



Andrzej Rzepliński

President of the Polish
Constitutional Court

TO BE A JUDGE

Being a judge is equally as beautiful and utterly as absorbing as being a doctor or being a scholar. The profession of 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 given 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 the moral courage to judge specific persons. This entails that judging belongs to “one of the most fundamental functions in each society”¹.

The importance that societies have always attached to selecting possibly the best persons to fill these posts is well demonstrated by the requirements posed for 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 Saint 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 serve 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 legitimise 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 recognise any private ownership. From criminal court judges he demanded his two favourite punishments: either death by firing squad or deportation for forced labour. The punishments had to be “merciless”, the courts had to be “militant” – “the proletariat’s courts”, he wrote, “should know what to allow”⁴.

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

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

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

4 W.I. Lenin, *Dzieła wszystkie (The Collected Works)*, Warsaw, 1989, vol. 44, pp. 317, 379, 394.

Within the system of a totalitarian state, there was no room for an independent judge. Even though the regime gradually softened, and the judiciary's terror subsided accordingly, the subsequent generations of judges were prepared for service by judges who, through their rulings, had 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 the 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 demoralising judges as Lenin was⁵.

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 need judges, also in periods of decline, to maintain control over society. Admittedly, this was already to be achieved at lesser expense. It had been hard to govern with bayonets. The control of people began to be exercised using relatively soft measures. This created a niche for most judges. Particularly those who preserved some institutional memory of the pre-Communist or pre-Nazi eras.

Many judges then still 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 that were binding in the countries of free Europe.

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

For the transformation of the judiciary to be fully completed, it is necessary, after the period of transformation, for the new judges to be prepared for their role by older colleagues who have adjudicated throughout their lives in a State ruled by law where the separation of powers is a well-established and unquestioned principle. This means decades of practice, as in the Bible's story of forty years of exodus from Egyptian slavery. One cannot buy time.

Just as it has been throughout the centuries, also at the present time, societies demand judges who are men of integrity and who have adequate intellectual capabilities, good work-organisation skills and solid knowledge of the law and its application⁶. Not every lawyer who has passed a judge's exam is able to meet such requirements.

I have devoted thirty years to research on the history of the judiciary, to analysing the essence and challenges of a judge's authority⁷, to the formation of the system of courts guaranteeing the separation of the three powers in Poland and in other countries, and furthermore, to the active defence of judges against attacks, as well as to monitoring the procedures of the judges' appointment to office and to monitoring the quality of the work of courts and judges.

5 Ingo 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.

6 The eighth 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 tenth 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 (see The World Conference on the Independence of Justice, Working Documents, Montreal, June 5-10, 1983).

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

I have held the office of judge in the Constitutional Court for 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 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 dignified assembly, so uniquely important for over 800 million Europeans – this assembly of outstanding judges, judges of those millions of people, also my judges. I decided to ask myself this question, as expressed in the title: what does it mean to be a judge? For the needs of my speech today, I have gathered thoughts that have come to mind at various stages of my career as judge and in my research on the judiciary.

Referring to the concept of antinomy in the idea of law from the work of Gustav Radbruch⁸, I would say that a judge's public function is to realise an idea of law which comprises legal security, common good and justice. In the case of a constitutional judge, this means assessing 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 man and the 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 bear responsibility. This is an extremely difficult task, requiring no mean 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 the 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 the court-house. Some judges are better at the art of judging, others are not so good. 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 of importance from the perspective of the European Convention, may actually outplay the first violin, as in a chamber symphony orchestra. But just as in an orchestra, nearly each work of art that an unprecedented judgment, referred to for years to come, undoubtedly is, will be a common achievement of various 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, together with – an equally salient point – any other judges who have adjudicated upon the 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 the skill of bridging 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 reason did Ronald Dworkin present in his works the character of the judge as Hercules¹⁰. To be a judge, one has to, more often than not, demonstrate a strength that is comparable to the strength of a Greek hero.

8 See Gustaw Radbruch, *Filozofia prawa (Rechtsphilosophie)*, transl. Ewa Nowak, Warsaw, 2012, pp. 79–84, 241–243.

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

10 See Ronald Dworkin, *Biorąc prawa poważnie (Taking Laws Seriously)*, Warsaw 1998; Ronald Dworkin, *Imperium prawa (Law's Empire)*, Warsaw 2006.

