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"THERE ARE STILL COURTS IN WROCŁAW!" A MEETING WITH PROFESSOR ANDRZEJ RZEPLIŃSKI AT THE UNIVERSITY OF WROCŁAW FACULTY OF LAW, ADMINISTRATION AND ECONOMICS (PROFESSOR DUDEK SALON, 26 MAY 2017)*

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Motto: *"In the study of law* [prior to 1989], *authors accepting the principle of the unity of state power erase from their vocabularies the notion of judicial independence – admitting only the notion of independence of the judge, or they give a new meaning to the concept of judicial independence, understanding it as 'the distinctness of the judiciary in relation to other powers'. The essence of this distinctness boils down to organizational separation within the structure of power*. ***The thing is, it was not clear at the time whether the distinctness of the railways within the structure of the ministry of transport was not of that same character.*** *Indeed, the accent is placed on technical and administrative aspects rather than constitutional ones."*
(Andrzej Rzepliński, *Sądownictwo w Polsce Ludowej. Między dyspozycyjnością a niezawisłością*, (Oficyna Wydawnicza "Pokolenie", Warsaw 1989) 8-9)

On 26 May, the 580th meeting of the Professor Dudek Salon was held at the University of Wrocław Faculty of Law, Administration and Economics. The special guest was prof. dr hab. Andrzej Rzepliński, President of the Constitutional Tribunal in the years 2010-2016, and director of the Chair of Criminology and Penal Policy of the Institution of Social Prevention and Resocialization, University of Warsaw Faculty of Applied Social Sciences and Resocialization. The subject of his remarks was *"Freedom of the individual as a value in our Act of Acts"*. Our special guest was accompanied by his wife, prof. dr hab. Irena Rzeplińska (Chair of Criminology, Institute of Legal Sciences, Polish Academy of Sciences). Prior to his speech at the Salon, the guests were received by Dean of the University of Wrocław Faculty of Law, Administration and Economics, prof. dr hab. Karol Kiczka. Their conversation addressed such issues as reforms to higher education planned by the Ministry of Science and Higher Education. During the meeting of the

Salon, participating alongside the Dean of the Faculty of Law were: Vice Rector of the University of Wrocław for Finances and Development prof. dr hab. Wiesława Miemiec, Dean of the Wrocław Regional Bar Association and Vice President of the Polish Bar Association Leszek Korczak, Dean of the Wałbrzych Regional Bar Association Sławomir Majka, former Dean of the Wrocław Regional Bar Council Andrzej Malicki, Judge of the Constitutional Tribunal prof. dr hab. Leon Kieres, Judge of the Supreme Administrative Court Mirosława Rozbicka-Ostrowska, and dr Wojciech Jasiński from the Supreme Court Office of Studies and Analyses.

Professor Rzepliński began his remarks by defining freedom as a fundamental value of the Constitution of Poland, deriving it from the principle of the democratic state (Art. 2 Constitution). The notion of freedom, in turn, appears 81 times in the text of the Constitution (by way of comparison, the German constitution, 1/3 longer than its Polish counterpart, mentions freedom 33 times). Frequent reference to this notion by the constitutional legislator is associated with memory of " *... the bitter experiences of the times when fundamental freedoms and human rights were violated in our Homeland*" (preamble to the Constitution of Poland). This explains why the Preamble of this fundamental law contains mention of the thirst to guarantee civil rights "*forever*". The Constitution is defined as the fundamental law for a state "*based on respect for freedom*". Later in the Preamble is mention of the "right to freedom" grounded in the inherent dignity of the person. The speaker defined freedom as a space for the functioning of every individual which the State (authorities) had essentially no access to, and in which we autonomously regulate our own functioning within this space without need of any assistance from public authorities. We take responsibility for the exercise of freedom within the borders of constitutional values and without the need for any additional action on the part of the State. The vision of freedom in the 1997 Constitution of Poland is different from the vision of the 1952 Constitution of the Polish People's Republic, in which particular freedoms (paragraph 1) were subjected to the condition of their appropriate exercise (paragraph 2) (*"As a rule, the second paragraph served to suppress freedom"*). By way of illustration prof. Rzepliński cited Art. 83(2) of the 1952 PPR Constitution, which mentions "putting into effect the freedom of speech". Referencing these observations to the 1997 Constitution, which declares in Art. 5 that "The Republic of Poland shall … ensure the freedoms and rights of persons and citizens …", he said: *"I am suspicious of those provisions in the Constitution which contain the word 'ensure', and this word appears very frequently in our Constitution, 33 times"* (for comparison: in the German Constitution it appears 13 times). Similarly, the State ensuring freedom for the creation and functioning of political parties (Art. 11(1)) is, according to Andrzej Rzepliński, unnecessary, and it would be sufficient to capture this freedom in Art. 12, discussing freedom of association and civil society institutions. Ensuring freedom of the press and other means of social communication also need not be a competence of the public authorities (Art. 14).

