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Independence of the judge civlist in the context of legal stability

> *"The judgements ought to be fixed to such a degree as to be ever conformable to the letter of the law (...), and judges are no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigour (...), and of the three powers, the judiciary is in some measure next to nothing."*
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> *Montesquieu, "The Spirit of Laws"*

Introduction

The purpose of this article is to examine the relation between legal stability, in particular, its manifestation in a form of uniformity of jurisprudence, and the internal independence of a judge.

I would like to form the following hypotheses:

1. The term "judicial independence" is complex and consists of two components – an external independence – guaranteed institutionally – and internal independence – guaranteed by the rules of ethics.
2. The internal independence might be considered as the "independence from…" and the "freedom to…" The space of the "independence from" contains the freedom from being pressured and influenced, freedom from own preferences, arbitrariness, emotions, ignorance, and unawareness. The space of the "freedom to" contains, in particular, an intellectual openness of a judge.
3. The internal independence affects decisions of a judge on the choice of factors to be considered while adjudicating, and thus influences the way a judge participates in establishing legal stability, in one of its aspects – namely – in establishing the uniformity of jurisprudence.
4. Court judicature has been designed to be a self-controlling system. Internal independence of a judge shall be one of the factors legitimizing self-control of the system.

Legal Stability in the Context of the Court Adjudication

The terms "stability," "consistency," and "uniformity" belong to the category of designations describing similar phenomena. Therefore, it is not surprising that legal stability occurs with consistency of legal provisions and uniformity of jurisprudence. Restrictive understanding of consistency of legal provisions does not guarantee legal certainty, because their consistency – towards changeability of the world and society – may lead to their i r r e l e v a n c e, understood as the situation in which law does not match to the current social, economic, or technical situation. One should note however, that the uniformity of jurisprudence is also not a simple consequence of consistency of the legal provisions. The approach of Montesquieu, which became a deceitful motto of this article, is not up-to-date anymore. The perspective on judicial power has evolved. The judges, indeed, are subject solely to the Constitution and statuses.[1] However, between the Constitution, acts, and a judicial decision there is also an a s s e s s m e n t. If there was no assessment involved, it would be difficult to categorize judiciary as the power. "The notion of 'power' itself implies making a choice between the options and different judgements. If a decision-making process does not allow certain leeway, or if allowed leeway is minimal, (…) it is hard to (…) reasonably conclude that the decision-making individual holds any power, but is, at the most, an executioner of the decisions taken by the ultimate decision-maker."[2] The concept of the division of powers is based, *inter alia*, on the assumption that different bodies conduct an assessment on different levels. The level of enacting legislation involves the assessment of general and abstractive cases performed by the legislator. The significant element at the level of application of law is constituted by courts' assessments of individual cases. Courts interpret the Constitution and statuses by passing individual judgments. Without the process of making assessments, the judicial power would be – per Montesquieu's words – "next to nothing." When asked about the role played in judicature, the judge replies:

> I am a great opponent of the formula that a judge is only the mouth that speaks the words of the law. I believe that the above concept is an aberration. Administration of justice consists of passing the judgment under which one may place their own signature and it does not involve

[1] "Judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes." "The Constitution of the Republic of Poland." Art. 178 Sec. 1.

[2] Sanetra, Walerian. *Sądy powszechne i Sąd Najwyższy jako władza sądownicza*. "Przegląd sądowy," 2008, No. 6, p. 6; cf. also Wróblewski, Jerzy. *Sądowe stosowanie prawa*. Warszawa, 1972, p. 382: "The impact of the judge on law application is most strongly expressed in the role of their assessment."

automatic application of the legislator's decisions. If we proceeded in that way, then we would not need the judges but judgment passing devices only.[3]

If the assessment stands between the Constitution, an act, and the judgment, one should also note the existence of at least two competing models of application of law – the syllogistic and argumentation-based one. The significant factor in syllogistic model of application of law (much simplified) is that a judicial decision is an automatically determined consequence inferred from the facts of the case and a provision.[4] It is a model example of a theory of mandatory decision, according to which, application of law consists of "execution" or "exact application" of statutes.[5] The argumentation-based model of application of law relies on a decision-making individual choosing between alternative decisions while taking into consideration several criteria (for example criterion of achieving the reconstructed aim of the provisions).[6] This model is included in the theory of discretionary decision of application of law. Occasionally, it may also be considered as a border case as, from one hand, it is based on the process of drawing logical conclusions from the adopted assumptions, and, from the other hand, the process of justifying interpretational decisions is not solely of logical nature.[7]

The argumentation-based model is related to judicial activism. "Judicial activism is implied when a judge makes their own decision while adjudicating the dispute, in other words, when a judge makes the decision that is not determined or is not entirely determined by binding provisions of law."[8] The dispute whether judicial power should

[3] An Interview No. 23, the Judge of the Local Court. Quoted statements of judges come from the interviews conducted within a scope of the research project, *Competences of judges to make decisions as the condition of effectiveness of judiciary in civil cases,* led by the author. The author conducted quality studies that involved conducting partially categorised interviews. Unlike free-form interviews, the partially categorised interviews imply asking questions prepared in advance and not conducting the unstructured conversation around the directives determined according to the field of study. Unlike categorised interviews, the partially categorized interviews allow changing the order of questions and adjusting the course of conversation to the interlocutor e.g. by skipping the questions answered by the interviewee as a comment to another question. The interviews focused on receiving answers within pre-defined categories of subjects. The project was carried out in the time of July 2013-December 2015 in Krakow Local Courts (civil departments) and Regional Court (civil, economic, civil appellate, economic appellate, and inspection departments). In total the project covered interviews with 100 judges. Further reference to interviews shall occur in the format of: "An Interview No. XY, the Judge of Local Court/the Judge of Regional Court."

[4] Cf. Morawski, Lech. *Główne problemy współczesnej filozofii prawa. Prawo w toku przemian.* Warszawa, 2005, p. 201.

[5] Cf. Sarkowicz, Ryszard; Stelmach, Jerzy. *Teoria prawa*. Kraków, 2001, p. 97.

[6] Cf. Morawski. *Główne problemy… op. cit.,* p. 201–202.

[7] Cf. Sarkowicz, Stelmach. o*p. cit*., p. 103.

[8] Morawski, Lech. *Kilka uwag w sprawie sędziowskiego aktywizmu*. [in:] Staśkiewicz, Wieław; Stawecki, Tomasz. *Dyskrecjonalność w prawie*. Warszawa, 2010. published on: www.proinfo.pl, under the link:

possess a quality of judicial activism or passivism has been conducted for some time already and there are several arguments for and against both thesis. I do not consider as necessary for my analysis to enlist all such arguments and all the past discussions involving the topic. My position is based on the presumption that judicial activism has become a fact.[9] Lech Morawski – referring to Jürgen Habermas – distinctly emphasises the irreversibility of existence of judicial activism:

> To paraphrase Habermas - we could state that due to its linguistic properties - law is an unfinished project in each moment of its very existence and this is a main reason for courts to be condemned to activism. I would like to firmly emphasise that courts are condemned to activism even against their own will.[10]

In such a case, it is necessary to consider the above fact while analysing the matter of stability of law in the form of uniformity of jurisprudence in relation to internal independence of a judge. Secondly, there is also a non-legal argument supporting the necessity of existence of judicial activism. Possibly, the argument is not related to philosophical and legal dispute on the necessity of existence of judicial activism and a competing concept of judicial passivism, but it is of primary importance for the conclusion of the discussion. It is related to the fact which is as vaguely associated with disputes on philosophy of law as the Newton's law of universal gravitation is. The above indicated fact is the matter of open texture of language, as presented in L.A. Hart's thesis on the matter of semantic indeterminacy of law.

