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Problem of Applying the Law on Positivist Grounds, Judge's Dilemmas, Judicial Paradoxes

The paper tackles contemporary problems of law application which can be identified in the area of legal positivism, e.g. moral evaluation of the law in the course of judicial interpretation or degree of free evaluation of positive law by a judge in the context of law enforcement criteria. In the culture of statutory law, it is stressed that processes of law making and law applying must be separated. At the same time, a judge should be characterized by moderation in terms of interpretation and decision-making. The author attempts to combine the extreme approaches resulting from these different paradigms: the one perceiving a judge as a „mouth of an act" and the other involving a non-positivist postulate of quasi-creation of law meaning through a free reconstruction of norms from laws.

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Courts and judges have power over the meaning of the law. It is so because courts represent the last link in the chain of „making-interpreting-applying" law. It is also the reason why it is so important to determine how judges can and should exercise this power. On the one hand, we believe that law operates the way the lawmaker has intended/has made it. On the other, the lawmaker's decision is a formalised, conventional text, whose real face is revealed once it starts to be applied and interpreted.

I was asked to present my arguments in the light of legal positivism. This is an ambitious, but at the

same time a very topical task. The question concerns the role played by judges in the process of applying the law as well as their role in public life, their power.

The courts have always sought, and rightly so, to be freed of political influence. Legal positivism was an expression, actually a guarantee, of the apoliticism of judges. Today's debate about the admissibility and scope of judicial activism raises concerns about the broadly understood politicisation of judges. The question is also about whether formalised law should be the sole basis on which judges make their determinations. Whether, and if so, to what extent, can moral issues be the subject of judicial deliberations and whether such issues shouldn't belong to the exclusive competence of the lawmaker?

The title of my article also presumes the existence of judicial dilemmas. Should judges have dilemmas, should they be regarded as unthinking machines whose task is to apply legislation? I can answer this question right away. Judges should be torn by dilemmas. A judge who has no doubts is a very dangerous judge. One can also easily see the danger of choosing comfort over challenges, which makes it difficult to the right decisions.

Ethics gives a specific meaning to the notion of dilemma. Dilemmas are situations of conflict of duties or obligations, in which the choice of one mode of conduct prevents one from taking a different course of action and thus results in doing specific evil, and when it is also necessary to choose one of the different modes of conduct. The notion of dilemma that lawyers use to express their moral experience as it relates to the exercise of their professions is much broader than the one used in ethics. It encompasses not so much ethical dilemmas in the strict meaning of the word, but also many other situations that lawyers regard as morally difficult or questionable.

And it is precisely such morally difficult or questionable situations that make us ask the following question: how should judges conduct themselves and how the law should be applied in a specific situation.

So, with respect to legal positivism, we are dealing with a dispute over whether judicial activism should be admissible, and if yes, then within the framework of this excessive activity of the judges, the dispute concerns the grounds on which judges should take their decisions.

Positivist concepts were born and developed in the 19th century primarily in the wake of the social and political transformations that swept across Europe. The many concepts of legal positivism are based on the one belief that legislation is willed by the lawmaker and is not the result of natural law[1].

1 Białas-Zielińska K., „Koncepcje pozytywizmu prawniczego i iusnaturalizmu w ujęciu Gustava Radbrucha" *Prace Naukowe Wydziału Prawa, Administracji i Ekonomii Uniwersytetu Wrocławskiego*, No. 5,

An important assumption made by contemporary positivists is the admission that legal norms being an expression of language carry „open textness". They contain vague, assessing expressions or general clauses, the meaning of a legal norm also depends on the context in which it is expressed. In effect, the legal system does not identify one right solution in all specific cases. The judge interprets and choses one judgement – in his opinion the most appropriate – from among many possibilities[2]. In this approach, individual judges are forced to accept a specific interpretation of legislative provisions if they want to solve their dilemmas. They are forced to accept complicated interpreting figures.

