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The Tribulations of Polish Judges (2015–2023) or the Sally-Anne Test of Judicial Independence

Abstract: The issue of judicial independence in Poland has deservedly attracted attention in academic circles in recent years. In this article, I address this issue by examining how the stress test of constitutional democracy proceeded within the Polish judiciary. I argue that developments in Poland exposed weakness in an important constitutional doctrine of judicial independence. Therefore, I seek to complicate the picture by bringing to light some older developments, pre-2015, but also by referring to a psychological experiment dealing with false beliefs (the Sally-Anne test). This article is an attempt to show what lessons can be drawn from Poland's democratic backsliding, focusing particularly on why the issue of judicial independence failed to generate electoral change after 2015 and how the legalists' reliance on legal proceedings proved ineffective. The concept of *constitutional fracking* is introduced to show how the Polish Allied Right ruling bloc exploited inconsistencies in the concept of judicial independence.

Keywords: judicial independence, penal populism, democratic backsliding, courts

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"The constitution and laws of a State are rarely attacked from the front,
it is against secret and gradual attacks that a Nation must chiefly guard."
Emmerich de Vattel, The Law of Nations, 1758

Introduction

Consider Poland, who was once handsome and tall as you (paraphrasing T.S. Eliot). We have seen "the unprecedented rapidity of Poland's descent into authoritarianism, with Poland having been identified as the world's most autocratising country for the period 2010–2020 by democracy experts."[2] A significant part of the constitutional breakdown in Poland in the 2015–2023 period involved multifaceted efforts to subjugate the judiciary by the Allied Right regime, of which PiS – the *Law and Justice* party – was the dominant coalition member. As of mid-2024, we have probably entered a prolonged transitional period. Although the democratic opposition forces cumulatively won the parliamentary election in October 2023 and successfully formed a new government, the Allied Right remains a formidable parliamentary minority supported both by millions of voters and by Andrzej Duda, the President of the Republic, who will remain in power till 2025. What happened in Poland after the autumn of 2015 when PiS won the parliamentary election may be considered a stress test of constitutional democracy. It exposed weaknesses in important constitutional doctrines and dogmas, like the virtues of the constitutional review and the independence of the judiciary. This essay is an attempt to complicate the picture by bringing to light some earlier developments and tensions in the doctrine of judicial independence.

The process of subjugating Polish judges to harsh political control would not be possible without the false beliefs of the Polish citizenry regarding the proper role of the courts, which were distorted by penal populism. A coherent

2 Laurent Pech and Dimitry Kochenov, *Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case* (Swedish Institute for European Policy Studies, 2021), 64.

legal theory of mind is required to see through the Allied Right deception regarding judges' autonomy, hence the reference to a psychological experiment dealing with false beliefs (the Sally-Anne test). In this essay, I argue that this heightened understanding will also lead to challenging the term "judicial independence" which in Poland was earlier emptied of any significant normative meaning.

The Tribulations of Polish Judges Since 2015

The process of seizing control of the judiciary by the political group led by PiS began in earnest in 2017 after the Constitutional Tribunal was subjugated and disempowered.[3] Huge efforts were made to subdue Polish judges, an important stage of which was taking over the National Council of the Judiciary (NCJ) which has the sole right to nominate judges for appointment by the President of the Republic. By using the previously "reformed" Constitutional Tribunal and the newly staffed NCJ, the ruling bloc was able to continue the process of seizing control of the judiciary and of repressing disobedient judges from within. The report "Justice under pressure" drawn up by judges from the Polish Judges' Association "Iustitia" and a prosecutor from the "Lex Super Omnia" Association of Prosecutors gives testimony to the scale of the hard and soft repressions used against Polish judges in the years 2015–2019.[4] Apart from many disparate sources,[5] the book "Poland's Constitutional Break-

3 See Tomasz Tadeusz Koncewicz, "The Capture of the Polish Constitutional Tribunal and Beyond: Of Institution(s), Fidelities and the Rule of Law in Flux," *Review of Central and East European Law* 43, no. 2(2018): 116–73, https://doi.org/10.1163/15730352-04302002.

4 See generally Jakub Kościerzyński, ed., *Justice Under Pressure – Repressions as a Means of Attempting to Take Control over the Judiciary and the Prosecution in Poland. Years 2015–2019* (Stowarzyszenia Sędziów Polskich „Iustitia", 2019), https://n.iustitia.pl/wp-content/uploads/2020/02/Raport_EN.pdf.

5 See, inter alia: Ewa Łętowska, *Defending the Judiciary: Strategies of Resistance in Poland's Judiciary*, Verfassungsblog, published September 27, 2022, https://verfassungsblog.de/defending-the-judiciary/; Piotr Radziewicz, "Judicial Change to the Law-in-Action of Constitutional Review of Statutes in Poland," *Utrecht Law Review* 18, no. 1(2022): 29–44, https://doi.org/10.36633/ulr.689.

down" by Wojciech Sadurski presents a comprehensive account of the collapse of Poland's constitutional democracy up to October 2018, including in the field of the judiciary.[6] In 2021, three experienced commentators stated that "Poland can now be considered the first EU Member State to no longer have an independent judicial branch following years of sustained attacks deliberately targeting Polish courts, judges and prosecutors."[7] Although the Polish Constitution devoted a whole chapter to "Courts and Tribunals" – with explicit assertions that courts should be independent of other branches of power, and furthermore that judges, within the exercise of their office, should be independent and subject only to the Constitution and statutes – these seemingly robust guarantees were largely disregarded or circumvented.

