Chapter 41

The Reform of the Common Judiciary in Poland – Annexation or Adaptation?

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1. Introduction

After 20 years, the level of trust in the justice system (prosecutors, courts) is one of the lowest among public institutions in Poland. On the other hand, the expenditure on the administration of justice is one of the highest among the countries belonging to the Council of Europe (share of aggregate public expenditure on the administration of justice in GDP per capita in the 40 member states by the Council of Europe in 2006). Poland also has a relatively high employment rate for judges and other court personnel per 100 thousand inhabitants (respectively 12th and 10th place among the 40 countries belonging to the Council of Europe, the data for 2008).

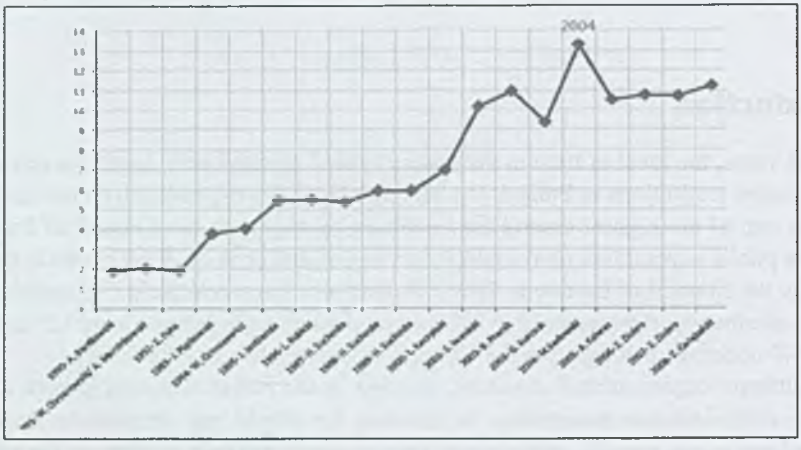
The multilevel organizational structure, existing in the Polish common judiciary, is characterized by a multi-instance proceeding. In addition, we should pay attention to the differences in the size of individual appeals, superior and district courts, not only in terms of the areas of their properties, but also of the number of incoming cases, and thus the size of the units and the number of posts. The basic problem of the Polish judiciary is its overly complicated structure, hardly applicable to the real needs. The faulty design of the system and the multiplication of the number of court units determine the need to involve more and more members of the judiciary, in particular of judicial positions. It should also be noted that a large number of mainly small units of the court (about one third of the district courts) employ fewer than 10 judges (Petryna, 2010), which contributes not only to the fragmentation of the structure, but primarily to the multiplication of functional positions in the courts and increasing the costs of the judiciary.

The lack of determination in introducing overall changes in the Polish courts is a common feature of the successive governments. This is why the list of the problems to solve is still long. In particular, the long-proposed postulates require execution, especially the releasing of the courts' presidents of the administrative management in their units through delegating these activities to the director of the court, secondly, changing the model of judges' career paths (resignation from the bureaucratic model of career progression), and, thirdly, further work on the network of courts in Poland.

2. The judiciary in Poland over the decades

During the twenty years of the Third Republic the position of the Minister of Justice has already been exercised by eighteen people. Practically, all of the ministers who came to the ministry, promised a reform. On average, their implementation lasted for one year and two months, which was an average length of their mission. The measure of reform achievements of individual ministers is the scope of initiated and driven to the end legislative and organizational changes, which contributed to the acceleration of procedures, reducing their costs and boosting their quality. But it is not always the minister in office who is responsible for the failure of the reform, or the lack of thereof. Many projects have collapsed along with the ministers and governments who submitted them. Some of the projects, which over years proved to be defective, have not been changed.

Figure 1. Filing of cases to courts in 1990-2008 (million)



