



# STRATEGIES OF JUDICIAL REVIEW

EXERCISING JUDICIAL DISCRETION IN ADMINISTRATIVE CASES INVOLVING  
BUSINESS ENTITIES



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PROGRAM *ERNST & YOUNG*

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## INTRODUCTION

This report presents the results of a research project<sup>1</sup> which examined how Polish administrative courts exercise discretionary powers when deciding cases related to business activity. When a business enterprise asks the court to review actions taken by administration, judges decide whether an administrative body has used its powers in accordance with the law. The law in this case includes both the relevant statutory regulations but also more general principles originating from other sources, such as the Constitution or European Union law. It is generally accepted that in such cases courts have discretion, i.e. are able to select legal standards on which to base their judgments and to decide how to apply such standards to the case at hand. This does not mean, of course, that administrative court judges can do what they please. But, within some well-established boundaries, they can select from among various rules and principles those legal standards which apply to the case before them, interpret their meaning, and assess their importance. We aim to understand this process.

When undertaking this project, we asked three main questions. The *first* is whether administrative courts in Poland are ready to make the transition from the traditional approach to law application, whereby judges are considered the *mouths of the law*, to the contemporary approach, according to which judges are required to rule on the basis of general standards and make axiological choices that are usually reserved to the political legislator. The transition between these two models of adjudication is captured by L. Morawski, who defines the traditional model as subsumptive, while he calls the principles-based model an argumentative model<sup>2</sup>. According to L. Morawski, 'Transition from a subsumptive (syllogistical) model to an argumentative model, if the process can be so named, and to be specific, the accumulation of argumentative elements as compared to purely syllogistical elements in contemporary law application procedures, is an outstanding feature of the law of post modern times'. Among the principles that are crucial for the contemporary model of adjudication are those constitutional and European Union principles which support business entrepreneurship. Similarly, the axiological choices that judges make include acting in support of the freedom of enterprise or prioritising values that compete with such freedom. It is the usage of these principles in the adjudication process that is of particular interest to us.

The *second* question is about the effects of the dominance of the traditional mode of adjudication. Although we assume that transition from one model to the other is unavoidable, not least due to progressive constitutionalisation<sup>3</sup> of modern legal systems, we will discuss the potential effects that the continuing dominance of the traditional model may have on business and the legal environment in which it operates. The move from the

traditional model of adjudication to the principles-based one is certain to run into obstacles which brings us to the *third* question of our study - difficulties administrative courts are likely to encounter when embracing the new approach to adjudication.

The report is organised as follows. We start by analysing judicial discretion and the part adjudication plays in a modern democracy. We go on to consider the factors that have led to changes in the approach to adjudication, including the increased role of judicial discretion, with particular reference to the new constitutionalism in Poland and other Central and Eastern European countries and the accession of these states to the European Union. The second part of the report describes how discretionary powers are exercised by judges in Poland. The third part explains our methodology and presents the results of our research. Finally, in the fourth part, we analyse the findings addressing the three questions underlying our research. We have undertaken this research for administrative courts influence business environment and can encourage or discourage entrepreneurship. Yet, we know very little about how courts affect the development of the business sector. Perhaps more importantly, in modern society, courts - including administrative courts - shape not only the law but the society itself. Rather than Montesquieu's functionaries, modern courts engage with the social and economic agenda, not as rivals to the political process but as designers of the structures within which political and administrative processes take place.

# JUDICIAL DISCRETION AND THE BOUNDS OF LEGITIMACY

## JUDICIAL DISCRETION IN THE WIDER CONTEXT

To enquire into judicial discretion is to enquire into how judges make decisions, that is, what standards they apply, the reasoning they follow in relation to the standards, and the application of the standards to a set of facts. When framing these matters in terms of discretion, we draw attention to the fact that they are not purely logical processes of reasoning from one set of premises to a conclusion, but that they require the exercise of judgment to decide what general standards mean in particular contexts, how apparently competing standards are to be reconciled, or even creating standards where none exist. According to one stream of jurisprudence, judges are there to apply the law and that in doing so their task is simply to understand what it means and to apply it to the case at hand. This approach is more likely to be found in the jurisdictions of Continental Europe, where the influence of legal codes is strong and where judges are considered to be functionaries who interpret and apply these codes. In these jurisdictions judges are considered *the mouths of the law*, as accurately defined by Montesquieu.

As opposed to the first model, which may be described as traditional, there is another model of adjudication that is playing an increasing role in contemporary law and jurisprudence. This model has thus far been considered typical of the common law tradition. Under this model, which is characteristic of Britain, the British Commonwealth and the United States, courts have traditionally played quite a different role in the constitutional order from that of their counterparts on the Old Continent. In this tradition, courts have been more independent of government and have been responsible historically for making and developing the law on a case-by-case basis. They rule on the basis of general principles which do not always arise directly from the text of the law (with rules of equity being a case in point). Such an approach to adjudication requires the use of methods of interpretation different from those applied in the traditional system; this seems to leave more room for judicial discretion.

In recent years the gap between these two traditions has been bridged, as modern constitutional systems and the role of courts have developed in Europe and elsewhere. A main feature of modern constitutional systems is, firstly, that the constitution sets standards for the protection of civil rights and other values and, secondly, that courts are required to interpret and put them into effect when deciding cases. Positive laws must be formulated in accordance with constitutional principles, which in turn guide the courts in their interpretation of the law when deciding specific cases. Constitutions

are a major source of general principles but not the only one; courts in European Union member states are also required to apply principles of European law, whether deriving from treaties or from European Court of Justice jurisprudence, while the *European Convention on Human Rights* is another source of general principles. The point of general principles deriving from such sources is that they must be considered and put into effect, not only by constitutional courts, but also by national courts at all levels. Constitutional courts are required to evaluate positive laws on the basis of general principles deriving from these sources, while for other courts the principles provide guidance in the interpretation of positive laws.

Since statutory laws and delegated legislation have to be interpreted in accordance with general principles, it is hard for courts to maintain the appearance of simply applying positive enactments in a formal manner. The greater scope for interpretation also encourages the growth of precedents, for even if one court is not required to follow the precedents set by another, it is to be expected that a body of interpretative principles will emerge, as the law must be interpreted uniformly. The upshot is that courts at all levels, including administrative courts, have unavoidably to exercise their discretion when interpreting general legal principles and deciding how they should apply to the case at hand. In other words, they depart from the traditional model of adjudication, where judges are considered *the mouths of the law*, to an approach that is based on the application of the principles rather than the provisions of law. Judicial discretion in the context of administrative law has its own special features. The judicial function here is to review the actions of administrative bodies to determine whether they have acted legally. The principle of legality means, firstly, that positive law has been properly interpreted and, secondly, that the administrative body has complied with the general principles of law. A question for the court is often whether the administrative body has exercised its powers and discretions according to both positive law and general principles. So the judicial function, itself discretionary, involves reviewing how administrators have exercised their powers and discretion to ensure that general principles have been taken into account.

In our research we do not analyse all areas of administrative court activity, since we focus on judgments of importance to business activity. This means in practice concentrating on judicial decisions reviewing administrative actions that concern tax and commercial law and on the application of general principles which are important to these areas of law. It seems, however, that the transition experienced by Central and Eastern European countries applies specifically to the economy and commercial law. The range of general principles in this area is significant: they include the constitutional principles of the freedom of enterprise and the protection of going concerns; they also include the proportionality principle and other general

principles of European Union law which originally were, and still are, based on the idea of economic integration. With such a large number of general principles to be interpreted and applied by the courts under the new model of adjudication, administrative law concerning business seems to be an area of particular interest for research on judicial discretion.

### THE CONCEPT OF JUDICIAL DISCRETION

The concept of discretion, whether in the judicial or administrative context, means essentially the authority to decide between different courses of action or outcomes.<sup>4</sup> Exactly what judicial discretion means has been a subject of wide debate in both legal theory and areas of substantive law. The debate in legal theory need not detain us here beyond noting in passing that it brought to light two opposing accounts of the judicial process. According to one account, usually associated with H. L. A. Hart, laws often have a *settled core of meaning* that develops over time and which covers most straightforward cases; when new or unusual cases occur, as they are bound to, the judge has discretion in the exercise of which he should make the best policy choice, all things considered.<sup>5</sup>

An opposing view, associated with R. M. Dworkin, contends that judges never have strong discretion in Hart's sense of the term, but always have general legal principles to identify and apply.<sup>6</sup> Under this view, the interpretation of legal principles is discretionary only in the weak sense that the judge must interpret them and he interprets them by considering how they have been understood in the precedents of the past and what interpretation best fits into the overall pattern of laws and principles. Dworkin used to claim that there was a right answer to such questions; whether he still holds that view is uncertain. But whether or not there is a right answer, the model of adjudication is of great importance and means that a modern legal system has adopted certain principles as part of its normative structure; they are distinctively legal principles, although of course their justification lies outside the law in moral standards and political theory; when using his powers and discretions a judge has a legal obligation to identify the principles and apply them to the cases before him.

Although we need not delve more deeply into this debate, it does help to identify the issues that need to be examined in any study of judicial discretion. In the first place, the idea that legal rules should be interpreted in a context of general principles seems apt in a modern European legal system, given the dense environment of such principles to which we drew attention above. An initial, major step then in any analysis of judicial decision-making should be to identify the principles that make up the legal environment, for it is in the context of these principles that judges will reach their decisions on specific matters.

In the *second* place, it should be recognised that sometimes the meaning and scope of a principle does have a settled core of meaning, although meanings are never finally settled and often a considerable degree of discretion is needed when deciding what the principle requires in a specific case. This process of interpreting legal principles lies at the very heart of adjudication, especially in modern legal systems, and may be considered a classic case of judicial discretion. However, it should not be seen as either an invitation to judges to decide as they think best all things considered, or as necessarily having one right or even best answer. A middle course is to accept that the interpretation of general principles is a structured process, drawing not just on past rulings, but also requiring judges to delve deeply into the relative importance of a principle within the legal and political structure, often in relation to other competing principles.

A *third* factor to bear in mind is that a court sometimes may be granted discretion by statute in the genuinely strong sense that it is authorised to choose or decide on a course of action in the relative absence of legal guidelines. Strong discretion in this sense is more familiar in the context of administrative powers and should not normally be a common feature of judicial authority. Where it does occur, the judge inevitably has a wider range of options open to him, although it would be a mistake to think that it entitles him to do as he pleases, for even strong discretion must respect the relevant general principles. It is not unusual, moreover, for discretion to be seriously constrained, sometimes to the point of disappearing, by past rulings. It should also be noted that the dividing line between discretion in the relative absence of standards and discretion to interpret a very abstract standard is not always easy to draw.

*Finally*, a brief note should be made of discretion to change the law or to depart from it on certain occasions. Again we should not expect this to be a common feature of judicial discretion, since the first duty of judges is to apply the law, not make it. The idea may appear in other guises, for a judge may well have to read down, modify, or basically ignore a particular law where it is in direct conflict with more fundamental principles.