As a constitutional judge, Andrzej Rzepliński was also inspired by the words of President of the United States Franklin D. Roosevelt, spoken on 6 January 1941, shortly before the USA entered World War II, and devoted to the "four freedoms":

1) freedom of speech and expression,

2) freedom of every person to worship God in his own way,
3) freedom from fear,
4) freedom from want [...] which will secure to every nation a healthy peacetime life for its inhabitants[1].

These freedoms have been captured in many words within the Polish Constitution as well, but as the speaker remarked, they are too frequently dressed with an additional role of public authorities: *"In the context of freedom, I also feel that the constitutional lawmaker needlessly employs the notion that public authorities either can or cannot do something. Either there is freedom, or we give public authorities – here we hesitate – we give them something, or precisely the opposite"*). The special guest cited a verdict of the Constitutional Tribunal of 1 March 2011 (P 21/09)[2], in which the Tribunal held that the personal freedom of the individual and the right to personal freedom guarantee the freedom of each individual from arbitrary conduct by public authorities, and protect everyone from fear of their own state, including against politically motivated deprivation of freedom in any form.

Andrzej Rzepliński also gave consideration to Art. 22 (freedom of economic activity), Art. 31 (principle of proportionality) and Art. 41 (personal inviolability and personal freedom). The content of Art. 31(1) ("Freedom of the person shall receive legal protection") – which, in the speaker's opinion should be included in Art. 2 – is not, thankfully, complemented with the statement that the Republic of Poland shall ensure this is realized. "Shall receive legal protection" is a direct command to the constitutional lawmaker, requiring it to compose a logical and complete legal system that will serve the freedom of people. At the same time, everyone is obliged to respect the freedoms and rights of others. No one shall be compelled to do that which is not required by law (Art. 31(2)). Article 31(3) is of fundamental significance for balancing various values by the Constitutional Tribunal, which seeks a "happy medium" in each case in order to declare whether the legal provision called into question is consistent with the Constitution or not. Paragraph 3 sets out what values should be taken into account in respect of potential limitations on the scope of the exercise of constitutional rights and freedoms, and thus those which "are necessary in a democratic state". A democratic state, in turn, is first and foremost a state in which there are free and fair elections, in which parliamentary democracy functions, and this functions when every parliamentary minority has the real

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[1] Taken from W Władyka et al (eds), *Wielkie mowy historii*, vol. 3 (Warsaw 2006) 120-127; Andrzej Rzepliński also invokes the "four freedoms" in an interview in "Gazeta Wyborcza": 'Rzepliński: przekraczający granice, wszelkie. Z prof. Andrzejem Rzeplińskim z rozmawia Tomasz Kwaśniewski' (*Gazeta Wyborcza*, no 224, 24-25 September 2016) 12-17.