Positivism as a method offers the conviction that law is autonomous, independent of political and economic phenomena, and indicates that the conceptual apparatus of law and jurisprudence that lawyers use is universal[3]. Using this method to educate shielded legal culture, to a great extent, against the conviction that law is a derivative of ideology or economic and political phenomena. Positivism, at least in the methodological sense, developed a model of a lawyer that can easily be applied in the concept of a rule of law state[4].

A positivist approach to law works during times of stability when there are no fundamental differences between codified law and values accepted by the society. It is not the case today.

Provisions of law are constructed so as to give judges a margin of discretion to allow them to make their own assessments. The application of law is not a zero-sum system. If legal norms were created to make only one interpretation leading to only one right decision possible, there would be no need for judges. One could also envisage a scenario that with progress in new technologies and big data, some of today's judicial decisions will soon be replaced by algorithms, especially when it comes to cases involving a simple juxtaposition of facts and the relevant norm. Situations involving such cases would be quite rare. Cases (not to mention the hardest ones) are usually complex and their assessment is open to different interpretations, which are a derivative of both the state of knowledge of a judge and his independence and impartiality, as well as of his conscience.

Today, judges are no longer regarded as „the mouth of the law." The judge's duty is to derive a fair ruling from the law. Hence, the ability to judge

2010. https://www.bibliotekacyfrowa.pl/dlibra/publication/29521/edition/35304/content.

2 Katarzyna Doliwa, „Tomasza Hobbesa koncepcja prawa a współczesny <miękki> pozytywizm prawniczy" *IDEA – Studia nad strukturą i rozwojem pojęć filozoficznych*, t. XXVII (2015): 279.

3 Marek Zirk-Sadowski, „Rządność sądów a zarządzanie przez sądy" *Zarządzanie Publiczne*, No. 1 (2009): 50.

4 Ibidem.

fairly should be the judge's greatest attribute. The positivist idea that the law is tantamount to an act of law is being questioned today, both in the doctrine and in practice. The concept of law is being increasingly understood not only as a body of acts of law and normative acts, but also as a set of principles and ideals invoked by courts when they construe the Constitution and acts of law and when they write the grounds for their decisions[5].

Today, we assume that judicial activism occurs whenever the judge is forced to make his own decision, when the act of law has not made the decision for him or when the decision is incomplete (when a regulation is a work in progress[6]). Given such facts – the lawmaker himself forces judges to be active. This reason alone argues in favour of open governance of the courts, as opposed to a positivist isolationism of judges[7].

Even though there are no doubts that the judge should not replace the lawmaker, since his role is to apply the law, not to make it, almost always the judge has to adjust the law to the needs of a specific case so that he can deliver a fair ruling. His judicial conscience can help him do that.

In Poland, every incumbent judge takes an oath from the President of the Republic of Poland. This oath says that the judge will rule consistently with the laws in force and his own conscience. So conscience is affirmed by legal norm. The text of the oath taken by judges is provided for by Article 66 of the Act on Common Courts Organisation: „At the appointment, a judge makes the solemn affirmation before the President of the Republic of Poland, in accordance with the following formula: »I affirm solemnly, holding the post of common court judge entrusted to me, to serve faithfully the Republic of Poland, to guard the law, to perform scrupulously the duties arising from my position, to administer justice, without any bias, according to my conscience and to the rules of law, to keep legally protected secrets, and to be guided by the principles of dignity and honesty«; the person making this affirmation may finish it by saying: »So help me God«". Judges of administrative courts, of the Supreme Administrative Court, and of the Supreme Court take the same oath pursuant to referenced provisions of law.

Therefore, judges should also be acting according to their conscience when they exercise their authority, and resolve judge's dilemmas. Conscience

5 Lech Morawski, *Główne problemy współczesnej filozofii prawa. Prawo w toku przemian* (Warszawa, LexisNexis, 1999), 199.

