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Autocratic legalism in the perspective of the role of judges in societies of new democracies*

Abstract

The advent of autocratic legalism prompts the presentation of the role of judges in societies of new democracies. The recommended proposal modifies the vision of judges as guardians of the law with an educational-democratic component, in which judges also become interpreters of the law. This article offers a presentation of this proposal. It will commence in two stages. The first is a reconstructive and interpretative process. Its aim is to present autocratic legalism and then, in its light, the problem of the abusive judicial review. The second one is of a normative nature, i.e. a presentation of the social role of judges. In this proposal, judges can be assigned three moral obligations: a) to protect the democratic system, b) to improve legal standards and public institutions when they are dysfunctional, and c) to educate the citizenry, with a particular emphasis on human rights. A primary argument in favour of such a role for judges is the strengthening of civil society as an important safeguard against autocratic rule. The context for the findings presented in this paper is the current constitutional crisis in the Polish legal order. However, empirical documentation does not determine the research methodology in the presented article. In it, I pursue an approach that can be described as "doing philosophy historically."

Keywords: autocratic legalism, abusive judicial review, the role of judges, liberal democracy

Introduction

Law is too important to leave only to the lawyers. A citizenry trained to resist the legalistic autocrats must be educated in the tools of law themselves. Liberal and democratic constitutionalism cannot remain an elite ideal that has no resonance in the general public; that leaves this public

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> ripe for autocratic legalists to sweep them away in the last remaining exercises of democratic power that the citizenry may possess. In the days when dictators came to power through military force, civil defense courses provided training for publics to resist with arms. In the days when dictators come to power with law reform as their primary tool, civil defense requires citizens to be empowered with law. Citizens need to be trained as constitutionalists — to understand the point of constitutionalism, to recognise threats to self-sustaining democracy, and to care about defending liberal values.[1]

Kim Lane Scheppele concludes her reflections on autocratic legalism with the quotation cited above. I intend to present this political experiment in light of the question of the role of judges in societies of new democracies. Autocratic legalism can also be encountered in the so-called mature democracies.[2] Nonetheless, societies that have either undergone political transition in the recent past or have experienced political instability in the form of autocratic rule are most fragile against the danger it presents.[3] Both of these aspects can occur together, which makes societies in new democracies particularly vulnerable to falling under some variant of authoritarian rule.[4] With this in mind, I propose to modify the vision of judges as guardians of the law with an educational-democratic component, in which judges also become interpreters of the law.

In pursuing this research objective I will first present autocratic legalism in the context of constitutionalism. Then, against this background, I will present the issue of abusive judicial review. This issue brings to light the question of the role of judges. In answering it, I will outline a proposal that combines a vision of judges as guardians of the law and its interpreters. In this proposed realignment the role of judges can be perceived through the following three moral obligations: a) to protect the core values of the democratic system, b) to improve standards when they are dysfunctional, and c) to educate the citizenry, with a particular emphasis on human rights.

Three more issues are worth noting at this point. Firstly, foregrounding the role of judges does not mean that other factors, e.g. local government, civil society, the free media, the international community (international organisations and commissions) are not equally important from the perspective of preserving the standards of liberal democracy in new and therefore fragile democracies. Secondly, the context for the research presented here is the constitutional crisis facing the Polish legal order. This crisis can be seen as a manifestation of the tension be-

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[1] K.L. Scheppele, "Autocratic legalism," *The University of Chicago Law Review* 85, 2018, no. 2, p. 583.

[2] G.J. Postema, "Constitutional norms — erosion, sabotage, and response," *Ratio Juris* 35, 2022, no. 2, pp. 99–122.

[3] D. Landau, "A dynamic theory of judicial role," *Boston College Law Review* 55, 2014, no. 5, p. 1502. See also S. Issacharoff, "Fragile democracies," *Harvard Law Review* 120, 2007, no. 6, p. 1406.

[4] D. Landau, "A dynamic theory of judicial role," pp. 1501–1562; R. Dixon, "'Politics as markets' goes global," *Jotwell: The Journal of Things We Like (Lots)*, 12.02.2016, https://intl.jotwell.com/politics-as-markets-goes-global/ (accessed: 30.12.2023).

tween legal and political constitutionalism, in which one of the issues to be resolved is the role of judges in society. Thirdly, empirical documentation does not determine the research methodology in this article. In it, I pursue an approach which Piercey calls "doing philosophy historically."[5] It involves learning about a particular concept or social phenomenon by asking specific questions.