[2] OTK ZU 2011, no 2-A, item 7.

possibility to jointly participate in the creation of law, *"and this is not done by saying 'There will be no more questions, there will be no motions, who votes ›for‹, who votes ›against‹. I hereby declare that the Bill has been adopted with 237 votes' – because then there is no democratic state: without the free creation of law"*. One of the fundamental obligations, tasks, and missions of a constitutional court (as we may learn from the case law of the German and Austrian Constitutional Tribunals, as well as the French Constitutional Council) is protection of political minorities, without which there can be no good law; there is only dictate, and not law. Another aspect examined by the Constitutional Tribunal is the "necessity" of restrictions, with the reservation that these restrictions may not violate the essence of rights and freedoms. Even when such restriction is necessary, a freedom written into the Constitution cannot be "hollowed out", the essence of that right or freedom cannot be "cut out".

During the discussion portion of the meeting, the special guest was asked about the legitimacy of the President of Poland refusing to administer the oath of office to three judges of the Constitutional Tribunal selected by the previous parliament (Roman Hauser, Andrzej Jakubecki, and Krzysztof Ślebzak), the potential to bring subsidiary charges in cases concerning suspicion of activity intending to initiate a coup d'état (Art. 128 of the Criminal Code), and the delegalization of a political party employing non-democratic methods (incompatibility with the Constitution of the programmes or activities of a political party: Art. 13 of the Polish Constitution and Art. 44 of the Political Party Act of 27 June 1997), assessment of the change in the rules governing the operation of the civil service enacted in the Act of 30 December 2015 on amending the Civil Service Act and some other legislation[3], and planned changes in the National Judicial Commission Act[4] and the Common Courts Act[5]. Other questions included the issue of permissibility of the President employing the power to pardon on grounds of Art. 139 Constitution of Poland in respect of individuals whose guilt has been stated in a verdict that has not yet attained force of law (so-called "individual abolition", the meeting with prof. Rzepliński took place prior to the Supreme

[3] OJ L 2016, item 34.

[4] The Act of 12 July 2017 on amending the National Judicial Commission Act and some other legislation (Sejm paper no 1423, Sejm of the VIII term). The Act was vetoed on 24 July 2017 by the President together with an equally controversial Act of 20 July 2017 on the Supreme Court (Sejm paper no 1727, Sejm of the VIII term). See: B Chrabota, 'Ruch sprzeciwu prezydenta' (*Rzeczpospolita*, no 171 (10809), 25 July 2017) A1. The second Act was subjected to criticism in the Position of Deans of leading Faculties of Law of 17 July 2017, *Stanowisko Dziekanów w sprawie poselskiego projektu ustawy o Sądzie Najwyższym* <http://www.wpia.uw.edu.pl/wp-content/uploads/2017/07/Stanowisko-Dziekanów.pdf>.

[5] Act of 12 July 2017 on amendments to the Common Courts Act (OJ L 2017, item 1452). See: *Stanowisko Krajowej Rady Sądownictwa z dnia 28 lipca 2017 r. w przedmiocie ustawy z dnia 12 lipca 2017 r. o zmianie ustawy – Prawo o ustroju sądów powszechnych* <http://www.krs.pl/pl/aktualnosci/d,2017,7/4929,stanowisko-krajowej-rady-sadownictwa-podjete-28-lipca-2017-r-w-sprawie-zmiany-ustawy-prawo-o-ustroju-sadow-powszechnych>, and the earlier *Opinia Krajowej Rady Sądownictwa z dnia 12 maja 2017 r. w przedmiocie poselskiego projektu ustawy o zmianie ustawy – Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw (druk sejmowy nr 1491)* <http://www.krs.pl/pl/aktualnosci/d,2017,5/4782,opinia-krajowej-rady-sadownictwa-dotyczaca-poselskiego-projektu-zmiany-ustawy-prawo-o-ustroju-sadow-powszechnych>.

