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POLITICAL DIMENSIONS OF THE JUDICIARY

ABSTRACT

The text aims at juxtaposing the thesis of the so-called "apoliticality" of the judiciary with the political-scientific analysis of its functioning as an institution of a political system. At the outset, the analysis is focused on demonstrating the multidimensionality of the judiciary, highlighting at the same time the features distinguishing it from the legislature and the executive. Further on, the phenomenon of judicialization of politics is elucidated. Judicialization is viewed as increased influence that the jurisdiction of the common courts exerts on the political decision-making process and its ramifications for the functioning of democratic political systems. The analysis encompasses deliberations on the so-called direct and indirect politicality understood as the offshoot of complex relations established between the judiciary and the remaining bodies of state authority.

Keywords: political system, political institutions, tripartite system of government, the judiciary

In the debate about the judiciary, held also in Poland, the view that courts should be apolitical is widely regarded as an indisputable axiom. However, is it not so that we deal with a conceptual misunderstanding in this regard? Is it not the case that advocates of this viewpoint voicing their support for the threatened – as they usually claim – judicial independence commit, in fact, a certain abuse, whose gravity may prove equivalent to the aforesaid threat to the constitutional principle of the court system. Taking account of the foregoing, a question arises: how is "the

third estate" and its apoliticality perceived within the ambit of contemporary political science?

In order to arrive at conclusions, the very concept of the judiciary needs to be defined at the outset of the present study. For the purpose of the present paper I deem the judiciary as composed of specialised state authorities entrusted with administration of justice or application of law. It is composed of various institutions, usually called courts or tribunals, combining, among others, the following features:

- public authorities have the power to appoint judges and adopt legal acts constituting grounds for their functioning;
- within their competence lie such activities as: resolving disputes arising in view of the provisions of the civil, administrative or constitutional law, penalising acts deemed as offences or – under a different principle – as reprehensible acts, deciding on applicable powers;
- proceedings pending before a particular authority shall meet the adversarial requirement, namely, involvement of two adversaries in dispute;
- the authorities adjudicate pursuant to the provisions of law;
- the judicial decisions are final and legally binding;
- the authorities are independent, which means they cannot be subject to any pressure exerted by other public authorities, political parties, interest groups, etc.[1]

The analysis at hand shall not account for constitutional courts and courts adjudicating on constitutional accountability of politicians. For politicality of the above-referenced institutions leaves no room for doubt; if certain debatable issues do arise in political discourse, they rather pertain to the role and position of these bodies within the political system[2].

The judiciary, as defined above, is inextricably linked with the legislature and the executive by numerous organisational (establishment of courts, appointment of judges) and functional ties (holding public officers accountable, participating in exercising such functions of the political system as extraction of resources, regulation of behaviour and, in particular political systems, adjudicating on constitution-

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[1] M. Taborowski, *Pojęcie „sąd" lub „trybunał"…*, [in:] *Szkice z prawa Unii Europejskiej*, vol.1, *Prawo Instytucjonalne*, ed. E. Piontek, A. Zawidzka, Kraków 2003, pp. 268-282.

[2] More on this issue, see R. Alberski, Trybunał *Konstytucyjny w polskich systemach politycznych*, Wrocław 2010, J. Zaleśny, *Odpowiedzialność konstytucyjna w prawie polskim okresu transformacji ustrojowej*, Toruń 2004.

ality of normative acts)[3]. Hence, it constitutes the third branch of government, alongside the legislature and the executive.

In the light of the opinions formulated above, one indisputable remark should be made – if courts are bodies of the state authority then, consequently, judges are vested with power. In the objective dimension, the essential feature of this power is the ability of the court to exercise its will (judicial decisions), also against the will of those to whom the decision pertains[4]. The relation established in the course of judgment enforcement gives rise to asymmetric social relation in which the court participates. Within the framework of this relation the court holds authoritative power in respect of the parties to the proceedings[5]. This ability is linked to yet another important feature justifying the position of courts as entities of genuine authority – meaning the entity having a wide array of realistic options at its disposal while making appropriate decisions (in this case passing judgments). The options include the following: convict-acquit, reject-acknowledge the suit etc. However, deeming courts as bodies of state authority entails a more salient consequence stemming from the fact that state authority, just as any public authority, is by all means political. Following D. Marsh and G. Stoker, politics may be defined in a twofold manner; as activity of certain institutions (by implication: state or – in broader terms – public) or a social process encompassing distribution of resources or power struggle[6]. In both cases courts are participants in politics so defined. In the former – in their capacity as state authority institutions, whereas in the latter – as bodies exercising control over the above-referenced social processes in terms of their compliance with the law.

