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**DID TOTALITARIAN EXPERIENCE SHAPE
DEMOCRATIC NORMS?
STRUGGLE FOR THE INDEPENDENCE
OF THE POLISH JUDICIARY AND ITS RESULTS:
CONCLUSIONS FROM TALKS
WITH PROFESSOR ADAM STRZEMBOSZ**

1. INTRODUCTION, RESEARCH PROBLEMS, METHODOLOGY

It is not arguable in today's legal doctrine, as well as in political philosophy and practice of the international organizations, that the independence of the judiciary is one of the fundamental factors of the rule of law. The problem of independence and separation of judicial power was mentioned in the famous *Spirit of laws* by Montesquieu: "Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression"¹.

To be precise, I understand the judicial independence in accordance with the definition offered by the International Bar Association in the *Minimum standards of judicial independence*, adopted in 1982. The judicial independence has been divided into "personal", which means that "the terms and conditions of judicial service are adequately secured so as to ensure that individual judges are not subjected to executive control"², and "substantive", which means that "in the discharge of his/her judicial function a judge is subject to nothing but the law and the commands of his/her conscience"³.

¹ Ch. De Secondat Baron de Montesquieu, *The spirit of laws*, Chicago 1993, p. 70;

² *Minimum Standards of judicial independence*, Article 1.b., https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx (visited December 31, 2018).

³ *Ibidem*, Article 1.c.

The judicial independence and its meaning is a subject of the academic and political debates in the United States, Europe, and specifically in Poland. After the political and legal transformation of the 1990s and the early 2000s, which led to the establishment of the strong liberal democracy ruled by law in Poland, the events of the last four years, starting from the elections of 2015, that are generally described as the constitutional crisis of state, showed not only that the effects of this transformation were less durable than it was predicted, but also that its social legitimacy was not as strong as many thought. In this article I would like to describe the process of struggle for the judicial independence in Poland during the years of communist rule, and then, its meaning for today's situation. In order to achieve this goal I will use a specific methodology.

This article is, above all, an effect of intensive work on the extended interview with Professor Adam Strzembosz, edited in the form of a book *Between Law and Justice (Między prawem a sprawiedliwością* in Polish)⁴. My interlocutor is one of the most respected legal authorities in today's Poland. He served for many years as the judge of the district courts, and was an academic (he was appointed Professor of criminology). He was one of the founding members and leaders of the "Solidarity" movement in the Polish courts, dismissed from work after Martial Law was introduced in December 1981. Then he became a leading negotiator of legal issues during the Round Table talks in February – April 1989, was appointed deputy minister of Justice in the first non-communist government (from September 1989 to June 1990), and served as the first non-communist Chief Justice of the Polish Supreme Court (1990-1998). Since December 2015 he has been one of the symbols of the resistance against the reforms of judiciary introduced by the right wing Law and Justice party, which were considered unconstitutional by many Polish lawyers, citizens, as well as the European Commission⁵. For his merits he was i.a. awarded the highest order in Poland – the Order of the White Eagle (2012) and the Paweł Włodkowic Award granted by the Polish Ombudsman (2018)⁶.

During the talks with Professor Strzembosz I had a possibility to confront the issues of the judicial independence in Peoples Republic of Poland, present in the historical and legal literature and the sources, with the perspective of the witness and a very important actor of the key events of the communist era.

⁴ A. Strzembosz, S. Zakroczymski, *Między prawem i sprawiedliwością*, Warszawa 2017.

⁵ *European Commission – Press release. Rule of Law: European Commission refers Poland to the ECJ to protect the independence of the Polish Supreme Court*, http://europa.eu/rapid/press-release_IP-18-5830_en.htm (visited December 31, 2018).

⁶ *Prof. Adam Strzembosz laureatem nagrody RPO im. Pawła Włodkowica*, there also full bio of Professor Adam Strzembosz, <https://www.rpo.gov.pl/pl/content/prof-adam-strzembosz-lau-reatem-nagrody-rpo-im-paw%C5%82a-wlodkowica> (visited May 20, 2019).

In this article I would like to reflect on the following problems:

1) How looked like the daily strategy of the judge who wanted to remain independent in the country that did not respect the judicial independence and expected judges to be politically loyal?

2) How intense was the support of the Polish judges for the “Solidarity” movement? How important was the issue of judicial independence in the “Solidarity” political program and practice?

3) How, from the perspective of 38 years, can we assess the attitudes of the Polish judges towards the Martial Law and their participation in the application of its laws?

4) How did the experience of totalitarianism and the resistance against it form the system of the independent judicial power in the Third Republic of Poland after 1989?

In this text I compare the claims of my interlocutor contained in the book (they were authorized before publication) with the views represented in the literature and the other sources. To verify the views of Professor I refer to the publications written by the lawyers as well as the historians and the sociologists.