1. Autocratic legalism[6]

Liberal democracy is centred around the vision of judges as guardians of the socio-political order. In this view, the judiciary is supposed to act as a safeguard against two basic threats.[7] Firstly, against anti-democratic practices or the temptations of such practices, which liberal-democratic systems are not immune to. Secondly, against the dangers of political populism that strives to re-evaluate and then modify the constitutional system. Under autocratic legalism this model of judiciary practice clashes with the reality that makes it difficult for judges to stay the course of liberal democracy. In the extreme, the courts become an institution aimed at not so much limiting and controlling political power (both legislative and executive), but rather at legitimising government policies.[8] To illustrate this situation, let us refer to the findings of Kim Lane Scheppele as well as David Landau and Rosalind Dixon.

One of the characteristics of political populism is the division of society into two antagonistic groups: the elites and the people.[9] In the Polish context, political populism finds fertile ground for several reasons. One of them is the historical background. Since the political transformation, which began in 1989, the political scene has been polarised into, in simple terms, two groups: the post-communists (seen as the elites) and the post-Solidarity camp (construed as representatives of the people). This opposition weakened over time and was replaced in 2005 by a different division, which is to this day influenced by the ideological divide between two parties: the Civic Platform (Platforma Obywatelska) and Law and Justice (Prawo i Sprawiedliwość). The conflict between these political entities has also divided Polish society. Another important factor influencing the development of political populism is the lack of a mature tradition of liberal democracy. In this context,

[5] R. Piercey, *The Uses of the Past from Heidegger to Rorty: Doing Philosophy Historically*, Cambridge 2009.

[6] Certain findings outlined in this section were further elaborated upon in a separate article: P. Kaczmarek, *"*Goodbye rządy prawa? Diagnoza i perspektywa," *Archiwum Filozofii Prawa i Filozofii Społecznej* [forthcoming].

[7] R. Dixon, "'Politics as markets' goes global."

[8] H.P. Graver, *Judges Against Justice: On Judges when the Rule of Law in under Attack*, Heidelberg–New York–Dordrecht–London 2015.

[9] J. Petrov, "(De-)judicialization of politics in the era of populism: Lessons from Central and Eastern Europe," *The International Journal of Human Rights* 26, 2022, no. 7, p. 1181.

let us note that Yaniv Roznai and Amichai Cohen identify the fragility of liberal democracy in Israel — and it has been in place since the 1950s.[10]

Autocratic legalism is one of the variants of political populism.[11] These governments are characterised by: a) the centralisation and control of public authority in the hands of the executive, b) introducing key socio-structural changes through legal acts, which is supposed to result in the legitimacy of the transformations in the constitutional system.[12] The claim to legality does not mean, however, that cases of abuse of the law or lawbreaking are unheard of in autocratic governments. Nevertheless, they are not the primary mechanism of governance. Autocratic legalism illustrates a technique of governance that relies on anti-democratic aspirations being realised through the use of law. This avoids, or at least limits, the political costs associated with citizen protests, as well as reactions from international organisations. However, this does not mean that autocratic practices remain unnoticed by the public and the international community.[13] An example of this is the non-publication of a judgment of the Polish Constitutional Tribunal or the refusal to enforce judgments.[14]

According to Scheppele, autocratic legalism illustrates a technique of governance in which charismatic political leaders, elected in democratic elections, use the electoral mandate to dismantle a constitutional system based on two basic assumptions: human rights and the rule of law.[15] In the process of undermining of a thus defined constitutional system, which is founded on liberal democracy, two basic phases of governance can be discerned: a) the takeover of public institutions by a political faction and then b) exercising political control over public institutions.[16]

The first of these phases is characterised by the ruling camp's takeover of public institutions, such as the judiciary. This takeover is accompanied by a campaign of coordinated criticism against the legal community. To this end, agonistic tools are used to drive home the division between the elites and ordinary people. The elites are portrayed as defending a liberal constitutional system and the ruling

[10] Y. Roznai, A. Cohen, "Populist constitutionalism and the judicial overhaul in Israel," *Israel Law Review* 56, 2023, no. s3: *The Constitutional Crisis in Israel*, pp. 502–504.

[11] K.L. Scheppele, "Autocratic legalism," p. 545.

[12] J. Corrales, "The authoritarian resurgence: Autocratic legalism in Venezuela," *Journal of Democracy* 26, 2015, no. 2, p. 40.

[13] L. Pech, K.L. Scheppele, "Illiberalism within: Rule of law backsliding in the EU," *Cambridge Yearbook of European Legal Studies* 19, 2017, pp. 3–47.

[14] M. Florczak-Wątor, "O skutkach nieopublikowanego orzeczenia Trybunału Konstytucyjnego. Rozważania na tle oczekującego na publikację wyroku z 9.03.2016 r. (K 47/15)," *Przegląd Sądowy* 2016, no. 10, pp. 7–28.

