

# JUDICIAL MANAGEMENT VERSUS INDEPENDENCE OF JUDICIARY

edited by  
Dobrosława Szumiło-Kulczycka  
Katarzyna Gajda-Roszczyńska

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MONOGRAFIE

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## ABBREVIATIONS

ABA	- American Bar Association
ADR	- Alternative Dispute Resolution
Amend.	- amendment
Art.	- article
C.S.M.	- High Council for the Judiciary in Italy (Consiglio Superiore della Magistratura)
CBOS	- Polish Public Opinion Research Center (Centrum Badania Opinii Społecznej)
CCJE	- Consultative Council of European Judges
CCP	- Polish Code of Civil Procedure (Kodeks postępowania cywilnego)
CEELI	- Central and Eastern European Law Initiative
CEPEJ	- European Commission for the Efficiency of Justice of the Council of Europe
CJEU	- Court of Justice of the European Union
Cl.	- clause
CoE	- Council of Europe
CPC	- Polish Criminal Procedure Code (Kodeks postępowania karnego)
CSM	- High Council of the Judiciary in Portugal (Conselho Superior da Magistratura)
EAJ	- European Association of Judges
ECFR	- Charter of Fundamental Rights of the European Union
ECHR	- European Convention on Human Rights
ECJ	- European Court of Justice
ECtHR	- European Court of Human Rights



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ENCJ	-	European Network of Councils for the Judiciary
EU	-	European Union
Fed. R. Civ. P.	-	Federal Rules of Civil Procedure (United States of America)
HCJ	-	High Council of Justice in Ukraine (Vyscha Rada Pravyosuddia)
HJCs	-	High Judicial Councils
HQCJ	-	High Qualifications Commission of Judges of Ukraine
IBA	-	International Bar Association
ICC	-	International Criminal Court in The Hague
ICTY	-	International Criminal Tribunal for the former Yugoslavia
KRS	-	National Council of the Judiciary in Poland (Krajowa Rada Sądownictwa)
LEC	-	Spanish Law on Civil Procedure (Ley de Enjuiciamiento Civil)
LOPJ	-	Spanish Organic Law on the Judiciary (Ley Orgánica del Poder Judicial)
MEDEL	-	Association of European Judges for Democracy and Liberty (Magistrats Européens pour la Démocratie et les Libertés)
NGO	-	non-governmental organisation
ODIHR	-	Office for Democratic Institutions and Human Rights
OECD	-	Organisation for Economic Co-operation and Development
PiS	-	“Law and Justice” Polish political party (Prawo i Sprawiedliwość)
PO	-	“Civic Platform” Polish political party (Platforma Obywatelska)
PSL	-	“Polish People’s Party” (Polskie Stronnictwo Ludowe)
SCC	-	Supreme Court of Canada
Sec.	-	section
TEU	-	Treaty on European Union
TFEU	-	Treaty on the Functioning of the European Union
UDHR	-	Universal Declaration of Human Rights
UN	-	United Nations
ZPO	-	German Code of Civil Procedure (Zivilprozeßordnung)