At the very beginning I feel obliged to underline that the time range of this publication contains the years of the professional activity of my interlocutor in judiciary, starting from 1956 when, motivated by the political and social changes provoked by the destalinization, he decided to start his judicial apprenticeship⁷. According to the today’s Polish historiography, the breakthrough of that time was “fast and thorough”⁸. The same reflection came to then-26-year-old lawyer, Adam Strzembosz, brought up in patriotic, catholic and anti-communist family, who stated in our conversation that “the changes in comparison to the previous nightmare of Stalinism were really quick”. To my question, whether he would have become a judge if the “Polish October” had not happened, he answered “certainly not!”⁹.

2. STRATEGY OF THE “INTERNAL INDEPENDENCE”. DILEMMAS OF THE JUDGE SERVING IN THE COMMUNIST POLAND

The thesis that the Polish judiciary under the communist rule did not meet the criteria of independence is not controversial in the literature. In the introduction to its classic book on this subject, Andrzej Rzepliński, the President of the

⁷ A. Strzembosz, S. Zakroczymski, *Między prawem...*, p. 45.

⁸ J. Kochanowski, *Rewolucja między październikowa. Polska 1956-1957*, Kraków 2017, pp. 16-17.

⁹ A. Strzembosz, S. Zakroczymski, *Między prawem...*, p. 48.

Constitutional Tribunal 2010-2016, stated directly: “The judiciary as the separate, independent power of the state did not exist in the countries of real socialism”¹⁰.

Karol Niewiński in his brand-new, very comprehensive book concerning the attitude of the Polish United Workers’ Party (PZPR in Polish) towards judiciary in the 1980s concluded: “the judiciary in the system of the uniformity of government of the People’s Republic of Poland was placed under the dependence of the executive: Council of State and Ministry of Justice”¹¹.

The personal dependence of the judges on the communist party officials was observed by the attorney J. Piątkowski, who stated “the presidents of courts were nominated from a list provided by the regional committees of party. (...) They were included in the party so called »nomenclature«”¹². This term, used popularly in communist Poland, was defined by the sociologist Jakub Karpiński, in his classic work on the nature of the communist system in Poland. “Nomenclature in party language meant the set of positions to which the »Party consultation« was necessary (in reality »consultation« meant simply decision)”¹³. The author indicates that according to the official “guidelines” of the Politbiuro of Party published in October 1972, the Chief Justice was included in the nomenclature of the Politbiuro itself¹⁴.

The fact that this system was imposed from abroad and in reality meant the domination of the party over the judiciary was mentioned in 2010 by serving Chief Justice, Stanisław Dąbrowski (also a judge belonging to “Solidarity” in the 1980s), who wrote: “The model of the state formed by the Soviet Union and imposed to Poland rejected the tri-partition of powers. Its assumption was that the real power belongs to the communist party and the role of courts is to serve party by the application of the states coercion to citizens”¹⁵. Respected Polish historian of law, Waclaw Uruszczak, pointed to very important problem – although the judicial independence was formally guaranteed by the 52 article of the Constitution of 22 July 1952, in practice it was an illusion¹⁶. The author indicates following factors limiting this independence:

¹⁰ A. Rzepliński, *Sądownictwo w PRL*, Londyn 1990, p. 5.

¹¹ K. Niewiński, *PZPR a sądownictwo w latach 1980-1985. Próby powstrzymania „solidarnościowej” rewolucji*, Oświęcim 2016, p. 29.

¹² J. Piątkowski, *Zaraza szaleje w sądach, w prokuraturach oraz w rządach*, Warszawa 2010, p. 10.

¹³ Karpiński, *Ustrój komunistyczny w Polsce*, Warszawa 2005, p. 83.

¹⁴ *Ibidem*, p. 85.

¹⁵ S. Dąbrowski, *Wstęp*, (in:) *Krajowa Rada Sądownictwa. XX-lecie Działalności*, Warszawa 2010, p. 9.

¹⁶ W. Uruszczak, *Niezależność sądów, niezawisłość i samorządność sędziowska w dawnej i niedawnej Polsce*, (in:) *Krajowa Rada Sądownictwa. XX-lecie działalności*, Warszawa 2010, p. 51.

- Arbitrary selection of the bench in each case,
- Using the unprofessional jurors against the professional judges,
- Lack of the inviolability of the court districts,
- Establishment of the secret courts or special court departments,
- Establishment of the unprofessional criminal-administrative colleges,
- Lack of the judicial review over the criminal preparatory proceedings,
- Special, political role of the Supreme Court, whose judges were nominated by the Council of State for a limited term,
- Possibility of the adoption of the guidelines for the judiciary by the Supreme Court,
- Lack of the real judicial self-government¹⁷.

One of the leaders of “Solidarity” in courts, judge Stanisław Rudnicki, invented the concept of „disposable” judge, defining it as “a person who generally does not fail to meet the decision makers’ expectations”¹⁸. According to already quoted Andrzej Rzepliński a “disposable judge” is characterized by:

- Weak character,
- Bad professional training,
- Bad organization of work¹⁹.

