted of councils for the judiciary from 13 countries of the European Union, including Poland[1]. The establishment of the ENCJ was intended to fill in the gap in the European integration process to enable the judiciary to keep up with the pace of other authorities in the integration process[2]. Officially, the ENCJ is an international non-profit association operating

[1] Founders and members of the ENCJ include (apart from Poland) Belgium, Denmark, France, Hungary, Ireland, Italy, Lithuania, the Netherlands, Portugal, Slovenia, Spain and the UK.

[2] See *Przewodnik po Europejskiej Sieci Rad Sądownictwa*, Warsaw 2014, p. 11.

according to Belgian law which was established as a legal entity on 10 December 2007. After acquiring legal personality, the ENCJ could obtain funding from the European Union (2008) and open a permanent Office in Brussels at the headquarters of the Judicial Supreme Council in Belgium (2009).

According to the ENCJ Statute[3] the association aims at improving cooperation and mutual understanding between councils of judiciary and members of judciary profession on the territory of the Member States of the EU and the EU candidate countries (Article 3). The Association directly pursues non-profit international goals only. Regarding the tasks of the ENCJ (Statute, Article 4) the association itself identified them as analysing the structures and competences of the members of the association, transferring and exchanging information about it between the members, exchanging experiences regarding the organisation and functioning of the judiciary and providing expertise, observations and proposals to the EU institutions and other national and international organisations. Concurrently, the member of the association clearly indicated in the Statute that decisions by the association in no way should restrict its members' independence and their competences. Therefore, each member of the association has the right to declare that decisions by the association do not bind them[4] in the event that such decision may restrict their independence or anything within their competences. It follows from the above that the ENCJ offers advice and expert opinions; nonetheless it does not have any binding powers over its members. In countries where councils operate within the association it influences the judiciary solely from a position of authority.

During nearly 12 years of operation the ENCJ has substantially expanded its numbers. Starting with the body of 13 founding members in 2004, in 2015 it reached the number of 22 members and 16 observers[5]. The increasing number of the ENCJ members and observers is accompanied by increased activity by the association. For the achievement of its tasks and objectives the ENCJ acquired the status of a perma-

[3] Polish version available in: *Przewodnik*…, op.cit., pp. 83–93.

[4] Except for those referring exclusively to the management of the association.

[5] Detailed summary available on the Network website: encj.eu

nent observer on the Consultative Council of European Judges (CCJE) affiliated with the Council of Europe, in The European Commission for the Efficiency of Justice (CEPEJ), in the European Law Institute (ELI) and in the Council of ELI. Moreover, the ENCJ is a member of the Advisory Board in The Academy of European Law (ERA) and co-operates with other European organisations with objectives and tasks related to the judiciary such as, for example, the EJTN (The European Judicial Training Network). How important the Network is and how crucial are its initiatives can be shown by the fact that the ENCJ collaborates with the Council of Europe in preparing the European Justice Scoreboard, which for many countries is a benchmark and discussion material about the national judiciary in comparison to other European systems.

The outcomes of the ENCJ's work include the compilation of standards for the judiciary in the European Union. Among other things, the ENCJ dealt with minimal standards of the competences and operation of judicial councils, measures referring to examining the level of judiciary independence and responsibility, standards of disciplinary actions, evaluating judges, transferring judges, appointing to judicial positions and promotion, conduct in the planning and implementing of reforms of the justice system, standards of management in the justice administration and its efficiency in conducting its respective tasks, the status of judges in terms of ethics, job evaluation and responsibility relating to performing their duties[6]. A brief summary of the most important standards created by the ENCJ can be found in the document called *The Distillation of ENCJ Guidelines, Recommendations and Principles*[7] adopted in Sofia in 2013 during the General Meeting. An important part of the ENCJ's work, in addition to the issue of judiciary independence, consists of the subject of judicial accountability before society for performing duties which are constitutionally and legislatively imposed on the courts. It stresses the need for the appropriate balancing of the independence of the courts through implementing the ap-

[6] Documents in English are available on encj.eu, in tabs *Projects & Reports* and *Opinions*.

[7] http://encj.eu/images/stories/pdf/workinggroups/encj_report_distillation_approved.pdf

propriate principles covering the responsibility for the outcome of the work of the judiciary system[8].

The mission of the ENCJ concurs to a large extent with the tasks performed by individual judiciary councils, since safeguarding the judiciary independence is seen as one of the most important operational aims for each of them[9]. Over the course of the years the ENCJ has constantly run its analytical and research project called *Independence and Accountability*. This project aims to implement conclusions from the report adopted during the ENCJ General Meeting in Rome in 2014[10] which contained the set of measures relating to the question of judiciary independence and accountability in given countries.

The ENCJ, by means of sending a survey to the councils on a regular basis, studies the situation of different jurisdictions in the context of their level of independence. These studies are directed to the councils cooperating within the Association and they aim to thoroughly analyse the legal and actual situation. The research does not intend to carry out the rating of countries from the perspective of their judiciary independence and the independence of judges; it only monitors the situation of the system of justice according to ENCJ standards. In general, the ENCJ survey was prepared on the basis of the measures created by the Network and it contains questions referring to the existing regulations. Thus its objective character and completing the survey requires only knowledge of the legal status concerning the judiciary system[11].

Within the works of the ENCJ relating to the issues of judiciary independence, which continued from 2014 to 2015, not only the aforementioned survey research was prepared but also **the survey for professional judges** from the Member States and observers. It was carried out due to the observation that an analysis of issues concerning the independence of the judges does not take account of the judges' views

[8] See e.g. ENCJ Budapest resolution: http://encj.eu/images/stories/pdf/resolutionbudapestfinal.pdf

[9] See information about tasks and competences of the given councils from the Member States: http://encj.eu/images/stories/pdf/workinggroups/guide/encj_guide_version_march_2015.pdf

[10] http://encj.eu/images/stories/pdf/workinggroups/independence/encj_report_independence_accountability_adopted_version_sept_2014.pdf

[11] The results are discussed in the report linked in the note 10.

concerning their independence and their opinion about the situation of the system of justice in different countries. Even though various surveys are addressed to, e.g. participants in the proceedings (based on consumer surveys), still the opinions and observations of judges themselves are not gathered and studied. The ENCJ survey was of such an innovative nature that it focused only on how the judges viewed the issue of independence connected with their profession. Never before was any study of this type carried out simultaneously and on such a scale in so many European countries.

The survey was anonymous and the only obligatory point was indicating in which country the questioned held office. It was filled in entirely via the Internet and in this respect the ENCJ used the web site courtesy of the Belgian Justice Council[12]. The survey was directed to professional full-time judges[13]. It excluded non-professional judges, with the exception of the pilot survey carried out among some jurors from Denmark, Sweden and Norway, where the social factor in making decisions is very important.

All in all, 20 countries[14] participated in the research and the survey was answered by 5878 judges, which should be seen as a significant result. What is important, the largest proportion of the survey answers came from the judges from Poland, since 621 professionally active Polish judges participated in it. Unfortunately, it becomes less impressive if one considers that this number constitutes less than 7% of Polish judges. Thus it can by concluded that with a planned redistribution of the revised survey (autumn 2016) it needs to be distributed on a larger scale,

[12] http://www.csj.be/en

[13] Some jurisdictions of the ENCJ, e.g. the British jurisdiction, allow judges to work part-time.

[14] 22 jurisdictions, as within the United Kingdom, England and Wales (jointly), Scotland and Northern Ireland are analysed separately. In addition, the following participated in the survey: Albania, Belgium, Bulgaria, Denmark, Ireland, Italy, Latvia, Lithuania, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Serbia, Slovakia, Slovenia, Spain and Sweden. Some councils associated within the ENCJ did not take part in the survey because of, according to them, too short a time for its dissemination among the judges or because of the complicated organisation of the judiciary, like in federal countries with Germany at the head. The representatives of France had reservations regarding some issues, the exclusion of which prevented the distribution of the survey among French judges.

e.g. through judges' associations. This will facilitate receiving a large number of answers, not only in raw numbers but also statistically.

The percentage of judges participating in the survey varied between different European countries. The survey was answered by as many as 57% of the Norwegian judges (315 people), which should be seen as an impressive result, difficult to obtain for countries with a large number of judges. The following had a high response level (over 40%): judges from Ireland, Northern Ireland, Scotland, Sweden and Denmark. Over 20% of judges from Belgium, Holland, Serbia, Slovenia, Albania, Latvia, England and Wales participated in the survey and therefore those countries also gave statistically significant results. A low percentage of answers came from countries with a relatively large number of judges (Italy, Spain, Poland) and the survey raised the least interest (at the 3% level) in the judges of Portugal[15]. As a result, the survey was answered by 13% of judges it was addressed to.

Moving to the content of the survey, the questions directed to judges are worth studying. The survey was not meant to be excessively developed in order to encourage to fill it in and let the participants focus on several key aspects connected with the subject of the study.

THE PRESSURE EXERTED TO OBTAIN A SUGGESTED DECISION IN A SPECIFIC CASE

An overwhelming majority of the respondents claimed to have no sense of pressure exerted on them to decide in a specific case in a suggested way. A noticeable number of positive answers (i.e. judges declaring that illegal pressure was exerted on them) came from judges of Albania, Latvia, Spain and Slovakia (over 10%) which indicates that this problem might involve countries from different parts of Europe, both those that have been EU members for years (Spain) and those aspiring to membership (Albania). When it comes to sources of illegal pressure the judges mostly pointed out the ones managing the courts (presidents) – 17% indications. It is worth underlining that the declared

[15] The number of responses was between 29 in Northern Ireland and 621 in Poland. A significant number of responses came from England and Wales – 596, Serbia – 590, Sweden – 519, Spain – 474 and the Netherlands – 383.

exertion of illegal pressure did not equate to succumbing to the influence because the vast majority of judges declared that they felt independent and they perceived the general representation of the judiciary in their country as independent.

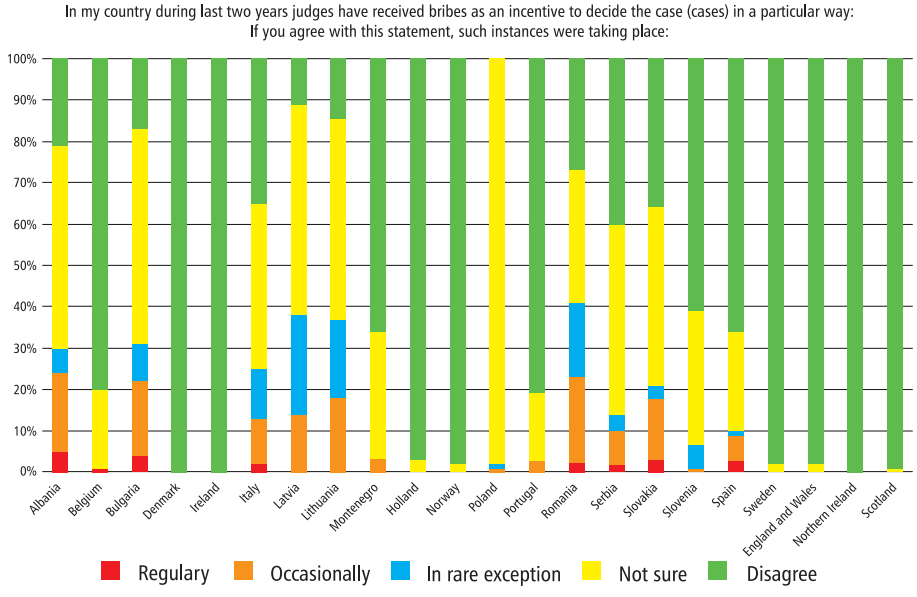
CORRUPTION IN THE JUSTICE SYSTEM

Interesting results were obtained by answers to the question of whether, according to the judges, in their country judges receive bribes offered in order to obtain a specific decision in a given case. The question about bribery in the judiciary system is always a hard one in view of the fact that bribery is not only an infringement of ethical rules and breaches the judge's independence but it is also an offence. The discovery of such an act should always lead to the end of a judicial career. The question emerges of how to inquire of judges about bribery in their profession and obtain honest answers. It is indubitable that the very wording of the question might influence the respondents' answers[16].

