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# JUDGES AND THE LIMITS OF DEMOCRATIC POWER IN THE LIGHT OF THE CONSTITUTION OF THE REPUBLIC OF POLAND*

**I.** The essence of the democratic power established in the Constitution of the Republic of Poland (hereinafter the Constitution) is to limit this power in order to protect the rights of the individual from threats that may be posed by the rule of the majority, especially when this majority seeks to impose its values and beliefs on others. This limitation is expressed both by the principle of the separation and balance of powers, as well as by the principle of a democratic state ruled by law and, above all, by the principle of inherent and inalienable human dignity. The system of the Republic of Poland and the interpretation of provisions concerning the organisation of the state apparatus and its mode of operation are subordinate to the latter principle.[1] According to Article 30 of the Constitution, the source of rights and freedoms is the inherent and inalienable dignity of the person. This dignity is inviolable, and it is the responsibility of the public authorities to respect and protect it. The Preamble to the Constitution states: 'We call upon all those who will apply this Constitution for the good of the Third Republic to do so paying respect to the inherent dignity of the person, his or her right to freedom, the obligation of solidarity with others, and respect for these principles as the unshakeable foundation of the Republic of Poland'. According to the Constitutional Tribunal, these rights, which refer directly to the essence of human dignity, have the character of fundamental rights which the legislator can neither 'question nor limit. In their essential content they are not dependent on the will of the legislator, let alone on the organs that apply the law, regardless of whether they are public administration bodies or courts. Hence their designation as inherent rights, which is inextricable from the constitutional thesis that human dignity is inviolable. Such reasoning refers to the Preamble and Article 1 of the Declaration of the Rights of Man and the Citizen, from which can be derived the principle that simply by virtue of being born a human being – and not on the basis of any other legal act—human beings possess all the rights that derive from their humanity. In this sense, human dignity is not dependent on the will of the constitutional legislator'.[2]

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[1] L. Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu*, Warsaw 2017: 99.

[2] The judgment of the Constitutional Tribunal, P 12/99.

The Preamble stipulates that human dignity is to be an 'unshakable foundation' of the state system. In the light of the Constitution, both human dignity and other associated values do not owe their existence to any authorities and are beyond their reach, and thus they are beyond the reach of the Nation's power, as a sovereign.[3] The key to understanding the relationship between freedom and democracy, and at the same time the paradigm of the Polish Constitution, is the inherent and inalienable dignity of the person, which in the Constitution is set above the highest authorities and the most qualified majority.[4]

**II.** The Constitution embodies the assumptions of liberal democracy,[5] in which the will of the majority does not constitute the source of human rights; a democracy in which human rights—as Immanuel Kant wrote—'must be considered sacred. However great a sacrifice the ruling power may have to make'.[6] The Constitution expresses the rules of democracy, in which human rights are shaped through dialogue, and knowledge concerning them is in constant development.[7]

The Constitutional Tribunal defined the political model of the Polish State as a constitutional democracy, that is, one in which the foundation of the democratic rule of law is the principle of the Constitution's supremacy.[8] In such a state, 'parliament is not superior to other organs, except in strictly defined cases, and it holds no monopolistic position in the system of state organs. One of the reasons for adopting this model was to avoid a repetition of the experiences that are now familiar to us from history. The vulnerability to similar experiences is a risk and real danger that results from a simplified understanding of democracy based mainly, if not exclusively, on the assumption that democracy can be equated with the omnipotence of the parliamentary majority. In order to avert such a danger, the system established in the 1997 Constitution was that of a constitutional democracy'.[9]

Unlike the constitutions of many other democratic countries, the Constitution of the Republic of Poland devotes a separate chapter to judicial power. This is in addition to other provisions referring to this power that are contained in other chapters of the Constitution and its Preamble.

According to Article 10 section 1 of the Constitution, the system of the government of the Republic of Poland is based on the separation of and balance between the legislative, executive and judicial powers.

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[3] Cf. R. Piotrowski, Konstytucja i granice władzy suwerena, in: J. Jaskiernia, K. Spryszak, (eds.), *Dwadzieścia lat obowiązywania Konstytucji RP. Polska myśl konstytucyjna a międzynarodowe standardy demokratyczne*, Toruń 2017: 717.

[4] Ibidem.

[5] Cf. M. Tushnet, *Advanced Introduction to Comparative Constitutional Law*, Cheltenham–Northampton 2014: 114 ff.

[6] I. Kant, *Zum ewigen Frieden*, in: idem, Werke, vol. 5, Leipzig 1920: 703, as quoted in: M. Szyszkowska, *U źródeł współczesnej filozofii prawa i filozofii człowieka*, Warsaw 1972: 53.

[7] Cf. R. Piotrowski, *Konstytucja...*: 707.

[8] The judgment of the Constitutional Tribunal, U 4/06.

[9] Ibidem.

According to Article 173 of the Constitution, the judicial power exercised by the Courts and Tribunals is 'a separate power and shall be independent of other branches of power'. From the perspective of the Constitution, this separateness and independence takes on special significance when considering the form of the State, and it is therefore crucial for the principle of constitutional democracy,[10] according to which human dignity and associated rights determine the limits of power.