Rzepliński underlines that the system of education of judges was aimed at the development of such features. He also points out that pressure could be exerted on the judge who was not disposable enough, such as:

- Removal of the judge from adjudicating on a specific case,
- Overloading a judge with work,
- Transferring a judge to another, less convenient, department or even court,
- Suspension of well-deserved promotion,
- Threat of the removal from judiciary or of the lack of the re-election on the post of the Supreme Court judge²⁰.

Now I would like to refer Professor Adam Strzembosz’s claims concerning his independence as a line judge. Let us start by his declaration that may be surprising in the context of the previously mentioned statements by the academics and the legal practitioners. Asked, whether serving for thirteen years as a District (*Powiatowy*) and Regional (*Wojewódzki*) judge, he felt an independent judge, replied “Obviously. During my work in court there was not a single moment for me to feel direct pressure on my rulings. And certainly, there was no such situation that someone could influence me effectively”²¹. So, my interlocutor is sure that his judicial activity was fully independent. And this despite the fact that, as

¹⁷ *Ibidem*, pp. 52-57.

¹⁸ A. Rzepliński, *Sądownictwo w PRL...*, p. 66.

¹⁹ *Ibidem*, pp. 66-67.

²⁰ *Ibidem*, pp. 67-68.

²¹ A. Strzembosz, S. Zakroczyński, *Między prawem...*, p. 56.

he states in another sentence, there was a whole range of possibilities to influence the judge's jurisprudence. Among them he lists:

- The possibility of dismissal of judges by the Council of State (“this was the sword of Damocles that hung above us”, Strzembosz says), moreover, importantly, this sword proved effective to him at the beginning of the Martial Law period, when he was dismissed from office,
- The criterion of party membership, as an important decision-making factor in appointing and promoting judges (“promotions had to be approved by the appropriate party committee. Of course, my career proves that this criterion was not always and everywhere decisive, but I have seen a number of cases where clearly the distinguished judge was kept at a low level because he could not have appropriate views”),
- The issue of salaries (“it happened that two judges performing identical or very similar work earned completely different money”),
- The issue of transferability (“it was easy to transfer the judge from place to place”);

Professor sums up succinctly his remarks about the judicial independence: “in a word, there were not all those guarantees that exist now and which are unpalatable for those currently ruling”²².

Before we go on to indicate how Strzembosz explains the fact that despite the lack of formal guarantees he managed, in his own opinion, to maintain independence, it should be pointed out that he himself witnessed situations that should be considered blameworthy from the point of view of guaranteeing judicial independence.

And so, during his interview for the judges' apprenticeship carried out by the officials from the Ministry of Justice – the head of the human resources department and a lower employee – my interlocutor heard a question which he said was: “what would you do if a comrade from the Regional Committee of Party press you to issue an appropriate sentence?”. Strzembosz answered that he would not obey, because “he should apply the law shaped by the Central Committee, and not take into account the interests of individual party members”²³. To my remark that this was opportunism, he replied “rather cynicism” which he justified this way: “I showed them [the Ministry officials – S.Z.] I realized that all legislation came directly from the Central Committee, and the Parliament was an executive element subordinate to it. Claiming I won't obey some guy from the provincial committee, but the law established in reality by the Central Committee, was for me a kind of joke”²⁴.

²² *Ibidem*, pp. 62-63.

²³ *Ibidem*, p. 47.

²⁴ *Ibidem*.

The above situation can be commented in such a way that the candidate for a judge's apprenticeship, even if they did not want to directly admit the "party leadership role", they had to accept it, at least in such a delicate way as Professor Strzembosz did, not willing to adhere to the party's will in reality.

One of the most honest and probably the most difficult sentences Professor utters in response to the question whether it did not bother him that in the law on the system of common courts there was a condition of judicial service, which was "a guarantee of proper performance of the profession of judge in People's Poland". The answer is: "Sir, it certainly was not possible to perform any functions in People's Poland without a drop of opportunism." And further: "it was certainly not pleasant to be aware that it served an undemocratic state, that every now and then some political processes occurred in Poland. However, I stood in such a position that until I personally behave decently, I do a useful job, until there's nothing wrong with my conscience, there is no reason to give up this job"²⁵.

This statement can be regarded as a kind of *credo* of a judge who, while working in the political and legal system he does not accept, wants to fulfill his mission in a reliable, responsible and effective manner. So which "preventive actions" did Adam Strzembosz undertake in order to, according to his own words, "do not have anything bad on his conscience"?

The first of them was a categorical decision, made at the beginning of his professional career, that he desires to go to the civil department, not the criminal one. He recognized the former as "politically neutral". Later, he said, "by accident" he became a juvenile court judge what pleased him, because it kept him out of criminal court²⁶. It should be pointed out that professor's remarks about the juvenile court indicate his considerable freedom in adjudication.