6 More on the subject: Lech Morawski, „Kilka uwag w sprawie sędziowskiego aktywizmu", [w:] *Dyskrecjonalność w prawie. Materiały XVIII Ogólnopolskiego Zjazdu Katedr Teorii i Filozofii Prawa, Miedzeszyn k. Warszawy, 22–24 września 2008 r*, red. Wiesław Staśkiewicz, Tomasz Stawecki (Warszawa, LexisNexis, 2010), 93-104.

7 More on the subject: Marek Zirk-Sadowski, „Rządność sądów a zarządzanie przez sądy" *Zarządzanie Publiczne* nr 7 (2009): 54.

– in a Polish dictionary – is defined as a "mental capacity, an ability to adequately assess one's conduct as conforming or not with the accepted ethical norms, awareness of one's moral responsibility for one's own deeds and behaviour"[8].

Jerzy Zajadło distinguished[9] situations when the judge's conscience can operate. The first analogy that comes to mind is the physician's conscience clause. Yet, it is hard to accept the application of this clause directly. If, by operation of law, judges could invoke the conscience clause, this would practically give them the right to refuse to examine a case on the grounds of their worldview. I believe that this should not be so. The judge's task and service is to rule on every case that he/she examines. Attorneys-at-law can refuse to take a case or can say that something cannot be done. Judges can't do that.

Second, English-language literature has identified a phenomenon defined as judicial resistance and legal change. It refers to situations in which projected or enacted legislative changes cause individual judges and/or a part/the entire judicial community to resent them out of a critical assessment of the rationality of such proposed legislation or out of habit and scepticism towards anything new. It often takes on the form of a sort of an internal voice of opposition. This voice is not triggered by a system of private religious or ethical beliefs like in the case of the conscience clause, but rather by a broadly understood professionalism – both in the positive sense (knowledge and experience), and in the negative sense (conservatism and routine).

Third, situations in which axiological conflicts occur can trigger problems with a judge's conscience. However, these problems are different from the ones described above that were compared to a physician's conscience clause. Their source is not, strictly speaking, a religious or ethical worldview, but rather that which literature on the philosophy of law refers to as hard cases. This involves situations when the application of a specific piece of legislation forces the judge to make a ruling with which he does not agree on the grounds of his professed standards of legitimacy. And this last dilemma is a subject of particular interest from the point of view of the subject matter of this paper.

It is assumed that in situations like these, the clash between a judge's conscience and his duty of obedience to the act of law can lead to one of the following solutions.

In the first case, we can be dealing with an escape into formalism and the application of an act of law irrespective of its moral or amoral nature or the effects of its application. This brings us close to legal positivism, which

8 *Uniwersalny słownik języka polskiego*, red. Stanisław Dubisz (Warszawa: Wydawnictwo Naukowe PWN 2008), 145.

9 Jerzy Zajadło, „Sumienie sędziego" *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, no. 4 (2017): 33-37.

gives a judge the comfort of solving all of his doubts for him. Since the act of law says so, the judge's internal conviction is of no importance. The judge turns his back to the problem and hides behind the authority of the formal letter of the law.

In the second case, the judge may reject an immoral act of law and rule *contra legem* on the grounds of what his conscience dictates him to do. If that happens, then the judge has to consider the possibility that his judgement will be quashed, and the judge of the last instance has to be ready to accept that the ruling which is contrary to the law will be rightly criticised.

The third possibility is to resign from the job. This is a simple solution, but one that does not solve the problem, just passes it on to another judge, who will be confronted with this necessity.

Finally the fourth option is to resort to judicial activism that was discussed earlier. It can assume the form of a dynamic and creative, but consistent with the law interpretation (especially whenever the lawmaker left some room for this) or a form of subversion that will bend the act of law to fit the requirements of one's conscience, knowing that this is an action *contra legem*, albeit hidden and veiled in specific arguments intended often to hide real motives.