The separation of judicial power as independent from other powers is co-essential with the principle of a democratic state ruled by law, and the principle of the separation of powers and their role in guaranteeing individual rights 'by preventing the abuse of power by any of its organs'.[11] The basic objective of constitutional regulation, and thus guaranteeing individual freedom and dignity, requires the separation and balance of powers. As is the case with the other powers, the Preamble requires the judiciary to make human dignity the 'unshakable foundation' of the state system. Therefore, the laws of the Republic of Poland should be interpreted and applied in the light of the Preamble to the Constitution in accordance with the principle of *in dubio pro dignitate*. The constitutional purpose of the judicial power is that it be the guardian of human dignity; the guardian of universal and timeless values. It happens that the parliamentary majority, due to political concerns, forgets these values, or chooses not to remember them in the legislative process. The judicial power, being independent of the parliamentary majority, has the ability to make corrections on the basis of the values that the culture of human rights considers superior to any power,[12] including a power with electoral legitimacy.

It should be emphasised that in the light of the jurisprudence of the Constitutional Tribunal, the principle of the separation of powers assumes that the system of state organs should contain internal mechanisms that prevent the concentration and abuse of state power, guaranteeing its exercise in accordance with the will of the nation and respecting the freedoms and rights of individuals. The requirement to 'separate' the powers entails that each of the three authorities should possess core competences that substantively correspond to their essence and furthermore, that each of these powers should retain a certain minimum core competence that could preserve this entity. Thus, the legislator, when shaping the competences of individual state organs, cannot infringe the 'essential scope' of a given power.[13]

According to the Constitutional Tribunal, the principle of the separation of powers presupposes a special way of determining the relations between the judiciary and the other powers. In the relations between the legislative and executive powers, different forms of mutual influence and cooperation are possible, and it is possible that are areas in which the competences belonging

[10] Cf. the judgment of the Constitutional Tribunal, U 4/06.

[11] The judgment of the Constitutional Tribunal, K 11/93.

[12] Cf. R. Piotrowski, Władza sądownicza w Konstytucji RP, *Krajowa Rada Sądownictwa* 2010, no. 1: 17ff.

[13] The judgment of the Constitutional Tribunal, P 16/04.

to both powers 'intersect' or 'overlap'. In contrast, the relationship between the judiciary and the other powers must be based on the principle of 'separation'. An essential element of the principle of separation of powers is the independence of the courts and judges.[14]

As the Constitutional Tribunal states: 'only [...] in relation to the judiciary does "division" also mean "separation", because the essence of the justice system is that its activities should be undertaken exclusively by the courts, and the other powers cannot interfere with these activities or participate in them. This results from the special connection between the judicial power and the protection of individual rights [...]'.[15] In this context, one should consider the view of the Tribunal, according to which the separated powers are not the same independent elements of the state system, with each of them having at its disposal instruments that allow it to restrain and check the others, but rather 'the mechanism for necessary balance between all powers. Each of these powers should have instruments at its disposal allowing it to check or hold back the actions of the remaining powers. However, each of the aforementioned powers has its own "core of competence", upon which the remaining powers may not encroach. Reference to the judicial power indicates that no interference may affect the independence of judges when exercising their office and any interference with the actions or organisation of the judicial power, concerning matters falling outside the absolute principle of independence, may occur only as an exception and must be sufficiently justified on its merits'.[16]

The Constitutional Tribunal also stated that the separateness of the judicial power manifests itself in its specific competences, consisting in the exercise of justice. 'However, the separation of powers does not eliminate all the links between the powers. Judges are appointed by the President of the Republic of Poland, as an organ of the executive body, and the Minister of Justice exercises administrative supervision over the common courts. The basis for the activities of the courts are acts of parliament, and hence the legislative power. However, these links cannot affect the separateness of the judiciary, which means that the other powers cannot be entrusted with the justice system'.[17]

Hitherto the jurisprudence of the Constitutional Tribunal has recognised that interfering with the operation and organisation of the judiciary, and hence also the Minister of Justice's administrative supervision the judiciary, can be only be exercised exceptionally and should be justified by a specific constitutional value.[18]

[14] The judgment of the Constitutional Tribunal, K 8/99.
[15] The judgment of the Constitutional Tribunal, K 6/94.
[16] The judgment of the Constitutional Tribunal, K 12/03.
[17] The judgment of the Constitutional Tribunal, K 28/04.
[18] Por. R. Piotrowski, Status ustrojowy sędziego a zakres i charakter zarządzeń nadzorczych, in: idem (ed.), *Pozycja ustrojowa sędziego*, Warsaw 2015: 170ff.