I fully agree that semantic open texture of law may be the factor determining the choice of the model of application of law. It does not only imply the choice made by theoreticians and philosophers of law, but also by the judges themselves due to the surrounding circumstances.

> A sphere of semantic uncertainty shall be the sphere, where the decision whether the facts of the case match the term of the legal text or not is made based on the arguments. Applying the terminology of J. Wróblewski, we could state that open terms are always related to discretionary power,[11] which needs argumentative reasoning to be filled out, which reasoning requires analysis of all arguments that would be for and against applying the rules embodied in the legal text to certain facts of the case.[12]

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http://www.aplikanci.profinfo.pl/gfx/lexisnexis/userfiles/files/kilka_uwag_w_sprawie_sedziowskiego_aktywizmu.pdf, p. 2.

[9] Cf. Morawski. *Kilka uwag… op. cit.*, p. 1.

[10] *Ibidem*.

[11] Wróblewski, Jerzy. *Sądowe stosowanie prawa*. Warszawa, 1988, p. 240.

[12] Morawski. *Główne problemy… op. cit.*, p. 204.

In my opinion – leaving the system-wide role of courts in the institution of the state behind at the time – openness and properties of natural language, in which legal articles are formed, enforces the application of argumentation-based model of application of law. Therefore, either way it places a judgement of the judge – as a decision-maker – at the heart of judge's activity[13] and, consequently, it makes the reasoning skills one of the key competences of a judge.

If one recognizes a function of a court within the legal order, then one must admit that the tripartite separation of powers bears a lot functions now.[14] Traditionally, it was established to limit any distinct branch of power from exercising the core functions of another. However, it also involves cooperation of the powers and their complementarity. The role of a court evolves because the legislative inflation increases,[15] and, at the same time, the legislator does not keep up with the dynamics of the social changes. A significant aspect of the process described above is also the fact that the Constitution lists the rights based on certain values. Courts are forced to settle disputes related to the clash between different values enlisted in the Constitution.

> In a public debate about values, a common strategy is to assume that when one has proved that two values conflict in some circumstances, and one is more important than the other, a problem has been settled. But that is, in fact, rarely the case.[16]

Very often it is not the judgment on which value is "more important," but rather the judgement on which value, in a specific case, deserves a stronger protection. It may turn out that both values shall be protected in a specific case and one needs to determine the proportion of the protection. It is a necessary activity of a court since such an activity is subjected to the Constitution and acts. The function of a court requiring "decoding" legal norms from legal articles[17] and not simply "performing the content of statutes" also justifies judicial activism.[18]

Uniformity of jurisprudence is a factor that co-shapes legal certainty. On the one hand, judicial independence constitutes one of the guaranties of the rule of law. If one of

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[13] The subject of legal reasoning – cf. e.g. Oniszczuk, Jerzy. *Koncepcje argumentacji prawniczej i działania komunikacyjnego* [in:] Oniszczuk, Jerzy. *Filozofia i teoria prawa*. Warszawa, 2012, p. 601–641.
[14] Cf. Łętowska, Ewa; Łętowski, Janusz. *Co wynika dla sądów z konstytucyjnej zasady podziału władz*. [in:] *Konstytucja i gwarancje jej przestrzegania. Księga pamiątkowa ku czci prof. Janiny Zakrzewskiej*. eds. Trzciński, Janusz; Jankiewicz, Adam. Warszawa, 1996, p. 383–387.
[15] Cf. Smolak, Marek. *Uzasadnienie sądowe jako argument z moralności politycznej*. Kraków, 2003, p. 25.
[16] Brighouse, Harry. *Sprawiedliwość*. Warszawa, 2007, p. 13.
[17] Cf. Izdebski, Hubert. *Fundamenty współczesnych państw*. Warszawa, 2007, s. 230.
[18] Cf. Morawski, *Główne problemy…*, *op. cit.*, p. 197–199.

the crucial elements of a judicial decision is a judgment and judicial independence is composed, *inter alia*, of directives that a judge should follow in a decision-making process, then it is necessary to state a question on how the uniformity of jurisprudence of independence judges – should be assured.

Mechanisms of Assurance of Uniformity of Jurisprudence

What can stand in the way of uniformity of jurisprudence? Firstly, mistakes of individuals issuing judgements and, secondly, discrepancies in justifiable judgements. By the term "justifiable" I mean non-arbitrary decisions based on argumentation expressed in the reasons for the judgement which may be accepted within the adopted value system and reference points.

In this context mistakes shall mean the result of blameable negligence – ignorance or lack of diligence in application of law, whereas discrepancies within the justifiable judgement are the regular outcome of decision-making process. Mistakes of judges may corrected to a variable extent – by a way of reproach for default, penalties applied within disciplinary proceedings, or judgements on complaint about finding illegality of the valid judgment. The discrepancies in the field of justifiable judgements may be removed with the use of instruments available for the Supreme Court and – in a fragmentary way – also by instance control.

In a case of a mistake, when there is an "obvious violation of the provisions of law" or a "gross violation of the provisions of law," a reproach for default[19] or disciplinary sanction is applied.[20]

Institution of reproach for default consists in a regional court acting as an appellate court or a court of appeal itself, or the Supreme Court (respectively to the stage of the proceedings) making a reproach for default to a relevant court in a case of a gross violation of provisions of law determined while hearing of the case. This is an out-of-court and an extrajudicial supervision measure. It is of preventive nature as being designed to prevent passing incorrect judgements. In fact, a decision of the court related to a reproach for default is not attached to the case being subject of an original

[19] Art. 40 of the Act of July 27, 2001 – Law on Common Courts Organisation, Journal of Laws 2001, No. 99, item. 1070, as amended; and Art. 65 of the Act of November 23, 2002 on the Supreme Court, Journal of Laws 2002, No. 240, item. 2052, as amended (further referred to as the Act on Supreme Court).
[20] Art. 107 § 1 of Law on Common Courts Organisation.

adjudication and the determination and notification of a breach of law itself also does not affect the initial case. However, it does potentially affect diligence of future proceedings. It is related *inter alia* to the fact that a reproach for default affects professional career of a judge as a consequence of judges' breach of professional duties. However, it is a court – and not a judge – that is the direct addressee of a reproach for default. The reproach for default does not concern interpretation, judgements, or points of view, but it does concern the basic professionalism in the legal field. It expresses legislator's awareness that there is a need to draw the line between freedom of adjudication based on judgment independence and "freedom of adjudication" based on lack of diligence and ignorance. Judges indicate that reproach for default is an instrument used rarely as it concerns only gross manifestations of lack of diligence of a judge: "That happens rarely and these are extreme cases like significant delay or preposterous judgment."[21] "I have seen a reproach for default only once. The proceedings were conducted by a local court instead of regional court and people involved wasted two years of their lives."[22]

A second type of liability for mistakes in the form of "apparent and blatant breach of law" is constituted by disciplinary responsibility.[23] Disciplinary responsibility provides sanctions such as an admonition, reprimand, dismissal form the function held, transfer to another place of service, and dismissal from the office.[24] Some of those sanctions are related to restrictions in promotions and other prerogatives of a judge for a certain period calculated from the time when the decision has been issued.[25] Disciplinary liability – similarly to a reproach for default – is related to mistakes and not different assessment of the case. Therefore, the fact of a judgement being amended or quashed by the court of higher instance does not constitute the reason for instigating disciplinary proceedings as much as it does not constitute the reason for applying the institution of a reproach for default.[26] Amending or quashing judgements is a result of the fact that the assessment of the matter may vary.