Thus, our attention should be focused in particular on the choice of the path of subversion. A judge, when he rules, does not forget what his conscience dictates, but also does not openly oppose the language of the act of law. In other words, it is an attempt to bend the text of an act of law to limits that his conscience finds bearable. This always prompts a question about the moment when discretion accorded to judges is transgressed. It is not possible to delimit in an abstract way the admissible ways of escaping into subversion or the admissible „depth" of this escape. Everything depends on the circumstances of a specific case. A possible common denominator is the interest of the man whom we are judging in a specific case and, on the other hand, the interest of the state, which should also be taken into account. These values, so self-evident today, move us even further away from the tenets of legal positivism.

In the event of a collision between legal and moral norms, a judge should be able to assess and balance the colliding values. Judicial activism is especially important – and anticipated by the public – wherever the quality of codified law is not good and the courts are the last link that can mend a bad law in the process of applying it.

So judges have an obligation to rule consistently with the law, but also with their own consciences. If a ruling delivered consistently with the law is to be considered just, it has to conform to the principle of legality as well as

be equitable. When weighing the two values of legal certainty and equitability of judgements, they cannot be separated[10].

The postulate to change lawyers' attitudes towards the law in the process of its application and the demand that they assume outright responsibility for the contents of the law clashes with radical positivism ordering lawyers to demonstrate mainly a cognitive attitude. It is an expression of a new, active vision of applying the law which is beginning to pave its way in legal culture[11].

When a judge delivers a ruling, he must account for formalism (because he is bound by the text of an act of law) and the consequences of his decisions. When applying the law, a judge should also bear in mind ethical norms, always see the man whose case he is judging. He should also be aware of the systemic context, that his ruling could produce unexpected effects.

Our conference discusses the quality and shape of people-to-people relations that are described, regulated and protected by law. Allow me then to give you an example of a problem, which has stirred a legal controversy in Poland and which reflects the dilemmas described here earlier. In one case[12] before the Supreme Court an issue arose whether liability can be ascribed in connection with the injured person who had been diagnosed with a brain stroke too late and because of this he suffered grievous bodily harm (resulting in a total lack of contact, among other things) for breaking family ties. This gave rise to a question about the categories of ties that are protected by law, the type of bonds (degree of intensity) that needs to be demonstrated for them to be protected and to what extent can protection of the emotional sphere and feelings arising from bonds with our close ones can be objectivised. On the one hand – out of pure empathy, we sense that the breaking of family ties, the feeling of being wronged – should be compensated in some way. And such rulings (let us call them "empathic") have appeared earlier in the Polish legal space. Expressing the need for the existence of legal protection in situations like this one – confronted with the lack of relevant legislation - this protection was sought by means of recognising family ties as personal rights which opened up the way for compensation in case they were violated.

However, let us not forget that the adoption of an absolute system of protection of personal rights involves giving absolute *erga omnes* effect to the laws that protect these rights. The notion of „personal right/interest" captured in its normative form refers to the sphere where rights and obligations of

10 Aneta Łazarska, *Niezawisłość sędziowska i jej gwarancje w procesie cywilnym*, Warszawa 2018, par. „*Niezawisłość sędziowska w ujęciu pozytywnym*". Lexonline.

11 Zirk-Sadowski, „*Rządność sądów*", 49.

12 Supreme Court resolution of 22 October 2019 passed in a bench of seven SC judges, I NSNZP 2/19.

subjects of legal relationships are developed. It is about expecting everyone else to be passive and the obligation to respect specific interests of the rights holder. Consequently, this protection cannot be based on a subjective concept of personal rights/interests, tying their existence to personal experience or feelings of an individual. Whereas family bonds are based on a positive relationship between people, one that satisfies the emotional needs of individuals who share a growing feeling of responsibility, but also of their respective self-worth, permits individuals to fulfil themselves in the social role of a family member. This role cannot be identified with biological descent and so it does not occur automatically between individuals descending from one another nor can it be identified with carrying out a legal transaction in the form of, for example, submitting a document certifying they are free to marry or adopt. It requires a specific degree of emotional commitment between people whom it is to bind and with time it should transform itself[13]. This way of understanding the notion of a bond refers to the factual situation, which by its nature is only relatively stable, and its existence depends on the will of another individual. An interpersonal bond is of an interpersonal nature. Personal interests do not protect relations, but the position and values of an individual person.