## Cited journals and official law collections

AnwBl	–	Anwaltsblatt
An. UMCS	–	Annales Universitatis Mariae Curie-Skłodowska
BOE	–	Boletín Oficial del Estado (Spanish Official Journal)
Dz.U.	–	Dziennik Ustaw (Polish Journal of Laws)
EPS	–	Europejski Przegląd Sądowy
GSW	–	Gazeta Sądowa Warszawska
KTS	–	Konkurs Treuhand Sanierung – Zeitschrift für Insolvenzrecht
MittBayNot	–	Mitteilungen des Bayerischen Notarvereins
MPP	–	Monitor Prawa Pracy
OJ EU	–	Official Journal of the European Union
OSNAPiUS	–	Orzecznictwo Sądu Najwyższego, Izba Administracyjna, Pracy i Ubezpieczeń Społecznych
OSNCP	–	Orzecznictwo Sądu Najwyższego, Izba Cywilna, Pracy i Ubezpieczeń Społecznych
OSNP	–	Orzecznictwo Sądu Najwyższego, Izba Pracy, Ubezpieczeń Społecznych i Spraw Publicznych
OTK	–	Orzecznictwo Trybunału Konstytucyjnego
OTK-A	–	Orzecznictwo Trybunału Konstytucyjnego, zbiór urzędowy, Seria A
PiP	–	Państwo i Prawo
PiZS	–	Praca i Zabezpieczenie Społeczne
PPC	–	Polski Proces Cywilny
PPH	–	Przegląd Prawa Handlowego
PPiA	–	Przegląd Prawa i Administracji
Prok. i Pr.	–	Prokuratura i Prawo
PS	–	Przegląd Sądowy
R.Pr.	–	Radca Prawny
RPEiS	–	Ruch Prawniczy, Ekonomiczny i Socjologiczny
SCR	–	Supreme Court Records (Canada)
ZfRV	–	Zeitschrift für Europarecht, Internationales Privatrecht und Rechtsvergleichung
ZNIBPS	–	Zeszyty Naukowe Instytutu Badania Prawa Sądowego
ZZP	–	Zeitschrift für Zivilprozeß



## INTRODUCTION

The present publication is a summary of a conference held at the Chair of Criminal Procedure and Department of Civil Procedure, Faculty of Law and Administration of the Jagiellonian University in Kraków on 8 December 2017, entitled *Court Management and Access to Justice System*. The event was co-organised by the “Iustitia” Association of Polish Judges, the MEDEL Association of European Judges for Democracy and Liberty, as well as the Chair of Civil Procedure at the Faculty of Law and Administration of the University of Silesia in Katowice. The conference was under the auspices of Professor Wojciech Nowak, Rector of the Jagiellonian University, Professor Małgorzata Gersdorf, First President of the Supreme Court, Professor Jacek Majchrowski, Mayor of the City of Kraków, and the National Council of the Judiciary. The event gathered representatives of many European organisations of judges (the European Network of Councils for the Judiciary, the Consultative Council of European Judges at the Council of Europe, the European Commission for the Efficiency of Justice of the Council of Europe), as well as judges (including judges of international courts and tribunals, presidents and judges from the supreme courts in Poland and abroad), and academics and scholars specialising in different aspects of judicial law.

The topic of the conference is extremely pertinent considering the ongoing public discussion, not only in Poland, about the effectiveness of the systems of justice, and the reforms of courts and bodies of legal protection undertaken by governments in various countries. Therefore, it comes as no surprise that much attention was focused especially on the issues related to the autonomy of courts, the independence

of judges, and the existing safeguards in this respect. European standards of the judges' conduct, as well as the elaborated codes of ethics resulting from many years of discussions held in professional circles and based on the experience of judges about how courts function have been broadly presented and discussed, with particular focus placed on the countries undergoing a political transformation from authoritarianism to democracy. The autonomy of the judiciary and the independence of courts are the necessary pillars of a democratic legal order, and extremely important components of the political system of the state and of checks and balances. Attempts at changing the system observed in different countries not only undermine the autonomy of courts and the bodies guarding them, but also exert different pressures on judges who, instead of serving the society and its citizens in protecting their civil rights and freedoms, are expected to act in the interest of the state and the political power. Such attempts have to be met with utmost opposition. The dangers of such a situation have been addressed in many of the speeches during the conference.

As Dean of the Faculty of Law and Administration of the Jagiellonian University, I am very happy that the conference participants, and in particular the speakers, accepted the invitation to share their views on the access to the system of justice, court management and autonomy, and the independence of judges. I would like to thank all the authors whose papers are included in this volume for their involvement in preparing it. Let me also express my gratitude to those responsible for the professional organisation of the conference and the publication of the present book. I should particularly like to thank Dr hab. Dobrosława Szumiło-Kulczycka and her associates without whose engagement and everyday efforts the event and the publication would not have been possible.