For the judges from some of the countries participating in the survey bribery among judges is not a noticeable or important problem. It should be pointed out that Poland is among those countries. Almost 80% of Polish judges disagreed with the statement that their colleagues accepted bribes in connection with their job and almost 20% were not sure about it. Only individual responses indicated that according to the respondent bribery occurs regularly or occasionally. In this matter the judges' declarations agree with data concerning the number of revealed offences of passive corruption, which is scant and not really problematic in the Polish environment. In this issue Polish judges expressed views similar to those of judges from, inter alia Belgium, Denmark, Ireland, Holland, Norway, Sweden and the United Kingdom. However, for some European jurisdictions the problem of bribery among judges exists and the respondents' declarations ought to be seen as alarming, even in cases when the judges indicate that it seldom occurs. Every case of

[16] Finally, the question was formulated in a quite straightforward way (in the original English version of the survey): 'In my country I believe that during the last two years individual judges have accepted bribes as an inducement to decide case(s) in a specific way'.

a corrupted judge undermines trust in the judicial system. At the same time the courts, whose power does not originate in elections and is not subject to any regular democratic verification, should feel the most inclined to maintain a high level of social trust. It should be stated once more that the division into countries without a bribery problem and those where this problem is noticeable does not reflect a geographical location, EU membership or the "duration" of the membership. Countries with a noticeable problem of accepting illegal benefits in relation to the work of judicial authorities include, on the one hand, Albania and Serbia (as states aspiring to the EU) and, on the other hand, Latvia, Lithuania, Bulgaria, Romania and Slovakia (so-called new EU Member States), but also Italy and Spain. Detailed data on this matter are presented in Figure 1.



THE MANAGEMENTS OF COURTS INFLUENCING JUDGES IN ORDER TO OBTAIN DECISIONS, EITHER ON SPECIFIC MATTERS OR IN A SPECIFIC TIME

The judges surveyed to a certain extent pointed to the managements of courts as a source of illegitimate pressure on judicial decisions. In fact, the cases of the managements of courts influencing judges in

order to obtain specific decisions may be seen as of no statistical importance. However, a serious problem for judges concerns pressure to resolve a case in a specific time. In this matter over half the judges from England and Wales experienced pressure exerted to give their decisions in specific time. Almost as many similar answers were given in Poland (almost 50%), Scotland, Northern Ireland, Sweden, Holland (each circa 40%). Countries in which this problem is not noticeable consist only of Albania and Romania (less than 10% of indications). Therefore, it can be stated that pressure to pursue a case in a specific time occurs in the vast majority of the ENCJ countries.

The pressure for resolving a case in a specific time may relate both to the fast settlement of a case (speeding up a judge's decision) and discouraging a judge from concluding a case that should already have been concluded. In practice, with an increasing number of court cases a real problem includes the pressure for faster conclusions of cases, and this includes their substantive settlement. It should be agreed that giving a judge any time frame influences his/her organisational independence, yet it does not always entail influencing his/her judiciary independence. There is a need to differentiate situations when a judge puts giving a decision on hold because, in his/her opinion, further procedures are required (the case is not ready to be concluded) from situations when a lack of conclusion results from illegitimate inaction in the case. In the first instance exerting pressure on a judge evidently violates the independence of the court, since it might influence the substantive settlement. And in the second one the pressure on a judge does not violate their independence because the case is ready to be concluded.

An obvious problem in this context is identifying which instance we are dealing with in a given case, and the aforementioned general statements might prove to be too narrow a guideline for deciding on the existing friction between a judges' independence and their accountability in their duty of administrating justice as required by society. When the situation of discouraging judges from concluding cases and making their decision is a blatant violation of their independence due to the fact that behind this pressure there have to be some considerations disagreeing with the rules governing the justice system.

TRANSPARENCY IN NOMINATIONS FOR JUDICIAL POSITIONS AND PROMOTIONS TO SENIOR JUDICIAL POSITIONS

Another serious problem emerging from analysing the surveys from many different jurisdictions is the conviction of many judges that nominations for judicial positions and promotions to senior judicial positions are conducted based on criteria different from solely candidates skills and experience. Spain is the extreme example, where over 70% responding judges think that judicial appointments are not based solely on substantive criteria. With regard to the question of judicial promotions in Spain as many as over 80% of the judges state that it is decided not only due to substantive reasons and only less than 5% think differently. A significant number of responses signalling non-substantive appointment criteria come from Albania, Bulgaria, Ireland, Lithuania, Serbia, Slovakia and Slovenia (all with over 30% of:: respondents) and in case of promotions the previous group also includes Belgium, Italy, Latvia, Portugal and Poland. Among the Polish judges over 20% estimated that judicial appointments are not based entirely on substantive criteria and this same opinion is exhibited by 35% of them with regard to promotions.

The results in this area should be seen as unsatisfactory and originating either in actual observations of the judges who experience certain illegitimate occurrences connected with their appointment and promotion or in insufficient transparency applied in the appointment procedures. And at least in the latter case the judicial councils, as organs crucial in the appointing process in many countries, ought to (in connection with the justification of their decisions) conduct an information policy clear and coherent enough to eliminate all doubts and ambiguities related to the judicial appointment and promotion criteria.

HOW JUDICIAL INDEPENDENCE IS TREATED BY OTHER AUTHORITIES AND OTHER CITIZENS

The survey results concerning the question of how, according to the judges, judicial independence is treated by other authorities and other citizens, are quite remarkable. The most controversial is the stand

of the government (the administration) and the parliament as well as the media, both traditional (radio, TV, press) and those based on the Internet. It is accompanied by the conviction that the media attempt to directly influence the conclusions of court cases (according to almost half of the judges from Spain and Lithuania and about 40% judges of Albania, Bulgaria, Latvia, Montenegro and Serbia). The perceived respect for judicial independence by the listed entities differs between judges in respective countries. The survey may be generally concluded by stating that Scandinavian jurisdictions have a sense of respect for judicial independence from the government and parliament as well as from the media (data from Sweden, Norway and Denmark).

Naturally, some respondent judges from those countries note irregularities in relations between the mentioned entities and the justice system, however, this group is very limited. It is especially visible if compared with responses from judges of countries where a lack of respect for judicial independence coming from other public players is clearly stated. Almost 70% of Italian judges, over 60% of Bulgarian judges, almost 60% of Polish judges and almost half the respondents from Spain, Albania, Slovakia and England think that their independence is not respected by the governments (the administration). Over 60% of Italian judges, about a half the judges from Bulgaria, Lithuania, Poland and Slovakia note a lack of respect for judicial independence in the parliament's actions. And considering the media, their actions are critically evaluated by over 60% of judges from Italy, Poland, Lithuania, Slovakia and Bulgaria, by about half the respondents from Albania, Spain and Slovenia, and by large numbers of the judges form other jurisdictions (with the exception of aforementioned jurisdictions from the Scandinavian countries). The new media are similarly evaluated; however, there are more undecided voices in this matter resulting probably from the novelty of the discussed phenomenon.

DISCIPLINARY PROCEEDINGS RESULTING FROM THE MANNER OF CONCLUDING A GIVEN CASE

The judges of some countries signal in their responses that, due to the manner of concluding a case, disciplinary procedures against them were initiated or they were threatened with the initiation of

such a procedure. This problem does not apply to Poland (only 5% of the respondents pointed out such situations), yet it can be seen in the Albanian jurisdiction (over 20% of responses) and in Spanish, Italian and Latvian ones (over 10% of responses). The judges from Italy (27%), Spain (21%), Albania (19%) and Montenegro (13%) state that in relation to their decisions there were claims made against them personally or they were threatened with such claims. Those countries have a noticeable problem of judges' being sued for compensation covering the results of their decisions or for decisions not meeting one of parties' expectations. In Poland only 6% of the judges indicated the occurrence of such claims, which is not a significant outcome, yet, judging from the data from other countries, this phenomenon could increase.

THE MANNER OF ASSIGNING CASES TO VARIOUS DIVISIONS

An important factor that guarantees judicial independence is the manner of assigning cases to various divisions. In this matter the principles objectified and specified in law allow the avoiding of accusations that the selection of the judge is dictated by a desire to influence decisions. Because of that the survey asked if the judges experienced violations of the established rules concerning the assignment of cases in order to influence decisions. Polish judges generally did not indicate any such irregularities (only 7% of positive responses). In other countries this problem was noted by, inter alia, every fourth Spanish judge (24% of positive responses), 16% of Latvian judges, 15% of Serbian judges, 13% of Bulgarian and Slovakian judges and 12% of Albanian judges. It seems that the best solution in this case is the implementation of regulations minimising the situations of the discretionary assigning cases to individual judges down to absolute exceptions.

HOW CHANGES IN WORKING CONDITIONS INFLUENCE JUDICIAL INDEPENDENCE

The question of how changes in working conditions influence judicial independence was also studied. Influences on changes in judges'

salaries, in a pension scheme, in the retirement age, in the number of cases to hear and in the amount of resources dedicated to the judiciary were studied. The question of whether the independence was influenced by a judge's potential transfer to another court or court department was also asked. On the whole, the judges from countries affected the most by the economic crisis (Spain, Portugal) claimed the most firmly that negative changes in remuneration policy and pension benefits influenced their independence. A negative impact on the independence of the number (supposedly increasing) of cases for hearing and an inefficient amount of resources for the judiciary in those countries was clearly underlined. In countries less affected by negative economic changes this problem was not so clearly stated; nonetheless, it was noticeable everywhere.

Asked if those influence their independence, in Poland 16% of the judges noted the changes in their salaries, every fifth changes in the retirement age, 18% the insufficient resources for the judiciary, and 28% an increasing number of cases appointed to them for hearing.

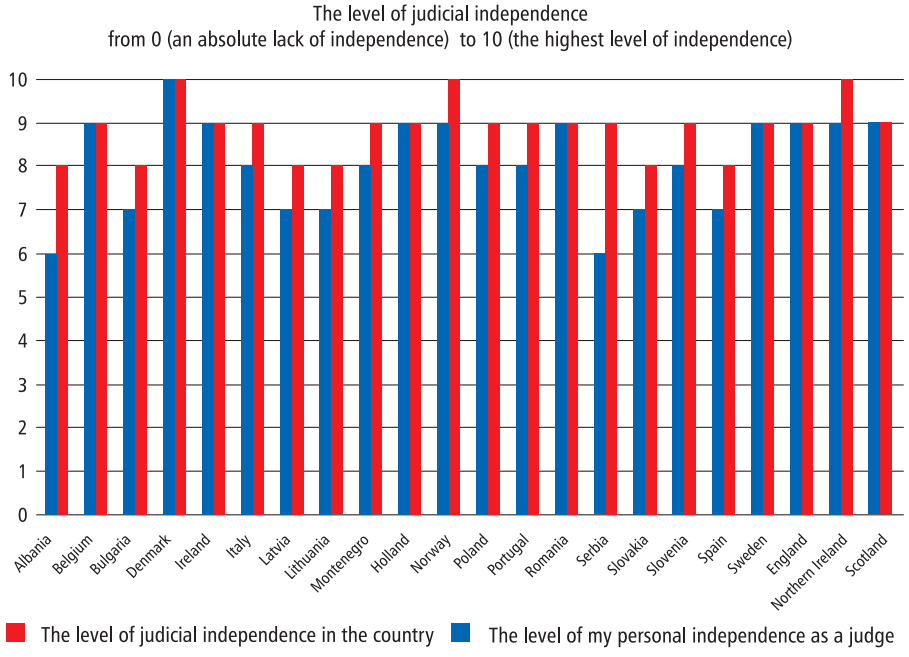
In relation to the discussed part of the survey it has to be underlined that there were many undecided answers (sometimes even over 60% of the total), which shows that it will be important in the next survey to express the questions in a more precise way. Some questions should even be removed, since they led to some confusion, e.g. the question about judicial independence in connection to potential changes in the retirement age.

HOW JUDICIAL INDEPENDENCE IS INFLUENCED BY JUDGES' BEING BOUND BY GUIDELINES COMPILED BY OTHER JUDGES

Interesting answers were obtained to questions about how judicial independence might be influenced by judges being bound by guidelines compiled by other judges. In some judicial systems (especially in the English-speaking countries) guidelines of this kind might visibly influence the jurisprudence. This influence was indicated by more than half the judges from Northern Ireland, almost half of the Lithuanian and Dutch judges, and one third of the judges from England, Italy, Albania and Montenegro. From the Polish point of view it might be also sur-

prising that 13% of Polish judges felt in some sense bound by those guidelines while 4% of them had no definite opinion about it. It is surprising due to the fact that the Polish judiciary system does not provide for, even by custom, any rules or even guidelines to be composed by judges for other judges. And their answers to the question above were based, in the Polish case, on some misunderstanding which requires explaining when repeating the survey.

The summarising answers in the survey related to a general evaluation of the level of judiciary independence in the given countries. The first referred to the evaluation of the level of judiciary independence as a general notion and the second to the respondent's evaluation of their level of independence. The collected results are presented in Figures 2 and 3.