Before moving on to discussing the key issue of the present paper I would like to focus for a moment on the conviction of "apoliticality" of the judiciary. How to account for the popularity of this opinion? Perhaps it ensues from the specific relation between courts and the remaining bodies of state authority. It was in the late 18th century that the formation process commenced on the basis of Montesquieu's tripartite system and political practice existing in the United States, Great Britain and post-revolutionary France, and in certain parts of the continental Europe in the post-Napoleonic era. The nearly 100-year evolution process has

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[3] G. Almond, G. Powell, K. Strøm, R. Dalton, *Comparative Politics. A Theoretical Framework*, New York 2000, pp. 46–50.

[4] M. Weber, *Gospodarka i Społeczeństwo*, Warszawa 2002, p. 39.

[5] K. Pałecki, *Wprowadzenie do normatywnej teorii władzy politycznej*, [in:] *Wprowadzenie do nauki o państwie i polityce*, ed. B. Szmulik, M. Żmigrodzki, Lublin 2002, pp. 191–204.

[6] *Teorie i metody w naukach politycznych*, ed. D. Marsh, G. Stoker, Kraków 2006, pp. 8-9.

brought about the ultimate (at least in democratic political systems) model in which the bodies of the judiciary operate on the basis of particular constitutional principles: guaranteed by law separation of the judiciary from other state bodies – and independence of courts and judges. Within the ambit of the principles outlined above, it is stated that the organisation and competence of courts may be set forth exclusively in the act, precluding any amendments or setting aside of judicial decisions by other bodies of state authority. One exception to this rule is the right of pardon (usually enjoyed by the head of state) and amnesty (usually within the competence of the parliament). Judicial independence entails inadmissibility of any external interference or pressure exerted on a judge inducing the judge to carry a particular resolution of the case. Apart from the previously-mentioned principles governing the organisation of judicial authority, guarantees of judicial independence include, *inter alia*: rendering the status of a judge incompatible with other functions within the state apparatus and other professions; security of tenure, save as set forth otherwise in the statutory provisions; judicial immunity and related disciplinary accountability limiting other forms of accountability, such as criminal accountability, or even eliminating them (e.g. political accountability); material independence of judges; appointment procedure setting a relatively high standard of professional competence to be met in order to hold the position, limiting or even eliminating political criteria[7]. I am of the opinion that the conviction of apoliticality of the judiciary stems from this particular position of courts granting them the status of bodies of state authorities yet – for the sake of proper performance of their systemic functions – placing them outside the domain of active politics perceived as the sphere of power struggle. Having regard to the foregoing, it should be noted that in the Polish political system, for instance, one may still observe institutions (e.g. the Monetary Policy Council) which have their say in particular areas of state politics, at the same time being excluded from the ongoing power struggle. What is more, their members are expected to meet high standards of professional competence, as well as demonstrate far-reaching restraint as regards their political activity.

Returning now to the issue of functioning of the judiciary as the third branch of government we should pose the following questions: "How to define politicality of the judiciary?" and "To what extent does the said politicality vary from politicality of the legislature and the executive?". The most straightforward approach to the issue of politicality of the judiciary has been adopted by A. Barak who stated that

[7] B. Banaszak, A. Preisner, *Prawo konstytucyjne. Wprowadzenie*, Wrocław 1993, pp.197–198.

inasmuch as the legislature and the executive seek to attain maximum political efficiency within the scope of functioning of the state, the judicature aims at maximizing legality of state functioning[8]. The author highlights the fundamental disparity between political functional goals formulated by particular branches of government.

In her commentary on the aforesaid distinction, M. Volcansek observes, for instance, that courts have traditionally been treated as a factor exogenous to the political sphere. The view that courts are peripheral to politics is, however, undergoing revision. They are conceived as the so-called *veto players* "whose agreement is necessary for a change in the status quo" – as proposed by G. Tsebelis[9].