The second basic decision that my interlocutor made at the beginning of his service and which he kept throughout his career was not to accept any "particularly exposed managerial functions" in court. Professor emphasized that if, for example, he had been the vice-president of a juvenile regional court, he would "take responsibility, or some responsibility, for a structure that he could not influence in a real way"²⁷. In addition, he would certainly be put under political pressure. Nevertheless, this provision did not prevent Professor from taking the post of a juvenile courts inspector, because on this position he had "clearly defined tasks and could freely fulfill them". He even accepted the delegation to the Institute for the Adjudication Studies (in Polish: IBPS) at the Ministry of Justice, because it was a "politically neutral" academic work. It should be pointed out that Professor refused to undertake tasks that could have a political character as part of his work at IBPS²⁸.

²⁵ *Ibidem*, pp. 58-59.

²⁶ *Ibidem*, p. 68.

²⁷ *Ibidem*, p. 59.

²⁸ *Ibidem*, pp. 67-69.

The third element of this strategy was, what may seem paradoxical, displaying “internal independence” in situations that could give rise to moral dilemmas. In the interview Professor gave examples of two such situations.

Summarizing these considerations, it should be pointed out that the criterion which determined whether Strzembosz was taking a particular position or not, was whether he could be fully responsible for his own actions and whether the pressures exerted upon him were so small that he was able to resist them. It was unacceptable for him, however, to be responsible for the behavior of other judges, that may have been incompatible with his sense of professional morality.

3. FAR REACHING DEMANDS AND THE TEST OF CHARACTERS – JUDGES IN “SOLIDARITY” MOVEMENT (1980-1981) AND DURING THE MARTIAL LAW PERIOD (1981-1983)

As a result of the August 1980 strikes, the first independent and self-governing trade union in the area of communist countries, “Solidarity”, was founded. The trade union quickly transformed into a social movement that was seeking far-reaching changes in the country²⁹. This fact created a great opportunity for the changes in the judiciary. Already, among the postulates presented in August 1980 in the Gdańsk Shipyard, apart from issues concerning everyday life, there were also problems of great political and legal importance, such as “the release of all political prisoners” (Demand No. 4), or “compliance with the constitutional guarantee of freedom of speech, the press and publication, including freedom for independent publishers and the availability of the media to representatives of all faiths” (Demand No. 3).

Professor Strzembosz learned about the Agreement that was ending the strike, to his surprise, from the state radio in the last days of the Summer vacation. As he said in the course of our talks, “I was overwhelmed with optimism”³⁰. He was pleased especially that the authorities agreed to release the political prisoners³¹. Immediately after returning to Warsaw, he was elected a new chairman of the Workers’ Council at the Ministry of Justice, which resulted from the fact that he had already been known as a man who was not afraid to speak his own opinion during the staff meetings. Then, in October 1980, at a conference in Poznań, he found himself among the founding members of the “Solidarity” in the judiciary,

²⁹ This term is used e.g. in T.G. Ash, *The Polish revolution. Solidarity 1980-82*, Oxford 1983, p. 223.

³⁰ A. Strzembosz, S. Zakroczymski, *Między prawem...*, p. 95.

³¹ *Ibidem*, p. 96.

and on 12 November, after a bravado speech at a meeting of ministry employees, he proclaimed the trade union in the Ministry of Justice, which provoked a hostile reaction of the minister himself³².

In Solidarity, Adam Strzembosz performed many functions: he was a member of the board of the Mazovia Region, a delegate to the First National Congress of Delegates in Autumn 1981, then for a short time, until the introduction of Martial Law, a member of the National Audit Commission. He was also among the initiators of the Center for Citizens' Legislative Initiatives, the body made up of dozens of lawyers, which prepared dozens of drafts of amendments to the state's law. Undoubtedly, he can be called one of the leaders of the "Solidarity" in judiciary, which evidenced his popularity among judges, his personal courage, and leadership abilities.

Certainly he was one of those who decisively influenced the position of the movement on the rule of law. Many authors share the opinion of Lech Gardocki, later the First President of the Supreme Court, the successor of Adam Strzembosz in this position, that the 21 Gdańsk demands "in no part reject the existing legal order, but strongly emphasize the need to comply with the Constitution of the PRL"³³. The sociologist Elżbieta Ciżewska, examining the place of the movement in the tradition of republican political thought, also draws attention to this aspect of the "vindicatory" legalism of "Solidarity". She points out that the movement's legalism was part of the republican conviction that "law is not a form of restriction of freedom, but its protection"³⁴. The author indicates that the "Solidarity" members, also the "simple" workers, demanded the implementation of constitutional guarantees. She also points out that the movement members paid attention to the necessity of respecting international standards (primarily in the field of human rights) as a binding law.