Judicial discretion is one of the major preoccupations of legal theory both in Europe and beyond. Research focuses on how judges choose the standards for their judgments and how they justify their choices.<sup>7</sup> Our research adopts a similar pattern – to identify the standards on which courts base their decisions, the reasons for choosing such standards and, if possible, to assess the effects of choosing some standards, while ignoring others.

## JUDICIAL DISCRETION IN POLAND - SOCIAL AND LEGAL ENVIRONMENT

The exercise of judicial discretion by administrative courts in Poland has to be discussed in context. This context covers: (i) the role and place of administrative courts in the Polish judicial system; (ii) the transition experienced by the Polish economy and society from the early 1990s; and (iii) changes in the legal environment brought about by the new Polish Constitution adopted in 1997 and Poland's accession to the European Union.

### ADMINISTRATIVE COURTS WITHIN THE POLISH JUDICIAL SYSTEM

According to Article 175 of the Polish Constitution, administrative courts constitute one branch of Polish courts of justice. In accordance with statutory regulations,<sup>8</sup> administrative courts are responsible for:

- controlling the activities of the public administration, and
- resolving disputes over the competences of administrative authorities.

The first of these responsibilities is relevant to our research: administrative courts have jurisdiction to assess the legality of actions taken by administrative bodies. Therefore, administrative courts mainly play a protective role, where proceedings before these courts are carried out to ensure that the administration, even though authorised under the law to limit the freedom of citizens, has not misused that power and in particular has not abused the advantages of the administrative powers it holds. This is why the positions of an administrative body and the citizen in proceedings before administrative courts are balanced, the administration no longer having the considerable advantage it previously enjoyed, and the courts, being independent of the executive, have the power to revoke administrative decisions or actions which are against the law.

Such restraints on administrative actions and the rights they generate are necessary in a modern constitutional system, where state power is both necessary and dangerous: it is necessary for order and prosperity, but dangerous due to its prodigious power and the ample opportunities for abuse. Long since gone is the unrestrained Hobbesian leviathan and in its place is the Lockean government on which powers are conferred on condition that they are used according to certain limitations. Administrative courts are there to ensure that the conditions and limitations are respected and in that role they bear a heavy responsibility, on the one hand to recognise the necessities of effective government, and on the other hand to protect citizens by enforcing the limitations and conditions.

Administrative courts have in particular the power to review the actions taken by the administration which are of key importance to the conduct of business activity. These actions are based on tax and administrative law regulations concerning business. In both these areas, administrative courts, when reviewing the actions of the administration, are supposed to balance public and private interests. For instance, in the area of tax law, a court decision is made in the context of the relation between the fiscal interest of the state and the interests of a business enterprise, which is entitled, among other things, to have its tax burden minimised in accordance with the law. In the area of administrative law concerning business, the court assesses whether the public interest, involving, e.g. protection of health and public morality or state security, justifies the restrictions imposed by the administration on the rights and freedoms of private business, such as the freedom of enterprise or freedom of commercial speech.

Implicit in the principle of legality and the balancing it entails is the idea, fundamental to modern constitutional orders, that administrative courts should be independent of government and administration. Unless they are independent, the courts cannot assess whether an administrative action lies within the bounds of legality, which includes but goes beyond simply applying a statute or regulation enacted by parliament or made by the executive. Here an important distinction has to be made between the traditional model of adjudication and the modern approach. In the traditional model, the court considers the application of the statute or regulation to be its sole duty; as the mouthpiece of the law, its duty extends no farther. The demands of modern constitutionalism are quite different: the statute and regulation remain central to the idea of legality but the court must also ensure that they are interpreted and understood in the wider context of general principles. The courts bear a heavy responsibility, for they must find a justifiable line between interference with legitimate government and protection of business enterprise. At the same time, the importance to business of the right line being drawn is plain; it is a line that gives full recognition to its constitutional as well as economic place in contemporary European societies. The role of administrative courts in resolving conflicts between the interests of the state and those of business enterprise makes the way in which these courts function one of the key components of the relationship between the state administration and business. Consequently, judicial discretion exercised by administrative courts may be discussed in terms of the authority exercised by the state towards entrepreneurs. Thus court rulings can be analysed as an element of a broadly construed state policy towards enterprise.

Another important characteristic of Polish administrative courts is their high rank within the Polish judiciary system. Next to the Supreme Court and the Constitutional Tribunal, administrative courts certainly have the highest position within the Polish judiciary. This has significant consequences both

in terms of the exercise of judicial discretion and its effects on public life. Firstly, administrative courts provide guidance in the interpretation and application of administrative law by administrative bodies. What this means is that rulings given by these courts are not only important for the parties, but are also relied on as precedents.<sup>9</sup> Although not formally binding, the core arguments of such rulings are subsequently used in other administrative cases by both administrative bodies and private entities. Secondly, the high rank of administrative courts in the judicial system means that these courts should, or at least are supposed to, hear cases that are both important and complex from the legal point of view. Indeed, administrative courts are the third (as the provincial administrative court) or even the fourth (as the Supreme Administrative Court) state body to consider an individual administrative case. Before a complaint is lodged with an administrative court, specialised administrative bodies issue two decisions (at the first and second instance) and each of the bodies can also review its decisions if they are disputed by a private entity. Therefore, cases coming before administrative courts are largely essential legal disputes between the administration and private entities. Such cases are, to a large extent, hard cases, as Dworkin calls them, ie. legal issues with no single solution following from the legal text and obvious to all.<sup>10</sup> Judicial discretion, realised mainly by the choice of standards to be relied on while deciding the case, plays a particularly significant role in hard cases.

#### JUDICIAL DISCRETION DURING TRANSFORMATION

It is frequently emphasised in literature on judicial discretion that economic and social transformation poses a particular challenge to the judiciary. Courts face a difficult choice between retaining the stability of the legal order and the possibility of adapting it to new social<sup>11</sup> and economic conditions. In a transition state the judiciary must go beyond the text of statutes in order to make equitable decisions. This means making dynamic interpretations of legal texts that were drafted in another era and taking a modified understanding of legal texts by considering the needs of the new social and economic reality. When deciding cases during the transition period, courts cannot rely on historical interpretations to examine the legislative intent. If a historical interpretation were to be used during the transition period, it would mean that courts continue to rely on the intentions of a legislator whose vision of society and the economy is in stark contrast to the contemporary one. Another element of the context in which judicial discretion is exercised by administrative courts is the specifics of the transition period. This element requires judges to select standards for judgments by dividing them into the old ones, incompatible with today's reality, and those that are in line with the legislator's current priorities. The very need for such selection strengthens judicial discretion and also partly transfers the responsibility for the speed of social and economic transformation to the judiciary.

## CHANGES IN THE LEGAL ENVIRONMENT: THE NEW POLISH CONSTITUTION AND EU ACCESSION

The major factors leading to change in the adjudicatory paradigm of Polish courts in the last decade were the adoption of the new Polish Constitution and EU accession.

### (i) The New Constitution

In reaction to the negative experiences of the past, the Constitution of 1997 provided for near complete freedom of the judiciary constrained only by its duty to uphold the law and act within its boundaries. Numerous guarantees, both institutional<sup>12</sup> and legal,<sup>13</sup> are provided to ensure the independence of judges. Legal guarantees are provided mainly in the Constitution and ensure that judges are able to perform their duties independently in two main aspects: personal and professional.<sup>14</sup> The personal independence of judges is protected by principles according to which a judge generally cannot be removed,<sup>15</sup> and may only be dismissed, suspended, or transferred to another bench or position against his will by a court judgment and only in instances prescribed in the statutes.<sup>16</sup> These principles guarantee judges' ability to exercise their discretion free of pressure from any institutions or third parties. The professional independence of judges is ensured, in particular, by the principle that judges, when deciding cases, are bound only by the Constitution and statutes. The most important implication of this principle is that judges can refuse to apply normative acts ranking lower than statutes<sup>17</sup> (all acts of the executive), which they consider to be contrary to the Constitution or statutes; thus the judiciary has a great deal of discretion with respect to applying these acts<sup>18</sup>. Judges who consider that acts ranking as statutes (passed by parliament) are contrary to the Constitution may submit legal questions to the Constitutional Tribunal.<sup>19</sup>

A very important aspect of the Polish Constitution is its direct applicability, a principle introduced by the Constitution of 1997 under which a judge may base his decision directly on the Constitution.<sup>20</sup> Even though there are many impediments to this principle being applied in practice (mainly in terms of methodology – not all provisions of the Constitution can be applied directly) the possibility of basing a judgment directly on a provision of the Constitution broadens the spectrum of possible decisions and, in effect, judicial discretion.

### (ii) Poland's Accession to the European Union

Poland's accession to the European Union and the resulting integration of the national legal system with EU law – a new, autonomous, legal order<sup>21</sup> – is of considerable importance to the scope of judicial discretion in Poland.

The influence of the EU membership process on the functioning of courts has been visible since 1994, when Poland signed the Europe Agreement.<sup>22</sup> Naturally, the Europeanization processes have accelerated after Poland's accession to the European Union in May 2004. According to article 91.2 of the Polish Constitution, the Europe Agreement ranked above statutes, if they were incompatible with the Agreement. Additionally, if a specific provision of the Agreement was a "self-executive norm",<sup>23</sup> parties to proceedings before Polish courts could refer directly to this provision.<sup>24</sup> In this way, both material standards analogous to those of the Treaty,<sup>25</sup> and legal standards characteristic of Community law became part of the domestic legal system. An interpretation of law called the pro-Community interpretation was a vital element of these standards.<sup>26</sup>

On 1 May 2004 all Community legal standards became applicable in Poland and administrative courts became Community courts.<sup>27</sup> For Polish administrative courts, this means in practice that they must deal with the two most important<sup>28</sup> aspects of Community law:

- supremacy principle, and
- direct applicability principle.

Application of the supremacy principle means *first* that judges must give priority to Community law over domestic law. *Second*, Polish courts must find their place in the legal relationship with the European Court of Justice and the Court of First Instance. This relationship involves applying the Community legal standards laid down in ECJ and CFI case law<sup>29</sup> and using specific procedures, such as the preliminary ruling procedure. *Third*, courts may decline to apply provisions of domestic law which are contrary to Community law.<sup>30</sup> Under the direct applicability principle, administrative courts learn how to hear argumentation put forward by parties invoking directly-applicable provisions of treaties or secondary legislation, which in some circumstances may result in such parties' being given rights that do not arise directly from national law.

# EXAMINATION OF JUDICIAL DISCRETION IN CASES INVOLVING BUSINESS ENTITIES

In the light of the above changes in the social, political and legal environment, we decided to examine selected judgments of Polish administrative courts in terms of selection of the standards on which the courts relied in these cases. The focus of our research was the extent to which general (constitutional or Community) principles are relied on by administrative courts when deciding cases. In this part of the report we discuss the methodology and results of our research.