From data gathered in the Figures it may be concluded that the judges evaluate their level of independence as at least equal to the level of independence of judges in general. However, in many countries (including Poland) personal independence is valued higher than general judiciary independence. The greatest dissonance can be seen in the data

from Serbia and Albania, where the respondent judges estimate their personal independence as very high (respectively as 9 and 8 on the 0 to 10 scale) while the general judiciary independence is evaluated the lowest from all the respondents (6 in both countries). Nonetheless, the general self-evaluation in terms of independence for European judges is high, and in this case Polish results should also be seen as very good (general judiciary independence indicated as 8, the respondents' personal independence indicated as 9).

CONCLUSIONS

The results of the survey carried out among judges, presented here in a shortened version[17], ought to be thoroughly analysed. It is worth noting and studying further the high level of independence felt by judges in Scandinavian countries – meaning countries with a small number of judges in both raw numbers and in relation to their general population, where at the same time the social factor makes an essential part of jurisdiction. Of course, the cultural specifics and the level of legal culture in those countries cannot be overlooked, but it still may be estimated that the position of the justice system in Scandinavian countries might result from the actual elitism of the judicial profession (which has to be accompanied by the limited cognition of the courts) together with real social engagement with the justice system and making jurors judicial "ambassadors" in their local communities. It increases the democratic legitimacy of jurisdiction in society and in return can affect the judges' self-awareness, reinforcing their sense of independence.

The conclusions drawn from this analysis should lead to attempts to improve those aspects in which the judges notice threats to their independence, using good practices from countries with better results. Changes in many areas relating to the judges' critical remarks are mostly independent from the judiciary (relations between the government, parliament, media and the judicial system). Still, judicial councils ought to work on the areas of their competence, e.g. in relation to the practical implementation of judicial appointments and promotion criteria.

[17] The complete results are available on encj.eu

Undoubtedly, the survey, to which almost 6,000 judges from the entire Europe responded, is a particularly useful tool for the better understanding of the state of the judiciary in various countries. It only needs a prior critical review and evaluation of some questions for its planned redistribution[18].

[18] This text is an extended version of the article published in "Kwartalnik Krajowej Rady Sądownictwa" 2015, No. 3.

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OPINIONS ISSUED BY THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE) – SELECTED ASPECTS

The Consultative Council of European Judges (CCJE[19]) is one of the bodies established within the Council of Europe – an organisation associating 47 European countries[20]. One of the objectives assumed by the Council of Europe is to strengthen the judiciary in the Member States, with a view to ensuring mutual respect between the legislative, executive and judicial powers, and to inspire higher trust in the justice system among the residents of Europe. In view of strengthening the role of

[19] In the official languages of the Council of Europe: Consultative Council of European Judges, Le Conseil consultatif de juges européens.

[20] However, the European affiliation of some of the countries belonging to the Council of Europe, appears somehow problematic in both geographical and cultural terms.

judges in Europe, the Committee of Ministers of the Council of Europe set up the Consultative Council of European Judges (CCJE) in 2000.

The CCJE is an advisory body of the Council of Europe on issues related to the independence, impartiality and competence of judges, highlighting the significant role of the judiciary in democratic societies. As is stressed on the CCJE website[21], it is probably the only body among international organisations composed exclusively of judges, and in this respect, it is unique in Europe, and maybe also in the world.

By establishing the CCJE, the Council of Europe highlighted the key role of the judiciary in exploring the concept of democracy and the rules by which it operates. A greater emphasis was thus placed on the status of judges and the quality of the justice system, as the implementation of the principle of the state under the rule of law, along with the promotion and protection of both human rights and fundamental freedoms, is based on a strong and independent judiciary, combined with mutual respect between the legislative, executive and judicial powers, and to inspire higher trust in the European justice system among European citizens.

The Consultative Council of European Judges is formed by representatives of 47 Member States of the Council of Europe, appointed (as far as possible) in consultation with the Councils for the Judiciary operating at the national level. The CCJE members are active judges having comprehensive knowledge on the functional matters and displaying impeccable personal integrity[22].

Furthermore, the CCJE has a number of observers, including the European Network of Councils for the Judiciary (ENCJ), the European Association of Judges (EAJ), the MEDEL Association *(Magistrats européens pour la démocratie et les libertés)*, the Council of Bars and Law Societies of Europe (CCBE), the Association of European Administrative Judges, the European Association of Judges for Mediation (GEMME), and the European Judicial Training Network (EJTN). Since October 2015 the function of President of the CCJE has been held by Niels Engstad, a judge from Norway.

[21] http://www.coe.int/t/dghl/cooperation/ccje

[22] Poland is represented in CCJE by the Supreme Court Judge Katarzyna Gonera – Member of the National Council of the Judiciary of Poland.

So far the CCJE conclusions have been published in the form of declarations or letters addressed to a given country or institution. One of such declarations, issued in November 2008, concerned the issue of suspending certain judicial appointments by the President of the Republic of Poland[23]. Since 2013 the Council has additionally published on its website a global **report** on the situation in Member States, regarding specific problems and the overall situation in individual countries. The CCJE can be asked by Member States to investigate into specific matters regarding judges. To this end, it refers to the current issues and, when necessary, its representatives pay a visit to a given country to discuss the possible ways of improving the existing situation in both legal and practical terms. It is also worth noting that similar competencies, though limited to such matters as the status of judges and the judiciary, have also been vested in another body of the Council of Europe, the European Commission for Democracy through Law, commonly referred to as the Venice Commission[24].

The underlying objective of the Consultative Council of European Judges is to prepare opinions for the attention of the Committee of Ministers of the Council of Europe, though the CCJE can also be requested to issue an opinion by other bodies of the Council of Europe. Such opinions are communicated once a year at a plenary meeting. They are drawn up by a specially appointed Working Group (CCJE-GT), usually on the basis of previously conducted investigations in the Member States concerned, and in consideration of the remarks and amendments made by individual members, following which they are approved at the CCJE's plenary meetings. The opinions are then submitted to the Committee of Ministers of the Council of Europe, in order to implement the recommendations specified in their content, and published on the Council's website.

Since 2001 the Consultative Council of European Judges has drawn up 18 advisory opinions regarding various functional aspects of the judiciary (see: the following discussion). The CCJE's opinions are

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[23] http://www.coe.int/t/dghl/cooperation/ccje/cooperation/PolandPractice.pdf

[24] See J.E. Helgesen, *The Independence of Judges – and the Judiciary – as seen from Venice*, [in:] *The Independence of Judges*, N.A. Engstad, A.L. Froseth, B. Tonder (eds.), Eleven International Publishing 201, p. 113.

published on the Council's website (http://www.coe.int/ccje). Under each opinion a clarification of its subject matter and information on the language versions can be found. Most CCJE's opinions are available in the Polish language on the website of the National Council of the Judiciary of Poland[25].

Selected standards and recommendations formulated in individual opinions are presented below:

- **Opinion No. 1 (2001)** – "Standards concerning the independence of the judiciary and the irremovability of judges"
  - The fundamental principles of judicial independence should be set out at the constitutional or highest possible legal level in each member State and its more specific rules at the legislative level.
  - Seniority should not be the governing principle determining promotion. Adequate professional experience is however relevant, and pre-conditions related to years of experience may assist to support independence.
  - The use of statistical data and the court inspection systems shall not serve to prejudice the independence of judges.
- **Opinion No. 2 (2001)** – "The funding and management of courts with reference to the efficiency of the judiciary and to article 6 of the European Convention on Human Rights"
  - Although the funding of courts is part of the State budget presented to Parliament by the Ministry of Finance, such funding should not be subject to political fluctuations.
  - Decisions on the allocation of funds to the courts must be taken with the strictest respect for judicial independence.
  - It is important that the arrangements for parliamentary adoption of the judicial budget include a procedure that takes into account judicial views.
- **Opinion No. 3 (2002)** – "The principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality"

[25] http://krs.pl/pl/dzialalnosc/wspolpraca-miedzynarodowa/c,437,wspolpraca-z-rada-europy-i-rada-konsultacyjna-sedziow-europejskich-ccje/p,1/2895,informacja-o-dzialaniach-rady-konsultacyjnej-sedziow-europejskich

Standards of judicial conduct[26]:

— Impartiality in the following contexts: the conduct of judges in the exercise of their judicial functions and other professional activities, the extra-judicial conduct of judges, and relations with the media.

Recommendations concerning criminal, civil and disciplinary liability of judges[27]"

— Judges should be criminally liable in ordinary law for offences committed outside their judicial office.

— Criminal liability should not be imposed on judges for unintentional failings in the exercise of their functions.

• **Opinion No. 4 (2003)** – "Appropriate initial and in-service training for judges at national and European levels"

In order to shield the establishment from inappropriate outside influence, the CCJE recommends that the managerial staff and trainers of the establishment should be appointed by the judiciary or other independent body responsible for organising and supervising training.

Initial training:

— Theoretical and practical programmes should not be limited to techniques in the purely legal fields but should also include training in ethics and an introduction to other fields relevant to judicial activity, such as management of cases and administration of courts, information technology, foreign languages, social sciences and alternative dispute resolution (ADR).

In-service training:

— Training programmes should be drawn up under the authority of the judicial or other body responsible for initial and in-service training and by trainers and judges themselves.

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[26] More: G. Borkowski, *Immaculacy of Character and Vocation for Legal Professions*, [in:] *Ethics of Legal Professions. Mutual Relationships and Expectations*, G. Borkowski (ed.), Lublin 2012, pp. 205–214.

[27] See the interesting summary in: *Les Juges: de l'Irresponsabilite a la responsabilite?,* Aix-en-Provance 2000.

The European training of judges:

— Whatever the nature of their duties, no judge can ignore European law, be it the European Convention on Human Rights or other Council of Europe Conventions, or if appropriate, the Treaty of the European Union and the legislation deriving from it, because they are required to apply it directly to the cases that come before them.

• **Opinion No. 5 (2003)** – "The law and practice of judicial appointments to the European Court of Human Rights"

— The CCJE refers to Article 21 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which states: "the judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence".

• **Opinion No. 6 (2004)** – "Fair trial within a reasonable time and judge's role in trials taking into account alternative means of dispute resolution (ADR)"

Access to justice

— The CCJE positively encourages the dissemination of information on the rules and possibilities of using court services and the creation of simplified information booklets and guides.

Quality of the justice system and its assessment

— The CCJE emphasises the role of statistical data and procedure monitoring.

Caseload and case management

— The CCJE points out significant differences between civil law and criminal law cases.

Alternative dispute resolution (ADR)

— The CCJE recommends using alternative means of dispute resolution and raising social awareness of the possibility to use such means.

• Opinion No. 7 (2005) – "Justice and society"

— The CCJE considers that each profession (judges and journalists) should draw up a code of practice on its relations with representatives of the other profession and on the reporting of court cases.

— The CCJE considers that judicial language should be concise and plain, avoiding – if unnecessary – Latin or other wordings that are

difficult to understand for the general public. Legal concepts and rules of law may be quite sufficiently explained by citing legislation or judicial precedents.

— Judicial reasoning should always be precise and complete, though simplified reasoning may be appropriate in procedural matters, and judges may, where permissible, give their reasoning orally (subscription to later transcription if required) rather than in writing.

— The CCJE recommends that at least all Supreme Court and other important court decisions be accessible through Internet sites at no expense, as well as in print upon reimbursement of the cost of reproduction only; however, appropriate measures should be taken in disseminating court decisions, to protect privacy of interested persons, especially parties and witnesses.

• **Opinion No. 8 (2006)** – "The role of judges in the protection of the rule of law and human rights in the context of terrorism"

The CCJE recommends that the states:

— Consult the national judiciaries when elaborating a legislation that might affect substantial and procedural rights.

— Refuse to establish tribunaux d'exception or legislation incompatible with universally recognised rights.

— To be vigilant that the fundamental principles of criminal law apply in the same way to acts of terrorism as they do to any other offences, and to ensure that the constitutive elements of these offences are clearly and precisely defined.

— To facilitate international cooperation in the fight against terrorism.

— To guarantee the security of witnesses and victims of acts of terrorism.

• Opinion No. 9 (2006) – "The role of national judges in ensuring an effective application of international and European law"

In the fields of training of judges in international and European law, access of judges to relevant information, foreign language courses and translation facilities, the CCJE recommends that:

— Prior knowledge of international and European law and case-law should be ensured by the inclusion of these topics in the curricula of the law faculties.

— Appropriate knowledge of international and European law should be one of the conditions that appointees to judicial posts should meet, before they take up their duties.
— Appropriate measures – including the allocation of grants – should assure that judges gain full proficiency in foreign languages; additionally, courts should have translation and interpretation services of quality available apart from the ordinary cost of the functioning of courts.