The agreement is not contingent on the degree of political rationality acknowledged in the decision subject to assessment, for political rationality drives the actions undertaken by the executive and the legislature, but rather on the degree of their lawfulness. It is noteworthy, however, that this seemingly formal analysis has been gaining particular momentum over the last decades. This situation has its roots in the ever more complex structure of the legal system and its equivocal nature.

In effect, owing to its characteristics, the judiciary is capable of preserving or altering the political order shaped directly by the legislature and the executive. According to the above-referenced M. Volcansek, nowadays courts shape politics by the very act of favouring one interpretation of law over the others[10]. In practice, such activity entails establishment of the law (within the framework of interpreting normative acts drawn up by the legislature and the executive) as well as exercising control over the decisions taken by the executive. Naturally, this role is more visible in the American system of judicial review consisting in the right of common courts to adjudicate on constitutionality of legal provisions.

Nevertheless, even in the present-day Europe, where the courts have traditionally been treated rather as bodies enforcing the law than actually creating it, their decisions are gaining political significance. One particular example of the situation outlined above occurs when the disputable law regulates political goods (resources) in the strict sense of the term: power, power distribution, principles governing allocation of public funds, namely – as stated by K. Pałecki – in the events of

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[8] Barak, *The Judge in a Democracy*, Princeton 2006, p. 43.

[9] After: M.L. Volcansek, *Constitutional courts as veto players: Divorce and decrees in Italy*, "European Journal of Political Research" 39/2001, p. 347

[10] After: I. Budge et al., *Polityka nowej Europy*, Książka i Wiedza, Warszawa 2001, p. 414.

referring to legal dimension of regulating the three spheres of political activity: actions aimed at gaining, maintaining and depriving someone of power (rules of the game in the political power struggle); determining competence and scope of powers attributable to entities vested with political power (the rules pertaining to the exercise of political power); determining the rights and obligations of citizens in respect of the public authority institution (rules pertaining to participation in political life)[11]. In light of the above, it is worth invoking the role of courts as institutions controlling the course and result of elections, exercising control over activities of the state administration or acting in the capacity of an appellate body in respect of decisions issued by the bodies regulating political competition, such as, for instance the National Electoral Commission[12].

The process very briefly outlined above and referring to gradual expansion of the role of courts in the political decision-making process is called "judicialization" of politics. Initially, the process prevailed in the countries belonging to the common law system and representing a dispersed model of judicial control of the law in comparison to the civil law countries[13]. However, a certain shift in the trend has been observed over the last decades. It has been noted that both systems are becoming more and more homogenous in this respect, which gives rise to the status of courts as a tool employed in political competition. The phenomenon in question entails, inter alia: extending the scope of judicial control over the rule of law in continental Europe; greater significance of European and international judicial institutions; increasing and strengthening the scope of judicial control exercised over activities of the administration; critical approach towards political and administrative decisions taken by the executive and the legislature, accompanied by the so-called criminalization of horizontal accountability of politicians related to gradual erosion of axiological foundation of contemporary democracies[14]. Furthermore, over the last twenty years Western Europe has experienced

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[11] K. Pałecki, *Prawoznawstwo*, Warszawa 2003, p. 194.

[12] In is worth invoking the decision of the Supreme Court on the validity of presidential election in 1995 in the Republic of Poland or the decision of the District Court in Świdnica invalidating election of the president of Wałbrzych in 2010.

[13] J.M. Maravall, *The Rule of Law as a Political Weapon*, [in:] *Democracy and the Rule of Law* (Cambridge Studies in the Theory of Democracy), ed. J.M. Marvall, A. Przeworski, Cambridge 2003, pp. 279–280.

[14] T. Koopmans, *Courts and Political Institutions: A Comparative View*, Cambridge 2003, p. 269. The process may be exemplified by the circumstances surrounding the downfall of the 1st Italian Republic and the everlasting "war" between Prime Minister S. Berlusconi and the Italian judiciary.

the emergence of a new factor leading to intensification of the process of judicialization and related to the process of transgressing traditional frontiers between the branches of state authorities. Its essence consists in entering the world of politics, perceived as the sphere of power struggle, by judges enjoying public confidence – such as T. Jean Pierre in France, B. Garzon in Spain or A. Di Pietro in Italy. Once they have assumed the new roles, the judges are promoted by the media as "fair sheriffs" satisfying the "hunger" for fair and effective politicians, suffered by the public opinion[15]. The phenomenon is additionally triggered by the activity of professional judicial associations which, in their capacity as both quasi-trade unions and corporate representation, begin to exert an active impact on the policy of the government and the parliament alike in respect of the judiciary, in fact acquiring the status of a classic, institutionalised interest group.