The PiS government's targeting of the judiciary should not have come as a surprise, considering that the PiS-led coalition intended to shake up the Polish political system. The number of judges that openly resisted the pressure from the new PiS regime could be counted in dozens rather than thousands. Any indications of resistance were met with swift reprisals, both in the form of official disciplinary measures and informal personal harassment. One should also not overestimate the scale of public support for the independent judiciary in Poland. Though thousands of people protested in cities across Poland against judicial reforms in 2017, these crowds rather quickly shrank to a handful of activists. Meanwhile, the ruling party's approval rating in the polls hovered above 40%. In 2019, PiS won a second term in office with over 43% of the votes (although PiS lost its majority in the Senate, the second and less important house of the parliament). In 2023, PiS lost the parliamentary elections, but won the most votes for a single party in the Sejm (the dominant chamber of parliament).

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6 See generally Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press, 2019).

7 Laurent Pech et al., "Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action," *Hague Journal on the Rule of Law* 13, no. 1(2021): 3, https://doi.org/10.1007/s40803-021-00151-9.

A simple explanation of the government's intrusion into the judiciary is provided by Samuel Issacharoff, who points out that populist regimes attempt to curtail any challenge to the executive authority: "Not surprisingly, the courts are a frequent irritant to the populist agenda. No less surprising, the courts become the targets for political attack, most clearly in countries such as Poland and Hungary where curtailing the power of the courts is a central plank of the populist agenda."[8] With the benefit of hindsight, a well-organized script may be discerned: "One may go as far as to speak of a recipe for constitutional capture being followed in one state after another, a process which results in a systemic undermining of the key components of the rule of law such as independent and impartial courts."[9]

Judge Paweł Juszczyszyn became a well-known target of such an attack. In February 2020, the Disciplinary Chamber attached to the Supreme Court suspended Judge Juszczyszyn from official duties and reduced his remuneration by 40%. The next day, Paweł Juszczyszyn lost access to his court's IT system and to most of the rooms in the court building.[10] The case of Judge Juszczyszyn was arguably the most obvious one but concurrently many other judges faced sanctions and disciplinary proceedings due to, for instance, participating in an educational moot court, wearing a T-shirt saying "Constitution" or requesting a preliminary ruling from the ECJ. For instance, Judge Monika Frąckowiak, who publicly criticized the violation of rule of law standards, was presented with 172 allegations of disciplinary misconduct. An incident which occurred in October 2019 during a mundane proceeding at a court in Poznań is a good illustration of the change in perception regarding judges in recent years. After the judge issued a decision in an alimony case, the defendant walked out of the courtroom feeling insulted. He called the police, who came to the court-

8 Samuel Issacharoff, "Populism versus Democratic Governance," in *Constitutional Democracy in Crisis?*, ed. Mark A. Graber et al. (Oxford University Press, 2018), 451.

9 Laurent Pech and Kim Lane Scheppele, "Illiberalism Within: Rule of Law Backsliding in the UE," *Cambridge Yearbook of European Legal Studies* 19, 2017: 9.

10 The case of Judge Juszczyszyn is explained in more detail in the report *Justice Under Pressure*, 36–38.

house with flashing lights. A police unit entered the courtroom in which the next court session was being held and tried to check the judge's identity card.[11]

A symbolic sign of the helplessness of the judges who stood against contravening the rule of law was the appointment of the new Chief Justice in May 2020, when the term of office of Chief Justice Małgorzata Gersdorf ended. When the General Assembly of the judges of the Supreme Court convened, members of the two new chambers who were nominated by the neo-NCJ took part in the proceedings and votes. The "old" judges raised many legal objections to this and to the way this multi-day meeting was chaired by two subsequent chairmen chosen by President Duda. Not surprisingly, the chairmen did not allow voting on these issues. In January, these "old" judges decided that the persons appointed to the office of judge on application of the neo-NCJ were unlawfully appointed. Iustitia's president, Judge Markiewicz, logically concluded that it follows from this decision that members of the two new chambers of the Supreme Court are not allowed to pass any new judgement – "Is anyone, who may not pass judgements, entitled to select the most important judge in Poland – the Chief Justice of the Supreme Court? Allowing this to happen would be a topsy-turvy reasoning."[12]

Obviously, these and other objections went unheeded. A good commentary was provided by Ewa Siedlecka, a journalist who has been writing about the system of administration of justice for many years. In 2018, she wrote that some moral, symbolic and even specific achievements of civic resistance were unable to change the reality of the situation: PiS was able to create a legal quagmire in Poland, in which it gets harder and harder to move. By breaking the Constitution, PiS shaped the law in such a way that any attempts to rescue the rule of law while obeying the law risked breaking the law even further and entailing contradictions.[13] Two years later this pessimism was only deepened when E. Siedlecka wrote: "More and more actions

11 Piotr Żytnicki, "Policja wtargnęła na salę rozpraw," *Gazeta Wyborcza*, October 24, 2019, 7.
12 Ewa Ivanova, "Sąd Najwyższy musi walczyć," *Gazeta Wyborcza*, April 22, 2020, 3.
13 Ewa Siedlecka, "Lewe prawo," *Polityka*, July 11, 2018, 13.

of the authorities are tainted by the original sin of unconstitutionality. How to deal with this? Legal 'fundamentalists' increasingly turn into 'pragmatists': illegal, but within acceptable limits."[14]

Broadly speaking, these developments may be summarized as follows. The ruling bloc unsuccessfully tried to seize control over the judiciary using rapid and resolute actions. This lack of immediate success was influenced by street protests, the stance of EU institutions and clear resistance from some judges, yet what proved successful was a tactic of patient and gradual pressure, in both institutional and personal dimensions.