[15] K.L. Scheppele, "Autocratic legalism," p. 562. See also G. Skąpska, "Znieważający konstytucjonalizm i konstytucjonalizm znieważony. Refleksja socjologiczna na temat kryzysu liberalno-demokratycznego konstytucjonalizmu w Europie pokomunistycznej," *Filozofia Publiczna i Edukacja Demokratyczna* 7, 2018, no. 1, pp. 278–279, 282–289.

[16] J. Petrov, "(De-)judicialization of politics in the era of populism," p. 1186.

class as representatives of the people, advocating for a truly democratic system.[17] This is how the resulting tension is presented by Scheppele:

> Democracy is a political system in which leaders are accountable to the people; constitutionalism is a political system in which leaders and the people together are additionally accountable within a system of constitutional constraint to uphold basic values that transcend the moment.[18]

The tension between the democratic and liberal component is exploited to take over institutions in order to strengthen the ruling camp's hold on power, focused especially on the centres of executive power. This takeover is rationalised from a formal point of view as being in line with established law. Autocratic legalism is thus a technique of governance that involves changing the constitutional system in a way that can be justified as legal from a formal point of view. Scheppele uses the term "Frankenstate" to describe this mechanism[19]:

> When perfectly legal and reasonable constitutional components are stitched together to create a monster like this, I call it a Frankenstate. Victor Frankenstein's monster — nameless in Mary Shelley's novel — was assembled from various component parts of once recognizably reasonable bodies. However, he went on to look and act a monster. The Frankenstate, too, is composed from various perfectly reasonable pieces, and its monstrous quality comes from the horrible way that those pieces interact when stitched together.[20]

The term denotes the creation of a semblance of the rule of law by preserving certain aspects of the functioning of public institutions in their existing form or modifying them in such a way that while on a declarative or formal level some coherence with the liberal-democratic order is preserved, it is in fact mimicry. This façade is put in place by combining various elements determined by the political context. Adopting such a holistic perspective makes it possible to better perceive changes in public institutions, e.g. the judiciary and public media:

> the new autocrats come to power not with bullets but with laws. They attack the institutions of liberal constitutionalism with constitutional amendments. They carefully preserve the shell of the prior liberal state — the same institutions, the same ceremonies, an overall appearance of rights protection — but in the meantime they hollow out its moral core.[21]

The comparison of autocratic legalism to Frankenstein's monster is meant to illustrate the fact that individual actions of public authority can pass the litmus test of legalism. However, if we look past individual elements and see them in

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[17] K.L. Scheppele, "Autocratic legalism," p. 557.

[18] Ibid., p. 557.

[19] K.L. Scheppele, "Not your father's authoritarianism: The creation of the 'Frankenstate'," *Newsletter of the European Politics and Society Section of the American Political Science Association* 23, 2013, p. 5.

[20] K.L. Scheppele, "The rule of law and the Frankenstate: Why governance checklists do not work," *Governance: An International Journal of Policy, Administration, and Institutions* 26, 2013, no. 4, p. 560.

[21] K.L. Scheppele, "Autocratic legalism," p. 582.

concert, the emerging picture of the institution will raise legal questions and may even frighten some observers, like the entity in Mary Shelley's novel that was created from different elements.

In order to obscure the overall picture, the legalistic factor is strongly emphasised in autocratic rule to legitimise the individual changes made to the socio-political order. This is the first stage of autocratic-legalistic rule. Its aim is to take over public institutions by utilising legal instruments while criticising the functioning of these institutions, thus undermining their legitimacy and credibility. The takeover of public institutions can be carried out through various instruments.[22] One can for example change the composition of the judiciary or lower the retirement age of judges so that the resulting vacancies can be filled with people who are expected to act in accordance with the will of the political authorities. Achieving this state of affairs leads to the second phase, in which lawyers are supposed to legitimise the policies of the state's decision-making centre.[23]

The "Frankenstate" mechanism outlined by Scheppele corresponds to the considerations of Ozan O. Varol, according to whom

> a new generation of authoritarians cloak repressive measures under the mask of law, imbue them with the veneer of legitimacy, and render authoritarian practices much more difficult to detect and eliminate. In the modern era, authoritarian wolves rarely appear as wolves. They are now clad, at least in part, in sheep's clothing.[24]

Taking control of the courts can serve various functions.[25] One example is using it as a contingency plan against having to surrender power following electoral defeats. In such a situation, the Constitutional Tribunal, for example, may become a body that will block changes to legislation and a return to the path of liberal democracy.[26] Equipping the judiciary with power — from the autocrats' perspective — may be aimed at shifting the responsibility for deciding systemically or socially controversial issues to the judiciary. The tightening of abortion law in Poland as a result of the Constitutional Tribunal's verdict of 22 October 2020[27] can be seen in such light. Preserving the formal independence of the

[22] D. Landau, R. Dixon, "Abusive judicial review: Courts against democracy," *UC Davis Law Review* 53, 2020, no. 3, pp. 1332–1333.