Naturally, the assessment of the process of judicialization is equivocal. Following the view expressed by R. Hirschl, for instance, politicians perceive this process as entailing:

- a threat of erosion of the public image of courts as politically-neutral bodies of state authority;
- a threat of the opposition using the courts as a tool in their fight against the government;
- the necessity of resolving the dilemma – how to reach consensus between the decisions of courts, the intentions of the government and preferences of the public?[16]

However, on the other hand, in view of some of the researchers, the phenomenon of "judicialization" of politics and the resultant serious strengthening of the position of courts may be perceived as a source of specific "benefits" for politicians, stemming, inter alia, from the following factors:

- accountability for difficult or unpopular decisions regarding public issues may be assigned to it;
- it may mitigate uncertainty associated with the process of collective decision-making;

[15] C. Guarnieri, *Courts as an Instrument of Horizontal Accountability: The Case of Latin Europe* [in:] *Democracy and the Rule of Law (Cambridge Studies in the Theory of Democracy)*, ed. J.M. Marvall, A. Przeworski, Cambridge 2003, pp. 236–238.

[16] R. Hirschl, *Towards Juristocracy. The Origins and Consequences of the New Constitutionalism*, Cambridge, Massachusetts, London 2007, p. 15.

– it helps to reduce problems related to aggregation of the public choice preferences[17].

Further to this, E. Salzberger points out that on the one hand independent and sound judiciary can prove a serious obstacle to implementation of particular goals set by the politicians in power (protection against "dictatorship" of the majority). On the other hand, however, it may be used as a tool owing to which politicians may "at least hope" for the attainment of goals whose implementation goes beyond the time horizon of one term of office, and the support of which upon power shift may indeed be ensured by independent and politically active courts[18].

Hence, with a view to proposing an initial characterisation of "politicality" of the judiciary we could invoke the opinion of D. Easton[19] who considered politics as authoritative allocation of values (material and symbolic). The definition so formulated perfectly encompasses the activity of courts, as by their judgments they are able to decide on the ultimate allocation of: liberties, privileges, status and material goods. Owing to the fact that they act pursuant to the applicable provisions of law, their decisions are binding and not subject to any revision[20]. Undertaking to analyse their functioning in the light of classic systemic theory of D. Easton, it should be stated that they may be treated as a particular type of political system institutions whose key responsibility consists in regulating social conflicts related to allocation of power, material goods or interpersonal relationships and, consequently, reacting to any irregularities occurring within the framework of the system and in the surroundings. Exercising the said function, courts naturally establish numerous ties with the remaining system institutions, the extent of which is contingent on the system itself (democracy vs. non-democratic system) and the political regime (presidential vs. parliamentary, federal vs. unitary system of government). Therefore, they can assume a more or less symmetric form, within the framework of which the judiciary may be brought to bear pressure or exert similar pressure (enforcing compliance with the law).

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[17] K. Metelska-Szaniawska, *Ekonomiczna teoria władzy…*, [in:] *Teoria wyboru publicznego. Wstęp do ekonomicznej analizy polityki i funkcjonowania sfery publicznej*, ed. J. Wilkin, Warszawa 2005, p. 135.

[18] E. Salzberger, *Economic analysis of separation of powers and the independence of the judiciary*, http://mle.economia.unibo.it/lectures/Salzberger.pdf, p.13, accessed 22.05.2011.

[19] After: A. Antoszewski, *System polityczny jako kategoria analizy politologicznej*, [w:] *Studia z teorii polityki*, vol. 1, ed. A. Jabłoński, L. Sobkowiak, Wrocław 1998, pp. 79–80.

[20] Bearing in mind the previously indicated exceptions: pardon and amnesty.