## UNDERLYING ASSUMPTIONS OF OUR RESEARCH

Our research involved analysing 807<sup>31</sup> judgments issued by Polish administrative courts between 1999 and 2004 and published in official journals. It is of key importance to any assessment of discretionary power that the research be focused on published judgments only, as we have assumed that only those judgments issued by administrative authorities that are of relative interest to those who take part in public life are published. This interest arises from the fact that only original cases (i.e. the first in a line of similar cases) or judgments issued in difficult and legally momentous cases are published. Both features (original nature or complex legal issue) make selected judgments particularly interesting as regards judicial discretion. Original judgments provide a good example of how judges use their margin of freedom to decide and go beyond precedents. Judgments in complex legal issues provide an example of Dworkin's "difficult cases". In order to decide them, the courts would have to go beyond the immediate text of a provision to look for standards they could rely on and the way these standards are selected is the focus of our interest. Half of the judgments selected for our research concerned tax matters, the other half concerned administrative decisions relevant to business activities in other ways (e.g. cases involving insurance and banking institutions, judgments relating to cases significant to investment, permit and licence cases).

## RELATION BETWEEN THE CONTEXT OF THE DECISION AND THAT OF THE REASONING

During our research, we assumed that judges present the range of standards they rely on to decide cases in the reasoning of their decisions.<sup>32</sup> However, a judge may also indicate the standards with which he did not seek (did not find) consistency if he believes it was not necessary. In both cases – demonstrating consistency or demonstrating that there was no need for it – the judge defines the position of his decision with reference to standards, thus selecting the standards on which he relies to make the decision.

TYPES OF JUDGMENTS  
SELECTED FOR RESEARCH

## CONTEXT OF JUSTIFICATION AND THE CONTEXT OF DECISION

Therefore, we analysed the reasoning of decisions rather than the decisions themselves.

For research purposes, we assumed that, to discuss a judge's grounds for a decision, it is sufficient to analyse the reasoning. Thus we treat the reasoning as a record of the dialogue between the judge and the parties, the legal environment and the public. Naturally, our assumptions may be disputed by arguing that judges do not in fact reveal the standards underlying their decisions, but merely present publicly acceptable reasons for their decisions that are actually based on some other standards. However, it seems that, on the one hand, a written justification is the only medium available for verifying judicial reasoning in any discussion of judicial discretion. On the other hand, the assumption that the bases for the decision disclosed in the reasoning are different from the actual reasons behind the decision (an issue often raised by proponents of legal realism) would cast doubt on the good faith of judges, which we would naturally like to avoid. It should be noted at this point that the requirement for a complete and precise reasoning is often described as one of the significant tools used to limit judicial freedom<sup>33</sup>. Any discrepancies there may be between the actual and the declared reasons behind a given decision may be found by checking the compatibility of the decision with its official reasoning.

In our research, we decided to analyse the selection of standards by judges in terms of the frequency of references to specific types of standards in a large group of judgments. Consequently, our assertions or recommendations concerning the way courts exercise judicial discretion refer not to specific judgments, but to judicial practice. For instance, when we argue that judges should use Community law argumentation more often, we do not mean that a particular judgment lacks such argumentation; what we mean is that the number of references to Community law is relatively low in the whole group of judgments analysed in our research, i.e. the focus is on judicial practice in a given place and time. This quantitative approach will show a pattern of the kinds of standards judges rely on. The pattern is then analysed to reveal various aspects of the judicial process. A possible objection to this approach would be that it does not tell us whether judges should have acted differently; it gives no basis for saying that they should have referred more often to a specific standard but did not. Our contention is, however, that much may be learnt from the pattern itself, as this report will show.

## HOW TO CLASSIFY STANDARDS JUDGES RELY ON

## TYPES OF STANDARDS RELIED ON BY JUDGES

The first problem we came across was how to classify standards judges rely on. Considering that our objective in this report is to identify and analyse a pattern based on different types of standards, then obviously we must first decide how to classify them. This can be done in several ways, but

the most obvious and useful is to draw on the classifications that are already inherent in Poland's legal culture. By legal culture we simply mean all opinions, views and values concerning the law shared by lawyers and judges, and possibly sections of the wider public. One aspect of legal culture is a shared view of what kinds of standards can appropriately and legitimately be used when arguing and deciding cases. These understandings develop over time, and respond to a range of influences which we need not here consider. Major events in the life of the nation, such as adopting a new constitution or joining the EU, will affect and sometimes drastically change legal culture. All that matters for our purposes is that there are identifiable categories of standards that would be recognised as legitimate according to Polish legal culture.

Indeed, Poland has recently undergone major transformations as a result of the transition from a communist state and legal order to a state and legal order based on the rule of law, independence of the judiciary and accountability of administrative bodies to democratically elected representatives of the nation. Secondly, Poland has experienced two fundamental changes that have been mentioned already, that is, the new Constitution and the quite recent accession to the EU. In the light of these momentous events, it is possible that Polish legal culture is itself in a state of transformation rather than equilibrium. This need not detract from our research, as one conclusion we might draw is that Poland is currently caught between two legal cultures, between two paradigms, with the old gradually giving way to the new. The very articulation of the competing paradigms could help stimulate the earlier demise of the old and the flourishing of the new. In the light of these considerations, and reflecting on their implications for Poland at this point in its history, we have classified the standards relied on by administrative courts when deciding cases as follows.

(i) Standards Internal to Law<sup>34</sup>

By standards internal to law we mean the application of the relevant statutes or regulations, according to their literal or generally accepted interpretation (e.g. interpretation accepted in past rulings). Here the underlying value is that these laws are the expression of parliament's will and in turn the wishes of the people. The more formally and literally the law is applied, the more faithfully the will of parliament and the wishes of the people are reflected. In addition to the formal and literal application of the law, the courts may subscribe to a range of standards that reflect certain characteristically legal standards, such as the presumption against retrospectivity and the presumption that, when in doubt, certain canons of interpretation should be relied on, e.g. *lex specialis derogat legi generali*. Internal standards may be treated as equivalent to the "inner premises" mentioned by K. Pałeczki.<sup>35</sup> Referring to them means that the judge keeps to the ground he knows

best and can ensure that the law is protected from pressure from other normative systems (e.g. protection against political pressure). The judge is not required to take an active role while referring to such standards, as references to internal standards are inherent in his work. The judge does not need to make such standards more precise, as for the most part they have been thoroughly analysed in legal writings (e.g. the method of linguistic interpretation).

(ii) Standards External to the Law<sup>36</sup>

This group comprises substantive standards such as compliance with the lawmaker's intentions, the social objectives and purposes of a specific law and the preventive function of the law. Such standards are a type of K. Pałeczki's "outer premises", which he understands as premises taken from the social environment of the lawyer who makes a decision to apply the law.<sup>37</sup> References made by judges to this group of standards means stepping outside the hermetic circle of the law to realise the social aims that the state wishes to achieve as an organisation. Nevertheless, reference to these standards hardly means that the court is taking an active role, as the traditional interpretative tools studied by lawyers as part of their education also include references to standards external to law (e.g. functional interpretation or interpretation in terms of aims and purposes). Such standards do, however, need to be made more precise by the judge in the application process (e.g. by identifying the lawmaker's intentions).<sup>38</sup>

(iii) Constitutional Standards<sup>39</sup>

Constitutional standards naturally derive from the Constitution. If the legislative process works well, constitutional standards should be taken into account when laws are formed in the first place. However, in a modern constitutional system the courts are also responsible for ensuring that constitutional standards are upheld, and this means, among other things, determining whether they are actually upheld in practice, which includes examining administrative decisions and actions to determine whether they do so. Thus judges deciding commercial or tax cases are obliged to assess the compliance of administrative actions with constitutional standards that protect the individual rights of entrepreneurs. These standards include, among other things, the proportionality rule, rules providing protection for business freedom or protection of private property, and the anti-discrimination rule.

(iv) Standards from European Union Law<sup>40</sup>

As a member of the EU, the Polish state and its institutions are subject to both national and EU law; where there is a conflict between the two, priority must be given to EU law. The Polish courts are obliged to apply

EU law to the extent that it is relevant to the cases before them. It is to be expected that fundamental efforts will be made by the Polish authorities to ensure that its laws are compatible with EU law, but the courts should also be vigilant in ensuring that administrative and executive authorities respect any relevant EU law principles. Strictly speaking, this principle does not apply unless the matter before the Polish administrative courts is one concerning EU law. However, the Polish courts should be encouraged to follow the practice adopted in other member states of incorporating principles of EU law into national jurisprudence.<sup>41</sup>

#### REFERENCES TO SPECIFIC GROUPS OF STANDARDS AND THE NATURE OF JUDICIAL PRACTICE

These four types of standards can be used to demonstrate the difference between the two models of adjudication outlined earlier. Judges relying heavily on standards internal to the law are using the traditional model, while the more references they make to the other three sets of standards, the more they are using or moving towards the contemporary model. The contemporary model, as we explained earlier, has recourse to principles, while the traditional model generally restricts itself to a literal application of the text or to other formal standards. In order to be able to use our research to determine whether judicial practice actually evolves from the traditional to the contemporary model, we had to design appropriate research tools to show that judges use one model or the other. Literature shows that referring solely to standards internal to the law in the judge's decision-making process is characteristic of the subsumptive (syllogistical) model of law application.<sup>42</sup> This model is also called computerised jurisdiction<sup>43</sup> or bright-line jurisdiction<sup>44</sup> as it features, e.g. a textual concept of law and pursuit of maximum accuracy and precision of rules. Therefore, standards classified as internal standards are undoubtedly features of this model. However, references to "outer premises" such as social and business environment or general rules and principles (which include constitutional principles and the majority of Community law rules and regulations) are features of an argumentative law model. The basic attributes of this model are a growing openness of legal language and increased significance of legal principles and other unspecified rules in legal argumentation.<sup>45</sup>

Therefore, we have assumed that the result showing:

- prevalence of references to internal standards in the judicial practice of administrative courts and
- no change in this prevalence over time, will be deemed to indicate there is no transition from the traditional model of adjudication to one based on principles.

By analogy:

- prevalence of references to external standards or general principles and the resulting difference in the judicial practice of administrative courts

(responsiveness to external standards, pro-constitutional and pro-Community) or

- evolution of current practice towards such practices, will be deemed to signal transition from the traditional judicial model to the principles-based one.

#### ANALYSIS OF JUDGMENTS - METHODOLOGY

Our analysis focuses on a quantitative examination<sup>46</sup> of the number of references to specific groups of standards and the number of references to specific standards within groups. To carry out the examination we analysed the reasons given and noted on an excel spreadsheet if a certain standard was cited by a judge in his judgment. The term “citing” a given value we took to mean a clear indication by the judge (e.g. as a reference to a standard being a linguistic interpretation, we treated the use of the words “linguistic interpretation of a provision showing that...”, while in the case of the following fragment: “the aim of the said provision is to...” we decided reference was made to the purpose of the regulation). However, we also marked down a reference when a judge indirectly described the standard in a way that would enable us to be certain that a reference had been made. For example, a statement that: “in accordance with article 000 the entrepreneur should...” was inferred by us to be a reference to the linguistic interpretation of provisions, while phrases such as “the circumstances in which the provision was adopted shows that it was to eliminate ....” we deem to be a reference to the lawmaker’s intention or – depending on the context – to the aim of the law.