Mistakes in judgements shall be removed and prevented while discrepancies in justifiable judgements are natural elements of the system of application of law. The aim

[21] An Interview No. 33, the Judge of Regional Court.
[22] An Interview No. 1, the Judge of Regional Court.
[23] Art. 107 § 1 of Law on Common Courts Organisation.
[24] Art. 109 § 1 of Law on Common Courts Organisation
[25] Art. 109 § 3 and 4 of Law on Common Courts Organisation.
[26] Resolution of the Supreme Court of November 28, 2000, SD 16/00 quoted by: Musioł, Józef. *Uwagi na marginesie dyskusji o niezawisłości sędziowskiej w państwie prawa*. „Krajowa rada Sądownictwa" 2008, No. 1, p. 58.

should not be to eliminate this element but only particular discrepancies when there are premises to do so. The Supreme Court has at its disposal the specialized instruments to remove discrepancies that result from a certain manner of administration of justice held by that court. The Supreme Court holds the administration of justice by *inter alia* ensuring the compliance of the rulings with law and its uniformity. In the case that jurisprudence of common courts or the Supreme Court itself reveals discrepancies in the interpretation of law, then the First President of the Supreme Court[27] may submit motion to settle such a legal issue to the relevant panel of the Court. If the bench of seven Justices finds it justified from the point of view of the court practice or the gravity of the doubts, it may submit the question of law or a request for the adoption of a resolution to a bench of a chamber, while the chamber may submit them to a bench of two or more chambers, or to the entire Supreme Court bench.[28] Upon their adoption, the resolutions of the entire Supreme Court bench, a bench of joint chambers, or a bench of the entire chamber shall become legal principles, and resolutions of a bench of seven Justices may gain such status on the basis of a decision. At the same time, legal principles are not changeable. If any Supreme Court bench intends to depart from a legal principle, it shall submit the resulting question of law for adjudication to a bench of the entire chamber.[29]

Judicial control may also act as a factor unifying judicature. Such unification however, is a fragmentary one – within the relevant appeal area and within the limits of an appellate measure by grievance or appeal. The judge of a Regional Court Appeal Division presents the role of a court of second instance in the following way:

> Specificity of adjudicating a case in the court of appeal causes the court to analyse the case to evaluate potential appeal allegations. We - in courts of appeal - do not adjudicate cases in the same way we do in the courts of first instance, where a judge is given case files and decides about the direction of the evidentiary hearing. The role of the court of appeal is, as a matter of fact, limited to the assessment if a proceeding conducted in the court of the first instance was correct and, additionally, is restricted to the limits of appeal allegations.[30]

[27] And some other parties in the scope of their properties, cf. art. 60 § 2 of Law on Common Courts Organisation.
[28] Art. 61 § 2 of the Act on Supreme Court.
[29] Departing from a legal principle adopted by a chamber, joint chambers, or the entire Supreme Court bench requires re-settlement in the form of resolution respectively by a proper chamber, joint chambers, or the entire Supreme Court bench and, if it is one of the chambers of the Supreme Court that wants to depart from a legal principle adopted by another chamber, the conclusion shall be reached by the resolution of both chambers. Art. 62 of the Act on Supreme Court.
[30] An Interview No. 85, the Judge of Regional Court.

I have presented basic[31] mechanisms of assuring uniformity of jurisprudence leading to elimination of mistakes and removal of discrepancies (irregularities) in the field of justifiable judgments. Making mistakes while adjudicating cases is not included in the notion of judge independence, because it is a result of a lack of professionalism or a blunder. Making different assessments, however, lays in the scope of the judicial independence, because it pertains to independence in the field of making free assessment. Therefore, the further part of this article will focus on the relation between judicial independence and uniformity of jurisprudence provided by the mechanisms of removal of discrepancies (irregularities) in justifiable judgments.

What is Independence?

Giving an answer to the question on the nature of the relation between "centralized" unification of jurisprudence conducted by the Supreme Court and the principle of judicial independence requires determining what actually judicial independence is. In fact, there are two kinds of independence: external independence with its external guarantees determined in the Constitution and a status, and internal independence with guarantees being anchored in personality of individual judges. Except for "freedom from pressure and influence" which has both internal and external dimension, all elements of judicial independence analysed in this article belong to the sphere of internal independence. Andrzej Rzepliński qualifies internal integrity, honesty, and courage[32] as internal guarantees of independence. I focused on the above, because there is a tendency to "fetishize institutional mechanisms guaranteeing independence and to diminish cultural and behavioural factors,"[33] while "sole constitutional guarantee of judicial independence is not directly translated into independent actions of individual judge."[34] One may even dare to claim that independence may function even without external guarantees.

[31] The word "basic" is used in the sense of "institutional" here, as there are other mechanisms of assuring uniformity of jurisprudence, being governed by other rules – as voting on judgement and legal literature.
[32] Rzepiński, Andrzej. *Niezależność sędziowska jako gwarant konstytucyjnych prawo i wolności*. [in:] *Niezależność sądownictwa i zawodów prawniczych jako fundamenty państwa prawa. Wyzwania współczesności.* eds. Wardyński, Tomasz; Niziołek, Magdalena. Warszawa, 2009, p. 80.
[33] Franklin, Charles H. *Behavioral factors affecting judical independence.* [in:] *Judicial independence at the crossroads: An Interdisciplinary approach*, eds. Burbank, Stephen B., Friedman, Barry. Londyn, 2002, p. 149–152, as cited in Skrzypiński, Dariusz. *Władza sądownicza w procesie transformacji polskiego systemu politycznego. Studium politologiczne*. Wrocław, 2009, p. 57.
[34] Tokarczyk, Roman. *Etyka prawnicza.* Warszawa, 2011, p. 136.

> It may be a result of adequately high culture of practising a profession – with imprinted readiness to deflect all kinds of the non-legal pressure, and sense of responsibility in judges who understand the mission and character of their office, and also social climate, where any attempt to affect judges is negatively perceived by the public opinion and media that have a firm belief that courts perform their role in an independent manner. Such an evaluation is also supported by the readiness of judicial community to remove individuals unable to perform the office in a manner that would comply with such high standards.[35]

In my opinion, judicial independence may be considered as "independence from…" and "freedom to…" The area of the "independence from" includes:

a) freedom from being pressured and influenced;
b) freedom from own preferences and arbitrariness (unjustifiability) of decisions;
c) freedom from emotions – to certain extent;
d) freedom from ignorance (lack of knowledge).

And the area of "freedom to" includes particular intellectual openness of a judge.

Freedom from Being Pressured and Influenced

There is a difference between a "pressure" and "influence." Pressure is related to activities of the parties, participants of proceedings, media, public opinion, other authorities, and representatives of the judicial power itself. But activities of all those subjects do not have to and, most probably, do not translate into an attempt to bribe a judge to set forth the shape the adjudication of the specific case. Such pressure is relatively easy to identify and thus – easy to avoid. Much harder to identify and to avoid are "traps of influence" which are not so direct and, most often, are psychologically conditioned. For example, a risk occurs when a judge is delegated to adjudicate in a court of higher instance. A judge may be potentially, even subconsciously, oriented opportunistically fearing to be assessed by other members of the panel – as it may be afterwards related to making the appointment of a candidate to be nominated for a higher judge position.[36]

Influence of media on a judge, for example, may translate into situation when tired or less attentive judge starts considering arguments presented in media before formulating and analyses their own ones.

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[35] Skrzypiński, *op. cit.* p. 118.
[36] Cf. Gonera, Katarzyna. *Niezależność i niezawisłość sędziowska jako podstawa państwa prawa. Wewnętrzna (intelektualna) niezależność sędziego*. [in:] *Niezależność sądownictwa i zawodów prawniczych..., op. cit.*, p. 95.