The reflection of the cited authors is consistent with the experience of my interlocutor. He indicates that the problem of the judges' independence was treated seriously by the ordinary members of the movement. The declaration of the workers from Warsaw Steel Mill, who stated that they are ready to strike on behalf of the judges, because they "realize that the judges are not allowed to do so" was a special manifestation of social interest in judges' independence. Strzembosz explained this attitude in a utilitarian way: "They were aware that in the authoritarian system the independence of the courts is absolutely fundamental to the security of the members of the trade union"³⁵.

³² *Ibidem*, pp. 97-98.

³³ T. Kozłowski, *Anatomia rewolucji. Narodziny ruchu społecznego „Solidarność” w 1980 roku* Warszawa 2017.

³⁴ E. Ciżewska, *Filozofia publiczna Solidarności. 1980-1981 z perspektywy republikańskiej tradycji politycznej*, Warszawa 2010, p.111.

³⁵ *Ibidem*, p. 114.

This attitude influenced the shape of the “Solidarity” program, which was adopted at the congress in Gdańsk in Autumn 1981. It is formulated in 37 theses preceded by an extensive introduction entitled “Who are we?”³⁶ Each thesis, however, was followed by proposals of specific solutions. Historians usually write about this program, focusing on its “self-government” dimension, concerning professional, economic and territorial self-governments, they neglect to mention the points of the program that are important from the point of view of our text, above all the Theses 23 and 24. Let us quote them in full: Thesis 23: “The system must guarantee basic civil liberties, respect the principles of equality before the law of all citizens and all institutions of public life”³⁷. Thesis 24: “The judiciary must be independent and the law enforcement apparatus subject to social control”³⁸. From our point of view, the second of the theses cited here is of key importance, but let us devote a moment to a few points from the development of the Thesis 23, because it will create a convenient context for us to interpret specific postulates regarding the judiciary.

Delegates for the Congress passed, among others that:

- It is necessary for Poland to ratify the Additional Protocol to the UN International Covenant on Civil and Political Rights, which would allow international control over implementation of the Covenant’s standards.
- It is necessary to clearly state in the Constitution the principle of equality of all citizens regardless of their beliefs, political views, and organizational affiliation.
- All aspects of public life, including political and social organizations, should be subject to law.
- An independent Constitutional Tribunal must be established in order to examine the compliance of laws with the Constitution and the national law with the international conventions.

These are demands aimed above all at counteracting the arbitrariness of the state authorities, that is, *de facto*, the communist party. The eminent historian of “Solidarity” Andrzej Friszke, recognized that “the program was designing a vision of a state whose system in many dimensions was an alternative to the system of People’s Poland and drew Poland close to the parliamentary democracy”³⁹.

How did the Union see the problem of independence of the judiciary? As its guarantee, it was recognized to introduce:

³⁶ *Uchwała programowa I Krajowego Zjazdu Delegatów*, <http://www.solidarnosc.org.pl/en/1-kzd-1981/item/6128-uchwala-programowa-i-krajowego-zjazdu-delegatow> (visited December 28, 2018).

³⁷ *Ibidem*, p. 31.

³⁸ *Ibidem*, p. 32.

³⁹ A. Friszke, *Rewolucja solidarności 1980-1981*, Kraków 2014, p. 685.

- The full judges' self-government, deciding about the casting of judges' and court presidents' positions,
- The principle of irremovability and non-transferability of judges,
- A ban on combining judicial functions with other public and political functions.

Interestingly, it was proposed to allow the dismissal of judges within one year of the reforms' entry into force, probably for the purpose of their verification⁴⁰.

The solutions that were developed in the Civic Center for Legislative Initiatives were in line with the cited-above proposals contained in the program. The draft amendments to the Act on the System of Common Courts included detailed rules regarding:

- The decisive role of the General Assembly of the judges in the selection of new ones,
- The key position of judges in the selection of the presidents of the court⁴¹.

The justification for the bill states: "the assumption of the project is to adopt, as a fundamental principle of the law on the system of common courts, the creation of the systemic guarantees of judicial independence, and above all to provide them with substantive character (...) Guarantees of independence must be formulated in such a way as to preclude any possibility of influencing the resolution of a particular case by factors other than facts of the case and applicable law. (...) There are no real guarantees of independence when the judge is formally independent while adjudicating but is dependent in matters of human resources, social, payroll, and other professional matters"⁴².

The reading of this extensive passage shows the realistic view of the authors of the project on the issue of judiciary and their actual willingness to change the state of affairs that I described in the previous chapter. No wonder, its authors were active judges who perfectly knew the problems faced by the judiciary lacking a guarantee of real independence⁴³.

What is significant and confirms previous claims regarding the seriousness with which the Solidarity movement treated the question of judicial independence, the Gdansk Convention also passed a significant resolution:

The first Congress of Delegates of NSZZ "Solidarity", expressing the conviction that it is impossible to repair the Republic without guaranteeing an independent judiciary, decides:

⁴⁰ *Uchwała programowa...*, pp. 32-35.