The pressure applied to judges on a personal level warrants separate discussion, because judges who openly tried to protect the independence of the judiciary fell victim to blistering attacks which could be called "character assassination." The authorities and the media favorable to them depicted judges as thieves, compared them to Nazi collaborators, accused them of taking millions of Polish citizens hostage and of being a caste above the law. The harassment of the most troublesome individual judges was, however, more sweeping and interfered in family and intimate affairs. This could be seen very clearly in the case of Judge Waldemar Żurek, who, in recent years, became arguably the most vocal and articulate representative of independent judges. Attacks on Judge Żurek carried out in pro-government media and in anonymous hate messages concerned his marital issues, relationships with his children, and allegations of asset concealment.

As it turned out, personal attacks on Judge Żurek and his family were just a part of a greater smear campaign. In August 2019, the independent media revealed that since the autumn of 2016 the personal files of judges stored in the Ministry of Justice were used on the internet and in the pro-government media to vilify the most defiant judges, such as Judge Żurek and Judge Markiewicz. As a repentant informer revealed, a group of judges with ties to the Ministry of Justice, claiming to be an underground resistance group, formed a closed and clandestine online clique called "The Caste" to fight the ostensible

14 Ewa Siedlecka, "Jak oswoić bezprawie?," *Polityka*, June 3, 2020, 19.

judicial caste. Some readers may be confused since I previously described the governmental actions targeted against Polish judges, whereas the Iustitia Association, alongside the Themis Association of Judges, was the key part of the resistance to the increasingly autocratic regime, and yet now I mention a resistance group of judges who stood up to "the judicial caste." This is, precisely, an important part of the whole story. Although it could be reasonably claimed that the system for persecuting judges who opposed the democratic backsliding consisted of government agencies, pro-government media and internet hatemongers, judges also played an important role in this scheme. These were the judges who held strategic positions in the state apparatus, such as disciplinary prosecutors and judges delegated to the Ministry of Justice, and they were largely appointed before the autumn of 2015.

In an important book from 2018 that describes the assault on the judiciary as seen through the eyes of the Polish judges themselves, one of the harassed judges, Judge Igor Tuleya, says: "By and large, the committed judges are in the minority. Ten percent of judges landed in the Ministry and the NCJ or became presidents of the courts. Ten percent oppose the Ministry. Eighty percent remain indifferent."[15] In October 2020, Judge Maciej Czajka from Krakow addressed the judges' community – apparently comprising ninety percent of judges – with an open letter in which he accused judges of indifference and of betraying their ideals. A month later Judge Tuleya was also suspended by the Disciplinary Chamber.

The fact that a group of judges, who knew both the law and their community well, took part in the process of seizing control of the judiciary had two important consequences. As this happened from within the judiciary, there was no need for the conspicuous use of state force or placing judges under arrest. Instead, the authorities were able to apply tailor-made legal solutions that were concocted and adopted by people who knew how to exert pressure on their fellow judg-

15 Ewa Siedlecka, *Sędziowie mówią. Zamach PiS na wymiar sprawiedliwości* (Czerwone i Czarne, 2018), 446.

es. Moreover, using judges to discipline defiant judges allowed the politicians from the ruling bloc to evade responsibility for the dirty business. The case of "The Caste" hate group showed it clearly. Those who believed that a scandalous affair has been exposed (akin to Watergate, as personnel files from the ministry used to oppress inconvenient judges) were surely surprised when it turned out that the whole thing had been efficiently swept under the rug, with minimal public relations losses for the government. The spin from the government and the ruling bloc about this situation was that this was a personal quarrel in the judges' community and, in fact, the judges supporting the new regime were the victims, because they tried to eradicate the pathologies inside the court system. The simple message to the public reiterated in the pro-government media went like this: did we not tell you that those judges are depraved?!

The Disputed Meaning of Judicial Independence in Poland

My cursory description of the developments in the Polish judicial system since 2015 may appear one-sided. Especially when we consider Mark Tushnet's remarks that "treating efforts to transform the courts as a strong point – 'assaults on judicial independence' – against populism is a defense of the failed status quo, not a politically neutral defense of a central component of every good constitution."[16] Therefore, in this essay, I seek to complicate the picture not only by bringing to light some older developments, pre-2015, but also by referring to a classic psychological experiment dealing with false beliefs and theory of mind.