Social sensitivity may also be a potential tool used for influencing a judge, as there is a temptation to consider and employ reasons significant from a social perspective, not relevant however in the light of law, for the final shape of ruling. I would like to use very expressive way of showing such influence and conflict related to it that is captured impressionistically in the novel:

> Children asked for money for parents, mothers for children, men asked for money for everything. (…) For clothing. For soup. For mother. For transplant. You passed by, you could not pass by. Without heart. (…) Pens for kidneys. Stamps for liver. Pasty Romanian females exchanged sleeping children for puppies. There was a time when children warmed up hearts and now dogs warm them up.[37]

However, a judge does not adjudicate based on sole sense of justice but on provisions applied in compliance with the sense of justice – that is within the specified limits e.g. limits of general clauses. Not all individual circumstances may affect adjudication of a case in a justifiable manner, unless these circumstances are set forth by law or may be placed within the application of general clauses.[38] Within the framework of judicial independence understood as "independence from…" a judge should be free from both pressure and, which is more difficult, from influence.

Freedom from Own Preferences

The demand of "freedom from own preferences" cast some doubts of psychological nature. Acting against own preferences may lead to cognitive dissonance. Thus, in turn, requires taking some actions to reduce the cognitive dissonance that might have negative consequences for a judge as a human being and for a judge – as a judge.

> Cognitive dissonance is a state of tension that occurs when a person holds two cognitions (ideas, attitudes, beliefs, opinions) that are psychologically inconsistent. Stated differently, two cognitions are dissonant if, when considered alone, the opposite of one follows from the other. Because the occurrence of cognitive dissonance is unpleasant, people are motivated to reduce it.[39]

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[37] Strumyk, Grzegorz. *Pigment*. Wałbrzych, 2002, p. 17.

[38] "Adjudication solely on the basis of law shall be weighed against the judgment based on other grounds, even if objectively legitimate, e.g. on the basis of criteria of expediency or effectiveness." Ereciński, Tadeusz; Gudowski, Jacek; Iwulski, Józef. *Komentarz do prawa o ustroju sądów powszechnych i ustawy krajowej radzie sądownictwa*. Warszawa, 2002, p. 14 (from foreword).

[39] Aronson, Elliot. *Człowiek istota społeczna*. Warszawa, 2005, p. 171. Leon Festinger is considered as an author of cognitive dissonance theory, cf. Festiger, Leon. *A theory of cognitive dissonance*. Stanford University Press, Stanford, CA, 1957.

The source of cognitive dissonance may be the fact that judges have certain convictions and believe that, acting in accordance with the conscience, they should make judgements according to them. Yet a judge adjudicates otherwise to meet the demand of "independence from one's own preferences" and follows the voices of the majority that has different opinion on the matter that a judge. Such a situation would be obviously unwanted; therefore it is worth considering what it really means to be "free from one's own preferences." It occurs that it may have slightly different meaning that initially assumed.

"A judge should avoid the voluntaristic judgements, i.e. being based only on their own opinion, without taking into consideration different circumstances."[40] What does it mean in practice? It means that, while adjudicating, a judge shall take into account the cultural and civilizational factors of the case being judged.[41] "The judges are also subject to the influence of the certain legal culture and ways of assessment adopted in their social environment, and only those elements, considered jointly, define the way of understanding the <act – A.D> that a judge, while adjudication, is subject to."[42] The Constitutional Tribunal pointed out that professional qualifications of a judge include not only the knowledge of law, but also, *inter alia,* knowledge of current social, economic, and political problems, social relations, as well as the established social customs and principles of social coexistence, and understanding of the concept of public or socio-economic interests as prerequisites of the functional interpretation of law.[43]

One may ask how a judge should act when society is divided on an issue. Is judge's role to seek a compromise, align to the will of majority, or to make the own judgement with detachment from social opinions? In this case it is necessary to allow a judge to make the judgement, since there is no universality of assessments and the total objectification of opinions is not possible.[44] One can only try to get as close as possible to the objective model.[45]

The question on the extent to which a judge can afford the "luxury of their own opinion" might be answered that:

[40] Gonera, *op. cit*. p. 90.
[41] Cf. Gonera, *op. cit*. p. 90.
[42] Ziembiński, Zygmunt. *O pojmowaniu sprawiedliwości*. Lublin, 1992 r., p. 127-128.
[43] Judgment of the Constitutional Tribunal on October 24, 2017, according to Bogdan Bladowski [in:] Bladowski, Bogdan. *Metodyka pracy sędziego cywilisty*. p. 40.
[44] Cf. Rott-Pietrzyk, *op. cit.* p. 291 and a footnote, No 95.
[45] *Ibidem*, p. 291.

> The idea is (…) that judges' opinions should not affect the judicial activity (…), although, (…) in the, so-called, difficult cases a judge can decide between the specified values (…) but in the objective manner – by referring to the current constitutional order or the social situation and according to the defined procedure.[46]

Judges adjudicate "according to their knowledge and own inner conviction."[47] They also make a pledge to bring justice according to the rules of law and to their conscience.[48]

One of the elements of making judgements is axiology.

> Quintessence of this is (...) the old anecdote about a judge who, considering a complaint against a woman pouring water into milk, imposed the lowest sentence possible within the scope of punishments. When asked on the application of the lowest sentence, the judge answered that he liked low-fat cheese. It is a human behaviour, but one may expect from a judge a sense of situation and not following someone's inclination.[49]

In other words, judges shall rely on their believes, but not necessarily reflect their opinions in judgements. Isn't the sentence contradictory? No, as…

> Every profession contains (…) elements of external necessity and requires dedication to tasks that are not selected for a personal purpose. (…) It means that one shall overcome something that is strange, presented by the profession as the peculiarity that one is, and the strange something makes a profession to be fully "own." And so, devoting oneself to the generality of the profession requires so that one can confine oneself; it means to make one's profession entirely own business. Then it does not limit a man.[50]

The legislator indirectly obliges the decision-making individual to use the opinions. In the provisions it applies general clauses that encourage judges to make their assessments, these being determined by "socio-political and cultural factors and personality of a judge."[51] At the same time,

> "considering moral pluralism and a fact that a judge does not conduct any research and does not have the studies on values being acceptable by the society, a judge needs to rely on their own

[46] Daniel, Krystyna. *Normatywny i społeczny obraz sędziego*. [in:] *Sądy w opinii społeczeństwa polskiego*. eds. Borucka-Arctowa, Maria, Pałecki, Krzysztof. Kraków, 2003, p. 123.
[47] Bladowski, Bogdan. *Metodyka pracy sędziego cywilisty*. Warszawa, 2008, p. 28.
[48] Art. 66 of Law on Common Courts Organisation and Art. 27 of the Act on Supreme Court.
[49] Łętowska, Ewa. *Rzeźbienie państwa prawa 20 lat później*, in a conversation with Krzysztof Sobczak, Lex Wolters Kluwer business, p. 60.
[50] Gadamer, Hans-Georg. *Prawda i metoda.* Warszawa, 2013, p. 40.
[51] Wróblewski, *Sądowe…, op. cit.,* p. 28.

perception of the social values. A judge is being legitimized to do so by a provision that obliges a judge to make decisions according to their own reason and life experience".[52]

Freedom from voluntarism and one's own preferences relates, in a sense, to objectivity – without excluding fidelity to subjectivity in terms of experience and conscience. I would like to emphasise that it is about the "objectivity in a sense." Objectivity results from one's own conviction about something being objective, and, at the same time, it separates itself from own opinions on various issues.