• **Opinion No. 10 (2007)** – "The Council for the Judiciary at the service of society"

In general:

— It is important to set up a specific body, such as the Council for the Judiciary, entrusted with the protection of the independence of judges, as a an essential element in a state governed by the rule of law and thus respecting the principle of the separation of powers.
— The Council for the Judiciary is to protect the independence of both the judicial system and individual judges and to guarantee at the same time the efficiency and quality of justice as defined in Article 6 of the European Convention on Human Rights in order to reinforce public confidence in the justice system.
— The Council for the Judiciary should be protected from the risk of seeing its autonomy restricted in favour of the legislature or the executive through a mention in a constitutional text or equivalent.

On the powers of the Council for the Judiciary:

— The Council for the Judiciary should have a wide range of tasks aiming at the protection and the promotion of judicial independence and efficiency of justice.
— The Council for the Judiciary should preferably be competent in the selection, appointment and promotion of judges.
— The Councils for the Judiciary should be actively involved in the assessment of the quality of justice and in the implementation of techniques ensuring the efficiency of judges' work, but should not substitute itself for the relevant judicial body entrusted with the individual assessment of judges.

— The Council for the Judiciary may be entrusted with ethical issues.
— The Council for the Judiciary may be entrusted with organising and supervising the training but the conception and the implementation of training programmes remain the responsibility of a training centre, with which it should cooperate to guarantee the quality of initial and in-service training.
— The Council for the Judiciary may have extended financial competences to negotiate and manage the budget allocated to justice as well as competences in relation to the administration and management of the various courts for a better quality of justice.
— The Council for the Judiciary may also be the appropriate agency to play a broad role in the field of the promotion and protection of the image of justice.
— Prior to its deliberation in Parliament, the Council for the Judiciary shall be consulted on all draft legislation likely to have an impact on the judiciary, e.g. the independence of the judiciary, or which might diminish citizens' guarantee of access to justice.
— Co-operation with the different Councils for the Judiciary at the European and international levels should be encouraged.

• **Opinion No. 11 (2008)** – "The quality of judicial decisions"

The basic elements on which the quality of judicial decision depends include:

— The quality of legal acts enacted by legislative authorities.
— Adequate human, financial and material resources.
— The quality of legal education and training of judges.
— Training court staff in order to relieve judges of administrative and technical duties and allow them to focus on the intellectual aspect of decision making.
— Interactions between the numerous actors in the judicial system.
— The professionalism of the judge as the primary guarantee for the quality of a decision and an important part of the internal environment[28].

[28] See e.g. *Independence, Accountability and the Judiciary,* edited by G. Canivet, M. Andenas, D. Fairgrieve, London 2006.

• **Opinion No. 12 (2009) (joint opinion of the CCJE and the CCPE[29])** – "The relations between judges and prosecutors in a democratic society"

The so-called Bordeaux Declaration: "Judges and prosecutors in a democratic society"

— In a State governed by the rule of law, where the structure of prosecution service is hierarchical, effectiveness of prosecution is, regarding public prosecutors, strongly linked with transparent lines of authority, accountability, and responsibility.
— The sharing of common legal principles and ethical values by all the professionals involved in the legal process is essential for the proper administration of justice.
— In Member States where public prosecutors have functions outside the criminal law field, the principles mentioned herein apply also to these functions.

• **Opinion No. 13 (2010) – "The role of judges in the enforcement of judicial decisions"**

— The effective enforcement of a binding judicial decision is a fundamental element of the rule of law. It is essential to ensure the trust of the public in the authority of the judiciary. Judicial independence and the right to a fair trial is in vain if the decision is not enforced.
— Enforcement should be fair, swift, effective and proportionate.

• **Opinion No. 14 (2011) – "Justice and information technologies (IT)"**

— The CCJE welcomes information technologies as a means to improve the administration of justice.
— Information technologies have to be adapted to the needs of judges and other participants in court proceedings. They should never infringe guarantees and procedural rights such as that of a fair hearing before a judge.
— Consideration must be given to the needs of those individuals who are not able to use IT facilities.

[29] The Consultative Council of European Prosecutors.

— Information technologies should not interfere with the powers of the judge and jeopardise the fundamental principles enshrined in the Convention.

• **Opinion No. 15 (2012) – "The specialisation of judges"**

— In principle, the predominant role in judicial adjudication should be undertaken by "generalist" judges.

— Specialist judges and courts should always remain a part of a single judicial body as a whole.

— Specialist judges, like "generalist" judges, must meet the requirements of independence and impartiality in accordance with Article 6 of the European Convention on Human Rights.

• **Opinion No. 16 (2013) – "The relations between judges and lawyers"**[30]

— It is recommended that judges organise case management hearings within the framework of the relevant procedural laws, and establish, in consultation with the parties, procedural calendars, e.g. by specifying the procedural stages, setting out reasonable and appropriate timeframes and structuring the manner and timing of the presentation of written and oral submissions and evidence.

— It is recommended that lines of communication be developed between courts and lawyers. Judges and lawyers must be in a position to communicate at all stages in proceedings. The CCJE considers that states should introduce systems facilitating computer communication between the courts and lawyers.

— The CCJE considers that, where appropriate, joint training for judges and lawyers on the themes of common interest can improve the quality and efficiency of proceedings[31].

• **Opinion No. 17 (2014) – "The evaluation of judges' work, the quality of justice and respect for judicial independence"**

[30] „How to better organise relations between judges and lawyers in order to improve the provision of justice" – the papers form the conference on such a topic organized on 7 Nov. 2012 in Paris by CCJE and Paris Bar may be found at CCJE web-site.

[31] See my paper on the works regarding the quoted opinion: *Relacje sędzia–adwokat w państwach europejskich. Wybrane zagadnienia prawnoporównawcze"*, [in:] *Etyka zawodów prawniczych. Relacje na sali rozpraw*, G. Borkowski (ed.) Lublin 2013, p. 205 *et seq*. Actually, the reference publication reflects the outcome of joint training in the field of ethics in the professions of judges, prosecutors, barristers and legal counsels.

— The aim of all individual judicial evaluation adopted by a Member State, whether it be "formal" or "informal", must be to improve the quality of the work of the judges and, thereby, a country's whole judicial system.
— The basis and main elements for formal evaluation (where it exists) should be set out clearly and exhaustively in primary legislation. Details may be regulated by subordinate legislation which should also be published. The Council for the Judiciary (where it exists) should play an important role in assisting in formulating these matters, especially the criteria for evaluation.
— Evaluation must be based on objective criteria.
— Evaluation should not be based on quantitative criteria alone.
— In order to safeguard judicial independence, individual evaluations should be undertaken primarily by judges. The Councils for the Judiciary (where they exist) may play a role in the process. Evaluations by the Ministry of Justice or other external bodies should be avoided.
— It is essential that there is procedural fairness in all elements of individual evaluations. In particular judges must be able to express their views on the process and the proposed conclusions of an evaluation.
— An unfavourable evaluation alone should not (save in exceptional circumstances) be capable of resulting in a dismissal from office.
— The use of individual evaluations to determine the salary and pension of individual judges is to be avoided.
— The principles and procedures on which judicial evaluations are based must be made available to the public.

• **Opinion No. 18 (2015) – "The position of the judiciary and its relation with the other powers of state in a modern democracy"**

— In principle, the judiciary must accept that criticism is a part of the dialogue between the three powers of the state and with the society as a whole. Politicians should not use simplistic or demagogic arguments to make criticisms of the judiciary during political campaigns just for the sake of argument or in order to divert attention from their own shortcomings. Nor should individual judges be personally attacked. Politicians must never encourage disobedi-

ence to judicial decisions, let alone violence against judges, as this has occurred in some Member States[32].

— The rule that any analyses and criticisms by one power of state of the other powers should be undertaken in a climate of mutual respect applies as much to the judiciary as it does to members of the legislature and the executive.
— There will be no confidence in the decisions of a judiciary which permits its members to make unreasonable or disrespectful comments of the other powers of state. Those types of remark will only lead to a "war of words" which will itself undermine public confidence in the judiciary.

MAGNA CARTA

In 2010, on the occasion of its 10th anniversary, the Consultative Council of European Judges adopted a document to summarise the main conclusions of its several previous opinions, entitled "Magna Carta of Judges (Fundamental Principles)" – revising, summarising and codifying the underlying principles laid down in the opinions that it had already adopted.

Selected issues and decisions:

1. **Rule of law and justice**
   — The judiciary is one of the three powers of any democratic state. Its mission is to guarantee the very existence of the Rule of Law and, thus, to ensure the proper application of the law in an impartial, just, fair and efficient manner.
2. **Judicial independence**
   — Judicial independence and impartiality are essential prerequisites for the operation of justice[33].

[32] See e.g. J. Casadevall, *L'avocat et la liberte d'expression*, [in:] *Freedom of Expression. Essays in honour of Sir Nicolas Bratza*, Wolf Legal Publishers 2012.

[33] The importance of common standards of judicial independence, especially in transitional period has been underlined in an exhaustive comparative study by Anja Seibert-Fohr (ed.), *Judicial Independence in Transition*, Max Planck Institute 2012.

— Judicial independence shall be statutory, functional and financial. It shall be guaranteed with regard to the other powers of the State, to those seeking justice, to other judges and to the society in general, by means of national rules at the highest level. The State and each judge are responsible for promoting and protecting judicial independence.
— Judicial independence shall be guaranteed in respect of judicial activities and in particular in respect of recruitment, nomination until the age of retirement, promotions, irremovability, training, judicial immunity, discipline, remuneration and financing of the judiciary.

3. Guarantees of independence[34]

— Decisions on selection, nomination and career shall be based on objective criteria and taken by the body in charge of guaranteeing independence.
— Disciplinary proceedings shall take place before an independent body with the possibility of recourse before a court.
— Following consultation with the judiciary, the State shall ensure the human, material and financial resources necessary to the proper operation of the justice system. In order to avoid undue influence, judges shall receive appropriate remuneration and be provided with an adequate pension scheme, to be established by law.
— Initial and in-service training is a right and a duty for judges. It shall be organised under the supervision of the judiciary. Training is an important element to safeguard the independence of judges as well as the quality and efficiency of the judicial system.
— The judiciary shall be involved in all decisions which affect the practice of judicial functions (organisation of courts, procedures, and other legislation).
— In the exercise of their function to administer justice, judges shall not be subject to any order or instruction, or to any hierarchical pressure, and shall be bound only by law.

[34] See an interesting study by M. Kuijer, *The blindfold of Lady Justice. Judicial Independence and Impartiality in Light of the Requirements of Article 6 ECHR*, Leiden 2004.

— Judges shall ensure equality of arms between prosecution and defence. An independent status for prosecutors is a fundamental requirement of the Rule of Law.
— Judges have the right to be members of national or international associations of judges, entrusted with the defence of the mission of the judiciary in the society.

4. Access to justice and transparency

5. Ethics and responsibility

SUMMARY

The above review of the subject matter dealt in with opinions issued by the Consultative Council of European Judges, and their significance arising from the powers vested with the CCJE, allows us to state a thesis that these opinions constitute a useful instrument in establishing universal – not only European – standards pertaining to the judiciary.

The significance of the CCJE's opinions, and in particular of Magna Carta of Judges which lays down the underlying principles, is also reflected in the fact that they are often referred to in judicial decisions issued by the European Court of Human Rights regarding the status of the judiciary and judicial independence (e.g. *Harabin vs. Slovakia*[35], *Albu et al. vs. Romania*[36], *Mitrinowski vs. the former Yugoslav Republic of Macedonia*[37]) and many others[38].

What is more, the reference opinions can be useful in determining the limits of judicial independence. However, this gives rise to the question (hence the question mark in the conference title) of whether

[35] http://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Harabin%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-114666%22]}

[36] http://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-110805%22]}

[37] http://hudoc.echr.coe.int/eng?i=001-154027#{%22itemid%22:[%22001-154027%22]}

[38] The review of ECHR judgments relating to the judicial independence may be found at G. Borkowski, *Judicial Independence in the Light of Art. 6 of the European Convention of the Human Rights – selected aspects*, [in:] Teka Komisji Prawniczej OL PAN, p. 5–20, available at: http://www.pan-ol.lublin.pl/wydawnictwa/TPraw7_2014.html

it would not be more appropriate to speak about the limits of interference of other powers with the independence of courts, on the one hand, and interference of the parties to the proceedings with judicial independence, on the other.

One should hope that the gravity and significance of the CCJE's opinions will be taken into consideration in the legislative process focusing on those legal acts which govern the status of the judiciary[39].