Court issuing resolution I KZP 4/17 of 31 May 2017 addressing the matter[6]). Consideration was also given to issues related to the ruling of the Constitutional Tribunal concerning Open Pension Funds (verdict of 4 November 2015, K 1/14[7]), permissibility of the death penalty, and the so-called "Monsters Act" (the Act of 22 November 2013 on proceedings in respect of individuals with psychological disturbances constituting a threat to the life, health, or sexual freedom of others[8], which the Tribunal addressed in its verdict of 23 November 2016, K 6/14[9]), and justification of changes to the present Constitution of Poland, and the deletion from the official compendium of case law of the Constitutional verdicts of 9 March 2016 (K 47/15)[10], 11 August 2016 (K 39/16)[11] and 7 November 2016 (K 44/16)[12].

In expansive responses, prof. Andrzej Rzepliński answered each of the questions posed to him. Responding to the charge of one member of the audience that Art. 139 of the Constitution of Poland was illogical, prof. Rzepliński stated that constitutional provisions which can be accused of internal inconsistencies or conflicts with other provisions are a part of the "everyday life" of each constitution, not only that of Poland. The more words used in Art. 139, the greater the number of problems there would be. But in these cases we can find support in constitutional courts (by way of illustration, prof. Rzepliński mentioned the decision of the Constitutional Tribunal in the case of the so-called "chair dispute", ruling of 20 May 2009, Kpt 2/08[13]). Decoding the norm contained in a provision consists not only in reading the provision, but also taking into consideration other verdicts, the entire constitutional context. Such a task can be very difficult at times, and at others virtually impossible for a constitutional court in a dispute where all of the main actors enmeshed in the controversy are present at sessions of the court. Nevertheless, however, together (if only owing to participation of the parties in the proceedings) a logical understanding of the disputes provision is arrived at. An important value in and of itself is the "durability" of constitutional regulation.

He also stated that the erasure of verdicts is a crim against documents, described in Art. 276 Criminal Code.[14] Concerning proposed changes in the

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[6] Resolution of a panel of seven justices of the Criminal Chamber of the Supreme Court of 31 May 2017 (I KZP 4/17) <http://www.sn.pl/sites/orzecznictwo/Orzeczenia3/I KZP 4-17.pdf>; also: Lex no 2294441; Legalis no 1603847.

[7] OTK ZU 2015, no 10-A, item 163.

[8] OJ L 2014, item 24 with amendments.

[9] OTK ZU 2016, Series A, item 98.

[10] OTK ZU 2016, Series A, item 2 (also: Lex no 2001897; Legalis no 1406600).

[11] OTK ZU 2016, Series A, item 71 (also: Lex no 2086840; Legalis no 1482365).

[12] OTK ZU 2016, Series A, item 86 (also: Lex no 2146792; Legalis no 1522391).

[13] OTK ZU 2009, no 5-A, item 78.

[14] *Usunięcie wyroków TK z urzędowego zbioru orzeczeń to przestępstwo*, "Karne24.com" (Internet journal of the Foundation "Krakowski Instytut Prawa Karnego"), 22 May 2017 <http://karne24.com/usuniecie-wyrokow-tk-urzedowego-zbioru-orzeczen-przestepstwo>. The content of the deleted verdicts has been placed on the website of the Commissioner for Human Rights and on the portals for "Monitor Konstytucyjny" and "konstytucyjny.pl": *RPO*

present Constitution of Poland, he posed a rhetorical question: *"Can someone who breaks the Constitution then change it?"*.