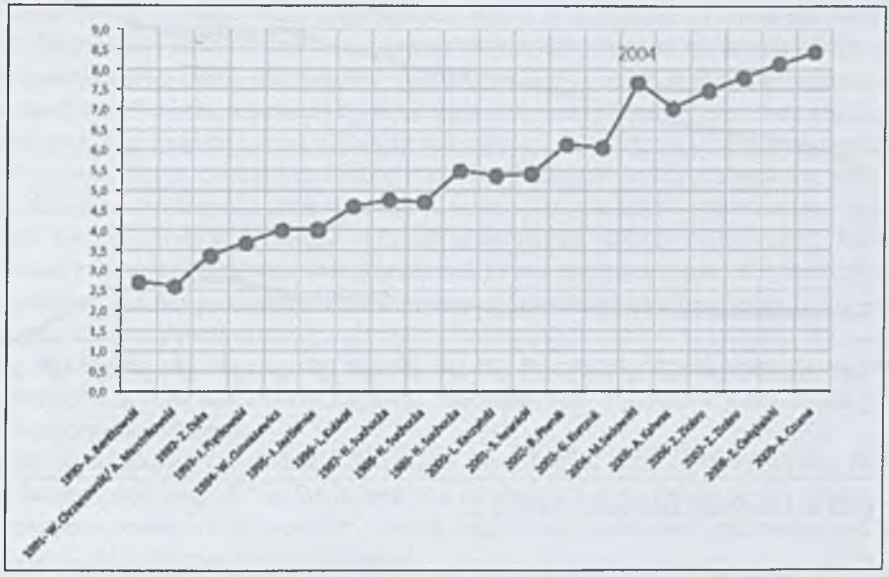
Source: GUS and Sześcidło, Bełdowski, 2010, p. 4.

At the threshold of the Third Polish Republic, the justice system had to cope not only with the stigma of the political influence on its activity during the period of communism. An equally important task was to adapt its structures to the new reality, and, in particular, to changes in the law, and hence to the cognition of the courts, the principles of government, and the carrying out of their proceedings. The basic measure of the tasks which the justice system in Poland has had to comply with over the past two decades has been an increase in the number of cases brought to the courts. During the twenty years, the number of cases filed in the courts in Poland has increased by over 500 percent. In 1989 the Polish courts received approximately 1.9 million cases, compared to 13.26 million cases in 2004. In recent years, the filing of cases has begun to stabilize and varies between 10.5 million and 11.9 million.

With the increasing number of cases in the courts the budgetary expenditure on the Ministry of Justice has been growing accordingly. In 1991 the budget of the Ministry of Justice was about 2.5 billion zloty (converted in 2009 prices). In 1994-1995 it stabilized at the level around 3.8 billion, then in 1996-1999 remained at 4.5 billion, to shoot subsequently from the year 2000 and grow almost continuously to the present day.

Considering the percentage of aggregated expenditure on the justice system, Poland is almost at the top among the countries belonging to the Council of Europe. The relation of aggregate expenditure on the courts, the prosecution and legal aid to GDP per capita in Poland is much higher than in all the most developed countries of the European Union.

Figure 2. Expenditure on the judiciary in the years 1990-2009 in the prices for 2009 (billion zloty)



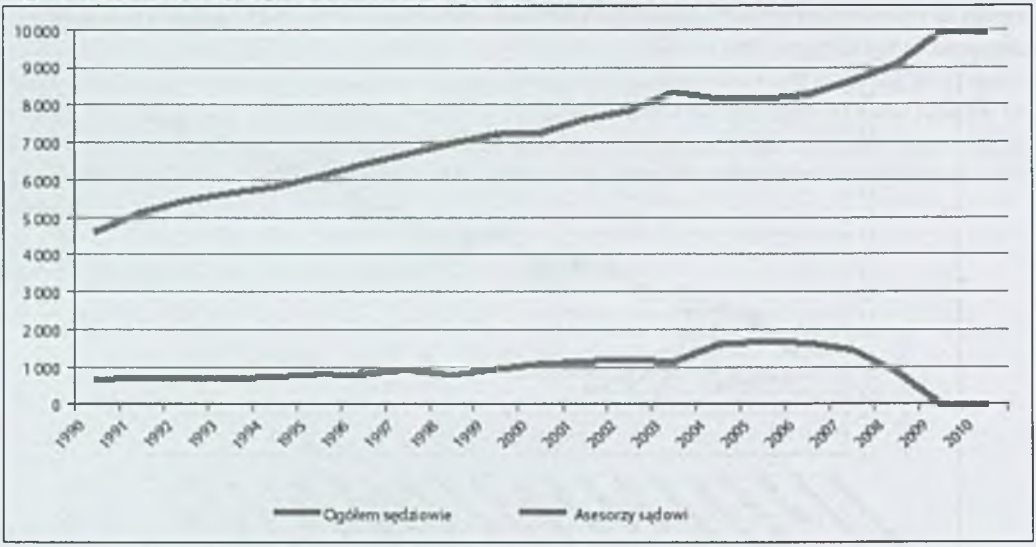
Source: GUS and Szcześcidło, Bełdowski, 2010, p. 5.