[39] The judicial independence should be seen as "as natural as the air we breathe" – see J. Laffranque, *Judicial Independence in Europe: Principles and Reality*, [in:] *The Independence of Judges*, N.A. Engstad, A.L. Froseth, B. Tonder (eds.), Eleven International Publishing 2014, p. 127.

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THE INDEPENDENCE OF JUDGES AND THE COURTS IN POLAND AS VIEWED BY THE JUDGES

Under the research project "The third power of the courts and judges in Poland in terms of the theory and philosophy of law"[1], financed by the National Science Centre (NCN), sociological research is being conducted with the participation of judges of courts of common jurisdiction. Their subject matter is comprised by responses to questions included in questionnaires, related to selected issues of judges' and courts' independence. The preparation of the questions was preceded by individual and group interviews. The questionnaires were sent in two batches – the first one in mid-2015, and the second one in December 2015 (to two different, randomly chosen groups of judges), which also allowed the analysis of the potential impact of the political situation, also comprising certain elements of the widely understood judicial system, on judges' views. To date, responses have been ob-

[1] A project conducted under the supervision of A. Machnikowska, participated in by O. Nawrot, B. Wojciechowski and M. Kaczmarczyk.

tained from 730 judges, including 100 in the period between December 2015 and January 2016. The polling process will continue until March 2016.

What spoke in favour of conducting the project was the emergence in the past few years of new solutions and relations involving the judiciary system and its direct surroundings. These have also included issues of identifying, defining and practising such notions as judicial independence and the independence of the courts. These circumstances require a multi-level verification comprising information gathering on the factors identified by judges themselves as having a positive or negative impact on the scope and the character of the power exerted by the courts. Information from this source can be helpful in shaping legally and socially desirable standards for the functioning of the justice system. This regards both the professional assessment of the processes occurring in this area, and defining the subjects for a debate on the challenges facing the judiciary and other institutions responsible for guaranteeing legal protection. This is noteworthy, even more so that such a debate – although expected after the systemic transformation of1989 – has never been held. It has been substituted by several subsequent strategies for the judicial system, including the now partially abandoned strategy for the years 2014–2020. On top of that volatility, a problem was posed by the fact that the documents insufficiently and incorrectly took account of significant prereguisites of the formation and impact of the judiciary power. Furthermore, for over a decade, a dispute has been increasingly visible between the judges and representatives of the government, including the Ministry of Justice. The background for the dispute has been provided by difficulties in achieving the set targets of effectiveness in the judicial system, with the central topic being the model of judges' and the courts' independence (for the existence of this prereguisites it is irrelevant which party is currently in power).

These circumstances determine both the relativism increasing in Poland on the subject of judges' and the courts' independence and the controversial nature of certain reformatory measures. They limit the potential of the assets invested in the justice system as well as adversely affect the attitudes of judges (the cyclicality of negative experiences) and the policy concerning the management system for the justice system (the domination of anachronistic doctrinal concepts or the auto-

matic copying of frameworks designed for other bodies). This is also not irrelevant for public opinion and its views on the current and the preferred conditions of judicial power. Meanwhile, with the increase in the social aspirations and needs of the modern economy, and because of improvements in the European patterns of court proceedings, as well as the increasingly complex and diverse body of philosophy and theory of law, including new ethical standards – all these are systematically stepping up the pressure on the courts.

In view of the above a new questionnaire has been developed, including 29 content-related questions (some of them extended) and five questions more precisely identifying the status of the respondent, from his or her age and gender, through, *inter alia*, the division and level of the courts' structure in which he or she works as a judge (district court, regional court, appellate court). The latter two issues have major significance in identifying both assessments and opinions common to the whole milieu, as well as differences in opinions, partially justified by the current experiences resulting from specific aspects of the functioning of the particular courts. The majority of questions concern the assessment of judges' and courts' independence in the context of both the constitutional guarantees and the level of implementation of these values. With a view to limiting the variety of interpretations of these three key notions, the questionnaire provides their common meaning. Some questions in this group regarded the kind and intensity of impact of the factors increasing and limiting independence. A separate question related to the judges' opinions on the reform of the mechanism of judges' immunity and the relations between this mechanism and guarantees of judges' independence.

What results from the obtained responses is a clear gap between the assessment of one's own independence as a judge, viewed positively, and the courts' independence. According to a majority of judges, the latter value ranks at the medium level in around 44% of responses and at a low level in around 20 % of responses. In the judges' opinion, the limited independence of the courts is primarily determined by factors such as the policies of the State's authorities, the rules of the court's financing and the manner in which courts cases are presented in the media. Separate questions involved the judges' views on the newly activated or planned competences of the Minister of Justice regarding,

among other things, the reorganisation of the courts, as well as the analysis and assessment of court files. As regards the factors influencing judges' independence, the judges could express their opinions on, among other things, the impact of the principle of the free assessment of evidence, the mechanism of exclusion of a judge from a case, and the openness of proceedings, as well as personnel policies and rules of promotion.

A personal question was also addressed to the judges regarding any possible interference with their independence, asking them to indicate the form of the interference in the case of a positive answer (here no sample answer was suggested). From among those polled, around 23% of the judges stated that they had faced such a challenge. A question was also singled out regarding the difficulty for the judge to meet the requirement of independence applicable to him or her. The answers obtained to date from the sample of 730 judges indicate an almost equal number of positive and negative questions.

The judges were also asked to rank sample aims of court proceedings (the choice concerned compliance with the letter of the law, the promptness of judgments, compensatory justice, social benefits and the optimisation of the usefulness of judgments for the parties to proceedings). In the responses obtained to date, promptness of proceedings was ranked third (this issue is also stressed in responses to other questions). The subsequent questions were intended to shed light on the frequency with which the judges used particular methods of interpreting the law and the body of jurisdiction (of the Constitutional Tribunal, the Supreme Court, the European Court of Human Rights and the EU Court of Justice). The judges could also provide their assessment of the level of the influence of some other characteristics of the legal and social system on the content of judicial decisions. Their responses ranked, for example, the expectations of public opinion and the criterion of social and economic rationality in distant places. At the same time, they indicated the significant influence of the need to make prompt decisions. Some questions were aimed at gaining information on the judges' opinions on selected systemic matters (e.g. delegating more power to the citizens), and economic, social and environmental issues (such as voicing the interests of judges). A separate question regarded the assessment of civil disobedience.

A detailed analysis of the results of the said sociological research on the basis of the complete information, viewed in a broader legal perspective, will be presented in publications prepared under the NCN's project, to be released in 2016. Information and conclusions gained from a representative group of judges can be useful, not only for the possible broadening of the functioning of the principle of independence. This is because the possibility to verify part of the currently used arguments in analyses and decisions concerning the status of the courts becomes equally significant, especially if their authors justify their opinions referring to the commonness of the opinion or approach among the judges. An example of this was provided by a statement presented at the current conference by the Ministry of Justice, according to which the internal organisation of work in courts, including the office of the head of department, is the factor most significantly limiting the independence of judges. In the Ministry's opinion, an immediate abolition or major modification of this office, along with reformed case-allocation rules, should substantially contribute to the strengthening of both the guarantees of judges' authority and the efficiency of the judiciary as a whole.

Grzegorz Wiaderek

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THE INDEPENDENCE OF THE JUDICIARY AND THE ACTIVITIES OF CIVIL-SOCIETY ORGANISATIONS

Civil-society organisations appear in different roles in relations with institutions connected with the broadly understood judiciary. We can especially point here to activities aimed at monitoring the judiciary, the activities of civil-society organisations in legal procedures, supporting participants in court proceedings and educational activities[1]. In this

[1] A lot of valuable information on relationships between courts and NGOs can be found in publications resulting from the conference on the topic in question, which was organised by INPRIS in October 2014 jointly with the National School of Judiciary and Public Prosecution, entitled *Together or apart? Cooperation, interaction and communication between the judiciary and non-governmental organisations*, prepared by Ł. Bojarski, G. Wiaderek, Warszawa, November 2014, as well as in several articles by Łukasz Bojarski, eg.: Ł. Bojarski, *Razem czy osobno? Współpraca, interakcja, komunikacja wymiaru sprawiedliwości i organizacji pozarządowych* [Together or apart? Cooperation, interaction and communication between the judiciary and non-governmental organisations], "Kwartalnik Krajowej Rady Sądownictwa" (Quarterly of the National Council of the Judiciary), 2014, No. 4, pp. 20–25.

text my goal is to draw attention to the key areas of non-governmental organisations' activities from the point of view of the independence of the courts.

Usually the objectives of the organisations operating in the field of the judicature revolve round ensuring that the right to a fair trial, expressed in Art. 45 of the Constitution of the Republic of Poland, is observed. This means the right to a fair and public hearing of a case, without undue delay, before a competent, impartial and independent court. Therefore, independence was elevated to a matter of a constitutional value. It is worth evoking the notion of independence, sometimes applied through four intertwined characteristics determining an independent court: (1) competent, (2) professional, (3) accountable and (4) effective[2]. Itappears that in the context of the deliberations below, such an approach is very current and useful.

Non-governmental organisations that observe judiciary institutions and monitor and evaluate their operations, demanding an increase in the transparency and openness of the functioning of the judicature, are at times treated as troublesome and importunate partners. It is worth, however, regarding them also as a kind of a "mirror" for courts and judges. Undoubtedly, this facilitates the improvement of their competencies and the increased accountability of the judicature. It is also conducive to the improvement and efficiency of their functioning and a more favourable social image. Judicial institutions should be open to the knowledge of how they are seen by the public. The debates on the judicature still lack the pronounced voice of the so-called "users of the justice system". Reliable (based on serious and verifiable tools), profound and independent monitoring of the functioning of the judiciary is the best way of obtaining knowledge on courts' reputation, whether participants in proceedings understand what is going on in the courtroom, what are the deficiencies in the organisation of court work or in the communication and justification of court decisions.

[2] The aforementioned depiction of the independence of the judiciary appeared in reports on the independence and efficiency of the judicature prepared within an extensive international project studying the preparation of individual States for accession to the European Union: *EuMap Project: Monitoring the EU Accession Process: Judicial Capacity, 2002.*

Sometimes the activities of non-governmental organisations take the form of systemic measures. In this case they focus not so much on observing individual court cases, but rather on formulating general and holistic propositions and recommendations for reforms, and observe the legislative process and issue opinions on subsequent draft amendments. Here, the role of the independent think-tank institutions is invaluable. When it comes to expressing their opinions on public issues, they are not as restricted as judges are due to their status. They can freely formulate their opinions on the political position and reforms of the judiciary and present them in various circles. Also important is the activities of organisations in the legislative process, within which they can file postulates concerning the proposed regulations, as well as indicate potential deficiencies and transgressions in the assessment of the regulations' effects. In this context it is worth mentioning two initiatives as examples. The first includes a project that has been carried out for several years by the Helsinki Foundation for Human Rights concerning the analysing of and issuing opinions on subsequent draft laws in respect of the broadly understood legislative process[3]. The other is a joint initiative of a coalition of non-governmental organisations entitled "Citizens Observatory for Democracy"[4], under which independent opinions and expert assessments concerning crucial legal acts applying to the state's political system and civil society are collected, prepared and published.

An important factor in the independence of the judicature, as often indicated by the judges themselves, is the poor public image of the judicature coupled with poor the legal awareness of the Polish society. This rather repeated grumbling is, however, close to the truth. This is also confirmed by studies pointing to the fact that the majority of the public shape their opinions not on the basis of their real contacts with courts, but rather based on simplistic media information presented using the "scandal" formula. The source of this problem is also ascribed to inadequate legal education and poor access to legal assistance services. No evident and immediate changes will appear in this field. Hard and long work based on proven and efficient methods is needed. Much has been already done in the field of legal education. Much credit in this re-

[3] Details on the website: http://programy.hfhr.pl/monitoringprocesulegislacyjnego/

[4] http://obserwatoriumdemokracji.pl/

gard is due to non-governmental organisations, which have and are still are undertaking many educational activities. There are many initiatives in this respect, also of the judges themselves. In this context we must mention the execellent initiative of the Katowice branch of the *Iustitia* Polish Judges Association, which published a very interesting guide for young people "Apteczka prawna – lex bez łez" (A legal first-aid kit – a no-tear lex"). Courts and judges should support such projects. They should also take the initiative and respond to invitations. There are very good examples of judges who have taken interesting educational initiatives and engaged in cooperation with local legal circles and non-governmental organisations. Associations of judges remain active. The cooperation of various circles and institutions can greatly increase the impact of these endeavours.

