

## Andrzej Rzepliński

### To Be a Judge

Being a Judge is equally beautiful and utterly absorbing as being a doctor or 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, an 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 judging belongs to “one of the most fundamental functions in each society”<sup>1</sup>.

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”<sup>2</sup>. 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”<sup>3</sup>.

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”<sup>4</sup>.

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 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*.<sup>5</sup>

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<sup>1</sup> *Israel Drapkin*, The Art of Sentencing: Some Criminological Considerations, “Reports of UNAFEI”, 1979, No. 16, p. 53.

<sup>2</sup> *Salomon Ladier*, Proces karny w Talmudzie (A Penal Trial in the Talmud), Lwów 1933, p. 46.

<sup>3</sup> *Tomasz z Akwinu*, Cnoty społeczne pokrewne sprawiedliwości (Treatise on Justice), transl. F. W. Bednarski, Londyn 1972, qu.110, p. 4, 5.

<sup>4</sup> *W. I. Lenin*, Dzieła wszystkie (The Collected Works), Warszawa 1989, vol. 44, pp. 317, 379, 394.

<sup>5</sup> *Ingo Müller*, Hitler’s Justice. The Courts of the Third Reich, Harvard University Press 1991; *Helmut Ortner*, Der Hinrichter: Roland Freisler – Mörder im Dienste Hitlers, Nomen 2009.

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 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<sup>6</sup>. 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<sup>7</sup>, 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-year 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

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<sup>6</sup> The 8<sup>th</sup> 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 10<sup>th</sup> principle it follows that judges shall be “individuals of integrity and ability, with appropriate training and qualifications in law”, see *Andrzej Rzepliński*, 1981, *Niezawisłość sądownictwa w świetle norm ONZ (The Independence of the Judiciary in the Light of the UN Norms)*, “Tygodnik Powszechny” 33|1987. 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).

<sup>7</sup> *Andrzej Rzepliński*, *Die Justiz in der Volksrepublik Polen*, Dieter Simon (Vorwort), Frankfurt am Main 1996.

to be 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*<sup>8</sup>, 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 co-operation, 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”<sup>9</sup>. 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 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 an 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*<sup>10</sup>. To be a judge, one has to, more often than not, demonstrate the strength that is 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

<sup>8</sup> Cf. *Gustaw Radbruch*, *Filozofia prawa (Rechtsphilosophie)*, transl. Ewa Nowak, Warszawa 2012, pp. 79–84, 241–243.

<sup>9</sup> *Ewa Łętowska*, *Prawo bywa bardzo piękne (The Law is Sometimes Very Beautiful)*, an interview in Channel Three of the Polish Radio of February 27, 2011.

<sup>10</sup> Cf. *Ronald Dworkin*, *Biorąc prawa poważnie (Taking Laws Seriously)*, Warszawa 1998; *Ronald Dworkin*, *Imperium prawa (Law's Empire)*, Warszawa 2006.

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 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 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 the criterion of adjudication given to him by law<sup>11</sup>. 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 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*)<sup>12</sup>. If a

<sup>11</sup> Cf. *Marek Sajjan*, *Wyzwania dla państwa prawa* (Challenges for a State Ruled by Law), Warszawa 2007, pp. 81–82.

<sup>12</sup> Cf. *Agnieszka Kacprzak/Jerzy Krzynówek/Witold Wołodkiewicz*, *Rugulae iuris. Łacińskie inskrypcje na kolumnach Sądu Najwyższego Rzeczypospolitej Polskiej* (Rugulae iuris. Latin Inscriptions on the Columns of the Supreme Court of the Republic of Poland), Warszawa 2006, pp. 92–93.

judge followed them – as Professor *Juliusz Makarewicz* said – “we would probably still be burning witches at the stake”<sup>13</sup>.

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.<sup>14</sup> 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.

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<sup>15</sup>. 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.<sup>16</sup> There is some power in the profession of a judge that holds back even political hooligans.

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

<sup>13</sup> *Lech Gardocki*, *Naprawdę jesteśmy trzecią władzą* (We Really Are the Third Power), Warszawa 2008, p. 119.

<sup>14</sup> *Aharon Barak*, *The Judge In a Democracy*, Princeton 2006, p. 311.

<sup>15</sup> See e. g. *Maria Stanowska/Adam Strzembosz*, *Sędziowie warszawscy w czasie próby 1981–1988* (Warsaw-Based Judges During the Time of Test, 1981–1988), Warszawa 2005, pp. 255–257.

<sup>16</sup> *Ibid.*, *Stanowska/Strzembosz*, fn. 15; *Hans Petter Graver*, *Judges Against Justice. On Judges. When the Rule of Law is Under Attack*, Berlin/Heidelberg 2015, pp. 259–270.

of the supreme court or the constitutional tribunal. The fact 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. They perceive the mere fact of not succumbing to the pressure – rather erroneously – as a 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 a judge's career, an artist of law, is an important actor – which particularly applies to a constitutional judge – in the protection of constitutional democracy and the 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*)<sup>17</sup>, 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 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.

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<sup>17</sup> *Kacprzak/Krzynówek/Wołodkiewicz*, fn. 12, p. 103.