In order to thoroughly fulfil the public function of a judge, i.e. – as I mentioned above – to realise an idea of 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 an individual. A judge must possess certain traits of character and personality. Among the most important ones, as 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 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. he 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 whereby everyone is given his due, or another objective criterion, is linked with another indispensable trait of a judge as an individual – 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 fore, as a condition of a judge's independence – and is able to think critically, i.e. is intellectually independent. Otherwise he will be dependent on the knowledge and views of other people, for example, other judges or his assistants. An independent judge is also someone who is internally independent, adjudicating not on the basis of his views and postulates, but on the basis of the criterion of adjudication conferred on him by law¹¹. In the case of constitutional judges, this criterion is the Constitution.

A judge must also be a sensitive individual. 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 legal norms with 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 as they do the reliable holding of the public function entrusted to him, also include humility. This is an oft-forgotten trait. Meanwhile, the awareness of one's own imperfection, and – by the same token – fallibility, is a judge's indispensable tool that makes him able to choose the best solutions, and not always those invented by himself. Humility will also be necessary to be able to accept reasonable criticism of the decisions made – on the part both of professionals and of public opinion, the voice of which, in a democratic State ruled by law, a judge cannot disregard.

Therefore, a judge must thoroughly justify his decisions in order to explain to others, and to public opinion in general, 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, and 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 judges had followed such voices – as Professor Juliusz Makarewicz said – “we would probably still be burning witches at the stake”¹³.

11 See Marek Safjan, *Wyzwania dla państwa prawa* (Challenges for a State Ruled by Law), Warsaw 2007, pp. 81–82.

12 See 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*), Warsaw 2006, pp. 92–93.

13 Lech Gardocki, *Naprawdę jesteśmy trzecią władzą* (*We Really Are the Third Power*), Warsaw 2008, p. 119.

To be a judge is also to offer the parties to the proceedings one's moderate temperament, to be equally loyal towards each participant in the proceedings. This means understanding 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 manner¹⁴. 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 the public office entrusted to him, a judge must also be a courageous person. He has to have the courage to take a different stand from that of 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, be it political, community-related or ideological. A courageous judge applies the law in a manner independent of what others expect of him. As a dignified example of this, I would mention some of the judges who adjudicated 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 peaceful opposition against the regime¹⁵. The courage of those judges restored the law's authority and dignity. In their hands, the law was what it was supposed to be: a tool allowing people to be protected from abuse by 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 legitimise an authoritarian regime. A Polish judge who, in 1980, joined the peaceful "Solidarity" movement, then about a dozen months later, when the Communist party declared a war against society, was interrogated by military supervisors, could either withdraw from "Solidarity" and condemn his political "error", or defend his attitude and the principles of a freedom-loving movement and sentence himself to banishment from the judiciary. Each of those judges was faithful to the judge's oath that he had taken: to conscientiously guard the law. The decree on martial law of December 1981 was an unlawful act, even in the light of the Communist Constitution. Every courageous judge who departed from the court or was removed from the judiciary delegitimised the regime and throughout the 1980s became a role model for the judges who stayed on the sidelines and for the judges that were just entering the profession. A regime usually steps back when confronted with a courageous judge¹⁶. 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 court 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 may happen that this causes irritation among political leaders who demonstrate 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 court. 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 is perceived by them – rather erroneously – as delegitimising their authority. The history of such tensions shows that judges/presidents of such courts have had sufficient courage and determination to protect the integrity of their courts. Usually, the best solution for such tension has been 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.

14 Aharon Barak, *The Judge In a Democracy*. Princeton 2006, p. 311.

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

16 Ibid, Maria Stanowska, Adam Strzembosz; Hans Petter Graver, *Judges Against Justice. On Judges When the Rule of Law is Under Attack*. Berlin Heidelberg 2015, pp. 259-270.

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 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 of its foundations. To be a judge means to be an individual 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 the question as to what kind of satisfaction a judge may expect from meeting these tough requirements, from subordinating his life to the profession of judge? There is no doubt that a good judge may find an interest in expecting the 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 both this law and this system will be.

17 Agnieszka Kacprzak, Jerzy Krzynówek, Witold Wołodkiewicz, op. cit., p. 103.