Another aspect of this problem is the education of the media. This also does not have an immediate effect, but it is necessary for the journalists to be served with good and clear information, and for them to know how to use it, as well as to present court cases correctly and to the fullest possible extent. This also requires work by the courts – skilful and patient communication of their activities. Here, non-governmental organisations can also be excellent allies, sometimes as "third parties" allowing both parties to reach an agreement. It would suffice to mention a very well received and remembered by its participants programme "Dziennikarz w sądzie" ("A journalist in the court") organised some 10 years ago jointly by the Stefan Batory Foundation, the Helsinki Foundation for Human Rights and the *Iustitia* Polish Judges Association. This programme inspired other activities, and media education found its way to the curricula of training courses for judges. However, it is still not enough. It is necessary to actively approach the media and search for ways to bolster the competencies and skills of journalists to provide reliable information on the work of courts.

Another problem of a similar nature is the issue of communication between public authorities. While observing public discourse one can clearly see that all three powers do not listen to one another very much and talk mainly in their respective circles. On the one hand, legislature and the executive are not responding in a serious way to the postulates filed by judicial circles, and, on the other hand, judges also find it difficult to extend their perspective of the discourse beyond their own cir-

cles and establish good communication with the authorities. It appears that also in this case non-governmental organisations can play the role of "third parties", which can streamline communication between the public authorities and help to work out good tools for communication and openness to discussion and arguments.

And lastly, the last area of operation of civil-society organisations, in terms of the issue of court independence, covers the activities of organisations before different national and international institutions. This means first and foremost making appeals, filing motions and complaints to different institutions dealing with human rights and the rule of law, presenting to national and international courts the opinions of a friend of the court (amicus curiae) and creating shadow reports to governmental reports presented in bodies and international organisations. For civil-society organisations this is their normal and constant mode of operation. The experiences of organisations based in other countries are known and valued.

Finally, it would be worthwhile to take into account another more detailed issue. It concerns a situation that has recently become quite common. What we mean here are media campaigns organised against specific judges due to judgements passed by them, which are at times reinforced by attacks in social media. The available legal measures are often inadequate to face the power of hateful statements. Individual judges find it difficult to cope with this problem, and institutions often fail to provide them with the appropriate support. This issue deserves a moment of reflection and coming up with support tools to make it possible to appropriately analyse and describe every attack, cope with it, and draw possible consequences. To do so, one needs to know how to navigate the "new media" and use contemporary technologies. Civil-society organisations are strong in these fields. Some of them are strongly involved in fighting hate speech. It would be worth finding allies and jointly developing effective methods and tools for supporting the judges who are sometimes wrongly becoming the targets of media campaigns and attacks in the social media.

Krajowa Rada Sądownictwa

THE JUDICIAL INDEPENDENCE AS A GUARANTEE OF RIGHTS AND FREEDOMS OF INDIVIDUALS

THE JUDICIAL INDEPENDENCE AS A GUARANTEE OF RIGHTS AND FREEDOMS OF INDIVIDUALS

Professor Małgorzata Gersdorf, Ph.D.

The First President of the Supreme Court
Member of the National Council of the Judiciary

The subject of our meeting today is the issue of the independence of the judiciary in relation to an absolutely fundamental problem, i.e. the status of the individual. It is difficult to find any other topic which would concern each of us so much. After all, what is more valuable than the guarantee of the rights and freedoms of a human being? And especially from the point of view of the courts, the role of which is in fact to protect the freedom of the individual from the whims of other people and the authorities?

Discussing any problem, even that which seems to be quite abstract, the lawyer has to start with the definitions of concepts. The independence of the judiciary stems from the tripartition of powers. If we think more thoroughly on why courts are to be independent, we can see that this is in order to allow them to exercise their power with peace and consideration – power which, at least in Montesquieu's opinion, is "in a sense, none", as it consists of "only" settling individual cases and disputes. This observation seems to be nothing but intellectual provocation. In the treatise "The Spirit of the Laws" the famous thinker emphasised many times that "judgements issued only by the ruler would be an inexhaustible source of injustices and abuses" and this is the only

reason why "in despotic states the ruler may adjudicate personally". In brief, the grand-creator of the concept of the tripartite of powers, in the independence of the judiciary saw the foundation of the legitimisation of any power, and at the same time one of the most vital brakes in the system, preventing the state from sliding towards tyranny.

At this point, the question arises of how Montesquieu's vision of the independence of courts from "the ruler" translates into the modern democratic system of government? Theoretically, there is only one source of power in the contemporary state: this is the nation – the sovereign. Hence the aporia between the homogeneity and the tripartition of powers, which, however, is explainable and possible to overcome, as is accurately indicated especially by Immanuel Kant and his followers. If the state is to respect the status of the human being, there must be both the separation of the functions as well as an element of mutual control and the restraining of the authority between the bodies of public authorities. This is because power which has been separated will not become omnipotent.

Are the courts in Poland independent? On the level of constitutional norms – yes, by all means. The independence of the courts is stipulated several times in the Polish Constitution, specifically in Articles 173, 178 and 186. The constitutional legislator additionally differentiates between the attributes of *niezależność* and *niezawisłość*, i.e. Polish terms denoting courts' and judges' independence, respectively. While the latter of these is assigned to judges, not to courts, in the end courts certainly cannot be independent (*niezależny)* without independent (*niezawisły*) judges. A premise frequently recurring in the body of rulings of the Constitutional Tribunal is that the independence of the courts is tantamount to other authorities' having their influence on the courts minimised, and establishing a kind of monopoly for the administration of justice. The grounds for these rules are looked for not only in the autonomous constitutional order, but also, and perhaps above all, beyond it, within the framework of the legal standards of the European Convention of Human Rights and the Council of Europe.

However, it would be hypocritical of me to claim that nothing should arouse our concern. Its reasons have been widely known, as a matter of fact, for a long time. Now, when the barometer of public moods in the whole of Europe is leaning towards "storm and urge"

again, the emotions concerning the conviction that democracy is ineffective, as never before, do not help in a sober assessment of the situation. This concerns especially Poland, the democratic traditions of which are not as strong as we tend to believe (neither the First nor the Second Republic of Poland were democratic states, even if due to their republican forms of government they had an element of democratism). Courts are – whether we want it or not – one of the first victims of the anarchisation of public mood.

If the diagnosis of the situation is to be complete, it is necessary to indicate the reasons for the evil threatening us. I can name two: the low level of development of the so-called civil society and the gradual deterioration of legal institutions. We cannot do much about the first of these elements immediately. Unfortunately, some Poles do not treat the state as a common good, and where there is no need to be involved in public affairs, the view of existence of the "mafia in gowns" becomes easily ingrained in popular opinion. However, we might try to fight the latter of these two problems when realising what its essence is.

Recent years have seen the introduction of many mechanisms that are controversial in terms of courts' independence. The establishment of a hierarchical administrative and service department which is subordinate to the Ministry of Justice is one of the most important ones. Maybe the idea is right but not necessarily the way in which it is being carried out if presidents of courts do not have a direct impact on the functioning of this sphere of activities performed by institutions which report to them. More and more emphasis is also being put on supervisory instruments, as there is a constant striving for their strengthening.

As responsible citizens we should start with a detailed analysis of the Constitutional Tribunal's body of rulings, which to this day has been rightly treated as a point of reference when introducing all kinds of reforms. It moved through various stages; nevertheless in judgements passed in cases with file numbers U 9/13 and Kp 1/14 (concerning access to court case files) the signal that the supervision of Minister of Justice over courts was limited and could not be freely expanded was loud and clear. Therefore, it is not possible to use every measure leading to the goal which is the strengthening of the politicians' impact on judges and courts, especially if it were to cause a "freezing" effect. The statement of grounds of the judgement in the case Kp 2/05

contains, in turn, a clear stipulation of what would be considered as constitutionally impermissible when it comes to the independence of the courts and the judges being affected by means of limiting, blocking and increasing financial resources to the extent to which their amount is made dependent on the number of judges in relation to the scope of the courts' tasks. The Constitutional Tribunal therefore advocates that the financing of the judiciary from public means be maintained at a stable and predictable level.

Are our courts independent, then? Yes and no. On the one hand, there is good constitutional regulation, on the other a high level of distrust towards courts and judges, which is in my opinion completely undeserved, but manifested in the further amendments of the Act – the Law on Common Courts Organisation. As a result of the alarming tendency in the developments of the law in the last few years, which was discussed above, common courts will have as much independence as the executive power good will. Let's hope it will not show the lack of it!

We do not know what lies ahead for our country. It is very probable that this stage of the independence of the courts which we have "worked out" during the last 25 years is the maximum of what we, as a society, can achieve. Maybe we have yet to mature to real changes for the better through crisis and self-reflection. One seems to be certain, however: the independence is the reverse side of the responsibility for oneself. Therefore, we will not have independent courts without treating the judiciary both in terms of function as well as in terms of organisation and system as power separated from others.

Professor Andrzej Zoll, Ph.D.

President of the Constitutional Tribunal (1993–1997)
Ombudsman (2000–2006)

The subject of today's conference is extremely topical because of the situation which arose in Poland after the elections on 25 October 2015. I have never been a member of any political party, and being a retired Judge of the Constitutional Tribunal does not allow me to be politically involved on any side. However, it is as a judge that I feel I am obliged to speak out when I see a threat to the law, and especially to the constitutional order.

This statement was necessary for you to consider my paper, which mainly serves as a warning, from an appropriate perspective. I am entitled to assume this tone by the steps undertaken by people who obtained a majority in both Houses of Parliament and who are openly supported by the President of Poland. I am encouraged to warn you about that by the thinking of a famous philosopher of law, Bernd Rüthers, who is also *doctor honoris causa* at the Catholic University of Lublin. This notable specialist on the Nazi period and the laws of the totalitarian system warned others that lawyers can effectively withstand forces destructive to democracy only as long as these forces do not reach the plenitude of authority. At present, Poland has reached such a moment when we can try to oppose the gaining of all authority by

one political party, which would exclude any effective control over abiding by the standards of democracy, freedom and civic rights. On 13 November 2015, I heard a statement made by an MP of the ruling party on Polish Radio Channel I. That MP was talking about the necessity of gaining control over the courts as the only authority remaining in the "tentacles" of the Third Polish Republic. On 21 November, I was talking to an MP representing the same party who explicitly told me that the elimination of the Constitutional Tribunal's independence is a prerequisite for introducing certain reforms into the country, which is the aim of the ruling party. The recurring argument involves pointing to the will of the electors. No reasonable person can contest the mandate of the winners of the last elections to fulfil their electoral programme and to introduce changes to the law in force. We cannot forget, however, that the electors did not give the winners permission to change the Constitution. All introduced reforms must comply with the Constitution. Also, there must be authorities that act independently of the legislative and executive powers. These authorities must be able to inspect whether the mandate given by the voters is not being abused. It is necessary in order to protect human and citizens' rights and basic liberties.

Let me remind you about the position of the judiciary that was quite recently expressed.

During the Communist system, as in any system of totalitarian power, there was the doctrine of unified state authority. The courts were not only subordinated by the executive power represented by the Minister of Justice in an organisational way but they were also fully subordinated to the political authority exerted by the Communist party.

In the Communist doctrine, no attention was paid to making a distinction between the independence of the courts and the independence of the judges. These two problems cannot be equated. Andrzej Rzepliński, in his work devoted to the courts of Polish People's Republic, comments on the lack of 'the independence of courts' term in the PZPR (Polish United Workers' Party) programme till the end of 1988. The directive role of the party was justified by the fact that the legislation was the expression of the proletariat's will ruling the country. When the party and its leadership rules the country in the name of the proletariat, it must have an influence on the application of Acts of law.

In most cases judicial independence is declared by law (it also used to be so during the times of the Polish People's Republic), and it is understood as the independence of adjudicating on a particular case as well as the prohibition of interference in specific judicial settlements. Such independence was, in fact, fiction, because of the direct interference of the political authorities while adjudicating on specific cases, and also because of shackling judges with political directives beyond the law.

In a system based on homogenous state authority, judges are treated as state officials who are obliged to serve the state and not to serve the law or the person whose case is the matter of judicial settlement. The protection of state interests, and primarily the protection of the interests of the group ruling the country, is before the protection of the entity's rights in the system of unified state authority. Such a hierarchy of values was clearly outlined in the Act regulating the system of common courts in 1985. According to that law, courts were supposed to guard the political system, then the interests of the socialised economy, and finally individual and financial civic rights and interests guaranteed by the civic order (Article 3). Please note that these were not all civic freedoms and laws only those that were guaranteed by the juridical order of the People's Republic.