For each judgment, we also coded a range of supplementary data: the judgment reference number, type of court that issued the judgment (court of the first or second instance), judgment type (ruling or resolution), nature of the case (substantive or procedural) and whether the decision was favourable for a private entity or for the administration. By compiling this additional data we were able to determine whether the scope of references made by judges changes in relation to the type of decision; for instance, having concluded our research we were able to compare the scope of references made in judgments issued in favour of the administration with those in which the winning party was a private entity.

#### RESULTS OF THE EXAMINATION<sup>48</sup>

##### (i) General Results of the Quantity and Type of References Made by the Judiciary

The table below illustrates the proportion between references made by judges to specific groups of standards in all the judgments examined in the years 1999-2004.

Table 1. References to Specific Groups of Standards in all Judgments Examined\*

Internal law standards	Standards external to law	Constitutional standards	EU standards	All
2427	267	201	25	2920
83%	9%	7%	1%	100%

Source: Own study. \*Data from 807 judgments analysed in the research and published in 1999-2004.

The results show the predominance of references to internal law standards: 83% of all references in the judgments examined belonged to this group. Within the group of internal law standards, judges refer mainly to a linguistic interpretation of legal texts (constituting 32% of all references to internal standards). Frequent references are also made to compliance with earlier administrative court rulings (14% of all references to internal standards), the result of system interpretation (12%) and to legal literature (10% of all references to internal standards). References to standards external to the law rank second and account for 9% of the total. Within this group, judges refer most frequently to: the aim of the law or regulation (32% of all references in this group), legislative intention (21%), and the social function of the law (7%). A large number of references were made to other external standards (32%); these include, e.g. the social and economic environment in which both the state administration and private entities perform their rights and obligations. We were surprised to see only occasional references to the *‘in dubio pro libertate’* doctrine (in the event of doubt, judge on the side of the freedom or admissibility of activity) and its variant – *‘in dubio pro tributario’* (in a doubtful case, find for the taxpayer). References to this value make up only 3% of all references within references to the group of external standards, and 2.4 ‰ of all references in all judgments analysed.

References to constitutional standards constitute 7% of all references. Within the group of constitutional standards, 40% of general references related to the constitution as a whole (e.g. unspecified constitutional rights and freedoms) or specific principles, such as article 217 of the Constitution dedicated to admissible forms of imposing taxes. 12% of references within the group of constitutional standards related to the equality principle, and 10% to the principle of the direct application of the constitutional provisions contained in article 8 of the Constitution. The proportionality principle of article 31.3 of the Constitution received only 1%, a result that may seem surprising considering its importance as a key constitutional guarantee for business activity. Only 1% of all references were references to EU law standards. The most common references in this group were references to the principle of interpreting internal law in compliance with Community law (48% of references within this group) and references to specific Community regulations (48%). 4% of references were to the non-discrimination principle. We found no references to the proportionality principle as defined by the Community law.

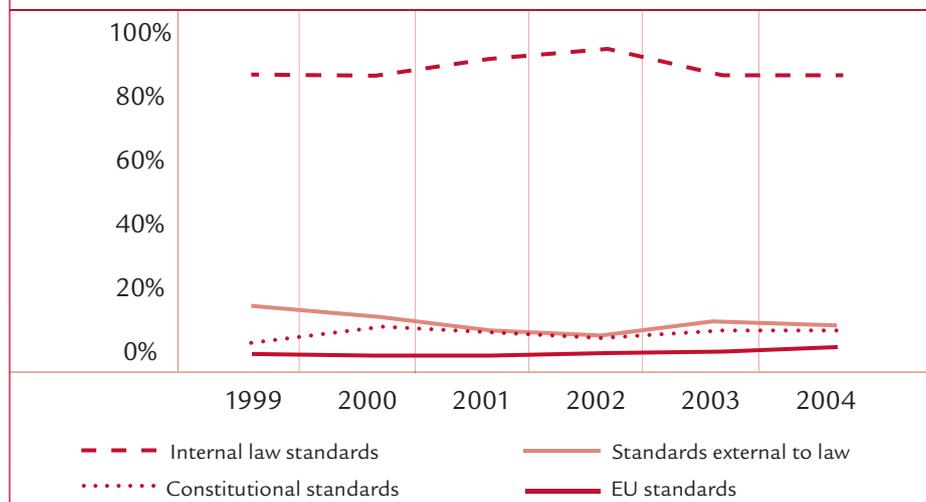
(ii) Changes in Frequency of References to Specific Standards Over Time

PREPONDERANCE OF LINGUISTIC INTERPRETATION

LOW PERCENTAGE OF REFERENCES TO PRINCIPLES

The table below shows the frequency of references to the different groups of standards. The table also shows that over the five years covered by the research there were no significant changes in the frequency of references to specific groups of standards. Despite a minimal fluctuation, internal law standards occupy a constantly high position. References to other groups of standards remain at a low level. So although the legal environment has changed drastically, due to the impact of the Constitution and EU membership, the pattern of references remains constant.

Table 2. Frequency of References to Specific Groups of Standards Over Time



Source: Own study.

(iii) Patterns of Argumentation Used by the Judiciary

We now consider the most common combinations of standards that administrative court judges used in the reasoning to their judgments during the period. Table 3 shows that 63% of judgments issued used argumentation based solely on internal law standards. Next, with 18%, comes a combination of internal and external standards in one judgment. Further down the list come other combinations, such as “internal + constitutional standards” and “internal + external + constitutional standards”.

The next table shows that, despite slight fluctuations, the differences in popularity of the argumentation models used by judges remained at the same level in the analysed period.

Table 3 Most Common Combinations of Groups of Standards Applied by the Judiciary – All Judgments\*

Internal standards	Internal and external standards	Internal and constitutional standards	Internal, external and constitutional standards	Other combinations
63%	18%	10%	6%	3%

Source: Own study. \*Data from 807 judgments analysed in the research.

In our research, we assumed that the high proportion of references to internal law standards could result from the nature of the cases heard. Since many cases involve essentially formal, administrative procedures, the preponderance of formal standards (such as linguistic or system interpretations) is understandable.

PREPONDERANCE OF  
FORMAL ARGUMENTATION

Table 4. Combinations of Groups of Standards – Changes Over Time\*



Source: Own study. \*The four most common combinations.

In order to test the above possible explanation, we introduced a control variable – we made an additional assessment of how often all the combinations of arguments were used in cases involving procedural provisions and in cases involving substantive provisions. The results show that even in cases involving legal provisions of a substantive nature, the preponderance of argumentation based only on internal standards is sizeable (59%), though not as high as in the group of cases involving procedural provisions (72%) or in the group of all judgments examined (63%).

Table 5. Most Common Combinations of Groups of Standards Applied by the Judiciary

	Internal standards	Internal and external standards	Internal and constitutional standards	Internal, external and constitutional standards	Other combinations
All	63%	18%	10%	6%	3%
Procedural	72%	16%	7%	2%	3%
Substantive	58%	21%	11%	7%	3%

Source: Own study. \*Of all 807 judgments 233 were of a procedural nature and 463 of a substantive nature.

We have also analysed the data by the type of bench. As demonstrated in the table below, the share of argumentation based solely on internal standards in resolutions and judgments issued by an extended bench (more than three persons) is below 50%, while the percentage of cases examined by applying a combination of external, constitutional and Community standard increases. This confirms the thesis that in order to issue judgments in hard cases (here we mean cases in which resolutions were passed or cases were heard by an extended bench), courts have to reach beyond the group of internal standards related to the text and formal features of the legal system, to more general standards.

Table 6. Standards in Resolutions and Judgments Issued by an Extended Bench\*

	Internal standards	Internal and external standards	Internal and constitutional standards	Internal, external and constitutional standards	Other combinations
All	63%	18%	10%	6%	3%
Extended bench (>3)	47%	23%	18%	9%	3%

Source: Own study. \*Of all 807 judgments, 120 were judgments and resolutions issued by an extended bench (>3).

To calculate the above we assumed that referring to several groups of standards in one judgment is tantamount to the application of an argumentation model (pattern) based on these groups of standards. For instance, if a judge in one judgment refers to both a linguistic and a functional interpretation, he or she is considered as applying the argumentation model based on the two standards (confirmatory interpretation).<sup>49</sup> This assumption would certainly be a simplification. The reason is that referring to two groups of standards in a judgment does not always mean that they are combined in logical or functional terms in a model. In order to minimise error in the case of judgments that deal with more than one issue (e.g. a judgment which first deals with a preliminary issue of a procedural nature

and then provides a decision on the main issue of a substantive nature), we decided that standards were combined in the model when reference was made to two groups of standards in a part of the judgment which dealt with one and the same issue. One should assume, however, that the above percentage of argumentation models based on two or more groups of standards may be overstated to a certain extent. This means, however, an even greater prevalence (than that demonstrated) of models based on only one group of standards; in our case an even greater prevalence of argumentation models based only on internal standards.

#### (iv) A Summary of the Empirical Findings

The empirical results show that (i) judges relatively rarely justify their decisions by referring to general principles of law, including constitutional and Community law principles, and (ii) judges only occasionally justify their decisions by referring to standards outside the law, such as the social aim of a law, other of its functions or the specifics of the social and economic environment in which the parties to the proceedings operate. These trends persisted throughout the period under review. This is surprising given that the years 1999-2004 saw major changes in the legal environment, including the adoption of the Constitution and then the EU accession. We thus find that the judicial practice of Polish administrative courts closely resembles the traditional judicial model with little evidence of transition towards a principles-based model.

# NO TRANSITION BETWEEN ADJUDICATION MODELS AND THE EFFECT ON ENTERPRISE DEVELOPMENT

The main idea behind this report is to analyse the relationship between enterprise development in Poland and particular trends in judicial review of administrative actions. Thus in this section we identify several areas where the impact of the traditional model of adjudication being retained can be seen.

## COMPETITIVENESS OF POLAND AS A PLACE IN WHICH TO CONDUCT BUSINESS

The principles important for the protection of freedom of enterprise are hardly present in the court judgments. The analysis shows that references to the constitutional principles of proportionality and of protecting going concerns make up 1-2% of all references to the Constitution which, in turn, account for just under 10% of all standards referred to by judges. An examination of external standards shows a similarly low percentage of references to the principle of ruling, in a doubtful case, in favour of the admissibility of a private entity's operations (the "*in dubio pro libertate*" principle). The low percentage of references to the principle of proportionality, as defined in article 31.3 of the Polish Constitution, gives rise to great concern in the light of administrative courts' role of protecting private businesses from administrative authority lawlessness and arbitrariness. The proportionality principle enables judges to examine the administration's actions in terms of usefulness, necessity and proportionality *sensu stricto*.<sup>50</sup> The examination of usefulness aims to assess whether the measures selected by the administration make it possible to effectively achieve the purpose set. An examination of necessity verifies whether, from two or more equally effective measures, the administration has selected the one that is least onerous to a private entity. Lastly, the examination by the judge whether the requirement of proportionality *sensu stricto* was met means checking whether measures and burdens imposed on a private entity are proportional to the purpose achieved, i.e. whether they are justified in the light of the public interest they are to realise.<sup>51</sup> The low percentage of references to the principle of proportionality in administrative court judgments could mean that the court allows actions taken by the administration that are ineffective in achieving a set purpose, impose burdens greater than necessary on private entities and also result in costs that are unjustified in view of the benefits attained. This is a thought-provoking situation. The lack of references to constitutional principles that protect private enterprise or to standards which are external to the law but may have an effect on its application should be considered in the light of the results of our research.