*Kraków, 19 February 2018*

*Prof. Jerzy Pisuliński, PhD habil.  
Dean of the Faculty of Law and Administration  
Jagiellonian University*

PART I

**CHANGES IN COURT MANAGEMENT  
AND THE POSITION OF A JUDGE  
IN THE POLISH LEGAL SYSTEM**



Krystian Markiewicz

## THE BATTLE FOR FREE COURTS IN POLAND IN THE YEARS 2015–2018

1. The fundamental human right – the right to a fair trial before an independent court is based on a triad of directives.

The first one stipulates the right of access to courts, next the right to the appropriately formed court procedures (a fair and public, transparent trial), as well as the right to judgment.<sup>1</sup> All these three are mu-

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<sup>1</sup> See S. Pilipiec, “Teoretycznoprawne aspekty zasady prawa do sądu”, An. UMCS Sectio G, Lublin 2000, p. 227; M. Wyrzykowski, “Zasada demokratycznego państwa prawa”, [in:] *Zasady podstawowe polskiej Konstytucji*, (ed.) W. Sokolewicz, Warsaw 1998, p. 82; H. Pietrzkowski, “Prawo do rzetelnego procesu w świetle zmienionej procedury cywilnej”, PS 2005, No. 10, p. 37 and *passim*; P. Pogonowski, *Realizacja prawa do sądu w postępowaniu cywilnym*, Warsaw 2005, p. 1 and *passim*; A. Zieliński, “Prawo do sądu i organizacja władzy sądowniczej”, [in:] *Księga XX-lecia orzecznictwa Trybunału Konstytucyjnego*, Warsaw 2006, p. 484; M. Kłopotcka, “Prawo do sądu w orzecznictwie Trybunału Konstytucyjnego”, Acta Universitatis Wratislaviensis, PPIA, 2007, No. 76, pp. 71–80; P. Sarnecki, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, (ed.) L. Garlicki, Vol. III, 2003, comments to Art. 45, p. 3, comment no. 5; M. Zubik, “Sprawowanie wymiaru sprawiedliwości w świetle Konstytucji i orzecznictwa Trybunału Konstytucyjnego”, PS 2005, No. 3, p. 10; A. Włosińska, “Prawo do sprawiedliwego procesu cywilnego w świetle orzecznictwa Europejskiego Trybunału Praw Człowieka”, [in:] *Współczesne przemiany postępowania cywilnego*, (ed.) P. Pogonowski, P. Cioch, E. Gapska, J. Nowińska, Warsaw 2010, p. 88; K. Marszał, *Proces karny. Zagadnienia ogólne*, Katowice 2008, p. 57; K. Osajda, “Zasada sprawiedliwości proceduralnej w orzecznictwie Trybunału Konstytucyjnego”, [in:] *Orzecznictwo Trybunału Konstytucyjnego a Kodeks postępowania cywilnego*, (ed.) T. Ereciński, K. Weitz, Warsaw 2010, pp. 429–472; T. Ereciński, K. Weitz, “Prawda i równość stron w postępowaniu cywilnym a orzecznictwo Trybunału Konstytucyjnego”, [in:] *Orzecznictwo Trybunału Konstytucyjnego...*, (ed.) T. Ereciński, K. Weitz, pp. 36 and 40; M. Pilich, “Wpływ orzeczeń



tually connected, and the element that interconnects them is the court as an autonomous institution (Art. 6 of the European Convention of Human Rights and Fundamental Freedoms [ECHR], Art. 10 and Art. 45 of the Constitution of the Republic of Poland).

The autonomy and independence of the judiciary have always been perceived as a necessary and fundamental condition for the proper functioning of the system of justice. “The idea of the autonomy of courts has been the red thread intertwining throughout the entire history of culture, beginning with the oath given by judges in ancient Egypt – not to execute orders of the king which would violate the law – and up to the famous response given to the French king: ‘Sir, the court issues judgments but does not provide services’.”<sup>2</sup>

The autonomy of courts and the independence of judges with a simultaneous administrative oversight by the executive branch have for years been one of the most sensitive problems in the judiciary.<sup>3</sup> After all, it is beyond any doubt that there do appear moments of contention between the two powers. It is the executive branch that has the biggest inclination to take over power from the other two. The separation