The input instigating the judiciary within the framework of the system comprises the following demands (manifested needs of: justice, vengeance, legalisation of a particular social relation, willingness to execute a particular vision of the state or social order) and support (court fees, respect and social recognition for the court, participation in the adjudication process, e.g. jury or lay judges in the works of the adjudicating panel). The output of the judiciary consists of:

– authoritative statements (judicial decisions and resolutions laying down the law) and symbolic statements (resolutions and standpoints adopted by the court bodies, e.g. General Assemblies of courts without normative power yet calling e.g. political and social players to endorse a particular conduct or condemning a particular form of behaviour);

– authoritative output (judgments along with relevant outcomes pertaining to the social structure, shape of politics, etc. or actions aimed at law enforcement) and symbolic output (e.g. individual forms of judicial activity or any other forms of judicial decisions, such as, for instance, operating report of courts providing assessment of actions undertaken by the legislature or the executive).

Within the framework of the systemic analysis of D. Easton, political dimensions of the functioning of the judiciary may be subject to research with the use of at least a few research perspectives. First and foremost, politicality could be viewed as being objective in nature stemming from the fact that courts and tribunals occupy a particular place within the structure of state authorities as well as relevant dependencies ensuing therefrom. One may assume that politicality refers to the process of appointing judges. According to findings of political research conducted even within the ambit of political systems characterised by a firmly-rooted tradition of independence of the judiciary and judges, it is still possible to observe attempts at exerting undue influence on the appointment processes. As proved by Ch. Cameron, in Great Britain judges renowned for their decisions in the courts of appeal expressing criticism of the government policy stand slimmer chance for appointment to the House of Lords (the position of Law Lord)[21]. An interesting analysis of the procedures of appointing state court judges in the United States was presented by M.G. Hall and Ch. W. Bonneau, who demonstrated a certain "orien-

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[21] Ch.M. Cameron, *Judicial Independence: How Can You Tell It When You See It? And, Who Cares* [in:] *Judicial Independence at the Crossroads: An Interdisciplinary Approach*, ed. S.B. Burbank, B. London 2002, p. 138.

tation" in their jurisdiction towards the views expressed by voters from their constituency[22].

The dimension of objective politicality is also related to the problem of legitimization of judicial power. Addressing this issue, from the very outset the viewpoint hailed by J. Gibson should be supported that a cohesive and complete theory explaining the mechanisms of "social recognition" of the judiciary is yet to be developed by political scientists. As far as factors affecting the process of legitimization of judicial power are concerned, political scientists place particular emphasis on recognition for the decisions and trust put in judges. Like no other authority, the judiciary seems to require both efficient institutions and the "good people" referred to in the works of J.J. Rousseau[23]. In light of the above, it is believed that given the conditions of crumbling social trust – it is possible for the executive and the legislature to function; however, as far as the judiciary is concerned – such a situation constitutes a significant obstacle to exercising its systemic functions[24].

Among Polish authors, this viewpoint is upheld by J. Ignaczewski who clearly states that the judiciary is legitimized by the level of trust expressed by the citizens[25]. For the process of legitimization of courts is not a democratic (election-based) one due to the fact that, as I have already mentioned, the responsibility of courts does not consist in "deciphering" and implementing preferences of the society. Courts and judges do not usually hold election mandate (with the exception of some state judges from the USA) and their legitimization is therefore rooted in the conviction expressed by the parties that on account of their professional qualifications (formal knowledge and experience), character, etc. the judges are able to guarantee impartial, professional and fair dispute resolution.

Accountability of judges is essentially linked with the issue of legitimization, as the mechanism of the former concept is as distinct as the latter. For it is established that in conformity with the principle of independence, judges shall not be held politically accountable (for the decision taken) before the voters, the parliament or any other body of state authority. What follows is that irrespective of the contents

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[22] See M.G. Hall, Ch. W. Bonneau, Does *Quality Matter? Challengers in State Supreme Court Elections*, "American Journal of Political Science" 2006, vol. 50, no 1; M.G. Hall, *Voluntary Retirements from State Supreme Courts: Assessing Democratic Pressures to Relinquish the Bench,* "Journal of Politics" 2001, vol. 63, no 4.

[23] K. von Beyme, *Współczesne teorie polityczne*, Warszawa 2005, p. 217.

[24] J.L. Gibson, *Judicial Institutions*, [in:] *The Oxford Handbook of Political Institutions*, ed. R.A. Rhodes, S.A. Binder, B.A. Rockman, Oxford 2006, pp. 525–526.