In the light of the doctrine, the systemic position of the judiciary 'is largely based on the principle of separation or even isolation of the judiciary',[19] with the exclusion of any derogation 'from the principle of separation of powers, which would give the legislature or the executive the power to settle individual cases of a judicial type'.[20]

According to the doctrine, 'the sovereign is the entity that has sovereign power at its disposal sovereign power, being thus independent in external relations and the highest in internal relations, and also original and legally unlimited'.[21] However, it is also pointed out that there are held to be 'certain boundaries, which the sovereign should not exceed, such as the rights of the political minority or the basic rights and freedoms of the individual';[22] for advocates of law-natural concepts, 'natural law, regardless of its source, constitutes the impassable boundary of any sovereign, including the collective sovereign'.[23] It is worth noting that 'state and international law are not only an expression (reflection) of sovereignty, but are also values that define and delineate its limits'.[24]

In the light of the provisions of the Constitution, the supremacy of the Nation as a constitutional value is not of absolute character, especially in view of the fact that it is anchored in the concept of dignity and the special status of human rights.[25]

The Constitution in force refers to a culture 'rooted in the Christian heritage of the Nation and in universal human values' and denies the sovereign power over these values, proclaiming their transcendent character. This excludes the absolutist interpretation of the concept of national sovereignty, since fundamental values are beyond its reach. The Constitution assigns values the role traditionally assigned to the sovereign.[26]

**IV.** The issue of the role of law in a democratic system—that is, the relationship between the rule of law, the principles of which have to be implemented by the judiciary independent of the other powers, and democracy understood as the right of a parliamentary majority to shape the rule of law—is inextricable from the determination of the limits of the sovereign power.[27] This problem is reflected in the contemporary scholarly literature in the conflict between two forms of constitutionalism: legal and political. From the point of view of legal constitutionalism, the judiciary fulfils a special role in the state because it is the supreme guardian of the

[19] L. Garlicki, *Polskie prawo*...: 79.

[20] Ibidem

[21] Z. Witkowski (ed.), *Prawo konstytucyjne*, Toruń 2002: 64.

[22] P. Uziębło, in: A. Łabno (ed.), *Wielka encyklopedia prawa*, vol. 6, Warsaw 2016: 379.

[23] P. Uziębło, in: A. Szmyt (ed.), *Leksykon prawa konstytucyjnego*, Warsaw 2010: 585.

[24] K. Działocha, Uwagi do art. 4, in: L. Garlicki, M. Zubik, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warsaw 2016: 200.

[25] Cf. M. Gulczyński, J. Wawrzyniak, Suwerenne prawo narodu do sprawowania władzy zwierzchniej we współczesnych warunkach, in: W. Wołpiuk (ed.), *Spór o suwerenność*, Warsaw 2001: 198ff.

[26] Cf. R. Piotrowski: *Konstytucja*…: 702 and the arguments presented there, which I make use of in this work.

[27] Ibidem: 416.

legal system, regulating the functioning of the other powers and the defender of the rights of the individual.[28] From the perspective of political constitutionalism, the legal system is a temporally limited system of rights, obligations and competences, subject to changes depending on the will of the majority representing the sovereign.[29] The principle of the separation of powers, if understood in an overly orthodox manner, may lead to the impossibility of restricting the ability of the majority to act.[30] It is not clear at this point why judges rather than elected politicians are to settle disputes in which law and politics are inextricably linked.[31]

In the contemporary constitutional doctrine of the United States, these doubts have been reflected in the form of an as yet minority view that 'the Supreme Court is our servant, not the master; it is a servant whose dignity and knowledge deserve respect, but ultimately it should submit to our judgment on the Constitution, and not vice versa. The Court is not the highest authority of the country in matters of constitutional law. We are this authority'.[32] However, in terms of the US Constitution 'we' means a legislator functioning in a system perceived as limiting the subjectivity of citizens in favour of corporations co-creating an economy of influence.[33] This disillusionment in the doctrine with regard to the role of courts in defining the limits of legislative power is reflected in the concept of 'populist constitutionalism' which advocates shaping of constitutional law not by way of judicial decisions, but rather by citizens, 'in a more direct and open manner'.[34]

In the British constitutional doctrine, the problem of the relation between judges and sovereign led to slightly different, noteworthy solution. The consequence of Parliament having a special status, being referred to as 'the direct sovereign', is that the constitution is recognised as the 'ultimate or normative sovereign'.[35] The scholarly literature on the subject is of the opinion that the sovereignty of the Parliament of the United Kingdom is in fact a reflection of the sovereignty of the unwritten constitution, from which it draws its extensive powers, consisting in the supremacy of the legislature within the limits of the rule of law;[36] the implementation of the rule of law is the duty of judges, based not only on the will of Parliament, but also on common law principles, which require that judges adjudicate according to their own understanding of how they should implement the ideal of the rule of law in specific circumstances. There are voices within the British doctrine

[28] Cf. T.R.S. Allan, *The Sovereignty of Law: Freedom, Constitution and Common Law*, Oxford 2015: 133.

[29] Cf. R. Bellamy, *Political Constitutionalism*, Cambridge 2007: 145ff.

[30] Cf. for example, T.R.S. Allan, op. cit.: 3.

[31] Ibidem.

[32] L.D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review*, Oxford 2004: 248.

[33] L. Lessig, *Republic, Lost: How Money Corrupts Congress—and a Plan to Stop It*, New York 2011: 104 ff.