[23] "[…] a new generation of autocrats has learned to govern by appealing to electoral legitimacy while using the tools of law to consolidate power in few hands. […] They rewrite constitutions to make what was once unconstitutional into something constitutional. They do not, as a first resort, call out the tanks or declare a state of emergency; they do not enter office with a phalanx of soldiers. Instead they come to power with a phalanx of lawyers" (K.L. Scheppele, "Autocratic legalism," p. 581).

[24] O.O. Varol, "Stealth authoritarianism," *Iowa Law Review* 100, 2015, no. 4, p. 1677.

[25] Ibid., p. 1687.

[26] Ibid., pp. 1687–1688.

[27] Judgment of the Constitutional Tribunal of 22 October 2020, ref. K 1/20, https://trybunal.gov.pl/postepowanie-i-orzeczenia/wyroki/art/11300-planowanie-rodziny-ochrona-plodu-ludzkiego-i-warunki-dopuszczalnosci-przerywania-ciazy (accessed: 16.12.2023). Note that on 19 November

judiciary, a form of autonomy in times of autocratic legalism, can also serve to lend credibility to political power in the international arena. This mechanism becomes viable not only for political reasons — hiding autocratic rule under the cloak of legality — but also for economic reasons, as a means of securing credibility with foreign capital.[28]

2. Abusive judicial review[29]

The second phase of autocratic legalism is highlighted by David Landau and Rosalind Dixon, who begin their essay, "Abusive judicial review: Courts against democracy," with the following words:

> Both in the United States and around the world, courts are generally conceptualised as the last line of defence for the liberal democratic constitutional order. But this Article shows that it is not uncommon for judges to issue decisions that intentionally attack the core of electoral democracy. Courts around the world, for example, have legitimated antidemocratic laws and practices, banned opposition parties to constrict the electoral sphere, eliminated presidential term limits, and repressed opposition-held legislatures. We call this practice abusive judicial review.[30]

The legitimacy of anti-democratic movements that contribute to the dismantling of liberal democracy can manifest twofold, in what David Landau and Rosalind Dixon call the weak form and the strong form.[31] The weak form implies that courts legitimise authoritarian actions of the legislature or the executive. The strong form, on the other hand, emphasises the active participation of judges in the dismantling of liberal democracy. An approximation of the two forms of abusive judicial review is all the more warranted given that this construction was recently invoked in a Supreme Court decision without the broader reference which in my opinion is essential to understand it.[32]

2019, MPs from the ruling party submitted a request to the Constitutional Tribunal to examine the Act on Family Planning, Protection of the Human Fetus, and Conditions for Permissibility of Abortion with the Constitution. As a consequence, the Tribunal ruled that the abortion hitherto permitted in cases where prenatal tests or other medical grounds indicated a high probability of severe and irreversible damage or defects to the fetus or an incurable life-threatening disease was unconstitutional.

[28] O.O. Varol, "Stealth authoritarianism," pp. 1692–1693.

[29] Certain findings outlined in this section were further elaborated upon in a separate article: P. Kaczmarek, "Goodbye rządy prawa? Diagnoza i perspektywa," *Archiwum Filozofii Prawa i Filozofii Społecznej* [forthcoming].

[30] D. Landau, R. Dixon, "Abusive judicial review: Courts against democracy," p. 1313. See also N. Fox, "Abuzywne zapożyczenia konstytucyjne jako 'ciemna strona' liberalnej demokracji (artykuł recenzyjny)," *Przegląd Konstytucyjny* 2022, no. 3, pp. 121–133.

[31] D. Landau, R. Dixon, "Abusive judicial review," pp. 1345–1353.

[32] Order of the Supreme Court, Civil Chamber, 11 May 2023, file III CZ 330/22, https://www.sn.pl/sites/orzecznictwo/orzeczenia3/iii%20cz%20330-22-1.pdf. (accessed: 15.12.2023).