Freedom from arbitrariness

Freedom from arbitrariness is closely related to freedom from voluntarism. Whereas voluntarism relates to criteria which a judge refers to while making decision, arbitrariness is about the ability to justify the decision taken. Thus, freedom from arbitrariness is not about specific sources of the decision, but rather if the decision can be justified or not. Instruments of protection against arbitrariness include *inter alia* openness of court proceedings, the obligation to provide reasons for a judgement, and judicial control.[53] Courts shall explain the course of interpretative process[54] and the matter of interpretation of law. [55]

With regard to the freedom, one shall pay particular attention to the reasons for judgements. Reasons for judgement has several functions. The first one is to legitimize the judgement.[56] Judicial power proves that the case has been examined. The second function of the reason for judgement is explanation[57] and persuasion of the people involved.[58] It shall facilitate the acceptance of the judgement.[59] "By reason for judgement, court's decision will be presented as rational act – based on established norms of the law in force, on findings on facts adopted on the basis of certain evidence,

[52] Cf. Rott-Pietrzyk, *op. cit.* p. 289.
[53] Cf. Rott-Pietrzyk, *op. cit.,* p. 290.
[54] Ibid. Footnote No. 142.
[55]Bladowski, *op. cit.*, p. 30.
[56] Cf. Judgment of the Constitutional Tribunal from April 11, 2005, SK 48/04, OTK-A-2005, No. 4, item. 45.
[57] Cf. *Ibidem.*
[58] Cf. Wróblewski, *Sądowe…, op. cit*., p. 106–108; Włodyka, Stanisław, gloss to the resolution of a bench of seven Justices of Supreme Court from September 25, 1967, III CZP 117/66, OSPiKA 1968 C 195, p. 413.
[59] Cf. Judgment of the Constitutional Tribunal on April 11, 2015, SK 48/04, Z.U. 2005 / 4A / 45.

on interpretative argumentation."[60] It is not the judgement that shall be approved but the reasons for judgement. A judge shall not only adjudicate but also be willing and able to convince others.[61] The third function of the reason for judgement is to allow verifiability of the methods used to make a decision and its control.[62] In other words, a reason for judgement ensures verifiability of the decision. The fourth function of a reason for judgement is to shape the practice. The justified decision favours the predictability of future decisions.[63] All of these functions can be united in a one word that determines the purpose of the reason for judgement. This word is "explanation." Explanation is an inverse of arbitrariness of a decision and that is why "freedom from arbitrariness" is manifested primarily in the substantive (but also technical) quality of the reason for judgement.

Freedom from emotions

In the context of decision making process, one can say about freedom from emotions only to a certain extent. It is due to the fact that psychological studies show that damage to a centre of brain responsible for emotions makes it impossible to take any decisions.[64] So one cannot eliminate emotions from the decision making process. It is rather about the ability to control emotions that are responsible for following impressions and superficial judgements or for interfering the stability of behaviour. In other words, emotions make it possible to form judgements, but it does not imply that they can be the reasons for judges' future decisions.

At this point I would like to refer to a controversial problem – routine. The word is commonly used in a pejorative sense, but, in the light of a judge being expected not to be driven by emotions, it is worth to analyse what routine is and what its purpose is. I am going to use an analogy. In chess, although there are countless combinations of

[60] Wróblewski, *Sądowe…, op. cit.*, p. 21; cf. referred R.A. Leflar, *Some Observations concerning Judicial Opinions*, "Columbia Law Review", t. 61, 1961, p. 813 and following.
[61] Cf. Łętowska, *Rzeźbienie państwa*…, op. cit., p. 42–43.
[62] Cf. Piasecki, Kazimierz. *Organizacja wymiaru sprawiedliwości w Polsce*. Zakamycze, 2005, p. 65; cf. Wróblewski. *Sądowe…, op. cit.,* p. 106–108; Włodyka, Stanisław, gloss to the resolution of a bench of seven Justices of Supreme Court from September 25, 1967, III CZP 117/66, OSPiKA 1968 C 195, p. 413 PDZ; Cf. Judgment of the Constitutional tribunal from April 11, 2005, SK 48/04, OTK-A-2005, No. 4, item. 45.
[63] Cf. Wróblewski, *Sądowe…, op. cit.,* s. 106–108; Włodyka, Stanisław, gloss to the resolution of a bench of seven Justices of Supreme Court from September 25, 1967, III CZP 117/66, OSPiKA 1968 C 195, p. 413.
[64] Cf. research described by A. Damasio in a book *Błąd Kartezjusza*, Poznań, 2002.

movements, one may notice some patters of pawns on the chess-board. To play well, a chess player considers the patters when deciding about the moves. Judges act similar to chess players thinking with chess diagrams – they think with categories of legal institutions. This does not prevent them to focus on a case that currently is being examined and that requires considering specific and individual circumstances.

Routine is perceived pejoratively as it implies automatism in action and this, in turn, to the lack of individual approach. No one wishes to be treated as one of the many "cases." However, professionalism is largely based on routine coming from experience. Individual approach and empathy arouses positive associations, but none of the reasonable people would claim they would like to be operated by a surgeon who is full of emotions. One might rather choose a surgeon with a cool head and steady hand being a result of routine. The apparent contradiction between an individual approach to a case and professionalism resulting from finding a pattern in a case may be illustrated by a sentence of Edouard Manet on the same apparent contradictions in painting: "Every new painting is like throwing myself into the water without knowing how to swim." [65]

Freedom from ignorance and lack of knowledge (unawareness)

Internal independence is related to the specific type of self-confidence – the one built on solid foundations.

"The most solid ground for independence is (…) professionalism, deep knowledge, and high level of competence, rich life and professional experience of a judge. It is hard to influence experts with strong opinions, who know their value and are guided by the adapted principles."[66]

Freedom of ignorance is mandatory in the field of independence of a judge.

> By neglecting self-education, not reading legal literature, not studying judgements of supreme courts, [a judge] risks that judging, understood as (…) making decisions or taking judgements, might start to be beyond their ability, (…) and, in this case, incompetence has some ethical connotations. Undertaking actions beyond one's ability is unethical, as it may expose (…) those who are subject to judge's adjudication to irreversible consequences in the area of rights being protected in court proceeding".[67]

[65] Manet, Edouard. *Pędzlem i piórem*. Kraków, 2010, Quotation No. 130.
[66] Gonera, *op. cit.*, s. 96.
[67] *Ibidem*, s. 97–98.

Here the freedom from ignorance combines with the second area of independence that I would define as freedom "to."

The ability to apply provisions to specific cases requires not only legal knowledge but also knowledge in the field of the case. General clauses and all elements of the system, opening law to reality, including culture, technology, knowledge on different scientific disciplines and areas of life, consider law as a social occurrence/event. Social realism of law prevent law from isolation. Law must be combined with knowledge in every area which the case being examined is related to. Therefore, an important characteristic of a lawyer, and a judge in particular, shall be the ability to acquire knowledge on facts – for the purpose of law enforcement. While observing the courtrooms, I have noticed that there are judges who take advantage of the presence of an architect, a doctor, or a nursery teacher in a hearing and try to find out more in their area of expertise.[68]

The method of a lawyer consists of an openness to finding out – that shall be distinguished from an openness to knowledge – and openness to question own knowledge. The latter element is necessary as people are not always aware that they "know that they know nothing" or that their beliefs are wrong. If judges based decisions only on the knowledge they believed they possess, they would not avoid mistakes. Questioning one's own knowledge and falsifiability of statements might prevent them from making some mistakes.

Falsifiability of statements includes, in particular, the search for information.

> The fact that a judge has knowledge in a fled does not release a judge from examining the evidence from expert's opinion (…) as it may deprive (…) parties of the possibility to ask questions and to criticise the given point of view. Judge's own information can only facilitate the assessment of opinion on an expert.[69]

On the other hand,

[68] It has an additional dimension – an expert talking about their matter of expertise becomes more relaxed and forgets about their role as a witness and, therefore, becomes more reliable. Some judges might have objections – even if it is a useful practice – there is not time for it. Especially when, in a department, there is pre-defined amount of cases being on a case-list.