[34] Cf. M. Tushnet, *Taking the Constitution away from the Courts*, Princeton 1999: 194.

[35] E. Barker, *Political Thought in England*, Oxford 1963: 212ff.

[36] Cf. T.R.S. Allan, op. cit.: 133ff.

that are of the view that the common law constitution reflects a compromise between the sovereignty of Parliament and limitations placed on it which stem from the rule of law. The British conception of parliamentarism indicates there is an inseparable connection between the sovereignty of the nation, Parliament and the constitution, and the relationship between the sovereignty of the nation and the sovereignty of law, which entails the independence of the courts and the judiciary.

**V.** In countries which are currently regarded as democratic,[37] the importance of the judiciary is increasing, and sometimes with some exaggeration it is referred to as the 'rule of judges'[38] or 'juristocracy'.[39] The reasons for the growing significance of the judiciary include: the increasing influence of judges on the resolution of conflicts between rival politicians and competence disputes between different sections of the public authorities, which is referred to the 'juridisation' of politics; the courts' adopting positions on disputes between the adherents of secular and religious beliefs; and the courts' meeting the common need to condemn corruption and inefficient exercise of the legislative and executive powers.[40]

However, the significance of the judiciary is also increasing due to the crisis in the legal system.[41] Legal regulations cover ever more areas of private and public life, which results in a constant broadening of the scope of jurisdiction related to the interpretation and application of regulations.[42] The inflation of the law, which is treated as a tool of a variable social and economic policy, requiring the use of general clauses, increases the importance of the discretionary power of judges, whose role is—with increasing frequency—not only to apply provisions to specific cases, but also to co-create rules, and thus the co-creation of political solutions.[43] Almost every public affair can become subject to the influence of the judiciary. Judgments are not indifferent for the legislative and executive powers. Judges who are supposed to be politically neutral make decisions that may affect election results and also the financing of political parties from public funds. Judicial power often plays a key role in shaping policy in democratic countries, as well as in solving political disputes of fundamental importance.[44]

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[37] On the issue of criteria and a proposed catalogue, see, for example, A. Lijphart, *Democracies*, New Haven–London 1984: 37ff.

[38] Cf. E. Bruti Liberati, A. Ceretti, A. Giasanti, *Governo dei giudici*, Milano 1996: 7ff. Cf. also R. Piotrowski, O znaczeniu prawa sędziowskiego w polskim systemie państwowym, in: T. Giaro (ed.), *Rola orzecznictwa w systemie prawa*, Warsaw 2016: 39ff.

[39] Cf. R. Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, Cambridge, MA 2007.

[40] Cf. D. Kapiszewski, G. Silverstein, R.A. Kagan, *Consequential Courts: Judicial Roles in Global Perspective*, Cambridge 2013: 35 ff.

[41] Cf. E. Łętowska, Prawo w „płynnej nowoczesności", *Państwo i Prawo* 69(3), 2014: 9ff.

[42] Cf. C. Guarnieri, P. Pederzoli, C.A. Thomas, *The Power of Judges*, Oxford 2002: 6.

[43] Cf. D.L. Horowitz, *The Courts and Social Policy*, Washington 1977.

[44] Cf. D. Smilov, *The Judiciary: The Least Dangerous Branch*, in: M. Rosenfeld, A. Sajo, *The Oxford Handbook of Comparative Constitutional Law*, Oxford 2012: 869.

The growing importance of the judiciary is a manifestation of the process that has been taking place in democratic countries since the mid twentieth century.[45] At that time, under the influence of the tragic consequences of the Nazi and fascist acquisition of power, the eighteenth-century tendency to minimise the significance of the judiciary in the system of the separation of powers was reversed.[46]

The judiciary is increasing in significance in Poland due to the phenomenon of enacted law and judicial law permeating the legal culture,[47] which is related to the European integration process[48] and the consequences of globalisation; and due to the multi-centrality of the legal system,[49] which is becoming transnational. European integration is bringing about changes in the system of the sources of law and a transformation of the concept of sovereignty, which places the judge above the legislator.[50]

The importance of the judiciary is also growing because increasingly ambiguous and complicated laws require its intervention.[51] In addition, the legislator entrusts the courts with legitimising the actions of the executive power in areas that are particularly sensitive from the point of view of individual rights and freedoms. Judges become the representatives of interests that are not represented, or which are represented incorrectly. The growing importance of party leaders as well as lobbyists and the European bureaucracy in the legislative process means that politically neutral judges—who are therefore supposedly independent of party power—are becoming the depositaries of the Nation's sovereignty; in their rulings they are able to represent the sovereign, irrespective of party politics and political interests which influence the functioning of the legislator, and of the representative integration of the legislature and the executive, which restricts representative democracy. The limitation of the role of parliament, which is due to multiple causes, has also led to an increase in the role of the judiciary.[52]

The Constitution assigns a special role for the Constitutional Tribunal, namely to determine the limits of democratic power. The transformations that the concept of national sovereignty has undergone over the past three decades, connected with its limitation by human rights, has entailed that the constitutional judiciary has become the guardian of the limits of national sovereignty, understood as the exercise of power based on the strength of the values referred to in the Preamble to the Constitution, and sometimes limited

[45] C.N. Tate, T. Vallinder (eds.), *The Global Expansion of Judicial Power*, New York 1995: 5.