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Trybunału Konstytucyjnego na Kodeks postępowania cywilnego”, [in:] *Orzecznictwo Trybunału Konstytucyjnego...*, (ed.) T. Ereciński, K. Weitz, p. 333 and *passim*; Ł. Błaszczak, [in:] *Postępowanie cywilne*, E. Marszałkowska-Krześ (ed.), Warsaw 2011, p. 57; the Constitutional Tribunal judgment of 9 June 1998, K. 28/97, OTK 1998, No. 4, item 50; the Constitutional Tribunal judgment of 10 July 2000, SK 12/99, OTK 2000, No. 5, item 143; the Constitutional Tribunal judgment of 12 March 2002, P 9/01, OTK-A 2002, No. 2, item 14; the Constitutional Tribunal judgment of 20 November 2007, SK 57/05, OTK-A 2007, No. 10, item 125; the Constitutional Tribunal judgment of 27 May 2008, P 59/07, OTK-A 2008, No. 4, item 64.

<sup>2</sup> E. Waškowski, *System procesu cywilnego*, Vilnius 1932, p. 47 and *passim*. The author writes that Frederick Wilhem I threatened in 1739 that every attorney who would approach him with a complaint about a court’s judgment would be hanged and a dog hanged next to him.

<sup>3</sup> S. Włodyka, “Nadzór nad orzecznictwem sądowym w sprawach cywilnych w świetle zasady niezawisłości sędziowskiej”, [in:] *Rozprawy prawnicze. Księga pamiątkowa dla uczczenia pracy naukowej Kazimierza Przybyłowskiego*, Kraków–Warsaw 1964, p. 482; W. Miszewski, “Dwa fragmenty nadzoru w sądownictwie na tle prawa o ustroju sądów powszechnych”, RPEiS 1929, No. 2, p. 551; the Constitutional Tribunal judgment of 24 June 1998, K 3/98, OTK 1998, sentence 4, item 52.

of the three powers – both genetically and historically – has been first and foremost aimed at harnessing any attempts of such expansion.<sup>4</sup> The biggest threat to civil rights and freedoms, including access to courts, comes from the executive branch.<sup>5</sup> The present situation is actually one in which this is no longer a threat but an actual violation of the system of checks and balances by representatives of the executive power.<sup>6</sup>

We now live in times when, on the one hand, history has come full circle and returned to the period from before World War II<sup>7</sup> and, on the other hand, we are forced to look at what is happening in a different light. The slogans inciting to fight the courts are voiced by both the executive and the legislative branches, which have mutually

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<sup>4</sup> E. Łętowska, J. Łętowski, “Co wynika dla sądów z konstytucyjnej zasady podziału władz”, [in:] *Konstytucja i gwarancje jej przestrzegania. Księga pamiątkowa ku czci Profesor Janiny Zakrzewskiej*, (ed.) J. Trzciński, A. Jankiewicz, Warsaw 1996, p. 386.

<sup>5</sup> A. Mogilnicki, “Niezawisłość sędziów w nowym ustroju sądowym”, GSW 1928, No. 13, p. 195; K. Piasecki, *Organizacja wymiaru sprawiedliwości w Polsce*, Zakamycze 2005, pp. 22 and 165; L. Garlicki, “Pojęcie i cechy ‘sądu’ w świetle orzecznictwa Europejskiej Konwencji Praw Człowieka”, [in:] *Trzecia władza. Sądy i trybunały w Polsce. Materiały Jubileuszowego L Ogólnopolskiego Zjazdu Katedr i Zakładów Prawa Konstytucyjnego, Gdynia, 24–26 kwietnia 2008 r.*, (ed.) A. Szymt, Gdańsk 2008, p. 149; also for international jurisprudence, see S. Golonka, C. Czech-Śmiałkowski, “Niezależność sądów i niezawisłość sędziów w prawie i orzecznictwie międzynarodowym”, PS 2007, No. 1, pp. 19–20. Cf. J. Wróblewski, rev. G. Freddi, *Tensioni e conflitti nella magistratura*, Roma–Bari 1978, ZNIBPS 1979, No. 11, p. 240 ff; A. Peyrefitte, *Wymiar sprawiedliwości: między ideałem a rzeczywistością*, transl. J. M. Padlewska, (ed.) B. Hołyst, Warsaw 1987, in particular Chapter 3.