A weak form of abusive judicial review is characterised by judicial activity that involves the legitimisation of authoritarian rule in the sphere of either legislative or executive activity. The crucial point in this respect is that the activity violates the democratic minimum core, e.g. by imposing laws that encroach on or violate human dignity. A strong form, on the other hand, is when judicial activity contributes to the destabilisation of the democratic order, e.g. enabling the enactment of a law that, under the guise of ordering the activities of a constitutional organ, actually undermines its ability to act effectively. The judgment of the Constitutional Tribunal of 20 June 2017, in which the law regulating the activities of the National Council of the Judiciary was declared unconstitutional, and by doing so allowed the ruling party to make the changes it desired, can be considered in this context.[33]

In outlining both forms of abusive judicial review Landau and Dixon make two points. Firstly, they refer to the notion of a democratic minimum core.[34] It denotes a series of *sine qua non* values, as well as legal-institutional conditions that have to be met in order of state to be considered a functional democracy to: a) free and fair, regularly held elections, b) human rights, e.g. freedom of expression, c) the rule of law, a system of institutional checks and balances. According to Landau and Dixon, a judicial decision is abusive if it impinges on the values that form the democratic minimum core.[35]

Secondly, Landau and Dixon present abusive judicial review as a deliberate, intentional act.[36] The reference to the notion of intention, and implicitly bad faith and good faith, is intended to enable distinguishing between judicial acts aimed to undermine the basic principles that comprise the democratic minimum core from those that do not.[37] An example of the latter attitude is the judiciary's choice of a restrained attitude towards the actions of political power, ostensibly in order to preserve the independence of the court, with an implied possibility of resistance when the strategy of taking over public institutions intensifies.

In presenting abusive judicial review, one might again point to the Frankenstein metaphor.[38] Attributing a particular court decision to one of the abusive

[33] Judgment of the Constitutional Tribunal of 20 June 2017, K 5/17, https://ipo.trybunal.gov.pl/ipo/view/sprawa.xhtml?&pokaz=dokumenty&sygnatura=K%205/17 (accessed: 3.01.2024). See also A. Bień-Kacała, "Polski przypadek *judicialization of politics*. Kilka słów o roli TK po 2015 roku," [in:] *Dookoła Wojtek… Księga pamiątkowa poświęcona Doktorowi Arturowi Wojciechowi Preisnerowi*, eds. R. Balicki, M. Jabłoński, Wrocław 2018, pp. 57–63.

[34] D. Landau, R. Dixon, "Abusive judicial review," p. 1323; D. Landau, "Abusive constitutionalism," *UC Davis Law Review* 47, 2013, no. 1; Y. Roznai, R. Dixon, D. Landau, "Judicial reform or abusive constitutionalism in Israel," *Israel Law Review* 56, 2023, no. s3: *The Constitutional Crisis in Israel*.

[35] "Applying our definition of abusiveness, a judicial decision is an act of abusive judicial review if it has a significant negative impact on the minimum core of electoral democracy" (D. Landau, R. Dixon, D. Landau, R. Dixon, "Abusive judicial review, " p. 1325).

[36] Ibid., p. 1326.

[37] Ibid., pp. 1326–1327.

[38] Y. Roznai, R. Dixon, D. Landau, "Judicial reform or abusive constitutionalism in Israel," p. 298.

forms might not always be straightforward. It is however crucial to consider the sequence of events, as well as the social and political consequences of this specific ruling, which Scheppele succinctly visualises using the Shelleyan metaphor.

Both forms of abuse are exacerbated in times of political instability, characterised by the seizure of legislative and executive power by populist political parties. In such a situation, the courts may turn out to be the guardians of the existing constitutional order, but they may also choose the path of an organ participating in systemic change. In such a case, the judiciary legitimises reforms that pass the test of legalism but violate the democratic minimum core. More often the not, both of the attitudes can be observed at the same time — with a proviso, however, that during the takeover of the institutions one notices to a greater extent an attitude of resistance, which gradually weakens in favour of an attitude of adjustment. This process is the result of various factors, e.g. change of management, fear of losing one's job or being transferred overnight from one court department to another.[39]

The experience of autocratic legalism leads Dixon and Landau to pose the question of how to emerge from under autocratic rule, e.g. when political parties that appeal to the tradition of liberal democracy manage to win elections.[40] According to the authors, one way is to use the instruments that were first used to take over public institutions against their intended goals,[41] which in fact they conclude in their article "Healing liberal democracies: The role of restorative constitutionalism"[42] to be the best way forward.

There are more viable strategies, however. Moreover, Dixon and Landau's preferred solution raises questions from the standpoint of preserving the standards of a liberal politico-legal culture, and therefore, I propose, to turn our attention to another route. For this purpose, let us return to D. Landau's idea that the experience of autocratic legalism prompts a rethinking of the role of judges in society.[43] In doing so, the author presents a project for a dynamic theory of the role of judges.[44] Landau distinguishes two core obligations of judges: the strengthening of civil society and, on a somewhat similar note, disseminating constitutional values among the citizenry.[45] A similar position is formulated by Scheppele, according to whom the lesson that can be derived from the experience of autocratic legalism is the importance of educating the citizenry.[46]

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[39] D. Landau, R. Dixon, "Abusive judicial review," pp. 1326–1327.