[46] Cf. R. Piotrowski, Uwagi o ustrojowym znaczeniu sądownictwa konstytucyjnego, in: K. Budziło (ed.), *Księga XXV-lecia Trybunału Konstytucyjnego*, Warsaw 2010: 335.

[47] Cf. R.A. Tokarczyk, *Komparatystyka prawnicza*, Cracow–Lublin 1997: 143.

[48] Cf. M. Safjan, Bez sędziów nie byłoby Unii Europejskiej, *Rzeczpospolita*, 25 February 2009.

[49] Cf. E. Łętowska, Dialog i metody. Interpretacja w multicentrycznym systemie prawa [Parts I & II], *Europejski Przegląd Sądowy* 2008, no. 11–12.

[50] Cf. P.P. Marcisz, *Koncepcja tworzenia prawa przez Trybunał Sprawiedliwości Unii Europejskiej*, Warsaw 2015: 239ff. Cf. also Z. Brodecki (ed.), op. cit.: 46.

[51] Cf. M. Krajewski, Znaczenie zwrotów niedookreślonych i nieostrych dla prawotwórczej wykładni dokonywanej przez sądy administracyjne, in: J.P. Tarno, T. Bąkowski (eds.), *Prawotwórstwo sądów administracyjnych*, Warsaw 2015: 170 ff.

[52] Cf. R. Piotrowski, O znaczeniu...: 42.

by these values. The notion of sovereignty thus understood legitimizes the constitutional judiciary, but it also makes this legitimacy dependent on the involvement of the Constitutional Tribunal in the field of human rights protection, since respect for these rights remains the yardstick of sovereignty. The ultimate and universal binding nature of the Tribunal's judgments is supported by the constitutional values which it is supposed to defend against the legislator.[53]

The paradigm of the democratic system has become the right to have rights[54]—and this cannot succeed without the participation of judges. The importance of judicial power is also growing due to its role in defending the rights that are threatened by the development of new information technologies,[55] including in particular the right to privacy.[56]

In a democratic state ruled by law, where the majority power is limited by the rights of minorities, which is reflected in the formula of constitutional democracy, the source of the legitimacy of power is not election results, especially parliamentary elections, but rather the ability to adjudicate independently of the will and interests of political parties. These political parties control the legislative power, and sometimes also constitutional courts which are dependent on the parliamentary majority. They also control the executive. Therefore, citizens are basically dependent on politicians, even if they did not vote for them. Only the judiciary is able to defend itself from this dependence, if judges and courts are independent.

Judges do not attain their positions from elections similar to parliamentary or presidential elections, but nonetheless they issue judgments on behalf of the Republic of Poland, which—as the Constitution states—is the common good of all citizens. The doctrine has expressed the view that 'the courts and tribunals issue judgments on behalf of the Republic of Poland, whose supreme power is vested in the Nation (Articles 4 and 174 of the Constitution). Thus, the legitimacy of the courts and judiciary is also derived from the will of the Nation, but not from direct elections'.[57] From this perspective, they are also representatives of the sovereign, especially if we recognise that in a democratic state under the rule of law the sovereign is essentially the laws which reflect the sovereignty of values limiting the power of the Nation by virtue of human rights, as a result of a change 'encompassing the concept of sovereignty as supreme and unlimited power, both in the internal relations of the state and its external relations'.[58] In the

[53] Cf. idem, *Trybunał Konstytucyjny na straży wolnych wyborów i podstaw demokracji*, in: R. Piotrowski, A. Szmyt (eds.), *Trybunał Konstytucyjny na straży wartości* konstytucyjnych 1986–2016, Warsaw 2018: 93ff.

[54] Cf. S. Rodota, *Il diritto di avere diritti*, Roma–Bari 2012: 41ff.; cf. R. Piotrowski, O znaczeniu…: 44.

[55] Cf. M. Zubik, Nowe technologie jako wyzwanie i zagrożenie dla prawa, statusu jednostki i państwa, in: P. Girdwoyń (ed.), *Prawo wobec nowoczesnych technologii*, Warsaw 2008: 37ff.

[56] Cf. R. Piotrowski, Prawa człowieka wobec globalizacji, in: M. Zubik (ed.), *XV lat obowiązywania Konstytucji z 1997*, Warsaw 2012: 69.

[57] Cf. A. Machnikowska, *O niezależności sądów i niezawisłości sędziów w trudnych czasach. Wymiar sprawiedliwości w pułapce sprawności*, Warsaw 2018: 58.