In responding to questions, the speaker presented his assessment of the current situation: *"In the face of the 'extinguishing' of the Constitution, the strength and hope of each of us are judges and courts. So we can say here: as long as there are courts in Wrocław, there remains Polish law and the Polish states, we are citizens rather than subjects. We need not fear our state as long as we have a court in Wrocław.* (...) *Are we a state of lawlessness?* (...) *I'll respond by saying this: we are citizens of a state in which a range of fundamental constitutional provisions have been 'extinguished', they do not function, they're gone. Judges have to know the law. The Constitution says that they are subject only to the Constitution and statutes. But if the Constitution is being 'extinguished', what are they subject to? What laws? What laws are still in effect? When a central political authority says, 'this is ok, but this doesn't apply anymore'. In other words, judges are suspended, and can then be, justifiably in the eyes of the 'extinguishers', accused of failing to follow statutes and the Constitution.* (...) *As long as there are courts and they will find the law – and a good judge can find law for every case, to issue a just verdict – we are still not a lawless state. But there are 'dead zones', indeed."*

Summarizing his remarks, the former President of the Constitutional Tribunal borrowed from the tale of the Miller of Sanssouci: *"If there is a court in Warsaw, in Wrocław, in Gdańsk, then we need not fear repressions for directly applying the constitution, as long as a provision of statute is obviously in conflict with the Constitution and the Constitution still applies in that area. But if it is absent because some provision of it has been 'extinguished' by its factual elimination, we still have international law, because the Constitution states that international agreements are incorporated into the Polish legal system with the consent of the lawmaker; in other words, there is always an Act, and there is always the content of a norm of international or European law*[15]*, there is the case law of the*

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publikuje usunięte z serwisu Trybunału Konstytucyjnego jego wyroki: w sprawach K 47/15, K 39/16, K 44/16, 2 June 2017 <https://www.rpo.gov.pl/pl/content/rpo-publikuje-usuniete-z-serwisu-trybunału-konstytucyjnego-wyroki-w-sprawach-k-4715-k-3916-k--4416>; <http://monitorkonstytucyjny.eu/archiwa/663>, 2 June 2017; *Zaginione wyroki TK*, 4 June 2017 <http://konstytucyjny.pl/?p=417>.

[15] This was the tone of the verdict issued by the Court of Appeals in Wrocław on 27 April 2017, II AKa 213/16 <https://orzeczenia.ms.gov.pl/content/$N/155000000001006_II_AKa_000213_2016_Uz_2017-04-27_002>; Lex no 2292416, Legalis no 1604275. Discussion of the verdict: R. Baszuk, 'Ratyfikowana umowa i owoce z drzewa zatrutego', 5 June 2017 <http://www.radekbaszuk.pl/2017/06/ratyfikowana-umowa-i-owoce-z-drzewa.html>; E Ivanova, 'Owoce z zatrutego drzewa znowu nielegalne' (*Rzeczpospolita*, no 131 (10769), 7 June 2017) C1, online: <http://www.rp.pl/artykul/1324444-Dowody-zdobyte-z-przekroczeniem-granic-prowokacji-sa-nielegalne---wyrok-Sadu-Apelacyjnego-we-Wroclawiu.html>; P Kardas, M Gutowski, 'Rozdwojenie jaźni ministra' (*Rzeczpospolita*, no 136 (10774), 13 June 2017) C1 <http://www.rp.pl/Sedziowie-i-sady/306189998-Maciej-Gutowski-i-Piotr-Kardas-dla-RZECZoPRAWIE---Rozdwojenie-jazni-ministra.html>, R Baszuk, 'Sąd przywrócił wewnętrzną spójność przepisowi o wykorzystaniu owoców z zatrutego drzewa' (*Dziennik Gazeta Prawna*, no 118 (4517), 21 June 2017) <http://prawo.gazetaprawna.pl/artykuly/1052212,owoce-z-zatrutego-drzewa-przepisy.html>.

Strasburg and Luxemburg courts. So, I remain confident that there are courts in the cities of Poland. Thank you." – concluded Andrzej Rzepliński.

This meeting with a former President of the Constitutional Tribunal, participated in by not only lawyers but also numerous representatives of other scientific disciplines, definitely demonstrated that constitutional issues are not nearly as simple as some would like to think they are.