The increase in the number of cases incoming to the courts has been followed by the increase in the number of judges. It has been, however, slightly slower than the growth in the number of cases; the number of judges has increased by almost 300 percent, from about 3.5 thousand to more than 10 thousand. Today Poland, compared to other European countries, has a relatively high employment rate of both judges and other court personnel. However, the growth of employment has not resulted in the efficiency in the resolution of cases in Poland.

In terms of the number of full-time judges Poland takes the 3rd place among the members of the Council of Europe (after Russia and Germany). Counting nearly 50,000 employees, the Polish judiciary belongs to the most expensive ones. Poland is in the top five countries both in absolute terms and in % of GDP, in terms of the amount of public funding for the maintenance of the judiciary from the state budget. The data of the financial resources available to the Polish justice system, compared to other countries, contradict the thesis of its serious underfunding. They rather tend to pose questions about the exact structure of public expenditure and economic efficiency of necessary means (*Efektywność...*, 2010, p. 6.).

Since 1990, the number of judges in all institutions has been increased, except for assessors, whose employment growth has been, "blanked" as a result of the judgment of the Constitutional Court[1].

Figure 3. Number of judges and assessors of common courts in 1990-2010



Source: GUS and Sześcidło, Bełdowski, 2010, p. 7.

During the terms of office of the individual ministers, the adoption of unconstitutional amendments to the Law on Common Courts took place, which allowed for dismissing judges because of "the faithlessness to the principles of independence", and expanding the powers of the Minister of Justice in the procedure of appointing court presidents. The first of the changes was the aftermath of the efforts to remove from office those judges who were supposed to represent improper ethical attitudes during the period of the non-democratic country. The second change was an attempt to increase the political influence on the personnel holding managerial functions in the courts. In fact, no other proposals aiming at improving the management of the courts emerged.

The insufficiency of the judicial system has been treated by the successive ministers as the cost of the democratic transition. The assurance of inhibition of the uncontrolled expansion of cognition of courts has not worked, e.g. the application of a preventive measure in the form of pretrial detention. It was a natural consequence of the adjustment of the Polish law to the standards of protection of an individual's rights, but on the other hand, the organizational problems of the courts deepened. Introducing the principles of efficient management of the court failed, despite the establishment of CFOs; the problem is mainly in their weak position, their dependence on the presidents of the court and a still significant administrative competence held by them.

[1] The decision of the Constitutional Tribunal of 30 October 2006, Transient act S 3/06.

More frequent reaching for preventive measures, including detention, resulted in a high number of the European Court of Human Rights' sentences, in which the abuse of the institution in Poland was noticed, perceiving it even as a systemic problem[2].

The growth of the budgetary expenditure on the judiciary in 2003 helped to increase the network of courts. This change, however, was not accompanied by a wider reflection on the effectiveness of the small courts' model, consisting sometimes of several judges, in addition, all of them performing their functions. The reform was not preceded by the analysis stating whether independent courts in small local communities, where it is difficult to avoid the relationship between the judiciary and the local elites, are not particularly exposed to the risk of corruption.

The question why small, independent courts are a better solution than the nonresident departments of larger courts, supported by the judges commuting into the area, was also left without an answer. The ministers tried to justify the changes, referring to unspecified requirements of the European Union, without indicating the EU documents which dictated the introduction of such changes. The flagship project of the so-called 24-hour courts, which were supposed to accelerate the adjudication in simple criminal cases (drunk drivers and cyclists), has proved to be a costly failure, which was soon abandoned. Other announcements of a thorough reform of the judiciary has not produced a coherent, comprehensive vision for change in the judiciary and the prosecution, either[3].

New ministers were expected to clearly cut off from the political attempts to influence the prosecutors' actions and undermining the independence of judges and the courts (Golona, Czech-Śmiałkowski, 2007, p. 16).

But the liquidation of the so-called horizontal promotion of judges (Wytrykowski, 2009) was pushed through and wage hikes for judges and prosecutors were linked to the average salary in the enterprise sector. A new model of general, judicial and prosecutor application, and the National School of Magistracy were established.