[69] Ereciński, Tadeusz [in:] Ereciński, Tadeusz; Gudowski, Jacek; Jędrzejewska, Maria. *Komentarz do kodeksu postępowania cywilnego, część pierwsza, Postępowanie rozpoznawcze*. Vol. 1, Warszawa, 2003, p. 553.

> …courts are not bound by an opinion of an expert and shall assess it along with other evidence in the scope of discretionary evaluation of evidence. Uncritical acceptance of an opinion of an expert may lead to the possibility of an expert deciding on a case, not a judge.[70]

Judges' knowledge allow them to evaluate opinions of experts.

Of course judges adjudicating in the wide scope of cases cannot be specialists in each matter. However, they need to understand the matter which law shall be applied to. In this specific professional situation, a judge shall manifest not so much the knowledge but an openness to finding out. It might be called inquisitiveness.

Independence as a "freedom to…"

The second area of independence is the one that I have already mentioned when considering the subject of "freedom from ignorance" – namely the area of freedom "to" – to think independently, to behave professionally in the decision making process, to internal integrity and to civil courage. A judge must be intellectually open.[71]

> Independence is a conscious choice to make one's own individual, intellectual effort to establish facts, to find a relevant provision of law, and interpret it, considering all possible variants of interpretation, to decode a legal norm taking into consideration not only the content of the regulation, but also the axiology adopted.[72]

I would like to strongly emphasise the role of "openness to finding out." To apply an abstract and general rule that is to translate it into a specific and individual one, one needs not only to have the good insight into facts but also possess knowledge that governs the facts. The importance of knowledge on facts related to the case requires a judge to establish a way to gather enough information on the subject being examined. Social realism of law does not allow law to isolate from other areas of knowledge. Therefore, it is an important element of the method of a judge to have the ability to gather knowledge on facts for the purpose of application of law. In my opinion this ability includes openness to finding out, being distinguished from the openness to

[70] Ereciński, *op. cit.*, p. 554 and quoted: Sehn, Jan. *Dowód z opinii biegłych w postępowaniu sądowym*. "Nowe prawo" 1956, No. 3; Ossowski, Waldemar. *Uwagi o korzystaniu z biegłych w sprawach cywilnych*. "Nowe prawo" 1960, No. 10; Włodyka, Stanisław. *Zagadnienia dowodowe w nowym k.p.c. "*Nowe prawo" 1966, No. 1; Rejman, Stanisław. *Dowód z opinii biegłego w postępowaniu cywilnym*. Warszawam 1967; Jaegermann, Kazimierz; Kłys, Stanisław. *Rola biegłego w sądowym stosowaniu prawa*. "Nowe prawo" 1989, No. 11–12.
[71] Gonera, *op. cit.*, p. 93 Footnote no. 9.
[72] *Ibidem*, p. 91.

knowledge, and to questioning one's own knowledge. The latter element is necessary as people are not always aware that they "know that they know nothing" or that their beliefs are wrong. If judges based only on the knowledge they believe they possess, they would not avoid mistakes".[73]

To summarise – internal independence is an intellectual attitude towards the position held[74] and is the "fundamental ethic postulate for all judges." [75] It is based on internal honesty and civil courage – that are being out-of-the-system boundaries of the independence.

And who will guard the guards themselves? – The relation between independence and control

"*Sed quis custodiet et Ipsos custodes*"[76] – "and who will guard the guards themselves."[77] These words illustrate the dilemma: how to find the balance between independence of judges and the responsibility for the administration of justice. The very combination of "independence" and "control" raises concerns, not to mention finding the relation between them. Responsibility lies in the fact that there is a possibility of control in case in which law has been wrongly applied. The control is designed to be difficult because, if "law lives in the code," [78] "a legal norm assumes a dispute over the content of the norm." [79] Therefore, on the one hand, there must be a form of control not jeopardising the independence, and, on the other hand, the control must end with a final and legally binging decision at a certain point. This is the purpose of judicial review and additional control of the Supreme Court – to issue a judgement resulting from cassation appeal.

> Although the assessment made by the court is subject to verification, one cannot imply the impact on or a control over a judge.
>
> The idea of external control over the work of a judge is a kind of logical absurd. By definition, a judge is a trustworthy person that not need to be controlled. Multi-level court system does not contest the thesis. Juridical activity of judges is subject to judicial supervision – thus appeal trial.

[73] Cf. Damasiewicz, Agnieszka. *Metoda prawnika (o tym, czy sędzia-wioślarz i adwokat-chemik są lepszymi prawnikami?).* Manuscript.
[74] Cf. Gonera, *op. cit*., p. 91.
[75] *Ibidem*, p. 94.
[76] Juwenalis, *Satyry*, VI, 347 (around. 115 A.D).
[77] Or: „and who will control the controllers."
[78] Fuller, Lon Luvois. *Anatomia prawa.* Lublin, 1968, p. 18.
[79] Piasecki, *Organizacja wymiaru…, op. cit.,* p. 61.

> It is used to adjust judgements. The institution of appeal does not result from lack of fundamental trust to judges in general, but from the fact that no person is infallible and some people are dishonest. It also results from the recognition of the right to a two-instance proceedings granted to citizens by the Constitution and from a reason of more general nature – that is e.g. difficulties in determining the so-called objective truth or interpretation of provisions. The change of judgement or reversal of a judgement by the higher instance does not result from the fact that a judge in the lower instance has been bribed or negligent but is a consequence of a different interpretation of provisions or other conclusions reached by a judge of a higher instance court.[80]

"Therefore, multi-level court system is not a supervising institution appointed in fear of judges' dishonesty or unconscientiousness. Its essence is rather to support an extremely difficult idea that is putting law into force."[81]

An appeal trial, and in particular a control of the Supreme Court, could be compared to self-control of the cybernetic system. Given the independence of judges, they can be treated as "relatively closed system" within the meaning of cybernetics. Cybernetics covers *inter alia* information coupling in relatively closed systems.[82] For example, when one lifts a glass that is on the table, one assumes that the hand, led by the eye, goes directly to the glass to lift it. Meanwhile, according to cybernetics, reaching for a glass is a process of eliminating deviations – deviations between the hand and the object are being reduced during the whole process, so that, at the end there so no mistake and a glass is being lifted.[83] Information is constantly being corrected. The process of application of law is also the process of transforming data related to facts, norms, and gradual and continuous control of the proper direction – where the direction given by the court of the first instance is then corrected by the court of the second instance of the Supreme Court. In other words, the essential role of judicial control is to

[80] Najda, Magdalena; Romer, Teresa. *Etyka dla sędziów. Rozważania*. Warszawa, 2007, p. 15 (introduction).
[81] *Ibidem*, p. 25.
[82] Cf. Wiener, Norbert. *Cybernetyka a społeczeństwo*. Warszawa, 1961, p. 15–17, [as cited in] Wróblewski, Jerzy. *Sądowe stosowanie prawa*. Warszawa, 1972, p. 57. "The term 'cybernetics' was created on 1940s by a mathematician from Massachusetts Institute of Technology, Norbert Weiner, as metaphorical usage of a Greek word *kybernetikos* that means "a controlling man." The ancient Greeks developed the concept of controlling skills probably on the basis of their understanding of processes of steering and navigation on watercraft, and extended its application to diplomacy and running the country. Wiener used this (…) concept to describe the process of exchange of information, through which machines and organisms are characterized by self-control that allow them to sustain the state of stability." Morgan, Gareth. *Obrazy organizacji*. Warszawa, 2009, p. 94.
[83] Cf. Morgan, *op. cit*., p. 95.

be an act of self-controlling system.[84] It follows that the principle of independence and the instance control are not contradictory to each other.[85]

How do judges themselves see the judicial control in the context of independence? They say:

"There is no case which judgement I am not sure about. It does not mean that they are not changed, revoked sometimes, but each case is being profound thought by me."[86]

"Success? What matters is a good legal idea on a case. Even the revoked judgement may be a success."[87]

"In civil cases there are many appeals as there might be different assessments in the cases."[88]

"I postpone the publication. I do not allow myself to make a mistake hoping that appeal will correct the judgement."[89]

"Sometimes I announce the judgement and see in people a sense of resentment. One needs to face that. I do not know if it results from them being so sure about them being right or I have given credence to testimony of the party that have had a better representative. Or one party has been more foresighted and secured their interested at some stage, made documentation, and the other counted on a good will that was not there. Then I hope that they appeal and maybe the bench of three Justices, being more experienced, will find something. I still have doubts, maybe because I do not adjudicate for that long – as others say they do not have doubts anymore."[90]

"I am aware I do things that are important to people. Even if a proceeding seems to be funny or unimportant, people do not see it as such. If they do, they would not trouble themselves with going to court. I think I do something really special. And the feeling always accompanies me. And the high sense of responsibility. And, not wanting to be misunderstood, the feeling of 'power' – in big quotation marks. Not power to do

[84] Habermas pointed that "Judicial control has the auto-reflective character that means the competence to control its own activities" – Cf. Habermas, Jürgen. *Faktyczność i obowiązywanie.* Warszawa, 2005, p. 259.
[85] Gonera, *op. cit*., p. 87.
[86] An interview No. 10, the Judge of Local Court.
[87] An Interview No. 1, the Judge of Regional Court.
[88] An Interview No. 2, the Judge of Regional Court.
[89] An interview No. 9, the Judge of Local Court.
[90] An interview No. 52, the Judge of Local Court.

whatever I want, but that I settle, make decisions. I do not feel the privilege of power, but the burden of it. Those are not things "from"-"to." It is very important for me."[91]

"Assessment of effectiveness does not depend on the judge, but on the appeal instance, and then on the Supreme Court. And the judgements of the Supreme Court are furnished with critical remarks. Then one may ask – who has been effective. The court which sentence has been revoked? (And the court is bound in the case, and cannot say – there have been five opinions and each says I am right)."[92]

Which conclusion can be drawn from these statements? There is no doubt that judges do not take judicial control personally as the intervention in judicial work of a particular judge, but as a system tool for the correction of judgements. They do not treat the revoked judgement as a criticism of them as individuals or as an attack on their assessment, but as making possibly different, but also justifiable, assessment that they do not need to accept. This is due to the specific nature of civil cases where difference in assessments is a norm rather than exception. Sometimes judges have a sense of relief that the case would be re-assessed. However, they are not released from responsibility for the case, knowing that the judgement may not be appealed – so there may be no moment of correction of a judgement. They have a high sense of responsibility for the sentence.

Following the jurisprudence

From the article 178 section 1 of the Constitution of the Republic of Poland and article 60 of the Law on Common Courts Organisation results that a judge shall be independent and subject only to the Constitution, acts and conscience. Analysing the relations between independence of judges while adjudication and the stability of law, one might ask if judges shall also follow the jurisprudence. On the one hand, following the existing jurisprudence meets the condition of independence that includes the knowledge resulting from wide reading and studies ("freedom from ignorance," "freedom to intellectual openness and inquisitiveness"). On the other hand, promotion of judges depends on, *inter alia,* the effectiveness of adjudication understood as upholding judgements in appeal trials. In literature it is noted that:

[91] An Interview No. 64, the Judge of Local Court.
[92] An Interview No. 32, the Judge of Regional Court.

„…a result of the mechanism is the existence of specifically understood <common law – A.D>, the more doubtful as the current technology makes it possible to use the extensive jurisprudence of dubious quality being selected for different reasons."[93]

I have explained earlier that judicial control cannot be and is not perceived as a pressure or influence jeopardizing the independence of a judge, as it is only the mechanism of self-controlling system. However, in case of constant revokes of a judgement, "the power of persuasion" seems to be more direct:

"It happens that I do something constantly, but I cannot convince the court of appeal. So eventually I change the practice."[94]

However, we cannot demonize the "the power of persuasion", because, as the same judge claims:
"… and sometimes I come to the conclusion that the practice was wrong, even though judgements have been upheld."[95]

Besides, the situation in which a judge, while getting acquainted with the jurisprudence, changes its decision to the consistent jurisprudence of the Supreme Court can hardly be regarded as "impact."

One shall notice where the judgement being considered come from – the local court, the regional court, the appeal court, or the Supreme Court – as the roles of the courts are different. While the judgement of local, regional, or appeal court can be treated as inspiration, the judgements of the Supreme Courts shall be considered as a point of reference because of the special role of this court in the administration of justice i.e. ensuring of uniformity of jurisprudence.[96]

Act of enforcement of law is characterized by not unified judicature in similar cases and it is the role of the Supreme Court to prevent the situation to the certain extent.

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[93] Czarnik, Zbigniew. *Prawotwórcza rola sądu a dyskrecjonalność sędziowska*. [in:] *Dyskrecjonalna władza sędziego, zagadnienia teorii i praktyki*, eds. Dębiński, Marcin; Pelewicz, Robert; Rakoczy, Tomasz. Tarnobrzeg, 2012, http://tarnobrzeg.so.gov.pl/sites/default/files/Dyskrecjonalna%20władza%20sędziego%2C%20Tarnobrzeg%202012_0.pdf .
[94] An Interview No. 5, the Judge of Regional Court.
[95] An Interview No. 5, the Judge of Regional Court.
[96] In case of a resolution with a judicial norm status it even has to be the point of reference.

"With all the freedom of choice that is given to a judge by statuses (…), a certain uniformity of jurisprudence is an indispensable condition of proper functioning of society and, hence, it represents at least an instrumental value, which, to some extent, can compensate for accidental decisions that fully comply with applicable law, but decisions which in the case we consider to be unjust."[97]

In referring to jurisprudence one shall – as in the application of law in general – maintain a certain standard. In the context of application of law, the notion of standard is characterized by Ewa Łętkowska who claims that "a standard is a term that refers to a model of behaviour (…). Law consists of both principles and an established standard."[98] She explains that "there might be a law that has a great potential, but, due to the repetitive, poorly shaped practice, the standard of protection granted by the law is much lower than the one presented by the principle."[99] Referring to jurisprudence also may be done with different – low or high – standards. "Jurisprudence shall be collected and analysed to determine the current standard to avoid quoting any, maybe even random, marginal, or obsolete judgement."[100] A judge indicates here the influence of technology on the decision making process:

"Publication of judgements may be risky – how judges refer to them? Thought process may be superficial, one might just copy judgements. Portals with judgements may support different things: opportunism, laziness, or challenging one's own way of thinking, without copying. (…). The Supreme Court is to unify law. A question of law – and no other judgement. Not a precedent – but positive law."[101]

I have asked judges whether they compare current cases with others, previously examined. When answering the question they referred both to their own experience and to the use of judicial decisions of other courts:

"One needs to refer to jurisprudence as it is about the confidence of parties and representatives. Too bad if one judge decides one thing and the other – otherwise. For example, several people filed a lawsuit, obtained a favourable decision and the opponent's appeal has been dismissed. The others, being in similar situation, followed

[97] Ziembiński, *O pojmowaniu…, op. cit.*, p. 128.
[98] Łętowska, *op. cit.*, p. 12, 13.
[99] *Ibidem*, p. 12.
[100] *Ibidem*, p. 13.
[101] An interview No. 84, the Judge of Regional Court.

the example, and the local court reached the same decision but appeal court did not share the same position, so the second group of people was sent away empty-handed and needed to bear costs. The situation in which one court makes one decision and another, in the same circumstances, forms different judgement should not happen. That is why I try to follow the jurisprudence of the Supreme Court, unless it is in opposition to my own sense of justice."[102]