The experiment I refer to is called the "Sally-Anne test" as it involves two doll protagonists, Sally and Anne. Sally has a basket; Anne has a box. There is also a marble (a little ball-shaped toy) and a subject being tested, usually a child, who is watching a short scene enacted by these dolls and is then asked

16 Mark Tushnet, "Comparing Right-Wing and Left-Wing Populism," in *Constitutional Democracy in Crisis?*, 644.

about the marble. The experiment goes like this. First Sally places a marble in her basket. Then Sally leaves. Anne takes the marble from the basket and hides it in her box while Sally is away. When Sally re-enters the scene the subject is asked, "Where will Sally look for her marble?" If the subject points to the box which is the marble's current location, then he or she fails the Belief Question by not taking into account the doll's belief (Sally is unaware that the marble has been transferred).[17] After PiS and its allies took power in 2015 there were numerous intrusions upon the judiciary of which I have described only a fraction here to support the claim that the constitutional requirement that "The courts and tribunals shall constitute a separate power and shall be independent of other branches of the power" (Article 173 of the Polish Constitution) was deliberately contravened in many instances. However, the Allied Right bloc persistently claimed that it was working towards strengthening the independence of the judiciary and that its actions contravened neither the Constitution nor EU law. The first association with the Sally-Anne test is therefore as follows. Scholars striving to avoid advancing criticism that may seem unscholarly are like the subject of this test who needs a coherent theory of mind to see through the fact that the marble has been transferred without Sally realizing – by which I mean that the independence of the Polish judiciary has been seriously compromised and it has very little to do with an attack on some former supposedly corrupt elites.

Wojciech Sadurski used an idea similar to the "Sally-Anne test" which he called a "Martian's test": "would an intelligent and otherwise well-informed Martian, having for herself all the information culled only from the formal structures of government, and knowing none of the practice, discern the non-democratic character of the regime" – the answer given by W. Sadurski is "probably not," since new populists, in Poland and other places, skillfully use the legitimating value of formal legality.[18] The issue of the independence

17 Simon Baron-Cohen et al., "Does the Autistic Child Have a 'Theory of Mind'?," *Cognition* 21, no. 1(1985): 41–42, https://doi.org/10.1016/0010-0277(85)90022-8.

18 Sadurski, *Poland's Constitutional Breakdown*, 6–7.

of the judiciary was strongly emphasized by the parliamentary opposition and by the judges. And yet PiS was able to maintain stable public support. It was not only a matter of an outsider "Martian" who does not know the practice. The winning electoral majority of citizens in 2015 and 2019–2020 elections was either indifferent to the issue of the independence of the judiciary and the well-known practice, or accepted the ruling parties' message that it is only they who were able to ensure the "real" independence of the judiciary by getting rid of all naysayers like Judge Juszczyszyn. This is like a second layer of the Sally-Anne test: in 2019–2020, more than half of the subjects, that is, the winning electoral majority, were convinced that the marble had not been transferred by Anne and everything was in order. Whereas people like Judge Markiewicz of the Iustitia Association, who urged that the actions of the unlawfully appointed judges should not be accepted, increasingly seemed like radicals and troublemakers – this was precisely the message that the government's media machinery hammered into the population. One must bear in mind that it is possible to expose one *Hauptmann von Köpenick* or a few of them, that is, persons who are deemed to be impostors, as unlawfully appointed officials, but a larger number become a part of the system. Reaching the tipping point does not even require that those "newcomers" outnumber the preceding ones. All it takes is to secure their presence sufficiently to make it look lawful.

This false sense of orderliness is related to an important facet of the process of seizing control of the judiciary by the ruling bloc. As I mentioned, the authorities chose not to resort to using any violence that would draw attention: there were no attempts to arrest judges or to remove them by force from judges' chambers, despite the harsh rhetoric. Presumably it was acknowledged that, for instance, media reports with pictures of a handcuffed Judge Juszczyszyn would be a PR problem which would hinder playing games with the European Union. Handcuffs were not needed, as Judge Juszczyszyn was effectively removed from the bench by blocking his access to the court's IT system and by revoking his security access card. R. Daniel Kelemen insightfully noted that

authoritarian enclaves may persist within democratic unions like the Europe's quasi-federal union. These regimes are unlikely to be particularly repressive, but rather hybrid regimes, whose leaders may rely on financial support from the union and therefore have reasons to avoid blatantly authoritarian practices in order not to provoke federal interventions.[19]

This is another lesson coming from Poland. Most of the time, authoritarian populists dismantling the Polish democracy relied on legal or quasi-legal tools when seizing state power. This greatly reduced the cost of the assault on liberal constitutionalism. The authorities were able to consolidate their own power without needing to resort to violence, thus managing to explain to their constituents and abroad that all the changes in the judiciary were simply reforms intended to improve the efficiency of the courts and to democratize them by means similar to those used in other EU countries. The helplessness of Polish legalists was succinctly explained some years ago in a general way by Sylvie Snowiss, who rightly claimed that we persist unthinkingly in bringing to the Constitution the inappropriate enforcement conceptions of ordinary law. "There is, however, a basic unbridgeable difference between the two. Selective enforcement of ordinary law can be remedied with a change of executive policy or administration. Enforcement of fundamental law, on the other hand, requires the voluntary cooperation of the potential violator."[20] On the whole, it would be hard to point out a single instance in which the legalists' reliance on legal proceedings proved lastingly effective before the elections in 2023. Quite the opposite, the only small victories were achieved when the legalists disregarded the laws passed by PiS and the authorities were not prone to use coercive power.

If one does not defer to the vision presented by the Allied Right, in which the pious and laborious Polish national community is threatened by sinister

19 R. Daniel Kelemen, "Europe's Other Democratic Deficit: National Authoritarianism in Europe's Democratic Union," *Government and Opposition* 52, no. 2(2017): 213–15, https://doi.org/10.1017/gov.2016.41.