3. The main problems of the Polish justice system

A major problem of the Polish judiciary, most noticeable from the point of view of the citizen, is the excessive length of the proceedings. It happens that some procedures in complicated cases

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[2] See: Temporary resolution HP/ResDH (2007) 75 concerning the judgments of the European Court of Human Rights in 44 cases against Poland concerning the excessive length of detention on remand. Until the adoption of the Resolution the Court issued 44 judgments finding an infringement of the European Convention on Human Rights because of the excessive length of detention on remand. As of the beginning of 2009, moreover, the Court recognized the following 145 cases of this problem (see Tymczasowe aresztowanie problemem strukturalnym, *Biuletyn Programu Spraw Precedensowych Helsińskiej Fundacji Praw Człowieka*, February 2009).

[3] A positive element was the establishment of the Office of Analysis and Etatisation of the Judiciary General, whose tasks include, among others:
a) to make analyses of the workload of judges and other judicial personnel and their widespread deployment and the use of the various organizational units;
b) development and introduction of the rational use of judges and other judicial personnel and taking other activities to ensure the state control in courts according to the actual needs arising from the state of the workload;
c) initiating and developing proposals for limits of employment of judges and proposals for the level of employment in other occupational groups of courts' workers in connection with the planned tasks to the draft budget of the Ministry for the year; http://www.ms.gov.pl/ministerstwo/org_baies.php.

(all instances) last more than 10 years. This is evidenced by, among others, numerous judgments of the European Court of Human Rights. At the stage of the work of Sejm (the Lower House of the Parliament) the law on complaint of infringement of the right to a trial within a reasonable time is currently being amended (Sejm printing No. 1281). Its objective is to adapt the regulations to the standards imposed by the European Court of Human Rights, including the coverage of complaint of preparatory proceedings.

The proposed changes, although they are a step in the right direction, seem to be insufficient. They do not include, inter alia, the fact that the excessive length of proceedings may have a multi-instance character, and may correspond to the various authorities and courts. But even the best act concerning a complaint against the excessive length of the procedures will not solve the problem of excessive length of proceedings itself. In order to eliminate this phenomenon, there needs to take place necessary comprehensive and reliable organizational work, which would be related to the functioning of the courts and the effectiveness of their work.

Therefore, the possibility of a better organization of judicial proceedings by scheduling individual hearings before the trial should be considered, as well as the application of the principle of concentration of the process by setting hearings, day after day or week after week. This should be particularly frequently used in the diagnosis of criminal cases(...) (*List Helsińskiej*... – Letter of the Helsinki Foundation for Human Rights to the Minister of Justice Andrew Czuma, 2009).

An important solution was the so-called e-court in Lublin, created for quick recognizing of simple civil cases in the electronic procedure.

The problem that may arise here, however, is the destruction of the dynamics of the reform of the justice system. Even the largest media activity and the determination to fight against irregularities cannot replace actions which are less spectacular, but most needed.

Part of the blame for the stopping of the reforms in the phase of general ideas and plans certainly falls on the general shaking of the Polish political scene and frequent changes of the government and coalition systems. On the other hand, even a short period of office can be very effective, if the minister comes with a clear vision of what they want to do. A valuable reform can then be carried out even without changes in the law, using the internal regulations and acts, as well as organizational activities.

Since the beginning of the political transformation, reviews of underfunding and staff shortages in the Polish justice system have been repeated like a mantra. For the successive ministers the fight for increasing the budget of the courts and prosecutors' offices and ensuring new jobs was a priority. But adding another million without any reform of the court management system, will not solve the problem.

After the twenty years of change in the justice system, the effect is that the share of expenditure on the administration of justice in GDP per capita in Poland is relatively high, higher than in most developed member states of the Council of Europe. However, the level of satisfaction with the services of the courts and the prosecutor's office is catastrophically low[4].