[40] R. Dixon, D. Landau, "Healing liberal democracies: The role of restorative constitutionalism," *Ethics & International Affairs* 36, 2022, no. 4, p. 427.

[41] Ibid., p. 428.

[42] Ibid., p. 434.

[43] D. Landau, "A dynamic theory of judicial role," pp. 1501–1562.

[44] Ibid., p. 1504.

[45] Ibid., p. 1517.

[46] K.L. Scheppele, "Autocratic legalism," p. 583.

3. Judges as guardians of the law?

What emerges from Landau and Scheppele's statements is the idea of a stronger appreciation by legal circles of the role of civil society in maintaining public trust in the law. This becomes necessary in order to weaken the tension between democratic and liberal elements, which is also observable in judicial power. In presenting this issue in more detail, let us take as our starting point the vision of judges as guardians of the law, which is unique for liberal democracy and shapes legal discourse.[47] The "judges as guardians" metaphor presented is founded on the idea of the rule of law.[48] A similar vision of the judicial profession is also present in the Polish debate on the judiciary, especially after the political transformation in 1989. Tomasz Koncewicz refers to it when writing about Polish judges as guardians of the EU legal order. In characterising this order, the author points to the strengthening of the position of the individual vis-à-vis the centres of public power. Courts are becoming the guarantors of rights. A similar position is adopted by Jerzy Zajadło, according to whom judges have an obligation to protect constitutional axiology, especially in a situation of tension between its principles and positive law.[49]

Having in mind the vision of judges as guardians of the law, let us turn our attention to the responsive judicial review project put forward by Rosalind Dixon.[50] In light of this project, judges should be proactive in responding to certain dangers — in Dixon's terminology, the dysfunctions of liberal democracy.[51] One of these responses is countering undemocratic practices within the liberal-democratic system. An example of such a practice is the monopolisation of political power in the hands of a single actor, leading to various forms of autocratic rule. Autocratic

[47] The collection of texts published in the book *Judges as Guardians of Constitutionalism and Human Rights* (eds. M. Scheinin, H. Krunke, M. Aksenova, Cheltenham 2016) revolves around the idea of judges as guardians of the law. See A. Barak, "On judging" (pp. 27–49); H. Krunke, "Courts as protectors of the people: Constitutional identity, popular legitimacy and human rights" (pp. 71–93); D. Hope, "Judges as guardians of constitutionalism and human rights: The judiciary and counter-terrorism in the United Kingdom" (pp. 97–116). See also K.L. Scheppele, "Guardians of the constitution: Constitutional court presidents and the struggle for the rule of law in post-Soviet Europe," *University of Pennsylvania Law Review* 154, 2006, no. 6, pp. 1757–1851.

[48] B.Z. Tamanaha, "The history and elements of the rule of law," *Singapore Journal of Legal Studies* 2012, December [no. 2], p. 243.

[49] T.T. Koncewicz, *Filozofia europejskiego wymiaru sprawiedliwości. O ewolucji fundamentów unijnego porządku prawnego,* Warszawa 2020, p. 34; J. Zajadło, "Strażnicy konstytucyjnej aksjologii, czyli co może zrobić sędzia," Konstytucyjny.pl, 24.11.2017, https://konstytucyjny.pl/straznicy-konstytucyjnej-aksjologii-czyli-co-moze-zrobic-sedzia/ (accessed: 12.12.2023).

[50] R. Dixon, *Responsive Judicial Review: Democracy and Dysfunction in the Modern Age*, Oxford 2023; R. Dixon, "In defense of responsive judicial review," *National Law School of India Review* 34, 2023, no. 2, p. 106.

[51] R. Dixon, "'Politics as markets' goes global," S. Issacharoff, "Democracy's deficits," *The University of Chicago Law Review* 85, 2018, no. 2, p. 585.

legalism is one such form. Another danger is that public authorities often exclusively represent the majority groups in society and marginalise other communities, resulting in the suspension of certain constitutional rights or limiting the ability to exercise them. In this case, the dysfunction is the dominance of one group of people and the value defended is the pluralism of values in the public sphere.[52]

The responsive judicial review project refers to the moral obligations owed to judges:

> At the same time, it is important to note an important duality or Janus-faced quality to the idea of RJR: as a theory, it simultaneously seeks to defend strong and assertive judicial intervention in defence of democracy, and a weaker, more dialogic and calibrated approach by judges to reviewing certain forms of reasonable democratic decision. In most cases, this also leads to embracing a form of weak-strong or strong-weak judicial review — or combination of elements of judicial strength and weakness, calibrated to the nature and specifics of the case.[53]

According to Dixon, the role of judges is: a) to protect the liberal democratic system, e.g. via preserving the non-retroactivity of the law, or the tripartite division of power — maintaining some form of balance and control between centres of power, and b) to improve the system when certain dysfunctions become apparent.