⁴¹ K. Barczyk, S. Grodziski, S. Grzybowski (eds.), *Obywatelskie inicjatywy ustawodawcze „Solidarności” 1980-1990, materiały i projekty ustaw Centrum Obywatelskich Inicjatyw Ustawodawczych „S” i Społecznej Rady Legislacyjnej*, Warszawa 2001, pp. 113-119.

⁴² *Ibidem*, p. 117.

⁴³ Cf. A. Rzepliński, *Sądownictwo w PRL...*, p. 93.

1) Ask all unit organizations of the Union to popularize widely the theses of the Union's program that relate to guarantees of judicial independence and reforms necessary to obtain a fully self-governing judiciary, independent of political authorities and state administration.

2) Oblige the authorities of the Union, and especially the National Commission, to develop materials presenting to the entire society the history of the judiciary in the post-war period and its role, both positive and negative, in the fight for human rights and respect for the rights of the whole society(...)"⁴⁴.

The above resolution indicates the high priority that "Solidarity" gave to the issue of the judiciary (its independence is mentioned as a condition *sine qua non* of the state's reform), and the awareness of its dual role in the PRL ("both positive and negative"), which indicated on the one hand the condemnation of using it as a cog in a dictatorship's machine while at the same time appreciating the efforts of the judges who, like Adam Strzembosz, wanted to maintain their independence.

Probably it was caused by the high activity of the judges in the social movement. According to various calculations, about 800-1000 active judges belonged to "Solidarity", which constituted about 25-30% of the total amount of judges⁴⁵. This result should be considered very high taking into account that the courts belonged to strategic state institutions serving the preservation of the communist power.

On 13 December 1981, the communist authorities proclaimed the Martial Law, which turned out to be another test of character for the Polish judges. Along with its announcement, a number of decrees were issued imposing heavy penalties on persons engaged in opposition activities, from participation in strikes to distributing leaflets. A serious change was the adoption of an "*ad hoc* procedure", which reduced the time of preparatory proceedings to 15 days, judicial proceedings to 5 days, and convictions to at least three years in prison⁴⁶. The authorities also initiated a large-scale operation aiming at subordination of judiciary that after a period of freedom seemed an uncertain element of the system of power⁴⁷. One of the dimensions of this operation was the elimination of the "rebellious" judges. By the end of 1982, about 40 judges had been dismissed and several dozen resigned⁴⁸. Among the four judges dismissed from the post immediately after the announcement of the Martial Law was Adam Strzembosz, to whom the news of the revocation arrived on Christmas Eve, 24 December, in the hospital⁴⁹.

⁴⁴ *Ibidem*, p. 90.

⁴⁵ *Ibidem*, p. 87.

⁴⁶ A. Paczkowski, *Wojna polsko-jaruzelska. Stan wojenny w Polsce 13 XII 1981 – 22 VII 1983*, Warszawa 2007, pp. 98-99.

⁴⁷ Cf. A. Rzepliński, *Sądownictwo w PRL...*, pp. 105-106.

⁴⁸ A. Friszke, *Sprawa jedenastu*, Warszawa 2017, p. 35.

⁴⁹ A. Strzembosz, S. Zakroczymski, *Między prawem...*, p. 134.

During our talks about this period Professor pointed to the fact that the attitudes of judges in penal cases in the era of Martial Law were very diverse. A group of around 40 Warsaw judges, for example, refused to submit a statement on leaving "Solidarity" and met at secret meetings discussing the means of acquittal of the defendants in the political trials⁵⁰. Some of the judges, associated with the party, facilitated such activities, while others were ruthlessly condemning all the accused.

The diversity of the judges' attitudes is also reflected in the statistical data concerning the criminal cases from the period of Martial Law and subsequent years in different District Courts in Warsaw. For example, in the District Court for Śródmieście, 49.4% of convictions were handed down in political trials, 18.5% of accused cases were acquitted and 29.6% of cases were discontinued.⁵¹ In the court for Ochota, only 30.8% of the defendants were sentenced, while 43.6% were acquitted and 20.5% of political cases were discontinued⁵². In another court, for the district Wola, as many as 70.4% of convictions were passed⁵³.

Interestingly, the party authorities were generally dissatisfied with the activities of the judiciary. In March 1982, at the meeting of the Central Committee for Party Control of the PZPR, it was concluded that "judgments are disproportionately low" to expectations⁵⁴.

4. IMPACT OF THE TOTALITARIAN EXPERIENCES ON THE JUDICIAL SYSTEM OF DEMOCRATIC POLAND AFTER 1989

In September 1988, another breakthrough in the life of Professor Adam Strzembosz took place. He was offered the position of chairman of the working group on law and courts in future talks with the party at the so-called Round Table⁵⁵. The negotiations that changed the course of the Polish history finally took place from February to April, 1989. Historians who describe this event focus primarily on the strictly political issues⁵⁶. Of course, the importance of settlement in political matters, which led to the first post-war partly free elections and then the nomination

⁵⁰ *Ibidem*, p. 147

⁵¹ A. Strzembosz, M. Stanowska, *Sędziowie warszawscy w czasie próby 1981-1988*, Warszawa 2005, pp.155-156.