The same applies to employment in the courts. As it was indicated at the beginning, compared to the other countries of the Council of Europe, we fall far above average in terms of employment levels, both of judges and court staff (clerks of the court, assistants, technicians). This

[4] According to recent studies, 41% of the respondents do not trust the judges, and the courts – 40.9%. Prosecutors fall out even worse, more than 42% of the population do not trust them (Ministry of Justice) (*Badanie opinii publicznej*..., 2009, p. 15).

raises the question, how it is possible that systematically strengthened by financial and human resources, the Polish justice system, cannot cope with efficient dealing with citizens' cases. The excessive length of judicial proceedings is in fact a problem which has long been pointed out by participants and observers of the Polish justice system (Bodnar, Bernatt, 2009, pp. 100-102). It is also perceived in the work of the institutions of the Council of Europe, and particularly in the jurisprudence of the European Court of Human Rights. With more than 550 judgments finding a violation of the European Convention on Human Rights by Poland, which were made up to 1st January 2009[5], it can be estimated that approximately one third of judgments concern violations of the right to a hearing within a reasonable time (Article 6 ECHR).

The estimates are based on the Committee of Ministers, Interim Resolution ResDH (2007) 28 concerning the judgments of the European Court of Human Rights in 143 cases against Poland related to the excessive length of criminal and civil proceedings, and the right to an effective remedy (Adopted by the Committee of Ministers on 4 April 2007 at the 992nd meeting of the Ministers' Deputies)[6].

The problem of the excessive length of proceedings in Polish courts is also visible in the study conducted by the World Bank's annual Doing Business study, which, among others, embraces the measuring of times of claims for receivables from contracts. Since the beginning of the Business Doing research in this area, the position of Poland has only slightly improved. Currently, the process of claims for receivables from contracts in Poland (data concerning Warsaw have been taken into account) is 830 days, of which 660 days is coming to judgment, and thus closing the judicial phase of the claim. The rest of the time (160 days) absorbs the stage of the execution of the judgment. In Latvia, for the closing stage they only need less than 200 days, in France it is 271 days, and in Hungary – 305 days (www.doingbusiness.com).

A detailed analysis of the justice system in the years 2000-2004 containsthe report of justice functioning in Poland (*Raport o funkcjonowaniu...*, 2006, pp. 7-12).

4. Annexation of solutions – examples of transplantation in selected countries

Experts have conducted a review of judicial reforms in many countries, characterized by varying levels of economic growth and different economic situations. The review shows the problem of trying to take over solutions, as identified in some countries, by other countries. The extensive research indicates, however, the negative effects of this type of action (Botero et al., 2003, pp. 61-88).

Specialists argue that e.g. the importation into England of administrative tribunals modeled on the French Conseil d'Etat, where individuals could sue the government, was unsuccessful because the English legal tradition, unlike the French one, did not have a well-developed distinction

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[5] Data from Country Information: Poland, http://www.echr.coe.int/50/en/#countries-infos.

[6] Content of the resolution is available on the website: https://wcd.coe.int/ViewDoc.jsp?id=1115721&Site=CM. The Committee of Ministers noted that until its final resolution in Strasbourg were 143 Polish cases, the object of which was a violation of the right to a trial within a reasonable time (Article 6. 1 ECHR) and the right to an effective remedy (Article 13 ECHR). The vast majority of them (over 130 cases) concerned the excessive length of civil proceedings.

between private and public law (Allison, 1996). Others explain the similar perils of transplanting Anglo-American rules of evidence into the Continental system (Damaska, 1997, pp. 839-59).

Anyone contemplating the use of foreign legislation for law making in his country should ask himself: how far does this rule or institution owe its existence or its continued existence to a distribution of power in the foreign country which we do not share? (Kahn-Freund, 1974, pp. 1-27) In a critique of the annexation of the American constitutional model into Ethiopia, experts wonder whether the Western rule of law is a desirable target for an African country (Mattei, 1995, p. 127). If Africa desires to borrow solutions from western institutions, it should do so after a serious comparative analysis of the pros and the cons of each institutional alternative. Similarly, after a thorough review of transplanted legal systems and customary law in several African countries, a South African legal scholar categorically concludes that it would be a pity to miss the opportunity to enrich our social and legal culture by some imaginative fusion of distinctly African models of, for example, dispute settlement.

The blind and hegemonic push for uniformity around a non-African standard simply increases resentments that have been simmering since colonial times, which in people's minds translates into "westernization", a process not characterized in the past by too much respect for the African viewpoint (Nhlapo, 1998). In the Philippines, enhancing tribunal and community-based traditions and systems for resolving conflict has proved to be an effective strategy for addressing structural inefficiencies of the judiciary. Transplantation may give rise to serious strains in the recipient justice system, for foreign law is not "a boutique in which one is always free to purchase some items and reject others" (Mayo-Anda, 2001).