What is apparent in Dixon's proposal, therefore, is a vision of judges as guardians of the standards of the liberal-democratic system. It attributes to judges, firstly, the obligation to protect a social system based on values that form a democratic minimum core. As such, judges are to protect democracy in the narrower sense. Secondly, judges must take it upon themselves to improve public institutions in such a way as to ensure maintaining the pluralism of values and among institutions of the state. Defined in this way, the task encompasses the notion of democracy in the broader sense.[54] This two-pronged understanding of democracy can be combined with a "strong-form" for the obligation to protect and a "weak-form" for the obligation to improve.[55] Such an arrangement suggests that judges are more than just guardians, and that their chief function boils down to strengthening democratic processes. Responsive judicial review, therefore, sees judges as participating in the process rather than exercising exclusive jurisdiction. The proposal is to prevent a) the monologic definition and resolution of problems by a single power centre and b) the alienation of the law, which is emphasised by the notion of responsiveness.[56]

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[52] T. Vallinder, "The judicialization of politics — a world-wide phenomenon: Introduction," *International Political Science Review* 15, 1994, no. 2, pp. 91–99.

[53] R. Dixon, "In defense of responsive judicial review," p. 108.

[54] R. Dixon, "The new responsive constitutionalism," *The Modern Law Review* 87, 2024, no. 2, pp. 1–34, https://onlinelibrary.wiley.com/doi/epdf/10.1111/1468-2230.12853 (accessed: 12.12.2023).

[55] Ibid., pp. 7–8.

[56] Ibid., p. 8; P. Nonet, P. Selznick, *Law and Society in Transition: Toward Responsive Law*, New York–Hagerstown–San Francisco–London 1978, p. 77.

The ability to responsibly adapt the law in the face of social change is particularly highlighted by Aharon Barak. According to him, the task of judges is to apply the law, but also: a) to bridge the gap between law and society and b) to protect the constitution and democracy itself.[57]

Three points are worth noting in this context. Firstly, the tasks mentioned can be carried out under the obligation to apply the law. The justification of a judicial decision as an act of applying the law can be an expression of the protection of constitutional values, e.g. human dignity.[58] Secondly, the obligation to protect democracy does not pertain to the judiciary alone. This task can also be applied to other centres of state power, especially the legislature.[59] And thirdly, in Barak's view, judges are not only concerned with applying the normative system that regulates the everyday life of individuals, but also maintaining the state of this system, its adaptability in society, and the related legal education.[60]

The educational dimension is particularly relevant in new and fragile democratic societies. The constitutional crisis highlighted the deficits of liberal democracy in terms of, for example, developing a constitutional culture. Underestimating the importance of civic education by the legal circles was one of the basic ills of the Polish systemic transformation, which started after 1989, and its misalignment with the expectations and needs of members of society, which contributed to the constitutional crisis.[61] This is pointed out by Judge Michał Laskowski:

> From the perspective of the events of recent years, it seems that this unsatisfactory legal awareness of Poles is the result of our collective negligence. In a properly functioning state, we did not notice the shortcomings, and society did not betray any special curiosity about how the law works. Today, it is very difficult to reach a wide audience with our arguments.[62].

Marek Safjan also comments in a similar vein:

> during the period of transformation a strong formal and legal framework for the functioning of democratic mechanisms was built […], but at the same time the building of civil society was forgotten, despite the often verbal declarations in favour of this idea.[63]

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[57] A. Barak, "Rola sędziego w społeczeństwie demokratycznym," pp. 1–21, Koło Naukowe Filozofii Prawa i Filozofii Społecznej, https://knfpifs.files.wordpress.com/2011/10/barak_a-rola-sc499dziego-w-spoc582_demokrat.pdf, pp. 1–2 (accessed: 12.12.2023); A. Barak, "On society, law, and judging," *Tulsa Law Review* 47, 2011, no. 2, pp. 302–304; A. Barak, "On judging," p. 27.

[58] A. Barak, *The Judge in a Democracy*, Princeton–Oxford 2006, p. xviii.

[59] A. Barak, "Foreword: A judge on judging. The role of a supreme court in a democracy," *Harvard Law Review* 116, 2002–2003, no. 1, p. 46.