[58] The judgment of the Constitutional Tribunal, K 32/09.

opinion of the Constitutional Tribunal, in a democratic state ruled by law, the 'principle of the sovereignty of the monarch is replaced by the principle of the supremacy of the Nation, limited by human rights, having its source in inviolable human dignity'.[59] Therefore the values expressed in the law are the sovereign.[60] Judges, being subject to the Constitution, are legitimised to watch over the respect for these values and to guard the constitutionally defined limits of sovereign power. The administration of justice entrusted to the common courts and the Constitutional Tribunal's rulings regarding the conformity of the law with the Constitution makes these courts and the Tribunal the depositaries of the right to settle disputes, which is an attribute of sovereign power.[61] The binding Constitution, which confers the supreme authority on the Nation, requires the recognition that the systemic premise of this supremacy is that it be exercised in accordance with the principles and forms defined in the Constitution. In particular, this entails that the judiciary has the constitutional legitimacy to limit—due to the provisions of the Constitution as the supreme law— the other powers, as well as the sovereignty of those exercising their power directly.

**VI.** The attempt to solve the issue of the role of judges in determining the limits of democratic power requires interpretation of constitutional provisions that is in itself in accordance with the Constitution. This kind of interpretation, which can be described as pro-constitutional, should reflect the axiological identity of the Constitution, and recognise the values expressed in the Preamble to the Constitution as the unshakeable foundation of the State. It would therefore be a holistic interpretation which does not determine the meaning of the Constitutional provisions in isolation from their mutual relationships. Since the Constitution is the supreme law, according to Article 8 section 1 of the Constitution, interpretative doubts should be resolved in favour of respect for fundamental values and constitutional principles that determine the rules of systemic rationality. This will make it possible to avoid paradoxical results of interpretation, such as the view that the repeal of the statutory regulation of the Constitutional Tribunal's organisation and the mode of proceedings before it (Article 197 of the Constitution) would rule out the possibility of the Tribunal performing its functions listed in the Basic Law. Similarly, the linguistic interpretation of the Constitution's provision, according to which the National Council of the Judiciary consists of '15 judges chosen from amongst the judges' would be of an anti-constitutional nature (Article 187 section 2 item 2 of the Constitution), if this interpretation resulted in the recognition that these judges are not chosen by judges. By construing a constitutional norm in such a way, we would be ignoring the tasks of this Council specified in the Constitution, which include safeguarding the independence of courts and judges (Article 186 section 1), and we would be ignoring the provisions of

[59] Ibidem.
[60] Cf. R. Piotrowski, *Konstytucja...*: 712.
[61] Cf. D. Smilov, op. cit.: 869.

Article 173 of the Constitution, according to which the courts and tribunals are 'a separate power and shall be independent of other branches of power'.

The interpretation which would, in accordance with the Constitution, make it possible to define the role of the judiciary in defining the limits of democratic power, should foster the implementation, as far as possible, not only of the provisions of the Constitution in the light of the wording of Article 8 sec. 1 thereof, but also the realisation of values expressed in international law. According to Article 9 of the Constitution, the Republic adheres to the international law binding upon it. Therefore, this concerns the values and principles that are based in particular on the Universal Declaration of Human Rights, the United Nations Charter, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Treaty on European Union, and the Charter of Fundamental Rights of the European Union. These values, whose guardians are judges, under Articles 9 and 91 of the Constitution, limit the supreme authority of the sovereign in so far as they are identical to the values and principles of the Constitution.

More specifically, the provision of Article 91 section 3 of the Constitution states that an agreement, ratified by the Republic of Poland, establishing an international organisation so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws. Thus, the court 'is obliged to settle the matter on the basis of the European Union provision and to exclude the Polish law which conflicts with it'.[62] Thus, a general or administrative court determines the limits of the legislative branch in such a way that in a specific case it refuses to apply the law,[63] which is an expression of the will of democratically legitimised representatives of the sovereign.

The fundamental consequence of European integration remains the recognition of the special role of independent courts in a democratic state ruled by law, without which it would be possible to concentrate the legislative and executive powers. The political homogeneity of these authorities could constitute a premise for the functioning of a specific tyranny of the majority, which would threaten the European Union, understood as a community of values. The Treaty on the European Union entails that the courts have a special role in terms of protecting the Polish Constitution from the application of statutory provisions that are contrary to the fundamental rights guaranteed by this Constitution.

The current model of the interpretation of the Constitution ensures the systemic privilege of the interpretations made by the judges of the Constitutional Tribunal and does not exclude interpretations made by the Supreme Court and common courts. The discretionary power of judges, referred to in the doctrine as a manifestation of 'undoubtedly one of the strongest forms of power in the entire legal system',[64] which is confirmed

[62] L. Garlicki, *Polskie prawo…*: 506.

[63] Cf. A.B. Capik, A. Łazowski, Uwagi do art. 91, in: M. Safjan, L. Bosek (eds.), *Konstytucja RP. Komentarz*, vol. 2, Warsaw 2016: 162ff.