"While I do not remember the details of the cases, I remember the general approach to them."[103]

"Once a decision is made, there is no time or will to re-examine it. The representative of the party needs to be really good to force a judge to reflect on the problem already being thought over by a judge."[104]

"One forgets the case being settled, but remembers the experience. Without re-examining previous cases."[105]

"In case of legal status I compare cases. I remember the judgement – of the Supreme Court or my own. I remember which facts need to be noticed to apply them in a current case.[106]

"I have my own files and 'words of wisdom'."[107]

"I act like a scientist. I read judgements. Knowledge helps, gives clearance."[108]

„For example – where does an amount of compensation come from? There are some criteria established in the jurisprudence of the Supreme Court to be considered: first – the level of damage and permanence of health impairment, range of injuries, the level of physical and psychological suffering, length and intensity of the rehabilitation process, consequences of damage, changes in injured party's life, former lifestyle, and age of a person. There are plenty of criteria that need to be taken into consideration. And I assume that compensation shall be of a sensible value, it cannot be just symbolic. In other words, if someone claims for compensation and the circumstances being

[102] An Interview No. 4, the Judge of Local Court.
[103] An Interview No. 5, the Judge of Regional Court.
[104] An Interview No. 5, the Judge of Regional Court.
[105] An Interview No. 9, the Judge of Local Court.
[106] An Interview No. 10, the Judge of Local Court.
[107] An Interview No. 1, the Judge of Regional Court.
[108] An Interview No. 1, the Judge of Regional Court.

established give the ground to award compensation, I see no reason to moderate, reduce it, unless a person clearly has not suffered and just try to get rich. Here the role of the court of second instance is very limited as a regional court can change the amount of compensation only when it is significantly low or high. As a rule, it is a competence of a court of first instance to determine compensation."[109]

"One thinks: I would do it differently, and therefore I consider ruling favourably in an appeal. Sure, we encounter here the cases which we examined before the court of first instance. It somehow affects, it is our experience, it is our methodology of work. Being a judge in the court of second instance does not mean that I do not have opinions, or have not examined similar cases in the court of first instance. It is just the opposite. It is obvious to make references to that. (...) the fact that we are judges in courts of second instance (...) is a kind of continuation."[110]

At the same time, the situation, in which a judge does not use jurisprudence because they have no time for studying it, debates from a good standard[111]:

"I read all judgements, check if there is something new on a case, read comments – only if a case is serious or difficult. Those are isolated situations. If the problem is not serious – I usually have no time to reach to jurisprudence. I read the principle, see what it says and I make a decision according to that."[112]

The same judge adds:

"…if a party refers to reasonable arguments and it makes sense, it is not possible for me not to read everything I can find on the subject. In addition, the jurisprudence of the Supreme Court is sometimes being questioned. There are different judgements on the same case. Fortunately, the Supreme Court gathers itself and adopts a summarising resolution."[113]

Quoted statements proves that, firstly, judges see the point in following the jurisprudence, especially the one of the Supreme Court, however – only to the certain extent, determined by their personal conviction. Secondly, they remember not the

[109] An interview No. 85, the Judge of Regional Court.
[110] An Interview No. 85, the Judge of Regional Court.
[111] An amount of work for a judge, both resulting from amount of cases and amount of administrative work on the case causes the standard being lowered. Judges point out in the interviews that they would like to and feel that should devote more time for a case. However, due to the amount of cases and tasks, it is impossible.
[112] An Interview No. 4, the Judge of Local Court.
[113] An Interview No. 4, the Judge of Local Court.

particular cases, but their approach to the specific legal matter. They admit that it is difficult to change the approach without convincing argumentation presented by a party. At the same time, they are aware that the usage of a particular solution depends the facts of the case.

The attitude of judges to jurisprudence of other courts may be described with the words of painters and their attitude toward painting of other painters. When it comes to following jurisprudence of other courts as inspiration – I quote the words of Henry Matisse: "I owe my art to all painters."[114] When talking about appreciation of the jurisprudence of other judges, while maintaining someone's individual characteristics, one may quote Matisse again: "If I were not making the paintings I make, I would paint like Picasso."[115] But when it comes to the critical approach in an elegant but significant form – I use the words of Picasso criticizing Braque's paintings in an exhibition: "Well hung."[116]

In conclusion, one cannot state that a judge shall be "loyal" to jurisprudence. However, it should be noted that a judge shall establish such a standard of using the jurisprudence to make it inspirational rather than a ready source of copyable judgements.

Summary

The author's role was to examine the relationship between the stability of law manifested in the form of uniformity of jurisprudence and internal independence of a judge.

Firstly, after determining the relations between "certainty," "consistency," and "uniformity," I analysed three problems: the role of assessment in judge's judgements, the need of making assessments caused by openness of natural language which principles are formulated in, and modern understanding of separation of powers in the context of the judiciary. There reflections let me outline the framework for the analysis of the fundamental issue which is the relation between independence of judges and stability of jurisprudence.

[114] Matiss, *Pędzlem..., op. cit.*, Quote No. 212.
[115] *Ibidem*, Quote No. 243.
[116] Pablo Picasso while "judging" Braque's paintings, *Pędzlem…*, *op. cit.*, Quote No. 40.

Then I reviewed the essential mechanisms of ensuring the uniformity of jurisprudence choosing for analysis those that are established to remove discrepancies in assessments. I passed over those designed to improve the obvious mistakes.

As, according to my first hypothesis, the notion of independence of a judge is a complex one because it consist of internal and external independence, I analysed internal independence that is more subtle to recognise and more difficult to examine, as it is protected mostly by internal boundaries resulting from a personality and education of a judge.

As, according to my second hypothesis, internal independence of a judge can be viewed as "independence from" and "freedom to," I defined the two aspects of independence. Freedom "from" means the independence from pressure and influences, from voluntarism and arbitrariness, from emotions and ignorance. Freedom "to" means primarily the freedom to intellectual openness, manifested on various ways. The analysis of the "freedoms" was crucial for the third hypothesis, according to which internal independence of judges influences their decision on factors to consider while adjudicating, and thus, determines a role of a judge in the process of creating the stability of law.

According to my fourth hypothesis, the judicature is a self-controlling system. Internal independence of judges is one of the factors legitimizing the self-control of the system. When examining this matter, I analysed the problem on boarders between independence and control, illustrating it with a famous question: "And who will guard the guardians?" Here the dilemma is that, on the one hand, instruments designed to avoid mistakes or differences in assessments shall exist, and, on the other hand, there need to be a stage where a judge shall stop to be controlled and be allow to make the final assessment. I referred to the cybernetic interpretation of a problem of eliminating mistakes by adjusting actions to the established goal, pointing out that judicial control is an element of self-controlling system and cannot be treated as intervention to jurisprudence of judges. I also considered the extent to which judges shall be "loyal" to jurisprudence – their own ones or of other courts, especially the Supreme Court. Analysing words of judges stated in the interviews conducted, I came to the conclusion that following the jurisprudence is perceived by judged as a value related to stability and predictability of the judicature – but to the limit. I pointed out to the problem of treating judgements as a set of ready-to-use decisions. The problem is indicated by judges themselves. They fear to create a negative standard of using jurisprudence. "A standard"

becomes an essential concept that shall be understood as a set of behavioural models which, in addition to legislation, shape the judiciary.

To summarise, the internal independence of a judge, against all appearances, does not interfere with the postulate of the uniformity of law, with it being a part of the more general concept of stability of law. On the contrary, reasonably used internal independence of a judge influences the axiological consistency of jurisprudence, which should be reflected in its uniformity, and, consequently, in the stability of law.