20 Sylvie Snowiss, *Judicial Review and the Law of the Constitution* (Yale University Press, 1990), 104–05.

forces like migrants spreading parasites, judges stealing sausages, or LGBT people hell-bent on undermining "normal" marriages and exploiting children, then one is able to analyze the importance of deception and outward lies in the current populist surge. As Steven Levitsky and Daniel Ziblatt noted, keeping authoritarian politicians out of power requires the filtering out of authoritarian lies by democracy's gatekeepers.[21] We are used to deception in the way politics is made and presented, so we even have a special term for it: spin. I believe that the Polish democratic backsliding provides us with another valuable lesson which goes far deeper than the familiar spin.

The problem is that constitutional legal scholars tend to conceptualize their area of study using terms and ideas that nowadays, at best, have a tenuous connection to reality. Commonly used terms like the separation of powers, the sovereignty of the people, or the independence of judges do not hold up under scrutiny despite the reverence they are treated with. Focusing on the more limited inquiry into the so-called independence of the judges, which is the crux of the matter presented here, we may begin with Sanford Levinson's question: how "independent" a judiciary do we really want? The French Academy is remarkably "independent" in the sense that it is a self-perpetuating body. When a vacancy occurs among the forty "immortals," the remaining ones select a new member. Would we endorse a judiciary that operated under the rules of the French Academy? It is also a settled reality that almost all judges face the prospect of their decisions being appealed to higher authority. As Sanford Levinson lucidly elaborates, built into our standard definition of the rule of law is precisely the notion that "inferior" judges will feel bound by the decisions of their "superiors". Why then would anyone describe such judges as "independent"?[22] These are no semantic charades. The issue of whether judicial members of the NCJ may be appointed not by judges but by parliamentarians is the one on which the validity of the whole NCJ and all subsequent ju-

21 Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (Crown, 2018), 24.

22 Sanford Levinson, *Framed: America's Fifty-One Constitutions and the Crisis of Governance* (Oxford University Press, 2012), 245–48.

dicial nominations made by the neo-NCJ depends. I mentioned Judge Monika Frąckowiak, against whom 172 allegations of disciplinary misconduct were presented. Let me quote the relevant part of the Iustitita Report:

> The prosecutor presented to the judge 172 allegations of disciplinary misconduct, consisting in exceeding the statutory time limits for drafting written justifications for judgements, making protracting proceedings in civil cases and causing invalidity of the proceedings due to procedural errors.[23]

It seems quite obvious that the disciplinary proceedings against Judge Frąckowiak resulted from her active involvement in the defense of judicial independence, but, regardless of the false pretenses, the charges against Judge Frąckowiak were based on her strictly judicial activity, especially on the issue of promptly drafting justifications for judgements and this is the issue for which Polish judges have been routinely evaluated.

This is just a small example, for generally speaking, the Polish judiciary since 1989, like many other European courts, has been built upon premises which Martin Shapiro discussed in his classic book. Polish judges are usually not recruited from among experienced practitioners. They enter into judicial service a few years after getting their law degree, starting at the lowest judicial rank and working their way up to higher judgeships. They are subjected to a great deal of discipline by their superiors, who control both their promotions in rank and their transfer to better courts in better places. It could also be argued that Polish judges are seen, and see themselves, as government officials who form one branch of a national higher civil service.[24]

There were some attempts by judges to loosen ties with other civil servants and the Ministry of Justice. Polish constitutional scholars and judges con-

23 Kościerzyński, ed., *Justice Under Pressure*, 28.

24 Martin Shapiro, *Courts: A Comparative and Political Analysis* (University of Chicago Press, 1986), 150–52.

vened a conference in 2013 on the relations between judicial power and other powers. A book with expanded papers from this conference was published in 2015, with an introduction that leaves no doubt as to the feeling among judges (at least those connected to Iustitia) before 2015. On the first page it stated:

> The constant pressure that judges are put under, as well as inadequate theoretical discussions about the relation between judicial power and political power, prompt the pressing need for systematizing knowledge about the current legal position and for evaluating it critically (…) Attempts to influence judicial decisions under the guise of administrative supervision must be prevented (…).[25]

Contributors to this book described many instances of attempts to undermine judicial independence in Poland before 2015. Importantly, most of these attempts had a statutory basis, particularly in the primary statute concerning Polish judges – the Law on the Organization of Common Courts. As the editor of the aforementioned book and a well-respected scholar, Professor Ryszard Piotrowski stated: "There are essential inconsistencies between constitutional as well as doctrinal determinants of the status of a judge and the Law on the Organization of Common Courts."[26] and that "The Law on the Organization of Common Courts creates a chain of dependence which is hard to reconcile with the Polish Constitution."[27] Strong ties with executive power were also provided in a statute regulating the training of judges. The systemic dependence of the Polish judiciary on political powers before 2015 was overwhelming. The Polish judiciary was not independent in normative, organizational, personal, or financial terms. Law students were also taught for years that this

25 Łukasz Piebiak, "Wstęp," in *Pozycja ustrojowa sędziego*, ed. Ryszard Piotrowski (Lex a Wolters Kluwer business, 2015), 13.

26 Ryszard Piotrowski, "Status ustrojowy sędziego a zakres i charakter zarządzeń nadzorczych," in *Pozycja ustrojowa sędziego*, 176.