[25] J. Ignaczewski, *Wymiar sprawiedliwości – teraźniejszość i przyszłość*, Warszawa 2008. p. 147.

of the judicial decisions (save as they are taken in a lawful manner) judges cannot be recalled. Politicians (ministers, members of parliament) do not enjoy such "comfort" as their decisions shall be compliant with the provisions of law (subject to control on the part of courts) as well as acknowledge a wide social spectrum, having regard to the best interest of various social groups, economic standing and the agenda of the political parties recommending them. Failure to take due account of the above-referenced factors could "cost" them support of their voters, trust of the professional chamber or the party leader, which may eventually lead to them being deprived of the mandate or their public position.

The context outlined above distinguishes the judiciary from the legislature and the executive since its decisions cannot be shaped under the influence of transitory views expressed by the public. Thus, there is certain "permanence" ascribed to it which is based on a sense of action congruent with the provisions of law and not political assessments. In contrast, the legislature and the executive in a democratic system are flexible and characterised by the ability to adapt to the ever-changing expectations of the society. However, the aforesaid factor should not in any way affect the decisions of courts, at least to the extent already visible in the case of the legislature and the executive. In light of the foregoing, A. Antoszewski concludes that it means the judiciary shall be placed outside of this part of social reality which we tend to call the political market[26]. All the more so given that, as R. Skidelsky notices after J.M. Keynes: "there is no market of law and market of order"[27]. Summing up, therefore, although the judiciary is a form of political power, it nonetheless plays the role of a politically-neutral factor ensuring balance within the tripartite system and a politically-neutral guarantor of freedom and rights of an individual[28].

However, apart from objective politicality, one can also distinguish subjective politicality indicating that by judicial decisions courts become creators of politics (although judges adjudicating in such cases are far from advocating such a viewpoint). Subjective politicality is somewhat more complex and it can be indirect or direct in nature. In general, this dimension of politicality is the offset of various systemic functions performed by the judiciary. M. Shapiro, for instance, indicates three fundamental functions fulfilled by courts within the framework of the politi-

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[26] A. Antoszewski, *Władza sądownicza w Europie środkowej i wschodniej*, [in:] *Systemy polityczne Europy Środkowej i Wschodniej. Perspektywa porównawcza*, ed. A. Antoszewski, Wrocław 2006, p. 235.

[27] R. Skidelsky, *Świat po komunizmie*, Kraków 1999, p. 191.

[28] L. Garlicki, *Polskie prawo konstytucyjne*, Warszawa 1998, p. 295.

cal system, noting at this point, that within social reality one can observe the process of their continuous and mutual "intertwining". The functions in question are:

– dispute resolution;
– social control;
– creation of law[29].

In the context highlighted above it is possible to talk about direct politicality, which is the offshoot of the systemic role of courts stemming from their constitutional position as bodies of state authority and the contents of their judicial decisions pertaining to various functional areas of the political system, e.g. structures and competence of public authorities; enforcement of legal accountability of civil servants for acts committed in connection with their holding of the office; protection of the rights of citizens, for instance by "correcting" the political decision-making process shaped by the politicians "diverting" from their "electoral base", control of the election process or directions of sectoral policies and administrative decisions.

The most trivial and seemingly apolitical at all example of such perception of politicality would be the judicial decision issued by one of the Polish courts, which invalidated a tender worth several hundred million zloty for the construction of a road bridge due to a several hundred zloty defect to the winning tendering party's offer. In consideration of the above, the deadline for completing construction was seriously extended and the costs of construction increased by several dozen million zloty. One may ask about the difference between a judge making such a decision and a member of parliament fighting for allocation of a similar amount from the state budget to finalising of the investment. When considered from the perspective of the political outcome of the action – there is no difference. The former and the latter result in a shift in the allocation of public funds. The difference lies in different motivation; the judge is driven by the need to observe the law and ensure legality of the action of public authorities, whereas the member of parliament wishes to create an image of a politician having a close relationship with own constituency, thus striving to ensure re-election.