⁵² *Ibidem*, p. 161.

⁵³ *Ibidem*, p. 169.

⁵⁴ A. Paczkowski, *Wojna polsko-jaruzelska...*, p. 100.

⁵⁵ A. Strzembosz, S. Zakroczyński, *Między prawem...*, pp. 172-174.

⁵⁶ A. Dudek, *Reglamentowana rewolucja*, Kraków 2014.

of the first non-communist prime minister, cannot be overestimated. However, the provisions regarding the reform of the judiciary, to which negotiations presided by Adam Strzembosz led, should also be regarded as groundbreaking.

The starting point were materials developed during the “Solidarity” period 1980-1981. The opposition group was made up of the lawyers who participated in that movement. Professor told me, figuratively, that after receiving the proposal to participate in the talks he “pulled from under the wardrobe” a manuscript of the draft law on common courts of 1981, which he had hidden there under Martial Law for fear of search by the secret police⁵⁷.

Already in the initial part of the Agreements concluding the talks, signed on 5 April 1989, it was stated that “the reform of state institutions includes the reform of Sejm, Senate, the office of the President and the courts”. So the courts were listed along with the key organs of legislative and executive power, what can be seen as the restoration of the third power of equal importance⁵⁸. Further it was stated:

Independence of the judges will be protected by the National Council of the Judiciary (KRS in Polish), consisting mainly of judges delegated by the general assembly of the Supreme Court, the Supreme Administrative Court, and the common courts. It will submit to the President a candidate for appointment to the each post of judge or promotion to the higher court of two candidates proposed by the general assembly of courts in the district in which the need to appoint judges arose. Judicial independence will be based on the principle of irremovability of judges (except for the cases specified in the Act) enshrined in the Constitution and non-transfer of judges, against their will, to another place of office⁵⁹.

It is evident that the most important concern of the authors of the Agreement in the matter of the judiciary was the same as that of the delegates to the Solidarity Congress seven and a half years earlier, i.e. to guarantee the independence of judges. The importance of this issue is firstly demonstrated by the will of its constitutional sanctioning and, secondly, by the intention of establishing a special, new body of state power that upholds this previously not respected principle.

Among the detailed solutions contained in the Agreements, there were:

- Introduction of the new appointment principle of the Supreme Court Justices – the term of office until retirement instead of the 5-year term,
- Resignation from the requirement of a “guarantee of due performance of the judge’s duties in People’s Republic of Poland” when appointing and dismissing judges,

⁵⁷ A. Strzembosz, S. Zakroczymski, *Między prawem...*, pp. 112.

⁵⁸ *Porozumienia Okrągłego Stołu: Warszawa 6 luty – 5 kwietnia 2018*, paragraph 36; http://ofop.eu/sites/ofop.eu/files/biblioteka-pliki/porozumienia-okraglego-stolu.html#kapit_36_porozumienia (visited December 27, 2018).

⁵⁹ *Ibidem*, paragraph 43.

- Extension of the powers of self-government bodies by, among others, co-decision in filling posts of court presidents,
- Selection of members of the college of the regional court by the general assembly,
- Introduction of term of office in the positions of court presidents,
- Modification of the institution of “justice and court practice guidelines” issued by the Supreme Court in such a way that they do not violate the principle of submission of judges to law only,
- Ensuring impartiality of the *criteria* for assigning to judges cases and rules for substitution of judges, which would be open to the parties,
- Determining the remuneration of judges according to *criteria* appropriate to the high social position of the profession of judge⁶⁰.

These provisions constituted a *sui generis* answer to all the problems with the independence of judges during the communist period. In fact, all of them were later put into law texts in the April amendment to the Constitution of the Polish People’s Republic and in the December package of judiciary laws. They should be assessed very positively as guaranteeing a high standard of judicial independence and separation of the third power from the executive one.

The Annex to the provisions includes specific rules on KRS, which was to play a key role in the appointment of judges. The provisions contained the specific composition of KRS –14 judges, the chairman of the State Council, the Minister of Justice and 6 Members Parliament⁶¹. Finally, the KRS was shaped by the Article 4 of the Act of 20 December 1989 (at the time when Adam Strzembosz was Deputy Minister of Justice), small corrections were made, but 14 members were still judges (which is 63.6% of the total number of members) and only 8 originated from a political nomination (36.4%)⁶².

The establishment of the KRS was certainly a far-reaching reform. Not only in Poland’s history has there been no such body, but also in Europe at that time it was not a frequent solution. For example, in Ireland, Denmark or the Netherlands such councils were appointed only at the turn of the 20th and 21st centuries⁶³, and the Polish example served as a model for other countries of Central and Eastern Europe⁶⁴. My interlocutor mentioned that the legal regulations in this respect, developed by the lawyers of “Solidarity”, were based on the Portuguese solutions

⁶⁰ *Ibidem*, paragraph 374.