The terminology of a totalitarian country referred to judges as "soldiers of the inner front". They were particularly obliged to fight off phenomena which were a threat to the country and the group that ruled it. Therefore, judges were required to fully accept the existing ideology and interpret the law along its lines. The essence of judicial independence was reduced to the duty of acting according to the law, the party guidelines and government politics in official statements. Tadeusz Rek, who was Deputy Minister of Justice in the Polish People's Republic and later a longstanding judge of the Supreme Court, explained judicial independence in that way. He also added that "the judiciary of the Polish People's Republic – the state authority body, the component of the oppression apparatus towards the class enemy – is a body of the proletariat dictatorship and its task is to fully participate in upholding this dictatorship together with all authority bodies".

I remind you of those bad times so as to make you react to the signs of similar practices in contemporary times which are aimed at

making courts and judges an instrument ruled by the authority in order to fulfill political purposes. To prove that it is indeed so, I will remind you of a statement made by Jarosław Kaczyński from 2007 when he was Prime Minister in 'Wiadomości' on Polish TV about the judgement of awarding a farm back to a person whose farm was repossessed by the country after he moved to Germany in the 1970s. The indignant PM criticised the court as being at fault in not taking care of the Polish *raison d'etat*. It is a typical example of putting forward political interest above the law. It is the PM who should protect Polish *raison d'etat*. The court is to protect the law. Ten days ago, we witnessed an unprecedented pressure on the court which was to adjudicate in the second instance in the case of a high officer of the party ruling the country at present who had received a non-final sentence for an intentional crime. This person became part of the government despite the sentence. However, the result of this pressure was unsure and the President, breaking several articles of the Polish Constitution. as well as neglecting the procedure laid down by the Code of Criminal Procedure applicable to granting pardons, decided to 'help out the judicature' and discontinued the proceedings in progress by issuing a pardon. No attention was paid to the fact that also the right to fair trial in respect of the person granted the pardon was infracted (Article 45 of the Constitution) as well as the right of the person who was acting as the prosecutor in the trial and who also lodged an appeal. That trial, despite the President's decision, should be continued and completed with a final judgement.

The condition of real judicial independence, although not sufficient in itself to ensure it, is the institutional independence of the judiciary, which is the simple outcome of implementing the principle of the separation of powers. This principle is, in turn, the foundation of a democratic state under the rule of law.

You cannot treat judiciary independence and the independence of judges in the same way as you do corporate rights, which is often done at present. Judiciary independence and the independence of judges are values which guarantee the observance of freedom and citizenship, as well as human rights, by the authority. You can even say that the basic right of every human being is the right to an independent court and an independent judge in that court as the body considering their case. Article 45.1 of the Constitution deals very well with this.

The judiciary as an independent and separate authority has its legal foundation in the Polish Constitution of 1997. The principles of the separation of powers and the balance of the legislative, executive and judicial power were considered the foundation of the system of the Republic of Poland in Article 10.1. The independence and the distinctiveness of courts and tribunals was clearly stated in Article 173 of the Constitution. The essential administrative supervision over court activity is performed by the Minister of Justice within the limits defined in the regulations. Also, the President of the Republic of Poland has competence clearly defined as the representative of the executive power in the range of judicial power. The National Council of the Judiciary is to uphold the independence of the courts, according to Article 186 of the Polish Constitution.

It can be said that judiciary independence is protected by the law.

Are there any reasons to be worried?

For the first time since the regaining of independence in 1989, all legislative and executive power is in the hands of one party. The ruling party does not have the majority allowing it to change the Constitution. Nevertheless, it is capable of weakening judicial independence using Acts of law. This party will continue doing this, and recent days justify this statement. Also, the draft of the new Constitution which was prepared by Law and Justice (PIS) in 2010 contains a large number of solutions which would weaken the independence of the courts. The majority in both Houses of Parliament and a friendly President ensure an "efficient" legislative process and the passing of laws ensuring the attaining of political goals. Last week's events demonstrated how efficiently this process can be performed.

The only possible way to protect judiciary independence at the present level is to secure the independence of the Constitutional Tribunal and the independence of its judges. These values were directly and dramatically threatened last week. It should be honestly stated that an excuse for this attack on the independence of the Constitutional Tribunal was brought by the previously ruling coalition, which let pass a law that, if not contrary in one aspect to the Constitution, definitely deviated from its democratic spirit. Choosing two judges whose tenure was to start after the beginning of the tenure of the newly elected Parliament was against the spirit of the Constitution. However, there is no legal basis allowing the President of the Republic of Poland to

refuse to take the oath from three judges who were chosen instead of those whose tenure came to an end during the previous tenure of the Parliament. Article 7 of the Constitution is also applicable to the President. No law can dismiss three appropriately chosen judges. Letting this choice be revoked, as it was in the Act passed on 20 November 2015, should be regarded as a constitutional *coup d'etat* by the Sejm and the Senate leading us to the path previously taken by such countries as Belarus, Kazakhstan and Azerbaijan. The Act of 20 November 2015 also includes other regulations flagrantly inconsistent with the Constitution, e.g. shortening the tenure of the President and Vice-President of the Tribunal. I wish to emphasise that the Act provides for reducing the tenure and not introducing the tenure to perform these functions which were not rotated before. Would it be compatible with the Constitution to shorten the judiciary rotation of those two Tribunal members?

I also think that the announced merger of two bodies – the Ministry of Justice and the Attorney General announced in PiS (Law and Justice) electoral programme and by the present Minister of Justice – will weaken the independence of courts. Politicising the prosecutor will have an impact on justice.

It has been said that the judiciary's independence is not a guarantee of the independence of the judges, but it is an essential condition.

The current Constitution is sufficient to ensure the independence of the judges. In Article 178.1 of the Constitution, it is written that judges are independent and are subject only to the Constitution and laws. Article 180 of the Constitution guarantees that judge shall not be removable. The immunity of the judge is widely defined there. The judge has the work conditions and the salary commensurate to the dignity of the position held and the scope of the duties guaranteed in the Constitution. We have no doubt that in Poland, after the experiences of the past, the prohibition of affiliation with any party or trade union is right. It is also a way to secure a judge's independence, even more so in the aspect of guaranteeing the human right for a person's case to be decided by a judge who is free from the direct influence of political parties or trade unions.

A number of measures for protecting the independence of the judges is also regulated in Acts of law. Here, I include the condition of equal salaries for judges which can vary only with the administra-

tive position held and the seniority. The attempt to give judges salaries depending on the results of their work is a simple way to having an impact on their jurisdiction.

It must be remembered that each judge must be independent. The problem of the independence of judges is also a question of their personality as well as their very good professional training.

The independence of judges while settling specific and individual cases must be balanced by binding the judge with the abstract and general standard established by an employer who is constitutionally qualified so as not weaken this independence. In this bond, there is not only the principle of the judge's submission to the Constitution and the laws (Article 178.1) but also the principle of balancing the legislative, executive and judicial power (Article 10.1). The judge is to adjudicate on the basis of the law and under the Acts stated in the law. Article 7 of the Constitution also states that "organs of public authority shall function on the basis of, and within the limits of, the law".

The problem of the degree to which the judge is bound by an Act of law is an interesting issue in the research on the history of jurisprudence. Especially the last 250 years provide a basis for interesting reflection. Beccaria postulated that the judge be fully bound by an Act of law. The law has to be so unambiguous and clear that the role of the judge should be reduced to analysing the facts and subsuming them to the appropriate provision of law. Only then would the citizen not become the slave of the judge. Kant saw it as unacceptable that the judge could be driven by the equity principle. A judge driven by the equity principle would take over the function of the legislator. The trend of strongly binding the judge with the law, as the reaction to the danger of human freedom and rights during the absolutism period, was also associated with the notion of narrowing the judicial interpretation, especially in functional terms.

A turning point in the assessment of the judge's role, especially the issue of the judge being bound by the law, appeared only after a century had passed, at the beginning of the 20th century, under the influence of the Free Law School. The judge's decision was to be made on the basis of the judge's sense of righteousness. The law was only one factor forming this sense. The judge was to base his or her decisions also on other sources such as cultural norms.

Binding the judge with the law in the totalitarian period was discussed in the introduction. The law in this system was to serve the gaining of political targets rather than a barrier justified with objective values, especially those connected with freedom and human rights. The basis of judicial settlement is the law interpreted according to the directives of the totalitarian authority.

Today the question also arises of whether the text of the Act of law passed in appropriate form is the law which the judge should abide by or if the judge is to decide which law is applicable on the basis of other sources. A judge is faced by the dilemma whether to refer to the law which does not follow the rule of a state ruled by law or, neglecting such a regulation, base his or her settlement on the rule of the constitutional norm of a state ruled by law or other norms beyond the law, e.g. a norm of international law.

The issue of binding the judge with a law whose axiology is not accepted by the judge relates to the basic concept of the relation between natural law and positive law.

I think positive law should be different from moral order and even the order which is accepted by the majority. Legal order and moral order have different functions. Only in totalitarianism and fundamentalism, the norms of the law are the same as the moral norms accepted by the ruling authority. Of course, also in a democratic state ruled by law, the law is based on the axiological order. There are no juridical norms completely separated from axiology. Two basic values of the moral order – human dignity and the common good – are foundations for the constitutional order and the legal order based on it.

Going back to the dilemma presented above, I think that a judge cannot pass over the law lightly and base his or her judgment directly on the constitutional norm because of Article 178 of the Constitution. Doing so can lead to weakening the meaning of the Constitution as the foundation of the juridical order through different interpretations of the constitutional norms. It would influence in a negative way the protection of freedom and human rights, increase juridical uncertainty and weaken the predictability of court decisions. It does not mean that the judge should only follow laws whose compatibility with the Constitution is negated by the judge. In my opinion, the only acceptable way is to use Article 193 of the Constitution and submit an enquiry to

the Constitutional Tribunal. This is the only body entitled to assess the compatibility of laws with the Constitution, and its interpretation of constitutional norms should be binding on the courts primarily because of the values I was talking about: the protection of freedom and rights and the predictability of court decisions.

Finally, I would like to discuss one more issue – how far can the legislator interfere with the judiciary, how big an impact can the legislator have on the decisions of the court, which is after all the body that should administer justice? The problem is especially topical in terms of criminal law. It involves the obligatory consequences of attributing a criminal offence which is increasingly frequent in criminal law and restricts the options of the judiciary in favour of an arbitrary decision by the legislator.

We should regret that the problem was not solved in a settlement of the Constitutional Tribunal. Such an opportunity arose in connection with the Tribunal's looking into the constitutionality of the law passed on 27 July 2005 amending the criminal code, among other things, in terms of sanctions for aggravated murder, restricting punishment which would be equivalent to the judge's sense of justice and judicial assessment in terms of the preventive functions of punishment. Unfortunately, the Constitutional Tribunal acknowledged the lack of compatibility of the law with the Constitution in its judgment of 16 July 2009 because of breaching the procedure for passing it without commenting on the essence of the issue.

I hope that today's conference, as well as the attitude of judges and the public, can convince the government that it is in the democratic interest of a state ruled by law and of Poland as a member of the international community that upholds certain standards in terms of the independence of the courts and the judges and, primarily, in the interest of citizens, to give up the plans for weakening these values. There also must be an increase in judges' self-discipline and an improvement in the functioning of the judiciary, especially in the effectiveness of court proceedings. The citizen does not have to be satisfied with the court's settlement if there was no legal foundation to acknowledge his or her arguments. There should not be any justified claims as regards to the time taken for looking into a case in the court and the way of treating the person by the court.

Jarosław Gwizdak

Judge

President of the Katowice-Zachód District Court

I would like to share with you some reflections concerning the cooperation between a court president and director, also in the context of the Civil Judge of the Year title, which I have been awarded, and also to present to you my views on the functioning of the judiciary from the perspective of a president of a district court.

When taking up the position of the President of the Katowice-Zachód District Court, I assured my superior, the President of the Regional Court in Katowice, that I will do everything to make the image of the justice system a positive one, and to make sure the Court is perceived in a positive way and remains active in the public space and public dialogue.

I reckoned that, despite housing problems that we face every day with the court being located in two venues separated by a distance of two kilometres, and each of these buildings being a historic monument, we will have to adapt at least one of them to the needs of people with disabilities.

Having finished the overhaul, with an installed lift for the disabled, a separate entrance, ramps and handrails, I decided to carry out an audit of the building. During the audit I was accompanied by the

chairman of the Katowice-based "Aktywne Życie" ("Active Life") Association, who uses a wheelchair to move about, and who also provided me with one for this audit.