[64] M. Gutowski, P. Kardas, *Wykładnia i stosowanie prawa w procesie opartym na Konstytucji*, Warsaw 2017: 4.

especially in the case of the Constitutional Tribunal, can be reconciled with Article 8 sec. 1 of the Constitution, according to which the Constitution is the supreme law, but only when the courts and judges are truly independent. However, this requires that a high level of constitutional culture be maintained, especially in the process of appointing judges. Otherwise, there may be an interpretation of the Constitution that favours the primacy of politics over the Constitution. Such 'political constitutionalism' is difficult to reconcile with the principles of constitutional democracy found in the Polish Constitution, in particular with the principle of the separation of powers. Deliberate anti-constitutional interpretation of the Constitution is in fact a kind of constitutional tort, which does not, however, lead to constitutional liability. Responsibility for any 'perverse translation of the Constitution' was provided for by the Declaration of the States Assembled of 1791, which stipulated that those who carry out this kind of interpretation are traitors and 'shall be punished as such with the utmost rigour by the Diet Tribunal'.[65] However, it does not seem possible—from the perspective of respect for the principles of judicial independence—to make judges accountable for their interpretations of the Constitution that are contrary to the ideas of experts, politicians or the public opinion.

If the Constitutional Tribunal determines an interpretation of the Constitution which is in line with the views of a parliamentary majority, this may be a threat to the Constitution, especially if it legitimises, by means of interpretation, an amendment to the Constitution carried out by means of ordinary statutes. However, if the Constitutional Tribunal does not concur with the parliamentary majority, or—as the experience of recent years has shown[66]—is accused of becoming a spokesperson for the parliamentary opposition, it may be deprived of the properties that give the parliamentary majority cause for concern; and such an act would constitute a breach of the Constitution. This would undermine the Constitution and endanger the constitutional system.

In a constitutional democracy, the rules of which are reflected in the Constitution in force in Poland, interpretation of the Constitution seeks support in social dialogue, which forms the basis of a consensus legitimising the state and law. However, this requires that constitutional culture be shaped on the basis of cooperation that respects the principle of the common good, which does not allow for discrimination against minorities and the exclusion of political opponents. Democratic power which rejects the principle that the state is the common good of its citizens loses its democratic properties. Political parties whose aim is to overthrow the Constitution by replacing the law of the common good with the good of the majority represented by those parties, and by subordinating judges to politicians, do not fulfil the constitutional duty to act in accordance with democratic methods. Depriving the judiciary of the possibility to determine the limits of democratic power leads to the politicians

[65] *Deklaracyja Stanów Zgromadzonych*, in: *Konstytucja 3 Maja*, Warsaw 1981: 106ff. An English translation can be found at <http://libr.sejm.gov.pl/tek01/txt/kpol/e1791.html>.

[66] Cf. P. Radziewicz, P. Tuleja (eds.), *Konstytucyjny spór o granice zmian organizacji i zasad działania Trybunału Konstytucyjnego*, Warsaw 2017.

acting on behalf of the sovereign being granted full sovereignty, with all of the systemic consequences this entails, including those pertaining to the identity of a European state.

After all, Europe is not only a pluralistic civilization,[67] shaped in a long process of development, and a name, replacing the that of 'Christendom'.[68] Europe—in the light of the axiology of European integration[69]—is in fact, as a civilisation, is associated with a kind of value, which is expressed in the affirmation of human rights, the affirmation of freedom that does not ignore dignity and the common good, and at the same time reflects the pursuit of these values.[70] This is confirmed by the Treaty on European Union, according to which: 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities' (Article 2). The preamble of the Treaty indicates that the parties to this agreement are inspired by the 'cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law.' According to the Preamble, the Member States confirm their 'attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law.' This means that Member States base their constitutions on these very values.[71] At the same time, the Treaty recognises that: 'Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law' (Article 6 section 3). The European legal order is therefore characterised by constitutional pluralism, based on the foundation of respect for the 'national identity' of the Member States, 'inherent in their fundamental structures, political and constitutional' (Article 4 section 2).

The limits of constitutional power are determined by universal constitutional values, defining—irrespective of any controversy regarding their interpretation[72]—both the European constitutional identity and the constitutional identity of European States. The restriction placed on the Member States of the European Union in terms of shaping the content of their own constitutions is not absolute. Significant limitations are placed upon the constitutional power of these countries by political and economic

[67] Cf. H. Kissinger, *World Order: Reflections on the Character of Nations and the Course of History*, London 2014: 11ff.

[68] N. Davies, *Europa*, Cracow 1998: 31. Cf. also A. Pagden (ed.), *The Idea of Europe*, Cambridge 2002: 33ff.

[69] Cf. Z. Brodecki, Idee—wartości (duch Traktatu) i sztuka rządzenia, in: idem (ed.), *Europa sędziów*, Warsaw 2007: 39ff.

[70] Cf. R. Piotrowski, Europa i granice władzy ustrojodawczej, in: T. Giaro (ed.), *Prawne problemy i wyzwania Unii Europejskiej*, Warsaw 2018: 13ff.

[71] Cf. L. Garlicki, Wprowadzenie, in: *W. Staśkiewicz* (ed.), *Konstytucje państw Unii Europejskiej*, Warsaw 2011: 8ff.

[72] Cf. D. Davis, A. Richter, Ch. Saunders, *An Inquiry into the Existence of Global Values*, Oxford–Portland 2015: 469ff.

conditions, and the consequences of globalisation, but also by their own constitutional tradition and the values of the legal culture that define their European identity.