27 Piotrowski, "Status ustrojowy sędziego a zakres i charakter zarządzeń nadzorczych," 178.

supposed "independence" does not really mean "independence" or lack of dependence at all. In a leading constitutional law textbook, one of the co-authors, Bogumił Naleziński, explained:

> The principle of the independence of the judiciary, considered as to other state organs, may be formulated in two complementary areas – organizational and functional. In both of them the implementation of the principle is not absolute and may be restricted but without breaking the principle.[28]

Viewed from this perspective, this principle does not require any real independence, restrictions are welcomed, just handle with care. Certainly, this is not just a local Polish deviation, there is no judicial Shangri-La in other jurisdictions either. Christopher M. Larkins noted that, "despite an almost universal consensus as to its normative value, judicial independence may be one of the least understood concepts in the fields of political science and law."[29] Similarly, a Polish scholar, Maciej Jakub Zieliński, in his thorough contemporary study on the independence of the judiciary, opined that there is a certain terminological havoc in this field.[30]

It is also worthwhile noting that the independence of the judiciary was considered by the Constitutional Tribunal in several high-profile cases decided in the years 2009–2013. All these rulings by the Constitutional Tribunal were unfavorable to the judges and they permitted substantial intrusions in the sphere of judicial independence by the legislative and the executive powers. The way the Constitutional Tribunal wrestled with doctrinal difficulties surrounding the idea of judicial independence was visible in judgement K 31/12

28 Bogumił Naleziński, "Organy władzy sądowniczej," in *Prawo konstytucyjne RP*, ed. Paweł Sarnecki (Wydawnictwo C.H. Beck, 2014), 391.

29 Christopher M. Larkins, "Judicial Independence and Democratization: A Theoretical and Conceptual Analysis," *The American Journal of Comparative Law* 44, no. 4(1996): 607.

30 Maciej Jakub Zieliński, *Niezależność władzy sądowniczej a model stosunku służbowego sędziego* (Wolters Kluwer, 2024), 128.

issued in 2013.[31] The NCJ challenged the law amending the Law on the Organization of Common Courts enacted in 2011. Beside two procedural challenges, the main challenge dealt with the core substantive matter of ministerial supervision over the administrative activities of courts exercised through newly empowered courts' directors. In regard to this matter, the Constitutional Tribunal majority relied on the distinction between the organizational (a separate system of courts) and functional (administration of justice) understanding of judicial power. Therefore, the majority ruling stated that the judiciary is not isolated from other state authorities and ministerial supervision is not forbidden unless it influences the functional aspect, that is, the administration of justice. Proceeding this way, the majority found that most of the new provisions did not contravene the constitutional guarantees of the independence of the judiciary. I am stressing here "the majority," for eight out of 15 judges filed opinions dissenting in part from the Tribunal's judgement, and that revealed considerable differences between the judges. Conspicuously downplayed in all these opinions but one was the challenge regarding the NCJ not being properly consulted with. Another rather downplayed issue was the NCJ complaint in regard to provisions introducing a professional development plan for judges. Judge Piotr Tuleja touched on this point in his dissent, stating that it is unconstitutional to subject judges to evaluation while allowing the executive power to develop criteria for this evaluation. In the last paragraph of his dissenting opinion, Judge Tuleja also stated that it is still problematic, under the Polish Constitution, to mark the boundaries of the administration of justice as opposed to the administration of courts.

The ramifications of this problem were taken up in the dissenting opinion by Judge Andrzej Wróbel, which is the most interesting one for the purposes of this essay. Judge Wróbel was the only one who construed the constitutional principle of judicial independence in an uncompromising fashion. Dissent is

31 Judgement of the Constitutional Tribunal of the Republic of Poland of November 7, 2013, K 31/12.

inherently an expression of difference, but it is quite remarkable how different Judge Wróbel's views on this matter were from other judges. In short, Judge Wróbel's reasoning was straightforward. The distinction the Tribunal made between the organizational and functional understanding of judicial power has no basis in the Constitution's text. The activities recognized as the organizational activities of the courts are either tied to the administration of justice or are part of it. There should be a constitutional presumption that the activities of judges performed while holding office are activities within the scope of the administration of justice. It is therefore unconstitutional, concluded Judge Wróbel, to allow these activities to be supervised by the minister of justice or courts' directors. It seems fair to say that the lonely voice of Judge Wróbel proves that the way the constitutional provision that the courts shall be independent of other branches was interpreted by the Tribunal's majorities (in this and similar cases) was neither strict nor literal. Before 2015, the dominant view in the jurisprudence of the Constitutional Tribunal and in legal academia was that courts are neither separate nor independent in any meaningful sense of both terms. Since the absolute understanding of independence was almost universally rejected, all that was left were the attempts of the Constitutional Tribunal to mark out the boundary between permissible intrusions into the business of courts and unacceptable ones. In reality, the question was not how independent the Polish judiciary should be but to what degree dependence is desirable and may be tolerated by the judges themselves. In this regard, even the rather modest expectations and concerns presented in Judge Tuleja's dissent were deemed too radical by the majority.

The "independence" of the Polish judiciary was not really respected long before 2015. Judges felt they were under assault before the Allied Right populist offensive. Populist streaks which affected the authorities' attitude towards the rule of law and the judiciary have been present in Polish politics since at least 2005. It would be too risky, however, to suggest that the developments in the judiciary since 2015 were caused by or grounded in earlier events, for such

a causal theory would require a thorough study. There is definitely a difference in kind between the past and the ongoing anti-constitutional counterrevolution. Bearing in mind this difference, several remarks can be made.