A question arises, however, to what extent is the activity of courts political when disputes are of civil, penal or commercial nature and participants are not political players, but rather citizens or business entities, and the subject matter of the dispute does not consist in political interest. I hold the belief that in such a case indirect politicality is at stake. With a view to providing an explanation of this concept, one

[29] M. Shapiro, *Courts. A comparative and political analysis*, Chicago 1986, p. 16.

should first refer to the opinion expressed by Ch. Fried who claimed that the law is a kind of bond consolidating the society and ensuring that in the absence of personal guarantees given "to everyone by everyone" the society may function. Courts, however, play the role of guarantors of this contract, supporting the mechanisms of positive cooperation between members of the society in the course of their social, political, commercial, cultural, charitable etc. activity[30].

From this perspective, the opinion on the functioning of courts (assessment of the efficiency and transparency of the proceedings, impartiality of the adjudicating judge or degree of judgment enforcement) may affect the overall assessment of the government, since an average citizen asserting his or her rights in proceedings pending before the court is under no obligation to fully account for the complexity of the relations of independence between the judiciary, the legislature and the executive. Significance of the assessment of the functioning of courts in respect of legitimization of the system was highlighted by H. Jacob; he emphasised that recognition of the rules of governing and those power-holding elites is greater if the citizens not only accept legal rules, but also hold a firm belief that the said rules are implemented by independent and impartial courts[31]. The remark is ascribed even more potency once we acknowledge that relatively seldom does an "average" citizen find himself/herself directly involved in the actions of the judiciary; nevertheless, the "cases" at hand, constituting the subject manner of the judicial decisions are usually very important to the citizen when compared with, for instance, those resting within the competence of the administration.

In the situations outlined above, courts are assigned the status of elements of broadly-defined "Power", which in the context of a democratic political system the citizen may account for during the election. It becomes apparent that judges, who are not themselves held accountable for their decisions from a political standpoint, may affect the scope of accountability of politicians through the manner in which such decisions are taken and their content. At the same time, J. Hołówka postulates that adjudicating judges try to react to social changes, new circumstances of conducting business activity or new attitudes expressed by the society. The predicament in which a judge ultimately finds himself/herself is therefore a difficult one; for not only is the judge responsible for the judicial decision issued, but he/she hopes for social acceptance with regard to the judicial decision despite the fact

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[30] Ch. Fried, *Markets, Law and Democracy*, "Journal of Democracy" 2000, vol. 11, no 3, p. 12.

[31] H. Jacob, *Law and Politics in Comparative Perspective*, New Haven–London 1996, pp. 13–14.

that it does not constitute a *sine qua non* condition for deeming it final and legally binding[32].

In conclusion, it may be noted that courts perceived as a significant element of the political system of a country, politicality of which cannot be refuted, should nevertheless remain "politically neutral". The above remark pertains also to the adjudicating judges who have been subject to certain limitation for the sake of their judicial independence. All of the restrictions brought to light in the present paper will not stop judges from developing their own views and political inclinations. To cite M. Weber's powerful metaphor describing the said phenomenon: "a judge is not a vending machine into which the pleadings are inserted together with the fee and which then disgorges the judgment together with the reasons mechanically derived from the Code"[33]. In practice, judges should seek to preclude situations in which their views could affect the adjudication activity of the judiciary; however, as K. Daniel points out, in the so-called difficult cases a judge may face a choice between particular values (also political in nature) but should still try to maintain objective outlook by referring to the applicable constitutional order or social situation and should never transgress the framework of the applicable procedure[34]. One ought to bear in mind dissimilarity in the context of politicality of the judiciary, namely that actions undertaken by the judiciary are reactive in nature[35]. This feature may prove rather problematic for the judiciary because when public opinion expects prompt and efficient action on the part of the judiciary (penalising criminals, reconciliation of the past), activity undertaken only "upon request" may be deemed by the critics as omission or even a political "sabotage" and allegations of this kind expressed by the public might serve to altogether challenge the conviction of apoliticality of the judiciary.

[32] J. Hołówka, *Dylematy moralne w zawodach prawniczych*, [in:] *Etyka prawnika, etyka nauczyciela zawodu prawniczego*, ed. E. Łojko, Warszawa 2006, p. 13.

[33] M. Weber, op.cit, p. 710.

[34] K. Daniel, *Normatywny i społeczny obraz sędziego*, [in:] *Sądy w opinii społeczeństwa polskiego*, eds. M. Borucka-Arctowa, K. Pałecki, Kraków 2003, p. 123.

[35] J. Blondel, *Comparative Government. An Introduction*, London 1995, pp. 339–340.