**VII.** The existence of an independent judiciary leads, on the one hand, to the rejection in the concept of a democratic state of the assumption of the unlimited scope of the sovereign's will as the governing authority, and, on the other hand, to the recognition as determinants of democracy only those manifestations of the will of the majority that have constitutional legitimacy and are therefore consistent with the version of the culture of human rights enshrined in the Constitution and which is accepted by judges at the time of their ruling.

The constitutions of contemporary democratic states regulate the relationship between the judiciary and other powers in different ways. The exact opposite of the principle of the separation of judicial power, which is adopted in the Polish Constitution and holds that judges are to be responsible before judges, is the appointment of judges through general elections, in order to make their them accountable to citizens.[73] The aspiration to make judges politically accountable is reflected in the fact that justice ministers have been given a significant role in the appointment of judges. The doctrine points out that the problem of maintaining a balance between the accountability of judges and their independence may be dealt with in various ways in a democratic state.[74] However, it is extremely important that a specific solution should correspond to the Constitution in force. The systemic position of the judiciary, which is inseparable from balancing the roles of politicians and judges in the process of appointing a judge, is a decisive factor in its legitimacy in a state whose constitution reflects the rules of liberal constitutionalism.[75]

The principles of the separation of powers and a democratic state under the rule of law are incompatible with idea that the boundaries of judicial power are defined not by constitutional provisions, but by rules of a political nature, which attempt to change the Constitution without changing its provisions, only by changing the practice reflected in legislation. The aspirations of the executive to maintain and increase its influence on the judiciary, which destabilises this power, threatens the constitutional status of judges, and thus also the rights and freedoms of the individual.

From this point of view, the separation and independence of the judiciary has an important systemic sense—after all, it concerns the performance of the important function of an arbitrator in the democratic system in disputes between the victorious majority and other minorities, protecting the rights of minorities and establishing borders that a minority should not cross, thereby preserving its identity and reconciling the majority's sense of fairness. The exercise of this function requires a court that is separated from the majority power so effectively as to be able to oppose it, especially by issuing judgments that are difficult for the electorate to accept (and it is on the will of the electorate that the fate of the government depends). Such separation may prove particularly important when

[73] Cf. D. Smilov, op. cit.: 861.
[74] Ibidem.
[75] Cf. M. Tushnet, *Advanced Introduction…*: 114ff.

the majority does not support minority or human rights, which may even be convenient for those wielding the executive
power.[76] The affirmation of minority rights in judicial decisions may reflect the ideas that judges have on what makes a good state and good society, ideas which are not in line with those of the majority; however, this may result in an amendment of the Constitution which is binding for judges. The Constitution of the Republic of Poland does not render the role of the majority in the law-making process absolute, stating rather that this process is based on dialogue. Judicial decisions that reflect a different point of view than that of the majority may contribute to this dialogue.

The constitutionally established independence of the judiciary allows us to overcome the contradiction between the exercise of supreme power by the Nation and the guarantees of the rights and freedoms of the individual that are derived not from the will of the governing authority, but from the inherent and inalienable dignity of the human person. However, the judicial power will not replace the Nation and its representatives by fulfilling its role of safeguarding rights and freedoms, whose existence depends not only on independent courts, but above all on social support for these rights, the lack of which results in the atrophy of the democratic system and transforms the judicial authority into its exact opposite as a consequence of the loss of independence.

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JUDGES AND THE LIMITS OF DEMOCRATIC POWER
IN THE LIGHT OF THE CONSTITUTION OF THE REPUBLIC OF POLAND

S u m m a r y

The essence of the democratic power established in the Constitution of the Republic of Poland is to limit this power in order to protect the rights of the individual against threats that may be posed by the rule of the majority, especially when this majority seeks to impose its values and beliefs on others. This limitation is expressed both by the principle of the separation and balance of powers and by the principle of a democratic rule of law, and above all by the principle of the inherent and inalienable dignity of man. In the light of the Constitution, the supremacy of the nation as a constitutional value is not of an absolute nature, especially in the context of the special status of human rights which is anchored in the concept of dignity. The current Basic Law, granting the supreme authority to the Polish Nation, requires that the authority of that supremacy be exercised in compliance with the principles and in forms set forth in the Constitution. This means in particular, the constitutional legitimacy of the judiciary to restrict, pursuant to the provisions of the Constitution as the supreme law, the powers of other authorities, as well as the authority (sovereign) exercising its power directly. The existence of independent judiciary leads, on the one hand, to the rejection in the conception of a democratic state, of the assumption of an unlimited scope of power of the governing authority, and on the other hand, to the recognition as a determinant of democracy of only those manifestations of the will of the majority, which have a constitutional legitimacy and are therefore in line with the version of the culture of human rights as enshrined in the Basic Law and which are accepted by judges at the time of the ruling.

[76] Cf. R. Piotrowski, Zagadnienie legitymizacji władzy sądowniczej w demokratycznym państwie prawnym, in: A. Machnikowska (ed.), *Legitymizacja władzy sądowniczej*, Gdańsk 2016: 18ff.