An arrangement stemming from a partial purchase can produce a far less satisfactory result in practice than either the recipient or the source system in its unadulterated form. Part of the reason is that to succeed, a judicial system must achieve a balance among at least three elements: accuracy (or fairness), speed, and access and the tradeoffs among these elements differ for different countries (Zuckerman, 1999). Some countries, for example, France, Germany, Japan, and the United States, have achieved a balance among accuracy, speed, and access that if not optimal at least does not seem glaringly wrong. Other parts of the world have succeeded less well. The accuracy-speed-access tradeoffs in the developing world may be quite different than those in developed economies. It is unlikely that complicated legal systems that work in rich countries, which have the resources and expertise to handle complexity, can be transplanted without significant modification into poor countries (Botero et al., 2003, p. 77). Developing economies tend to lack a highly trained and competent judiciary, have fewer resources with which to fund such a system, and would have more trouble achieving good results even if they had the same resources as developed economies. The evidence suggests that poor countries have more formal procedures than rich countries, apparently as a result of legal transplantation/annexation. In many developing economies proceedings often last more than 10 years, even for simple cases (Buscaglia, Dakolias, 1996). In Sri Lanka, lawyers have a high level of professional competence, and a high number of them have been trained in western, and particularly North American countries, but the judicial system functions not so well. Even appeals against death penalty sentences take many years, and land disputes are often passed on to sons and grandsons (Malik, 2001, pp. 93-97).

This is not to mean that lawyers in poor countries should not seek foreign education. Instead, it suggests that in a large society with a judiciary that has very limited human and financial resources, greater emphasis should be placed on reducing the gap between highly sophisticated justice in a few cases and no justice at all in most. Poor countries, or countries without a devel-

oped judicial tradition, should probably concentrate on instituting simple rules and procedures that are easy to enforce. A legal system that will do perfect justice in infinite time and at infinite cost is probably a luxury that the poor can ill afford. Efficient though blunt justice is better than no justice at all (Botero et al., 2003, p. 77).

5. Practice in the Polish judiciary

Since the beginning of the reforms in the Polish judiciary we can generally notice the lack of a coherent vision and specific strategies. The successive ministers have been trying to implement some of the western solutions applied by other countries, without an in-depth analysis and forecasts of the effects of such actions. In Europe there is a widely developed model of subordination of the Attorney General prosecutor's office to the Minister of Justice, which is reflected not only in the possibility to appoint and dismiss prosecutors by the Minister, but also in the powers of the Minister to issue binding guidelines and instructions to prosecutors, including those related to the conduct of specific cases. This is the case, among others, in Austria, Germany, France, Denmark, the Netherlands, Luxembourg and the Czech Republic. The model similar to that introduced in Poland is mainly the domain of post-socialist countries, such as Hungary, Latvia, Lithuania and Slovakia (*Sądownictwo*... – the report prepared by the MCC Group in the framework of the project). Among the so-called "Old EU" countries the model of the Attorney General's independence (constitutionally guaranteed) occurs in Italy. The only authority to control held by the Minister of Justice there is the possibility of disciplinary action against the head of the prosecutor's office. In Lithuania and Hungary the supervision of the prosecution has been moved towards the parliament, which can determine the broad lines of prosecution action (Lithuania), or even require from the Attorney General some information about specific investigations (Hungary) (Tak, 2005, pp. 33-34).

It is therefore possible to take advantage of ready-made solutions, however, there must be made an analysis who should be the benchmark, and whether indeed adaptation is not required, due to the specific conditions and traditions of the country concerned.

Resource management (human resources and material) is also a problem, with which the public administration in Poland cannot cope for years. The need to improve the management of the courts stumbles on the barrier still unknown to reformers of public administration, which is the barrier of independence and accountability of judges. Allegations of the judicial community include not only the content of the proposed changes, but also "an illusory form of consultation with the judges" (Uchwała Zarządu Stowarzyszenia...). It is unacceptable, however, that for two decades the government and the judicial environment have not been able to work out a model to protect the independence of the judiciary, while still guaranteeing them the improvement of their work. Imposing the U.S. model would not be the right solution, because of a different legal system and a much different way of perceiving the judge by the citizens of both countries.