Exploiting Inconsistencies in the Concept of Judicial Independence

One could see clearly before 2015 that steps made by politicians to increase judicial dependence were relatively risk-free and these politicians faced no penalty at the ballot box. The countermeasures judges were able to employ proved insignificant, especially when legislative changes were persistently ratified by the Constitutional Tribunal. In fact, it could be argued that the Allied Right government could feel surprised in the post-2015 era both by judges' recalcitrance and by the scale of the street protests. As Ewa Siedlecka reminds us, even in the late 1990s politicians and the media started to harshly criticize the courts (overburdened and understaffed) and accuse judges (underpaid) of idleness under the slogan that judges should be independent, but not of work. Accordingly, the public expected successive ministers of justice to urge judges to work.[32] Sujit Choudhry quotes Professor Marcin Matczak, one of the sharpest and most articulate critics of the Allied Right regime, who admitted that the Polish opposition failed to persuade the public in the court of public opinion in the last few years.[33]

I believe there is also another factor, rather neglected, which helps explain why ultimately the issue of judicial independence failed to generate electoral change in 2019–2020 elections, although arguably this issue was the shibboleth of the democratic opposition during this time. This factor is the penal populism which has been all the rage in Poland since the Constitution of 1997 was adopted. This phenomenon was thoroughly discussed by Michalina Szafrańska

32 Siedlecka, *Sędziowie mówią*, 24.

33 Sujit Choudhry, "Will Democracy Die in Darkness? Calling Autocracy by Its Name," in *Constitutional Democracy in Crisis?*, 579.

in her book on penal populism and media. She convincingly claims that in Poland ample opportunities have been provided for penal populism to grow and prosper. The interplay between the commercial interests of media outlets, politicians' efforts to communicate with voters and to convince them of their parties' responsiveness to collective needs, the personalization of politics with leaders taking advantage of the affects and presenting themselves as full of empathy for victims and tough on criminals, as well as the infantilization of the media and of the public discourse, has all made penal populism a reliable device for politicians to get media attention and voters' support, especially considering that this device is always available, for crime is an integral part of social life. All Polish political parties resorted to this device and in the instance of one particular party, Solidarna Polska, argues M. Szafrańska, penal populism was used to build the party's identity.[34] It should be mentioned that the Solidarna Polska party is part of the Allied Right bloc whereas the leader of the party and its founder became the Minister of Justice in November 2015. An important part of Polish penal populism is the faulty system frame, that is, the dissemination of the belief that crime is a product of irrationally liberal criminal law as well as a lenient and ineffective judiciary. What is particularly relevant here is the type of penal populism that M. Szafrańska calls the "internal enemy of the people," based on exclusionary rhetoric against social groups portrayed as destroyers of the social order built by decent people.[35]

It would not be too much to say that in the post-2015 era the ruling bloc channeled the accumulated energy of "enemy of the people" propaganda and skillfully exposed the judges themselves as "folk devils" or subversive troublemakers deserving comeuppance in the form of the reform of the judiciary. The picture of Polish judges as Nazi collaborators or commies presented by the Polish Prime Minister and the President apparently fits well with Polish voters' visceral understanding that "[l]egal interpretation takes place in a field of pain

34 See generally Michalina Szafrańska, *Penalny populizm a media* (Wydawnictwo Uniwersytetu Jagiellońskiego, 2015).

35 Szafrańska, *Penalny populizm a media*, 29.

and death," as Robert M. Cover famously stated, which also means that legal interpretive acts made by judges occasion the imposition of violence upon others.[36]

Another layer of the ideological narrative disseminated by the PiS party has been insightfully exposed by Adam Sulikowski, who demonstrated that this political group reappropriated leftist critical thought and perverted its methods and proposal in order to develop its own legal ideology.[37] As a side note, I shall also briefly mention that since the 1990s many right-wing Polish politicians, most of who ended up in PiS, were avid students of Newt Gingrich-style politics based on the idea of destroying institutions in order to save them, that is, to reclaim the power by intensifying public hatred of official bodies.[38]

The inter-branch hostilities that afflicted the judiciary before 2015 had a side effect whose value cannot be overstated. The judicial community had a strong incentive to unite, at least partially, to build their own structures, to coalesce around leaders. Since the 1990s, the Iustitia Association has been committed to improving the working conditions of judges, to professional training and to integrating judges. Increasingly, the Iustitia took a harsher stance, which prompted some judges to form Themis, a less confrontational association, in 2010. The Iustitia spokesman, Judge Bartłomiej Przymusiński recalled these times, saying that nowadays the former dissonance between lower-ranking judges and the "palaces" or "Byzantium," that is, the top judges, has been obliterated. Before 2015, many lower-ranking judges felt there was a glass ceiling and they were bitterly disappointed by the Constitutional Tribunal's rulings which were unfavorable to the judiciary.[39] Since judicial resistance was galvanized at that time, it was easier for the judges to rise up in an organized manner in defense

36 Robert M. Cover, "Violence and the Word," in *Narrative, Violence, and the Law: The Essays of Robert Cover*, ed. Martha Minow et al. (University of Michigan Press, 1995), 203.

37 Adam Sulikowski, "The Return of Forgotten Critique: Some Remarks on the Intellectual Sources of the Polish Populist Revolution," *Review of Central and East-European Law* 45, no. 2–3(2020): 376–401, https://doi.org/10.1163/15730352-bja10009.