[60] A. Barak, "On society, law, and judging," pp. 297–298. See also M. Gersdorf, M. Pilich, "Judges and representatives of the people: A Polish perspective," *European Constitutional Law Review* 16, 2020, no. 3, p. 345.

[61] M. Safjan, *Wyzwania dla państwa prawa*, Warszawa 2007, pp. 19–21.

[62] M. Laskowski, "Jakiś inny ustrój. Z sędzią Michałem Laskowskim, prezesem Izby Karnej Sądu Najwyższego, o stanie polskiego sądownictwa, podziałach wśród sędziów, protestach w obronie prawa i bolesnym powrocie do normalności rozmawia Magdalena Bajer," *Odra* 2023, no. 1, p. 5.

[63] M. Safjan, "Społeczeństwo obywatelskie w czasach kryzysu," *Chrześcijaństwo – Świat – Polityka* 2018, no. 22, p. 58.

Having experienced the consequences of these shortcomings, spreading constitutional culture can be seen as a form of moral obligation. The mandate for this type of action can be sought in the dual fiduciary relationship in which judges function.[64] The first concerns the relationship between judges and litigants, while the second one is more fundamental, as it concerns the relationship between judges and the public. The fiduciary obligations in the first relationship is to protect citizens who appear in the courtroom. In the second relationship, on the other hand, this protection concerns the citizenry as a whole. Its purpose is to strengthen civil society also in terms of legal awareness. The ECHR rulings on the participation of judges in the public debate can be interpreted in that light.[65] They indicate that judicial freedom of expression in the public sphere can be understood as a response to the public's right to information about the administration of justice.

Conclusions

Autocratic legalism prompts questions about the role of judges in societies of fragile democracies. This is taken up by Rosalind Dixon, who points out the responsibilities of judges in cases when dysfunctions emerge in the liberal-democratic system. The obligation to protect the system, and to improve public institutions, is in line with the vision of judges as guardians of the system. I see the concept of Aharon Barak as complementary to this proposal. While not overlooking the role of the guardian, this project also points to another facet of judges as interpreters of the law. It is in this light that I understand Barak's words about the identity of the judge:

> Every judge is part of his people. At times he lives in an ivory tower, but my tower is on the hills of Jerusalem, not on Mt. Olympus. As a judge, I am conscious of what is taking place in my country. It is my duty to study my country's problems, to read its literature, to listen to its music. A judge is a creation of his time. He moves with history.[66]

Barak's and Dixon's projects allow to conceptualise a new social role of judges, one that combines the function of guardian of the law and interpreter of the law. As guardians of the constitutional system, judges are tasked with responding to the autocratic practices of those in power, as well as the deficits of liberal democracy (Dixon). One such deficit is the alienation of the law, which stems from,

[64] R. Claassen, "Loyalty to client, conviction, or constitution? The moral responsibility of public professionals under illiberal state pressures," *Legal Ethics* 25, 2023, no. 1, p. 5, https://www.tandfonline.com/doi/full/10.1080/1460728x.2023.2235176 (accessed: 12.12.2023); E.J. Criddle, E. Fox-Decent, "Guardians of legal order: The dual commissions of public fiduciaries," p. 21, SSRN, 22.09.2017, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3040152 (accessed: 12.12.2023).

[65] Judgment of the European Court of Human Rights in the case of Judge Igor Tuleya of 6 July 2023, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-225672%22]} (accessed: 12.12. 2023).

[66] A. Barak, "The role of a supreme court in a democracy," *Hastings Law Journal* 53, 2002, no. 2, p. 1215.

among other things, underestimating the importance of legal education in civil society. By explaining the mechanisms of the judiciary to citizens, judges become interpreters of the law, whose aim is to build bridges rather than walls between "the legal world" and society (Barak).

As the experience of autocratic legalism shows, the price of assuming the role of guardian or interpreter of the law can be severe and also encroach on the private lives of these individuals. However, as K.L. Scheppele points out, in times of political instability we need a civil society that is aware of its rights and obligations. This awareness also concerns the ability to recognise and respond to undemocratic practices in various forms. Such a task and moral obligation — civic education — is incumbent on the various legal communities, not excluding legal academics.[67] In carrying it out, it is worth taking into account, besides the universal context, also the local one — presenting non-democratic practices, and deficits implicit in liberal democracy using the example of a specific legal culture and public morality. In this way, it will be possible to show the many facets of autocratic legalism.

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[67] M. Stambulski, "Deficyt obywatelskości. Demokracja, edukacja prawnicza i kryzys władzy sędziowskiej," *Państwo i Prawo* 2023, no. 11.

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