⁶¹ *Ibidem*, paragraphs 445-450.

⁶² Full text of Law: <http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19890730435> (visited May 20, 2019).

⁶³ W.Voermans, *Councils for the judiciary in Europe: trends and models*, Leiden 2003, <https://openaccess.leidenuniv.nl/handle/1887/3708> (visited May 20, 2019).

⁶⁴ P. Tuleja, *Konstytucyjny status Krajowej Rady Sądownictwa*, (in:) *Krajowa Rada Sądownictwa. XX-lecie działalności*, Warszawa 2010, pp. 61-62.

adopted in this country after the collapse of Salazar's dictatorship⁶⁵. However, according to Art. 218 of the Constitution of Portugal, the National Council of the Judiciary consists of 17 members, of which 8 are judges (47.1%), and 9 (52.9%) are appointed by the politicians (the Parliament and the President)⁶⁶.

Pursuant to Article 187 of the Constitution of the Republic of Poland, the National Council of the Judiciary consists of 17 judges (68%), and 8 members appointed by the politicians (32%). In none of the European countries surveyed by W. Voermans this proportion was so favorable for the judges⁶⁷.

On the one hand, such a phenomenon may indicate an exceptionally high level of protection of court independence, but on the other hand, it may provoke isolation of the professional group of judges. This situation was criticized in 2004 in the largest Polish daily "Gazeta Wyborcza" by prof. Andrzej Rzepliński, who demanded the extension of the KRS to include the representatives of other legal professions⁶⁸. Interestingly, in his speech in the 20th anniversary of the establishment of the KRS, Orlando Afonso, chairman of the Consultation Council of European Judges (CCJE), pointed out that

(...) the Judiciary Council should not only be composed of judges, forming a kind of Levite group, but should reflect different opinions from both judges and social circles, and thus legitimize this judicial body. On the other hand, this body should consist mostly of judges elected by other judges⁶⁹.

Despite the above facts and opinions, the Polish legal doctrine was more likely to be satisfied with this form of the Council, and it was even postulated to "consider the purposefulness of maintaining its mixed composition", because the presence of other members than the judges in the Council "may even be dysfunctional"⁷⁰.

It seems, therefore, that in this aspect the totalitarian experiences have created an above-standard sensitivity to the issue of independence of the judiciary, while ignoring the important aspect of its social legitimacy. Maybe the judges do not see themselves as a "Levite group" but for the future of the independence of

⁶⁵ A. Strzembosz, S. Zakroczymski, *Między prawem...*, p. 110.

⁶⁶ Cf. also P. Mikuli, *Rady sądownictwa w Europie*, (in:) *Krajowa Rada Sądownictwa. Album pamiątkowy*, Warszawa 2010, p. 120.

⁶⁷ Currently the judges – members of KRS are elected by Parliament, what is found contrary to Constitution and was a basis for the suspension of KRS in ENCJ.

⁶⁸ A. Rzepliński, *Żeby sędziom się chciało chcieć*, „Gazeta Wyborcza” 6 February 2004, issue 31.

⁶⁹ O. Afonso, *Niezawisłość sędziów i Rada Konsultacyjna Sędziów Europejskich (CCJE)*, (in:) *Krajowa Rada Sądownictwa. Album pamiątkowy*, Warszawa 2010, p. 37.

⁷⁰ P. Sarnecki, *Krajowa Rada Sądownictwa*, (w:) *Trzecia władza. Sądy i trybunały w Polsce. Materiały Jubileuszowego L Ogólnopolskiego Zjazdu Katedr i Zakładów Prawa Konstytucyjnego*, Gdańsk 2008, p. 201.

judiciary in Poland it may be crucial to find a good balance between the necessary provisions and the need for social legitimacy and responsibility. Finding such a solution may be a tribute to “Solidarity” heritage and the final end of the “post-totalitarian trauma” in Polish judiciary.

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Summary

This paper is a confrontation of the statements made by eminent Polish Professor of Law, Adam Strzembosz, in the interview published in the form of a book *Między prawem i sprawiedliwością*, with the views presented in the legal, historical, and sociological literature. I describe the ways judicial independence was limited in Communist Poland, and the strategies judges undertook to counteract that phenomenon. Special emphasis is put on the attitude of the “Solidarity” movement towards this problem and the judge’s behavior under Martial Law. In conclusion, I try to prove that the post-totalitarian trauma in Polish judiciary provoked an “over-sensitivity” in regard to the judicial independence.

KEYWORDS

Communist Poland, judicial independence, “Solidarity”, Adam Strzembosz

SŁOWA KLUCZOWE

Polska Ludowa, niezawisłość sędziowska, “Solidarność”, Adam Strzembosz