An example of the Dutch Council for the Judiciary was used to develop solutions in the institutional sphere, allowing the transfer of issues related to the supervision and budgeting of the judiciary outside the executive branch. In the Polish legal system, the Minister of Justice is responsible not only for policy-making in the field of justice, but also for the disposal of public funds allocated from the state budget to finance the courts. The delegation of competences in the above areas to an independent judicial authority would allow to work out a system of funding that takes

into account the real needs of individuals units. In Poland, there have never functioned court budgeting mechanisms made by external bodies, and it is not surprising that such a proposal is being opposed, suggesting a threat to the sovereignty of the body.

In terms of the organizational structure of the universal judiciary, taking into account the organization and structure of the courts of the countries surveyed, we should instead strive to compensate for areas of jurisdiction and the internal structure and the number of posts of judges in the courts of various levels. From the point of view of the analyses, it seems necessary to create a model of judiciary, in which departments, courts, counties and appeals would be comparable to each other, particularly in terms of impact cases. However, the inappropriate transfer of information on the reorganization of the Polish judiciary through the media, provoked the opposition of citizens who understand that the court in the place stops to exist, and not that it will act as a department of a larger nonresident court.

Among the listed problems associated with the efficiency of the judicial system in Poland, there should also be mentioned a still insufficient level of digitalization of services. There should certainly be mentioned, among the positive examples of tools implemented in recent years, a system of electronic proceedings functioning since 2009, an electronic land registry system or the National Criminal Register. Such solutions should definitely be taken over from countries that have experience in their implementation. Information technology solutions are generally dedicated, but you can learn on mistakes of others, before you commit your own errors.

6. Conclusion

The lack of coherent and developed strategies to carry out a reform has a decisive influence on the efficiency and effectiveness of the Polish judiciary, in particular on the speed of the proceedings. The adaptation of the jurisdiction of the courts to the population and economic potential of particular areas and providing full computerization should be an objective of the actions taken by the actors and institutions responsible for the condition of the Polish judiciary. It should be remembered that the citizens' access to the courts cannot be determined and understood only by issues of logistics and transport. Availability of a national court should be seen primarily as the efficiency of its operation, including in particular the speed of adjudication. Draft changes in separable areas of the judiciary should be widely consulted.

Moreover, some proved valid tools for testing the workload of judges and other employees in common courts should be created. The level of workload in a decisive way influences the effectiveness and efficiency of the proceedings. The process of estimating the length of judicial proceedings is a very difficult task, which consists of many independent factors, including an increase in the number of cases, or the nature and complexity of the issues requiring e.g. opinions of experts. It is worth pointing out that among the countries that inform the parties of anticipated timelines of its duration is Finland. In Spain, however, there are procedural rules establishing the time frame of the proceedings. When designing one's own solutions it is advisable to pay attention to the good practice of other countries, but not to accept it uncritically, just adapt only selected items to your own needs.

Conducting a rationally planned reform of the judiciary would allow the elimination of the universal substantial disparities in workload, which in turn would translate into speed of the proceedings. In addition, the statistical data showing the level of employment in the Polish justice system,

based on the efficiency of proceedings before the courts, allow us to conclude that the current human resources potential is not used in the correct way. It seems necessary to develop a model of rational management of human capital.

Institutional arrangements should be supported by the continuation of the process of computerization and increasing the availability of electronic services. The development of technology to a large extent can compensate for a geographical proximity and access to the courts. The implementation of new solutions, such as video conferencing, the ability to use electronic forms and the exchange of documents between the parties, or the Internet proceedings for small claims, will certainly contribute to improving the efficiency and quality of the judiciary.

An extremely important factor contributing to the efficiency of the judiciary, affecting the quality of services, is the level of knowledge and competence of the personnel. Providing training and lifelong learning for the judicial personnel is entrusted to the National School of Magistracy, created in 2009. In addition to the training system, proper incentive models should be worked out, allowing to increase the efficiency of work, plans, career paths and professional development of judges and other employees.

The knowledge owned by Polish experts from the fields of law, management, government officials and other persons associated with the judiciary, should help to develop a coherent strategy for reforming the institution. There is also a need and ability to develop our own solutions, without uncritical annexation of those that may lead to negative situations described in the foreign literature. If there are good practices that can help to streamline operations, you must use them, but it is necessary to adapt to the conditions prevailing in the country, including the needs of the citizens and the tradition of the legal system.

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