Acknowledging family ties (which include, in addition to the situation mentioned earlier also the matter of marital faithfulness or children's obedience towards their parents, etc.) to be personal interests would represent a real normative revolution. One could, for example, imagine a court decision ordering a child to maintain family ties with a parent (because the child does not see his parents even on Christmas) or a decision ordering a third party to cease violating the family ties of spouses (because the husband is unfaithful to his wife).

Reaching in Polish case law for the construction of a personal right/interest is „a demonstration of jurisdictional helplessness that comes up in judicial decisions whenever there is a need to judge a morally (socially, psychologically) just claim, but one for which there is no (…) simple reference in positive law. (…) [A] wrong done breeds a normal human reaction to redress it; however, neither a wrong nor an even extreme form of violation of an individual's feelings does not represent a sufficient, constructive motive to make references to the category of personal interests"[14]. When courts create tort law - which goes against the statutory model - they violate the principle of statutory exclusivity of regulating rights and obligations derived from the principle of a democratic state ruled by law. Interpretation of legislative provisions should stop where creation of norms begins, which a lawmaker

13 Supreme Court judgement of 20 August 2015, II CSK 595/14.

14 Jacek Gudowski, SCJ, dissenting opinion to reasons for Supreme Court resolution of 27 March 2018 passed in a bench of seven SC judges, III CZP 60/17.

deliberately left out of the legal system, especially considering their potential broader consequences.

This is just one example of a hard case. The art of judging has lost one of its traditional attributes, namely straightforward referencing to legislative texts. In so-called hard cases, judges are left with one option: to find a solution outside the law.

So can a judge have personal opinions, feelings? The answer should be affirmative. Judges are human, too. In administering justice, a judge should make sure that his independence and integrity are never questioned. However, apart from this aspect, a judge is not allowed to disclose his personal convictions.

We had an interesting case in Poland some time ago. A judge who ran for the National Council of the Judiciary (Polish: KRS) came to a public hearing organised by the Helsinki Human Rights Foundation and when the hearing was officially over, he handed the organisers a copy of the New Testament. He explained that he had done it to show the source that shaped his hierarchy of values. This was considered a violation of the principle of impartiality; it was argued that by doing so he had destroyed the trust of atheists, among others, that they would be judged fairly. He was not elected to the KRS. This example shows the importance of judicial restraint. I have recently attended a lecture by a US court judge. As an example she said that a judge is not even allowed to declare himself to be against racism (which would seem to be the expected norm for a judge), because if such judge were to try a case involving a racist, the defendant could question his impartiality.

Judicial activism is now a fact. On the one hand, it is a reaction to judge's dilemmas, a way to resolve them. On the other, however, in this new open space for activity, the judiciary's traditional attribute, independence, could be seen as providing grounds for making courts unpredictable if they have no straightforward relation and they judge exclusively on the basis of a legislative text. The concept of the court and of the judge is gradually expanding and getting out from under the domination of the state. It is hard to predict how this process will develop. One can only see harbingers of new solutions. However, they should be given forms that would favour benefits over losses.

All extremes are dangerous. On the one hand, traditional legal positivism carried the risk of oversimplification and moral ignorance. On the other, too much of judicial activism (especially when it becomes subversion) can lead to excessive moral arbitrariness and subjectiveness. One should always be mindful of the risk of one's own subjective approach, adopted as a primacy, over the objective sense of law. In both cases, the ultimate victim is our sense of justice.

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