NO REFERENCES TO THE  
PROPORTIONALITY PRINCIPLE

The results show that there are significant differences in the choice of standards between judgments benefiting the administration and those benefiting business entities that are party to proceedings. Table 8 shows that in judgments benefiting the administration, the percentage of references to internal standards is higher than in judgments beneficial for private entities, which is true for judgments based on both procedural and substantive law. The reasons given in judgments beneficial to business entities also contain more references to external, constitutional and community standards (positive difference of up to 9 percentage points).

Table 7. Most Common Combinations of Groups of Standards I

	Internal standards	Internal and external standards	Internal and constitutional standards	Internal, external and constitutional standards	Other combinations
All					
Administration	69%	17%	5%	5%	4%
Private entities	59%	18%	13%	6%	3%
Procedural					
Administration	75%	17%	1%	4%	4%
Private entities	69%	17%	9%	2%	3%
Substantive					
Administration	66%	18%	6%	5%	4%
Private entities	53%	21%	15%	8%	2%

Source: Own study. \*Of all 807 judgments 233 were of a procedural nature and 463 were of a substantive nature. 310 judgments were in favour of the administration and 392 in favour of private entities.

To underline the difference in references between the groups of judgments, we suggest that this difference is more obvious if the following assumptions are taken into account:

- At least some of the references to previous administrative court judgments can be classified not as references to internal law standards (as we assumed when classifying standards into specific groups), but as references to other groups of standards; this is the result of the assumption that, since a judge refers to previous court judgments, the judgments must contain something more than legal provisions (value added), while reference to such provisions would be a classic example of a reference to internal standards. In any other case a reference to a previous judgment could successfully be replaced by a reference to legal provisions.<sup>52</sup>
- A similar hypothesis can be made in respect of some of the references to legal literature, also initially classified as internal standards.

Our analysis in Table 9 shows that, if we assume that references made by judges to previous administrative court judgments are references to external standards, the most common combination of standards in judgments bene-

beneficial to business is the joint use of internal and external standards, while in judgments beneficial to the administration the sole use of internal standards takes the lead. This may mean that when ruling in favour of the administration, courts use the model of formalistic argumentation, while judgments beneficial to entrepreneurs are mostly issued based on the antiformalistic standard,<sup>53</sup> i.e. argumentation relying on internal standards supplemented by other types of standards.

Table 8. Most Common Combinations of Groups of Standards II

	Internal standards	Internal and external standards	Internal and constitutional standards	Internal, external and constitutional standards	Other combinations
All	36%	43%	4%	12%	6%
Administration	45%	41%	2%	7%	4%
Private entities	30%	43%	4%	15%	8%

Source: Own study. \*Of all 807 judgments 310 judgments were in favour of the administration and 392 in favour of private entities.

The low percentage of references to standards of high importance to business entities in judgments relating to taxes and other judgments relating to business may undoubtedly lead to judicial formalism and thus have a negative impact on the growth of enterprise. Such an adjudication strategy may result in severe judgments, where such severity may not always be justified. At the same time, the low percentage of references to constitutional standards shows the opportunity provided by article 8 of the Constitution (direct use of the Constitution in law application) has not been used to the full.

The possible negative effects of judicial formalism on enterprise development are supported by economic and legal writings. Studies carried out by the World Bank and works by La Porta<sup>54</sup> demonstrate that judicial formalism has a negative effect on a country's investment environment. As these studies have demonstrated, legal systems based on the civil law tradition (the French model) are less appealing in terms of attractiveness to investors than those based on the common law tradition. The main reason for this is the excessive formalism of adjudication and low flexibility when adjusting the law to market needs. As the study carried out for the World Bank makes clear 'bright-line rules and excessive judicial formalism may not allow judges sufficient discretion to apply laws fairly to changing conditions and therefore not support evolving commercial needs'.<sup>55</sup> That impact of judicial formalism on the creation of the investment environment is not surprising, if we consider the aspect of adaptability of the law to changing conditions. When references to external standards are low and principles-based argumentation is rarely used, legal regulations are not applied with flexibility

and they are more often inadequate to the problems of a rapidly changing world, including those related to business.

#### TRANSMISSION OF LAWMAKER'S AXIOLOGICAL PREFERENCES BY COURT JUDGMENTS

If we treat the judiciary as an agency of the state, the low readiness to rule based on principles and the resultant relative formalism of judicial practice must give rise to questions about the coherence of state policy towards enterprise development.<sup>56</sup> Specifically, one could wonder whether, under the existing constitutional order that gives judges certain tools to protect standards that are vital to business, the tools are used to further the policy preferences of the democratically established legislator, which, it seems, firmly supports enterprise development. The problem of the judiciary transmitting the lawmaker's axiological preferences should be considered against the background of diversified argumentation patterns in cases resolved in favour of the administration and entrepreneurs, respectively. Our research shows that, in the majority of cases, regardless of the substantive or procedural nature of the case, judges rule on cases based on internal standards only. The main internal value is a literal interpretation of the text, occasionally supplemented by case law and legal literature. The pattern of argumentation is different in cases where the court rules in favour of entrepreneurs. In those cases, judges refer to standards that, in addition to internal standards, involve external and constitutional standards, much more often.

These results may lead to different conclusions, depending on whether the argumentation pattern in cases resolved in favour of entrepreneurs is primary or secondary to the judgment. If argumentation is primary to the judgment, we should assume that, if judges increase argumentation based on external, constitutional or Community standards, they would be likely to rule in favour of entrepreneurs more often. The contemporary model of adjudication based on principles, as we have indicated, requires a transition from internal to general standards. Consequently, the transition to the new judicial model would be beneficial in terms of protecting the interests of private entities. With the transition, the share of external, constitutional and Community standards in judicial argumentation would increase. Thus the percentage of judgments in favour of private entities would rise according to the relationship between the range of standards used and the outcome of the adjudication, as indicated. This move to the principles model would also be in line with the axiological preferences of a democratic lawmaker.

However, one can support the view that the detailed argumentation given in the reasoning of a judgment is formulated *ex post* (only a loose framework of the argumentation is developed prior to the judgment). Thus if external and constitutional argumentation occurred more frequently in judgments

favourable to entrepreneurs, this would not affect the judgment. In this case, reference to standards other than internal ones could be seen solely as an element of the context of the reasoning of the judgment, not as an element of the context of the adjudication (we discuss both contexts under “Relation between...” on page 20) We believe, however, that this view should be rejected, as it assumes that the reasoning is only apparent and that judges act in bad faith, and it implies that they adjudicate in accordance with some indeterminate (e.g. personal) preferences and then tailor their argumentation to fit the decisions they have already made. This leads to the apparently paradoxical conclusion that a formalistic approach to law application does not guarantee compliance with the axiological choices of the legislator. This conclusion is, however, supported by literature on legal interpretation. According to A. Marmor<sup>57</sup> and G. Mac Callum Jr., textualism and the disregarding of the lawmaker’s intentions during the judicial process distort the principle of judges being subordinate to the Constitution and statutes, and thus are a source of incorrect relationships between the judicature and the legislature.

#### AUTHORITY OF COURTS AND ITS BEARING ON EFFECTIVE LAW APPLICATION

PUBLIC PROTEST  
AGAINST FORMALISM

The phenomenon of low readiness to rule on the basis of principles and low responsiveness of judges to social and economic environment could have manifold effects for public reception of the ruling and court’s position in the society, and thereby indirectly on effectiveness of law application. Judgments based only on internal standards, which are by definition difficult for outside observers to understand, could lead to judgments being subjectively seen as “losing touch with reality” or “unjust”, because they do not take into account the circumstances in a given case that are outside the law. This type of reception of court judgments is illustrated by the Latin maxim “summum ius, summa iniuria” – “the highest law, the highest injustice”. Judges themselves are aware of such perception of judgments. According to K. Pałeczki: *“The empirical study conducted recently in Poland showed that most judges believed not only that at least some ‘subjective distortion’ (the phenomenon is usually referred to as ‘personal sense of justice’) was unavoidable in adjudication, but, more importantly, that by renouncing ‘personal beliefs’ as additional premises, judges may issue an utterly unjust judgment, although correct from a formal point of view”*.<sup>58</sup>

Indeed, the perception of judgments based on formal standards as unjust seems to be confirmed by public opinion polls centred on society’s assessment of court operations and the socially desirable judging model carried out by M. Borucka-Arctowa and K. Pałeczki.<sup>59</sup> Poll results show that there are “social expectations to abandon ‘the letter of the law’”.<sup>60</sup> These expectations are apparent in answers to the following question: “Should the court follow legal regulations only when issuing a judgment or should it also take

other factors into account?”.<sup>61</sup> 24% of respondents replied that the court should follow legal regulations only, but as many as 67% indicated that the court should also take other factors into account. Such other factors include the judge’s sense of justice, the judge’s beliefs about what is useful for society, the costs to be borne in complying with the judgment, the political needs of the state (e.g. a programme implemented by the government) or Community law.<sup>62</sup>

Polls show that the formalistic approach to adjudication is the one least expected of the three general adjudication strategies: formalistic (according to the “letter of the law”), antiformalistic (subject to the individual assessment of the judge based on a sense of justice) and responsive (taking social expectations into account).<sup>63</sup> The antiformalistic and responsive adjudication methods are supported especially by the business world.<sup>64</sup> This means that there is social consent to judges abandoning “computerised jurisdiction”<sup>65</sup> and implement extra-textual elements, i.e. individual sense of justice, common sense, or other extra-legal values that may have a major impact on the final decision of the judge, in judgments.

To summarise the results of the opinion polls, their authors state that “antiformalistic” trends and “weakened legalism” trends are apparent among respondents and also that respondents declare they are ready to “give [judges] far-reaching discretion (freedom of judgment) in the judicial process”.<sup>66</sup> Furthermore, what is important from the point of view of this report is that the largest percentage of those advocating departure from formalistic adjudication was from the economically productive age group (young people and students) and groups connected with business (managers, traders and service providers).<sup>67</sup> It would be unwise to use opinion poll results to formulate demands or recommendations as to how judges should adjudicate. However, society’s perception of courts affects their authority and thus the authority and effectiveness of the law. Therefore, such opinions cannot be dismissed. Instead, one should consider whether it is possible to meet social expectations concerning the adjudication model without the autonomy of the law and independence of judges being affected.