<sup>6</sup> See A. Ratajczak, “Polityczne i prawne uwarunkowania niezależności sądów oraz niezawisłości sędziów w III Rzeczypospolitej”, [in:] *Prawo – społeczeństwo – jednostka. Księga jubileuszowa dedykowana Profesorowi Leszkowi Kubickiemu*, (ed.) A. Łopatka, B. Kunicka-Michalska, S. Kiewlicz, Warsaw 2003, p. 104; L. Garlicki, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Vol. IV, Warsaw 2005, comment 10 to Art. 178; M. Jabłoński, “Uwagi o ewolucji gwarancji niezawisłości i niezależności sędziów i sądów powszechnych”, [in:] *Studia nad prawem konstytucyjnym*, (ed.) J. Trzciński, B. Banaszak, Wrocław 1997, p. 119 and *passim*; A. Zieliński, “Wokół reformy polskiego sądownictwa”, PiP 2009, No. 2, p. 15. See also the resolution of the Council of the Faculty of Law and Administration of the University of Warsaw of 19 March 2007 on the threats to a democratic state rule of law, PiP 2007, No. 4, p. 111.

<sup>7</sup> Paper delivered by Judge of the Supreme Court, Jacek Gudowski, during the celebrations of the centennial of the reborn Polish judiciary at the seat of the National Council of the Judiciary, Warsaw, 28 September 2017, Iustitia 3(29)/2017.

**Dobrosława Szumiło-Kulczycka** – Doctor habil. of Laws, Associate Professor of the Jagiellonian University in Kraków, Chair of Criminal Procedure; Head of the ARS Centre for Alternative Dispute Resolution at the Jagiellonian University; attorney-at-law; Alexander von Humboldt Foundation research fellow; author of over 70 publications on law and criminal procedure, access to a fair trial before court, and relations between the right to privacy and the right to safety.

**Katarzyna Gajda-Roszczyńska** – Doctor of Laws, Assistant Professor at the Chair of Civil Procedure of the University of Silesia in Katowice; judge; member of: the Editorial Board of the “Polski Proces Cywilny” legal quarterly, the Scientific Association of Civil Procedure Law Academics, the “Iustitia” Association of Polish Judges, the Social Codification Committee, the ARS Centre for Alternative Dispute Resolution at the Jagiellonian University; author of over 60 publications on civil procedure and the court system, organisation, and case examination process.

The foregoing monograph is the first to present the situation of the Polish judiciary after the reforms of 2015–2018 against the background of the international standards of managing the justice system and in the context of regulations and models adopted in other legal systems. The publication contains papers by about twenty international and Polish authors (academics, judges of international adjudicating bodies, and local judges), which are an excellent commentary for debate on the direction and rationality of the ongoing changes in Poland with respect to court management and the legal and systemic guarantees of the judges’ status.

“The subject matter of this collection gets to the core of the problems which the Polish judiciary contends with. First of all, one can find studies on judicial independence analysed from various points of view: related with the structure of the courts’ system and their management (papers by Noel Rubotham, Stephen P. Anthony, Vittorio Fanchiotti, Henrik Engell Rhod, Artur Dionísio Oliveira) and the role of independent associations of judges (Nuria Díaz Abad, Gualtiero Michelini). The contributors also draw attention to the impact that the constitution and its interpretation have on respect for judicial independence (John McClellan Marshall) and to the participation of citizenry in the administration of justice (Aleksandra Karpińska).

The papers provide an insight into the way in which proper operation of the justice system, judicial independence and its guarantees related with the appointment and irremovability of judges, as well as acceptance of their independent associations, are ensured both in the common law countries and those basing on the civil law tradition, including ‘new democratic’ states.”

*Prof. Piotr Hofmański, PhD habil.*



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