38 Thomas E. Mann and Norman J. Ornstein, *It's Even Worse Than It Looks: How the American Constitutional System Collided with the New Politics of Extremism* (Basic Books, 2012), 33.

39 As quoted in Siedlecka, *Sędziowie mówią*, 394–99.

of the Constitution and rule of law when a far graver threat to the whole constitutional system emerged in 2015.

As I alleged above, my coherent legal theory of mind allows me to not succumb to deception and to recognize that the independence of the Polish judiciary has been compromised. Yet I also claim that the term "independence of judiciary" was earlier emptied of any significant normative meaning. This leads me to an observation that the strategy employed in Poland by the ruling bloc under the slogan "good change" may be described as *constitutional fracking*. Fracking is a very successful technique for recovering gas and oil by injecting special high-pressure liquid into rock to create or enlarge fissures and cracks through which oil and gas can flow. The analogy here consists of the deliberate method of pumping impurities into a seemingly stable system to exploit its internal weaknesses in order to extract power. Look at the way Ewa Siedlecka, a very keen observer, described how the Constitutional Tribunal was subdued by the PiS party:

> The Tribunal was a testing ground for PiS. It was then that PiS employed a method, for the first time, which turned out to be useful in the whole process of "good change," especially where expertise is required to assess what the authorities say. This method involves flooding the public with opinions, legally bizarre, also adding that there are as many opinions as there are lawyers. Along with persuading them that the law is not physics where there are objective rules. That in law there are no fixed points and everything relies on interpretation. This strategy, coupled with a flood of lies and distortions, which the media could not fact-check despite their efforts, proved very successful. The public has become convinced that nothing is certain and this is all too complicated to settle who is right.[40]

40 Siedlecka, *Sędziowie mówią*, 136.

In less troubled times, inconsistencies and gaps in the concept of judicial independence could stimulate scholarly activity and occasional moderate outbursts of judges' frustration. When this concept was subjected to deliberate fracking by populists who had a whole lot of law for their enemies and a number of bizarre legal opinions to shore up their actions, it turned out that it is hard to form a clear-cut argument against "judicial reforms" after 2015 that could appeal to the masses. After all, it was always considered normal, not only in Poland, that parliament could make laws regulating the judicial branch. As Ivan Krastev noted, what makes the rise of Eastern European populism in the form of "illiberal democracy" particularly dangerous is that it is an authoritarianism born within the framework of democracy itself.[41] Similarly, the notion of judicial independence, as a semiotic code, is attractive not only to the democratic opposition, but also to the Allied Right bloc which used it to justify subsequent changes in law and to dismiss the opposition's charges by presenting itself as the champion of "real" judicial independence.

Conclusions

Coming back to the Sally-Anne test of judicial independence – are we, scholars and legal practitioners, really able to claim that the marble has been transferred or even that there was a marble to begin with? In other words, can we assert that judicial independence has been compromised in Poland? Can we rely on a concept of independence that for many years in Poland has been chipped away by many intrusions into the judicial sphere, some of which were encouraged by legal academia and the Constitutional Tribunal? It appears that if we are trying to rely on the concept of judicial independence, what we end up with is only some kind of a bad tendency test. Manifold interferences in the judiciary, both from the outside and the inside (in the form of appeal proceedings), are accepted unless a bad tendency may be attributed to them. The sheer scale of the repression

41 Ivan Krastev, "Eastern Europe's Illiberal Revolution," *Foreign Affairs* 97, no. 3(2018): 56.

and intimidation of Polish judges shows this bad tendency quite clearly, but this test is probably too subjective to retain any usefulness. The main thrust of my argument here goes forward not backward. I certainly do not intend to justify the tribulations of Polish judges with some previous irregularities. Instead, I argue that the notion of judicial independence, a clear misnomer, proved ineffective when subjected to constitutional fracking. It also hinders judges' ability to articulate the needs of their branch, for judges' attempts to assert their "independence" and to protest against intrusions into the judiciary are censured as politicking. Instead of relying on a fuzzy and unrealistic notion of independence, a reasonable and substantive standard of judicial dependence should be developed. Abandoning the obfuscating dogma of independence does not mean abandoning higher values, if we consider Anna Harvey's findings that "democracies with more accountable courts have higher levels of economic and political rights than do those whose courts are less accountable (and more independent)."[42]

In this regard, some important initial steps have been taken by the European Court of Justice since the *Portuguese Judges* case in 2018. As Laurent Pech and Dimitry Kochenov have documented in their study, the Court made a decisive contribution to the fight against rule of law backsliding and strengthened the EU Member States' obligations "via the progressive crystallisation of a renewed and more detailed substantive understanding of the principle of judicial independence."[43]

A clearer and meaningful standard of judicial dependence will prove to be particularly useful in Poland in the transitional period during the current wave of democratization, because it is very probable that any efforts to clean up the judiciary after the current constitutional crisis will be met with fierce resistance under the banner of judicial independence, especially in the Supreme Court. Possibly many of the arguments of present-day legalists will be reversed

42 Anna Harvey, *A Mere Machine: The Supreme Court, Congress, and American Democracy* (Yale University Press, 2014), xiv.

43 Pech and Kochenov, *Respect for the Rule of Law in the Case Law of the European Court of Justice*, 16.

by the beneficiaries of the Allied Right camp and used to their advantage. It also remains to be seen whether judges whose resistance has been galvanized during the Allied Right regime will accept a mere return to the multifaceted dependence they were subjected to pre-2015.

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