#### KEEPING LEGAL ACTS UP-TO-DATE

The low responsiveness of judges may also affect the extent to which legal acts remain up-to-date and the flexibility of legal regulations in the changing economic and social environment. Specifically, this low responsiveness may contribute to legal acts becoming out-of-date sooner and legislative intervention being needed. The low responsiveness goes together with the rare application of the so-called dynamic interpretation of a legal text. This kind of interpretation endeavours to take into account social changes and model the outcome of the linguistic interpretation (by extending or narro-

wing the meaning of legal terms in order to obtain a result that suits the changed social and economic environment). Interestingly, the low responsiveness of judges to social and economic environment needs disclosed in the research is also viewed by the public as a weak point in the Polish judiciary. The relevant opinion polls show that respondents critically assess judges' sensitivity to social problems.<sup>68</sup>

Due to the failure to apply dynamic interpretation, law application practice may fail to keep up with the quickly changing reality. This, in turn, may lead to frustration on the part of addressees of the law and to pressures on the legislature to adjust regulations to new challenges by way of legislative intervention. This is only one step away from another statute or amended law being adopted, which increases legislative inflation. Also, the time entrepreneurs have to wait for a change in the law is a major impediment to effective business. Literature emphasises that lack of a dynamic approach to law application results in legislative gaps, i.e. delayed responses of the law to social and economic problems. Legislative gaps are a major threat to the business environment developing in a given country.<sup>69</sup>

# OBSTACLES TO TRANSITION FROM THE TRADITIONAL TO THE PRINCIPLES-BASED MODEL OF ADJUDICATION

The outcome of the research presented in the previous sections shows that the transition from the traditional (syllogistical) model of adjudication to the principles-based one is not apparent in the area of administrative court judgments involving business entities. No transition between the two models could, as we have already mentioned, create a worse environment for the development of enterprise in Poland. In this section we identify possible obstacles that may have hindered the transition process. Generally, we argue that cultural and social factors are responsible for judges' relative reluctance to apply the principles-based adjudication model. Specifically, we indicate below five cultural and social obstacles that prevent or hamper the evolution of Polish judicial practice from the traditional to the contemporary model of adjudication.

## LAWYERS' EDUCATION IN POLAND BASED ON PREFERENCE FOR FORMAL STANDARDS

Specifics of lawyers' education, aimed mainly at equipping judges with the skill to use argumentation based on internal standards of law, is apparent for instance in the views of judges themselves on the correct ways of interpreting the law. Judges' (and public prosecutors') opinion polls available in Poland indicate that most prefer using a literal/linguistic interpretation and reject the need to apply a functional interpretation of law.<sup>70</sup> Justifications for this approach are deeply rooted in the need to protect standards such as the stability and autonomy of the law. The judges and public prosecutors polled indicated that the approach which favours a literal/linguistic interpretation and rejects the need for a functional interpretation is reasonable because it "ensures legal safety and consistent judgments" and "lifts social and media pressure".<sup>71</sup>

The fact that in judicial practice the so-called confirmatory interpretation technique,<sup>72</sup> according to which the result of the linguistic interpretation (and thus an interpretation constituting an element of internal law standards) should be confirmed by the result of the functional or purpose-oriented interpretation (which we have classified as standards external to the law) is rarely applied also seems to be an educational problem. The role of the confirmatory interpretation is to ensure that the judge has understood the intention of the lawmaker as set out in the legal text. This understanding is ensured by a double filter – examining that the judge's decision complies with the legislator's intention on the linguistic level and checking that it complies on the level

MORE EMPHASIS ON  
EXTRA-LINGUISTIC  
INTERPRETATION TECHNIQUES

of the legislator's political aims, which could be expressed outside the law act (e.g. in documentation of the legislative process).

The situation in which judges rarely use a confirmatory interpretation can lead to a breach of the principle of the judiciary's deference to the lawmaker (set out in the constitutional principle of subordination to the Constitution and statutes). Compliance of a decision with a legal text which, by its very nature, is ambiguous, without this compliance being confirmed by argumentation based on the lawmaker's intention or the aim of the law could paradoxically mean that the judicial decision does not optimally converge with the law. This could also lead to a question as to the appropriateness of relations between the legislative and judicial branches. We elaborate on this topic in the part entitled "Transmission of preferences..." on page 35.

From the point of view of lawyers' education, more frequent use of the confirmatory interpretation may be attained by a greater emphasis being placed on presenting the methodology of using non-linguistic interpretation techniques to prospective judges. The analysis of judgments indicates that judges follow only two directives in this respect: (i) that a purpose-oriented or functional interpretation is totally unacceptable in the area of public law and (ii) that an extensive interpretation of exceptions is unacceptable. These two directives may be supplemented with a number of others; thus judges themselves may have a wider range of interpretative tools at their disposal. It seems reasonable to increase the share of certain matters in lawyers' and judges' education. These are, for instance (i) methodology of identifying the lawmaker's intentions, (ii) use of legislative process documentation in court, (iii) hierarchy of interpretation techniques used if the legal text is unclear, (iv) types of adjudicating for public law purposes where it is admissible to apply a functional or purpose-oriented interpretation and to expand or restrict the result of linguistic interpretation as an effect of applying non-linguistic directives of interpretation.

#### JUDICIARY'S HISTORICAL EXPERIENCES OF COMMUNISM

FORMALISM – A SHIELD  
AGAINST PRESSURE

Formalism of adjudication, related to the use of the linguistic interpretation only, is often justified by the need to protect judges against external pressures. This approach seems to be a heritage of Communism, when engaging in the judicial process substantialist standards from outside the law, such as the lawmaker's political intentions, could mean the loss of autonomy of the law and a breach of judicial independence. This heritage is probably the second reason for the formalism of Polish judiciary practice. In communist times, political pressure was frequently exerted on judges in order to ensure that the judgments issued were those expected by the political decision-makers. Under the circumstances, the obvious reaction of judges could have been to use external standards-proof formal legal argumentation. However, it seems that the new situation of the judicature after 1990 and

the guarantees of subjective independence (described in the part entitled “Judicial discretion...” on page 17) present in the contemporary Polish legal system should make judges abandon this defence strategy. The reason is that now excessive formalism of the judicial process may also have undesirable effects, such as unreasonable inflexibility in the legal stance of courts and incompatibility of court decisions with the rapidly changing reality.

#### MISCONCEIVED JUDICIAL INDEPENDENCE AND IMPARTIALITY

It seems that an obstacle to judges applying substantialist constitutional standards, including those which protect enterprise, could be that otherwise necessary element of judicial ethics – the impartiality requirement. In the judgments we have examined, administrative court judges ruled on cases in which one of the parties was an entrepreneur. In this situation, using standards that directly protect enterprise in the argumentation often leads to the entrepreneur winning the case. There is no doubt that, when applying formal (internal) standards or even procedural standards, there is no such determinant connection between the argumentation used and acceptance of the arguments of one of the parties. An indirect indication in support of this interpretation may be the fact that, according to the research results, judges relatively often cite the constitutional principle of equality. This would mean that a reference to the Constitution is not a problem if it concerns standards of a formal nature, such as equality before the law. It should, of course, be stressed that citing substantialist principles protecting one of the parties to administrative court proceedings does not breach the principle of judicial impartiality, as it complies with the intention of the constitutional lawmaker, who granted the privileged position to the individual in vertical relations between the state and the individual. Therefore, the judge, under the Constitution, is undoubtedly obliged to defer to the constitutional lawmaker’s axiological choice.

It seems that abandoning formalism in the application of law and using substantialist standards protecting one of the parties to administrative proceedings does not violate any elements of judges’ ethos. The reason is that judges themselves point to the benefits of taking extra-textual standards into account to a great extent in the judicial process and seem not to be afraid that this will adversely affect their independence or impartiality. For instance, the document entitled “Position of the State Council of the Judiciary on the independence of judges and the independence of courts” adopted on 4 April 1990 reads:

*“The State Council of the Judiciary shall ensure due interpretation of the term ‘independence’. There are organisational and legal grounds to ensure that, for all citizens, the independence of judges does not mean arrogance of the authorities any more, that it is not associated with heartless instances of applying the so-called letter of the law any longer. An independent judge should be a paragon of humanistic personality and should*

*care for the operation of the law serving higher standards. ... [The independence of a judge] becomes the touchstone of civil liberties in the social, mature search for justice”<sup>73</sup>*

Even though this statement is bombastic, which is justified by the historical context, an idea was expressed in it which is relevant to the matters discussed herein. The independence of judges and the ethos of judges need not be affected by going beyond the text of the statute, the “letter of the law”, and taking social, political and other standards into account.

#### UNIQUE DEFENCE MECHANISM CONSISTING OF “ESCAPE IN FORMALISM”

One of the weaknesses of the Polish system of justice administration which is often emphasised is the lack of sufficient time given to consider each case in detail due to the caseload of courts. In the face of time limitations, one of the strategies for proceeding may be “escape in formalism”.<sup>74</sup> This consists of handling cases so as to engage the judge to the minimum extent, that is nonetheless within the framework of the legal order. The public can see this: research shows that some groups polled indicate that features of courts include the inability to issue controversial judgments.<sup>75</sup> Undoubtedly, issuing controversial judgments, which should be taken to mean judgments incompatible with existing judicial practice (precedents), are atypical and thus require more of the judge’s time who must justify his judgment in a special way. Given little time to examine cases, judges are probably prone to examine them in a typical way.

NOT ENOUGH TIME  
TO APPLY PRINCIPLES

Formal manifestations of saving the time of higher instance courts, including administrative courts, include, for instance, the strict requirements concerning formal bases for pleadings or obligatory representation by an advocate, the purposes of which include ensuring the due substantive level of actions taken before higher instance courts. This tendency to possibly minimise time devoted by courts to an examination of cases is apparently transferred to the choice of argumentation in the case. Undoubtedly, in terms of workload, referring to internal standards of law is optimal. As we have shown in previous parts of this report, referring to these standards does not require much effort on the part of judges, since argumentation patterns based on internal standards are those that are known to them best.

The availability of ready-made patterns of argumentation based on other groups of standards looks quite different. Let us discuss this problem using the example of a constitutional and Community standard: the proportionality principle. In order to build up his argumentation on the basis of this principle, the judge must analyse all aspects of the situation in which the administrative authority acted, including extra-legal (business, technical and other) conditions. In the context of the considerable workload of

courts, judges may simply not have enough time to examine these issues thoroughly. Additionally, in order to duly justify a judgment based on the proportionality principle, the argumentation has to be very precise. Otherwise, the argumentation could be easily refuted, as literature shows. For these reasons, the administrative court's choice of judgment standards may be affected by the relative difficulty and considerable time required to build up argumentation based on the proportionality principle.

#### CONCERN OVER DESTABILISING LEGAL ORDER BY UNCONTROLLED JUDICIAL DISCRETION

In our opinion, the most important obstacle to deformalising the judicial process by referring to general standards is the concern over the stability and predictability of the law application process being affected. This concern is a prevailing feeling among judges (and others) and it is a factor that we do not intend to underestimate. It seems to have been typical for the law since the dawn of time and was *inter alia* the reason for the casuistry of the ancient regulation or the whole codification movement on the Old Continent. What is more, this concern is perfectly reasonable in our opinion. We believe that in the environment in which Polish courts, uncontrolled and unsupported by lawyers, operate, the transition from a formalistic to a non-formalistic judicial process could cause far-reaching damage in terms of stability and predictability of court judgments.