The experience of this "tour" was incredible. First and foremost it made me aware of all architectural barriers, and the gravity or problems arising even from smallest thresholds and bumps. I could also experience for myself that what is in line with the rules and regulations and "accepted" by the supervisory authorities is not always ergonomic, friendly and convenient. Once again law is lagging behind life. This was a lesson of empathy and compassion every judge needs.

Paradoxically the publicity enjoyed by the action in the local media has yielded a concrete result. We managed to get rid of a high kerb from the parking space for the disabled, which was under the city's administration.

Undoubtedly, however, all these actions, in addition to "media" image of the infrastructure modernisation, were facilitated by the director of the court. I have no doubt that I should share this award with the director or plea for her being awarded the title of the "Civil Director of the Year." Article 8 of the Law on Common Courts' Organisation shall serve here as a legal basis.

I sometimes refer to the Katowice-Zachód District Court in Katowice as a "social court" due to the specificity of the court's jurisdiction: we examine all family and juvenile cases, as well as labour and social-insurance cases from the whole of Katowice, and, at the same time, the court has no commercial, registration and land and mortgage register divisions.

I always explain to the judges that usually our court is visited by miserable people, and that it is only up to us (and not because of the content of the decisions, but the way it is passed and how participants in a dispute are heard and treated) to decide whether they leave the courthouse even more miserable or, on the contrary, reassured. Once again I would like to draw you attention to empathy necessary for judges to fulfil their service.

Moving on to detailed remarks on cooperation, and the division of duties between the director and president of a court, I have observed that at the beginning this idea had been cautiously taken up by the commentators. It was indicated that entrusting some economic, HR-re-

lated and financial duties to a qualified manager will make it possible to reduce the workload of court presidents who could be relieved of duties requiring knowledge of public finances, HR management and the technical functioning of the unit.

Hence, the presidents were to remain, as already stated today, "wise leaders of independent judges." At the same time the commentators drew our attention to the fact that depriving the presidents of direct impact on the court budget, and making it fully dependable of the Minister of Justice, can substantially hamper the correct functioning of the court.

We should repeat after judge Irena Kamińska that the judiciary has "no purse or sword." In particular this lack of purse or even ability to influence how it is emptied makes the efficient functioning of courts much more difficult. I would like judges to work in fairly comfortable, normal conditions. Comfortable chairs, also in courtrooms, and air-conditioned, spacious rooms. Very often these are unattainable luxuries.

I have my personal typology of court directors, based on my own experience and a number of conversations held. I classify directors into two categories: "mainly chief accountants" and "true managers". It appears to me that the former form a vast majority. Is it more conducive to the efficient and dynamic functioning of the justice system? I think we know the answer.

Among the presidents of courts participating in a programme for modernising the management of justice system units, we came up with a comparison that the court president is a director in "a judiciary theatre," while the director is a producer.

I identify myself with modern Polish theatre represented, among others, by Maja Kleczewska, Ewelina Marciniak and Jan Klata, which is somewhat in opposition to classical and canon theatre. I am aware that a producer in such a theatre can have a hard time, but I am striving to ensure that our cooperation is based first and foremost on dialogue, consensus and cooperation.

I would like actors of this "judiciary theatre" to work in comfortable conditions. That is a truism. I would like ordered envelopes not to be sold with cheap glue that when heated in a printer glues their electronic parts and the repair costs much more than apparent savings made due to the cheap price.

I would like the aforementioned court security service not to be composed of pensioners, usually with some disability and outsourced cleaners not to suffer asthma attacks in court corridors. In my opinion this is simply not proper for the third power.

I am a president. I try to lead, direct and motivate.

I assume that thank to the appropriate division of competencies and tasks, I will be able to support judges without thinking about the said envelopes, security or software for the HR department.

Finally, I would like to share with you one last story. For nearly two years we have in our court a new judge, and I am extremely pleased, as her superior, with her achievements, attitude and quality of decisions. I went to her office to tell her that. I said: "I am very pleased that you work with us, your rulings are spot on, and you are a very valuable member of our team". She listened and asked me: "Could you please repeat that? This is the first time ever somebody praised me". Another example of empathy?!

It is a matter of judge's self-awareness, the way we cooperate, how our superior see us. This shows that sometimes it is a good idea to tell somebody some good words. This is how I understand leadership, support and motivating judges and facilitating their development. I would like the conditions of effecting the justice system, also in respect of the appropriate division of competencies between the court president and director, to facilitate such leadership.

Tomasz Wardyński

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THE INDEPENDENCE OF THE JUDICIARY AS A GUARANTEE OF RIGHTS AND FREEDOMS OF INDIVIDUALS

The elements and institutions of the state under the rule of law are abstract notions. Understanding them is not easy for the general public. It is not hard to understand the structure of a building, the function of groundbeams, foundation pillars and cantilevers. However, it is more difficult to comprehend such notions as the independence of the judges, courts and, in general, the independence of the legal professions in the so-called judiciary. A builder who deprives a building of beams supporting its structure, endangering the residents of the building, is subject to criminal liability. A politician who persuades public opinion to get rid of the crucial elements of the state under the rule of law is met with the approval of the public after the latter has been negatively motivated.

The state under the rule of law is a specific social contract, according to which the political elites perform legislative and executive

roles. Lawyers perform the roles of judges, public prosecutors, barristers and legal counsels. The media's role is to educate and inform society about the nature of the socio-political system and the threats it faces. The individuals assuming the above-mentioned roles must fulfil their obligations in a genuine way, in line with their mission. Actions counter to this mission will always be an abuse causing the collapse of the state under the rule of law.

At the beginning of the 20th century Max Weber, and in the second half of the century Hans Jonas, defined the so-called ethics of responsibility as ethical principles applying to politicians and people performing social-utility functions, crucial from the perspective of the operation of the state under the rule of law. The ethics of responsibility defines the obligation of politicians, journalists, barristers, legal counsels and civil servants to bear responsibility for future generations, which must be taken into consideration when making decisions within the functions performed by them. This is particularly crucial, as the generations who have not been born yet, and also those already born but not holding voting rights, are not adequately represented. The basis for all fair actions taken by individuals performing roles of significance for society consists of three basic elements: logos, ethos and pathos.

Unfortunately, reality departs significantly from theory. Political parties have lost the status of civil society's institutions of social utility. Politics has ceased to be about competing programmes and has moved to the sphere of symbols, whose only goal is to gain power. The media are becoming "tabloidised" for commercial reasons, thus betraying their mission. Practising lawyers often speak to the press about court judgments without being familiar with the case files. In this way they are struggling to become celebrities (while the only acceptable form of criticising court judgments is writing legal commentaries and publishing them in the applicable periodicals).

As we could observe during the recent electoral campaign, politicians' actions are based mainly on evoking negative emotions among the general public, which by nature is thoughtless, cruel and unjust. This is a way of promoting ideas that in fact destroy the rule of law, such as the dissolution of the Senate and the Constitutional Tribunal, whose role is to protect the minority against the dictate of the majority.

There were also proposals to place judges under the control of bodies that implement the ideas of populist justice.

The society in which we live does not have an immunological system to protect it against such harmful actions. As I mentioned at the beginning, the state under the rule of law is an abstract idea, and, in order to understanding its structure and its dynamic mechanism, one needs the appropriate education. If the primary education system included issues related to law and economy, it would be possible to expect that adult voters make rational decisions, similar to those that they would make in relation to an incompetent architect or constructor.

The culture of spectacle promoted by today's media provokes state actors to act unprofessionally and contrary to the principle of ethics. Surveillance and interference with privacy have become commonplace and characterise the public life. Blackmailed political elites are helpless towards the mediocrity of character and the lack of understanding of the true role of the state, which they are supposed to protect. The media, instead of reacting in a responsible way, enter the game, amplifying the circle of wrongdoing and justifying their participation in their destructive activities by referring to the freedom of speech.

One of the elements of the culture of spectacle is public support for particular people to make them popular but to later destroy them. Both phases involve a significant number of onlookers, who first observe the life of a celebrity climbing up the social ladder, satisfying their need of voyeurism, and later watch the artificially created celebrity being thrown down from the pedestal and humiliated in public.

The informational function of the media has been subordinated to invoking sensation. The obligation to educate, explain and organise social discourse on matters critical for future generations is performed perfunctorily and often in bad faith. People who organise discussions on TV stations provoke aggression among the participants, and individuals who interview important figures from the social and political sphere use them as an opportunity to promote only themselves. The result is the demise of the culture of media-animated discourse, which would maintain the level of social awareness necessary for the functioning of the state under the rule of law.

Through the media, politicians are trying to gain control over the judiciary. The media, instead of focusing on conscientious reporting

(to which they are fully entitled) evoke negative emotions towards the courts, criticise their judgments without trying to become familiar with the case in detail, or even try to pressure the judges.

Actions with a possible impact on judges' decisions, i.e. aimed at limiting their independence, take a number of forms. They often involve public opinion and shaping its judgments on problems arising in a particular court case. This often takes the form of lobbyists who represent the economic interests of specific social groups and influence the media. Usually certain emotions are built around the case, with the precise formulation of a specific resolution appearing at a certain moment. Sometimes the media also participate in creating "Public Enemy Number One" by skilfully generating social hysteria, which has some impact on court judgments in particular cases.

Another method is reports on proceedings, in which the media, abusing the rights of freedom of speech vested on them, suggest solutions to legal problems and interpret regulations or make conclusions on facts on the basis of the interpretation of evidence. Such actions are equivalent to the imperceptible yet effective pressure on the court, as they shape the individual decision of the court, which could be different if the court acted in peace, without being distracted or pressured. What is even worse, comments on judgments are also formulated by lawyers, in spite of the fact that the only form in which lawyers can submit such comments is the official legal commentary.

The third form of coercion is personal attacks on judges who have issued judgments contrary to what was expected by the media. As a rule, in such situations the media apply specific sanctions on judges by dragging out stories from their personal life, searching for concealed reasons of their alleged partiality, discussing in public their origins and family relations, and often commenting on their private lives and the political choices of their parents or distant family. An example of such actions is the press publications on the family of Judge Igor Tuleya and Wojciech Łączewski.

The frequency of such actions naturally causes society to lose trust towards the judiciary and is likely to lead it to support parties whose political programme provides for the limitation of the independence of judges. All the described forms of pressure, including ruthless criticism from political groups, which leads to a situation in which the judiciary

loses its authority, is subject to influences, and begins to make decisions dangerous from the perspective of the functioning of the state under the rule of law. This creates self-aggression that disintegrates civil society in the same way that an autoimmune disease devastates a human system.

Judges are only people, and are as susceptible to the influence of their environment as any other person. This susceptibility, or amenability, however, differs depending on the culture of their community, their principles, models and professional competence. The independence of the courts in a state is a result of the sum of the independence of each of the judges. There is a difference in the level of independence between judges who started working in the profession directly after studies, following a few years' preparation, e.g. in law schools, and judges who become such due to their professional experience and due to the fact that their previous careers had proven their intellectual independence and professional integrity. The difference is crucial due to the ever-present pressure from the politicians on the judiciary in every political system.

There is no state in the world in which the executive power does not try to impose a negative impact on the judiciary. The effectiveness of such attempts, however, depends on the legal culture of the given community.

As a rule, politicians use the media to destroy the esteem of people or institutions with whom or with which they are in conflict. Yet there are states in which the authority of the judiciary is deeply rooted in social awareness and protected by specifically designed legal instruments; states in which the independence of judges and the judiciary is the sum of the intellectual independence of each and every judge related to their level of experience, education and tradition.

Professor Andrzej Zoll, in his lecture opening today's conference, pointed to all formal and conceptual drawbacks of the judiciary in the People's Republic of Poland. However, those who were involved in the operations of the judiciary during that time know that the anomalies resulted mainly from the functioning of the so-called special-purpose departments consisting of politically corrupt people. The overall functioning of the judiciary, as far as issues of ordinary citizens are concerned, was proper, and most judges can now be regarded as models of independence. This is because these people have gone through the experience of World War II, the ultimate test of character.

A special role in preventing the erosion of social trust towards the judiciary can and should be played by press secretaries of the court. They should inform the community, instead of the media, on the principles of the functioning of the state and of the motives behind the judgments passed. All organisational problems faced by courts, which have an impact on the perception of the judiciary by the public, can be solved by taking inspiration from solutions adopted in other European countries. We are not alone. In every EU Member State, professionals dealing with the judiciary are, to a lesser or greater extent, obligated to continuous care for preserving the independence of the judicial authority. There is no need to invent anything new here. The independence of judges and legal professions is not a privilege of corporations but a fundamental guarantee of law and order and the protection of citizens' rights. Therefore, we need to unite our forces to protect this independence.

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