In order to prevent this, in the first place the other obstacles referred to above should be removed. First of all, lawyers' and judges' education should be changed by building a principles-based law application methodology. Only if a uniform methodology of referring to extra-linguistic interpretation methods and methods for further defining constitutional and Community standards are developed will it be possible to ensure that decisions issued by judges are uniform in this respect. Academic circles certainly have a major part to play here. Judges must also be provided with substantive (content-related) support for the actions necessary to find the information needed to responsibly issue judgments based on principles, such as assistance with identifying purposes of legal acts or analyses of legislative materials aimed at identifying the legislator's intentions. Finally, it is important to ensure that judges are given more time to examine the case in the light of general principles and principles external to the law.

Apart from these actions, attorneys (advocates, legal counsels and tax advisors) may play an important role supporting judges in the process of transition from the traditional adjudication model to the principles-based model. An attorney who presents extensive and professional argumentation in the case, using external, constitutional and Community standards, undoubtedly makes

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it easier for the judge to refer to and address these standards. Unfortunately, professional argumentation based, for instance, on constitutional arguments is not common among attorneys. This is, of course, due to the fact that argumentation in the case reflects the train of thought of the judges who rule on the case: since judges rarely refer to general standards, attorneys believe that it is not very effective to use such standards in the argumentation. However, it could also be that attorneys are afraid judges may view using, e.g. constitutional argumentation in business cases, as proof of not having other “stronger” arguments and thus that this will adversely affect the perception of the whole line of argumentation presented in the case. Therefore, it seems that increasing the share of general standards in adjudication requires feedback between judges and attorneys: judges should be more open to argumentation based on general standards and attorneys should be more courageous in using such argumentation professionally.

## NOTES

- <sup>1</sup> The text sets out the results of the research carried out by the authors thanks to the support provided by the Ernst & Young Better Government Programme. The unabridged version of the report is available at [www.sprawnepanstwo.pl](http://www.sprawnepanstwo.pl). Given the breadth of the issues addressed in the report, work on drawing it up needed to be divided. Denis Galligan was, in any case, responsible for the part of the report devoted to the question of judicial discretion in modern democracies, while Marcin Matczak formulated the assumptions on which the review of Polish administrative court judgments was based, devised the content of the database used to analyse rulings and, together with the team, carried out the analysis. However, both authors were responsible for the part of the report on interpreting the findings from the review of Polish administrative court judgments.
- <sup>2</sup> L. Morawski, *Od modelu sylogistycznego do modelu argumentacyjnego*, [in:] *Główne problemy współczesnej filozofii prawa*, Warsaw 2000, p. 151.
- <sup>3</sup> See M. Borucka-Arctowa, *Courts under the New Constitution of Poland – The Problem of Communication between Courts and Society*, p. 141 [in:] IVR 21st World Congress, Lund, Sweden, 12-18 August 2003, Law and Politics; In search of balance; Stressing legal decisions, ed. T. Biernat, K. Pałeczki, A. Peczenik, C. Wong, M. Zirk-Sadowski, Cracow 2004.
- <sup>4</sup> For a discussion of the several meanings of discretion, see: D. J. Galligan, *Discretionary Powers* (Oxford, 1986), and in Polish literature, e.g. B. Wojciechowski, *Dyskrecjonalność sędziowska*, Toruń 2003, A. Kozak, *Granice dyskrecjonalnej władzy prawników*, Wrocław 2001.
- <sup>5</sup> H. L. A. Hart, *The Concept of Law* (Oxford, 1961).
- <sup>6</sup> R. M. Dworkin, *Taking Rights Seriously* (Duckworth, London, 1978).
- <sup>7</sup> Ola Wilkund, *Judicial discretion from a European perspective* (Stockholm 2003), p. 111.
- <sup>8</sup> Articles 3 and 4 of the act on proceedings before administrative courts (*Journal of Laws* of 2002, no. 153, item 1270).
- <sup>9</sup> See an interesting discussion of non-binding precedent in L. Morawski, *Główne problemy współczesnej filozofii prawa. Prawo w toku przemian*, Warsaw 2000, p. 211ff.
- <sup>10</sup> For this feature of higher courts' case law, see: A. Marmor, *Immorality of Textualism*, [in:] *The Language of the Law: Interpretive Theories and Their Limits*, ed. N Staudt, (in preparation).
- <sup>11</sup> For a discussion of the role of the law in political and social transformation, see e.g. R. Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 *Yale L.J.* 2009.
- <sup>12</sup> Institutional guarantees are reflected in the institution of the National Judicial Council whose main task is, according to art. 186.1 of the Constitution, to protect the independence of judges. The Council, which is a kind of „buffer” between the judiciary on the one side and the executive and the legislature on the other (e.g. has the power to review and appraise candidates for judges, proposes judge appointments, consults legislative bills affecting the court system and judges), consists primarily of judges

although there are also members who act as liaison with the executive (minister of justice and president's designees) and the legislature (members elected by parliament).

<sup>13</sup> The necessity to ensure the independence of courts and the full independence of judges results from the principle that power is divided among the executive, the legislature and the judiciary (which are, however, interrelated). This principle was established by the Constitution (and replaced the principle of uniform power of the state, which applied under the Constitution of 1952).

<sup>14</sup> The distinction between two aspects of the independence of judges (personal and related to merits) is put forward by L. Garlicki. Concerning the personal aspect, he identifies the stability of the judge's office, the impossibility of moving or removing a judge, judge's immunity, disciplinary only liability (for certain case categories), the incompatibility principle, political impartiality, and work and pay terms commensurate with the status of this office and the responsibilities associated with it. The merit-related aspect of a judge's independence means, according to L. Garlicki, that a judge "when ruling on a case may be bound only by instructions expressed in the judgment of a higher court, in accordance with provisions of applicable procedures." Cf. Leszek Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu*, (Warsaw 2000), pp. 360-362.

<sup>15</sup> Cf. article 180.1 of the Constitution.

<sup>16</sup> Cf. article 180.2 of the Constitution.

<sup>17</sup> A long discussion took place in doctrine and case law on the possibility of refusing to apply unconstitutional provisions of statutes. Originally, courts accepted this possibility (cf. e.g. SAC judgment dated 9 October 1998, file ref. II SA 1246/98, *Glosa* 1999/3/29; SAC judgment dated 14 February 2002, file ref. I SA/Po 461/01, OSP 2003/2/17; Supreme Court resolution dated 4 July 2001, file ref. III ZP 12/01, OSNP 2002/2/34) despite the negative opinion of the Constitutional Tribunal on the matter (cf. e.g. Constitutional Tribunal judgment dated 31 January 2001, file ref. P 4/99, or Constitutional Tribunal judgment dated 4 October 2000, P 8/00). In accordance with a new line of Supreme Court decisions, courts are not competent to refuse to apply unconstitutional (in their opinion) provisions of statutes (they should address a legal question to the Constitutional Tribunal in such a case) – cf. e.g. the famous Supreme Court judgment dated 16 April 2004, file ref. I CK 291/03).

<sup>18</sup> It was possible to assess the compliance of acts ranking lower than statutes with statutes under the Constitution of 1952 (it was impossible to assess their compliance with the Constitution because it was not treated as a normative act at that time). As early as in the 1950s, the Supreme Court pronounced that: "judges to whom statutes only apply may check the legality of executive regulations in terms of their compliance with statutes", cf. Supreme Court judgment dated 27 June 1957, file ref. 3 CR 702/56 (OSN of 1958, issue III, item 79). In 1988, the Supreme Administrative Court pronounced that "the rule that the Supreme Administrative Court directly controls administrative decisions only does not rule out indirect control of the legality of acts ranking lower than statutes, which form the legal basis for administrative

*decisions*”, cf. SAC judgment dated 14 March 1988 (IV SA 1139/87, ONSA 1988/1, item 40). The said principle was broadly applied to assess compliance of acts ranking lower than statutes with statutes and also with the Constitution ever since the Small Constitution was adopted, and was finally confirmed in the Constitution of 1997. Cf. for instance SAC judgment dated 8 June 1992 (file ref. III SA 241/92, ONSA 1/1993, item 19, p. 120), SAC judgment dated 17 February 1993 (file ref. SA/Gd 1836/92, ONSA 3/1993, item 78, p. 126), SAC judgment dated 14 July 1993 (file ref. I SA 1788/92, ONSA 4/1993, item 118, p. 194), and SAC judgment dated 14 February 2002 (file ref. I SA/Po 41/01, OSP 2/2003 item 17).

<sup>19</sup> Judges are bound by the Tribunal’s assessment of compliance of regulations with the Constitution.

<sup>20</sup> As mentioned above, Polish law theorists maintained for a long time that the Constitution was not a normative act (e.g. S. Rozmaryn), but the present Constitution undoubtedly is a fully-fledged normative act (even though, due to its generality and specific subject matter of regulation, it also includes regulations that are special from this perspective).

<sup>21</sup> Cf. judgment re Van Gend en Loos, file ref. 26/62. Cf. also R. Barents’s comments, *The autonomy of Community Law* (Kluwer International 2004).

<sup>22</sup> Agreement Establishing an Association between the Republic of Poland of the one part and the European Communities and their Member States of the other part, made in Brussels on 16 December 1991, ratified on 4 July 1992, published in *Dziennik Ustaw* [Journal of Laws] dated 27 January 1994, no. 11 item 38; it took effect on 1 February 1994.

<sup>23</sup> I.e. specified sufficiently clearly and precisely the rights in personam granted to individuals; cf. K. Czapracka, *Miejsce Układu Europejskiego we wspólnotowym i polskim porządku prawnym*, (Prawo UE 2/2003).

<sup>24</sup> In this respect, cf. M. Safjan, *Konstytucja a członkostwo Polski w Unii Europejskiej* (*Państwo i Prawo* 3/2001) and E. Podgórska, *Podstawowe koncepcje prawa Wspólnot Europejskich a perspektywa członkostwa Polski w Unii Europejskiej* (*Kwartalnik Prawa Prywatnego* 1/1995)

<sup>25</sup> What is meant here is, for example, the transposition of the right of the free movement of goods (art. 10.4 of the Treaty), right of establishment (art. 44 of the Treaty), etc.

<sup>26</sup> Articles 68 and 69 of the Treaty were the basis for applying pro-Community interpretation techniques when interpreting domestic law. These articles required the Polish party to harmonise its legal system with the Community system. This duty was confirmed by judgments issued by the highest Polish courts. In its ruling of 28 January 2003 (file ref. K 2/02), the Constitutional Tribunal stated that “*in the period of preparation for accession, the interpretation direction that should be reinforced is that which is most compatible with the idea behind the solutions prevailing in Community law and complies with established European case law, and interpretation of domestic law of a country which formally is not a member state of the EU can and should be used as the cheapest and fastest instrument to perform the obligation to harmonise law in this respect*”. This Constitutional Tribunal position was preceded by a Supreme Administrative Court judgment which stated (on 31 March 2000, file ref. V SA 2268/99) that “*when customs law, i.e. a domain that must be*

*harmonised with Community law, is interpreted, the methods and criteria used must be those which will ensure that the results of the interpretation are not contrary to *acquis communautaire* and at the same time will bring Polish customs law measures closer to European law*". Examples of judgments issued by other courts and confirming this line of authority include Supreme Court judgment dated 13 November 1997 (file ref. CKN 1217/98) and Antimonopoly Court judgment dated 8 January 1997 (file ref. XVII Amr 65/96).

<sup>27</sup> See the discussion in M. Taborowski, *Pojęcie „sąd” lub „trybunał” w rozumieniu art. 234 Traktatu Ustanawiającego Wspólnotę Europejską* [in:] *Szkice z prawa Unii Europejskiej*, vol. I, Zakamycze 2003, pp. 247 ff.

<sup>28</sup> Most commentators maintain that these two Community law principles are by far the most important from the point of view of the system. See, e.g. A. Wróbel, *Zróżdła prawa Wspólnot Europejskich i prawa Unii Europejskiej* [in:] *Stosowanie prawa Unii Europejskiej przez sądy*, Zakamycze 2005, p. 23, and J. Futeuil de la Rochere, *Wstęp do prawa Unii Europejskiej*, Warsaw 2004, pp 148 ff.

<sup>29</sup> Ruling standards created by ECJ/CFI are deemed to be a source of law.

<sup>30</sup> See D. Kornobis-Romanowska, *Stosowanie prawa wspólnotowego w prawie wewnętrznym z uwzględnieniem prawa polskiego*, (Dom Wydawniczy ABC), pp. 172 ff.

<sup>31</sup> As far as the authors are aware, these are all the judgments issued in 1999-2004 which were published with their reasoning related to matters relevant for business. The publication forums included ONSA (62% of the judgments under review), Lex (15%), Przegląd Orzecznictwa Podatkowego (13%), Monitor Prawny (2.5%), Wokanda (2.4%), and others (5%).

<sup>32</sup> See O. Wiklund, *Judicial discretion ...*, p. 111.

<sup>33</sup> M. Smolak, *Uzasadnienie sądowe jako argumentacja z moralności politycznej. O legitymizacji władzy sędziowskiej*, Zakamycze 2003, p. 111.

<sup>34</sup> The table we used to list references to specific standards shows the following internal standards of law: linguistic interpretation of legal texts, staying with the literal outcome of an interpretation (ban on interpreting an unambiguous text), systemic interpretation of the law (internal and external), rational lawmaker assumption (*argumentum ad absurdum*), consistency of the legal system, hierarchy of the legal system (interpretation consistent with a superior act, *the lex superior derogat legi inferiori* rule), conflict of laws rules related to the specific/general nature of provisions of law (*lex specialis derogat legi generali*), the essence (nature) of the regulation, references to previous judicial decisions (divided into references to previous decisions of administrative courts, the Supreme Court and the Constitutional Tribunal, references to legal literature (commentaries, articles, opinions), other internal standards.

<sup>35</sup> K. Pałeczki, *Stressing legal decisions. Basic assumptions*. p. 18, reading: "(...) any kind of legal decision is governed by two basically different types of premises: those inferred from the 'inside' of a given legal system which has auto-poietical characteristics - 'inner premises'; and others, taken from the social and natural environment of the legal decision-maker, from 'the outside' of a given legally directed decision-making process - 'the outer premises'".

<sup>36</sup> The table we used to note references to specific standards identifies the

following standards external to the law: the lawmaker's intention, aim of the regulation, function of the regulation, the '*in dubio pro libertate*' doctrine (in the event of doubt, one should judge in favour of freedom/admissibility of activity), prevention requirements (bad man approach), public (e.g. fiscal) interests, other external standards.

<sup>37</sup> See note 35 on outer premises in K. Pałeczki *Stressing legal decisions. Basic assumptions*.

<sup>38</sup> See G.C. Mac Callum Jr., *Legislative Intent*, 75 Yale L.J. 754;

<sup>39</sup> In the table we used to note references to specific standards, each constitutional reference was noted, both a reference to the Constitution as a whole (e.g. where a judge referred to constitutional rights and freedoms without going into details) and to its specific provisions. By way of illustration, before starting the research, the table showed the following constitutional standards: interpretation consistent with the Constitution, proportionality principle, equality principle, protection of going concern, freedom of business, freedom of commercial speech, direct application of the Constitution, other constitutional standards.

<sup>40</sup> As in the case of constitutional standards, in the table we listed each reference to Community law, both specific acts and principles of Community law, or at least to the idea of European integration in general. By way of illustration, before the research was started, the table showed the following Community standards: interpretation consistent with Community law, the principle of non-discrimination in cross border transactions, the principle of proportionality in Community terms, other Community standards.

<sup>41</sup> Another potential set of standards that Polish courts should refer to in their judgments are those contained in the *European Convention on Human Rights* to which Poland is a party. However, it is likely to be rare that judgments on tax or commercial cases will fall within any ECHR standards.

<sup>42</sup> See. L. Morawski, *Główne problemy...*, p. 153 ff.

<sup>43</sup> The term "computerised jurisdiction" is used by K. Pałeczki with reference to the syllogistical law application method, *Stressing legal decisions. Basic assumptions*, [in:] IVR 21st World Congress, Lund, Sweden, 12-18 August 2003, Law and Politics; In search of balance...., p. 18;

<sup>44</sup> Marmor, *Immorality of Textualism*, p. 111;

<sup>45</sup> Morawski, op. cit., p. 157

<sup>46</sup> For more details on using quantitative methods in examining judicial practices, see H. Robertson, *Judicial discretion in the House of Lords*, Oxford 1998;

<sup>47</sup> The dividing criterion was the nature of the provision of law (procedural or substantive) interpreted by the court with respect to the main issue of a given case;

<sup>48</sup> The authors would like to thank Bartłomiej Osieka for his invaluable help with compiling and processing data during the research and the whole research team of lawyers from the Law Firm Domański Zakrzewski Palinka Sp.k. and the tax department at Ernst Young Sp. z o.o., comprising: Hanna Filipczyk, Izabela Andrzejewska-Czernek, Olga Łyjak, Elżbieta Zienowicz, Szymon Daszuta, Marek Gizicki, Przemysław Kucharski, Krzysztof Radzikowski, Michał Bator, Krzysztof Kwieciński, Przemysław Furmaga, Piotr Gołaszewski, Paweł Zalewski, Piotr Duda, Oskar Luty.

<sup>49</sup> See note 72 and the accompanying text.

<sup>50</sup> K. Wojtyczek, *Zasada proporcjonalności, [in:] Prawa i wolności obywatelskie w Konstytucji RP*, p. 670;

<sup>51</sup> K. Wojtyczek, *ibidem*, (670)

<sup>52</sup> This reasoning is supported to some extent by studies on the theory of precedents. See, e.g. L. Morawski, *Główne problemy współczesnej...*, p. 211 ff., in which the nature of non-primary precedents present in continental law is analysed. This analysis seems to allow us to conclude that (i) decisions which subsequently become precedents usually concern difficult cases in which it is impossible to stick only to the law, hence they must include a certain “added value” and (ii) reference to a precedent established by a judge when ruling another case is made to supplement the results of the linguistic analysis of regulations. Thus both the substance of precedent decisions and how they are used by judges in subsequent cases make them closer to external standards.

<sup>53</sup> K. Pałeczki, *Spotecznie oczekiwany model...*, p.156;

<sup>54</sup> See R. La Porta, F. Lopez-de-Silanes, A. Shleifer, R.W. Vishny, *The Quality of Government*. *Journal of Law and Economic Organisation* 15, 1999, 222-279; and S. Johnson, R. La Porta, F. Lopez-de-Silanes, A. Shleifer, *Tunneling*. *American Economic Review*, Paper and Proceedings 90, 2000, 22-27;

<sup>55</sup> T. Beck, R. Levine, *Legal Institutions and Financial Development*, World Bank Policy Research Working Paper 3136, September 2003, p.7;

<sup>56</sup> This point is confirmed by, among other things, the freedom of enterprise acts that have been adopted from the beginning of the Third Republic of Poland and numerous provisions of the Constitution with a view to protecting enterprise.

<sup>57</sup> A. Marmor, *Immorality of textualism*, p.111, G. Mac Callum Jr., *Legislative intent...*, p. 755 ff.

<sup>58</sup> K. Pałeczki, *Stressing Legal Decisions. Basic assumptions*, p. 18;

<sup>59</sup> See K. Pałeczki, *Spotecznie oczekiwany model...*, p. 156 ff.

<sup>60</sup> J. Czapska, *Wizerunek sądu w opinii społecznej, [in:] Sądy w opinii społecznej...*, p. 31;

<sup>61</sup> M. Borucka-Arctowa, *Komunikacja między sądami a społeczeństwem, [in:] Sądy w opinii społecznej...*, p. 81;

<sup>62</sup> K. Pałeczki, *Spotecznie oczekiwany model...*, p. 156

<sup>63</sup> K. Pałeczki, *Spotecznie oczekiwany wzorzec orzekania sądowego [in:] M. Borucka-Arctowa, K. Pałeczki (ed.) Sądy w opinii...*, p. 160

<sup>64</sup> Managers, traders and service providers – see *ibid.*, p. 157

<sup>65</sup> K. Pałeczki, *Stressing legal decisions. Basic assumptions, [in:] IVR 21st World Congress, Lund, Sweden, 12-18 August 2003, Law and Politics; In search of balance...*, p. 18;

<sup>66</sup> *Ibidem*, p. 157

<sup>67</sup> *Ibidem*;

<sup>68</sup> K. Daniel, *Normatywny i społeczny obraz sędziego, [in:] Sądy w opinii społecznej...*, p. 107;

<sup>69</sup> See the World Bank report *Judicial Systems in Transition Economies, Assessing the Past, Looking for the Future*, Washington 2005, p. 23;

<sup>70</sup> K. Pałeczki – Społecznie oczekiwany model..., p. 155;

<sup>71</sup> Ibidem;

<sup>72</sup> M. Zieliński, *Wykładnia prawa. Reguły, zasady, wskazówki* (Warsaw 2001), p. 111;

<sup>73</sup> *Rzeczpospolita*, 11 April 1990;

<sup>74</sup> K. Pałeczki, *Stressing Legal Decisions...*; - “[the formal and positivistic model of adjudication] is a type of a ‘shield’ against personal responsibility [for judgments] or an ‘escape’ for adjudicators, especially in difficult and controversial cases”, p. 18;

<sup>75</sup> J. Czapska, *Wizerunek sądu w opinii...*, - pp. 20-21 – According to source research, this opinion is held by advocates. It should be taken into account that this group can expect controversial judgments due to the needs of its clients, whose situation may be worse when standard, uncontroversial judgments are issued;

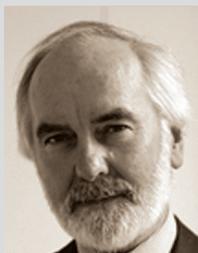
<sup>76</sup> K. Wojtyczek, op. cit., p. 692;

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