ANP Newsletter

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Profanes in the temple

The court is a great, amazing, wonderful place. The temple of law. The roles here are clearly separated and clean. All legal knowledge is concentrated in the court. While a lawyer advisor can always be right because he will never challenge him. He has time to check everything, ask. In court, at least two people assess our position, our view, our knowledge: the judge and our trial opponent. Moreover, in general, a lawyer has to know everything for real, in one second. A lawyer has to reach for the entire resource of his knowledge and choose from it what is necessary at this moment.

The court is, should be, the mirror of all knowledge and, what is more, of legal intelligence.

Personally, as a lawyer, I feel like a student, a poor student of outstanding judges whom I met at the beginning of my legal path. My view of the current judgments is probably why it is so saturated with frustration, so critical because as a trainee I had the unique fortune of hitting outstanding, unique characters. Romuald Gilewicz, Krzysztof Stępiński, Jadwiga Skórzewska, Mirka Wysocka, Teresa Romer, Anatol Derkacz and a few others. The court at that time appeared to the young man as an extraordinary cluster of momentous people and lawyers who had their own clear opinion on each case and listened to Cohen and Wysocki at the same time. I am curious myself and I do not think that I will find a good answer – are these my pesellos idealizations or someone sees this old world of judgments in the same way as I do today.

If I were to say – from the perspective of over 30 years of professional career as an advocate, what the courts lack today, the most I would say is the most commonly general quality, class and authority. I don't need to convince anyone that is intelligent that this is an extremely general view that does not apply to everyone. It concerns a general tendency, I am convinced of it, which is best seen in the Warsaw courts.

No decent person wants to be a supporter of Ziobro. Today, when we about liberal, left-wing or simply decency convictions have become defenders of the independence of the judiciary, it is really difficult to talk about how bad the judgments look. Everyone who has to go to court will find out about it. So perhaps there are reasons why this de lege ferenda discussion should be undertaken.

I write about the courts without reluctance, but with care and faith. A private lawyer will not be valid unless the courts are valid. Several solutions in this regard seem to be absolutely necessary and obvious here. It is worth talking about it today, when their implementation is impossible. Important things come from open thinking, and it's never too early to think.

The court as an agora

If I had the power to change one thing in the courts, I would oblige the courts to respond to the arguments raised by the parties. Probably it is not always possible, probably sometimes the arguments of the parties are so hopelessly stupid that little can be said about them. Nevertheless, today we very often have such a situation in courts – especially in criminal courts, but not necessarily – that judgments and their justifications occur alongside what the parties raise and argue during court proceedings.

The court is a place of something like a discussion, an intellectual dispute. The judgments are in the minds of the judges. Judgments are not an objective reason, but a view of the matter by a certain person, equipped to implement his views into the power of the State apparatus. More than once, not twice, I had to upset my clients who, after the sentence was passed, told me: you see, sir, I was right. No, you were wrong. The

court that day at that time made a view in accord with yours. Because a court is a dispute and a discussion.

The court has power. Power is dangerous to thought and reason. For understanding and truth. Every lawyer who becomes a judge at least once in a while in an arbitration or corporate court knows that passing an award is actually more difficult than writing a justification. Because passing a judgment means having to choose one of the reasons and reject the other, when none of them is obviously "better". Writing a justification is a process for which an intelligent man prepares himself throughout his life, and is able to choose arguments for each thesis. Often, unfortunately, the justification of a judgment consists in completely ignoring the reasons of one of the parties, or in dismissing these reasons in one meaningless sentence.

This is why honestly addressing the position of both sides is the essence of a true, wise judgment. And this real weighing of the parties' arguments in courts – that I miss the most today. And that is why, if I had to change one thing in court procedures – I would oblige the court to refer to the arguments of the parties under pain of setting aside the judgment.

A court is a decision, a court is a courage

What is most ambiguous in the courts in the technical and pragmatic sense is the avoidance of decision making. Courts handle cases as if the endless postponement of hearings and the gathering of evidence would help them deliver their sentence.

Will not help. Judgments are the view of the court.

Subsequent hearings will not change that. Sometimes a judgment may be handed down – especially in commercial cases – at the first hearing. I do not know any case where any court would dare to do so.

Perhaps the problem is systemic. Courts are settled primarily in the instance procedure, by the number of revoked judgments. Those in the second instance are very often not smarter than those in the first instance – that is why they are more conservative and accept only and exclusively the current way of proceeding and passing judgments.

The question – how to break this circle? How do you give the courts the courage to decide, which is ultimately necessary in the end?

The court is the truth

An extremely frustrating phenomenon is the use by courts of completely untrue, even imaginary arguments in their justifications. This is the case in particular in arrest cases in criminal cases and in civil cases. The cited facts often did not take place, the conclusions and associations of the court are based on colloquial and simply untrue ideas.

Such situations in the courts have hardly taken place in the past and should not have occurred under any circumstances. Court – in cases based on probability (and there are more and more such cases in courts due to the length of regular court cases) is not exempt from elementary reliability, from the obligation to tell the truth. The court may, of course, infer as to the mental courses of the parties, but it cannot speculate as to material facts which either happened or did not take place.

The court is too serious institution for that. Writing and telling the truth should be the absolute standard in courts. This is on the surface so obvious that it is sad to talk about it. Unfortunately, attorneys and other attorneys-at-law know very well that this is not a standard. The principle of absolute recourse to the truth should, however, be entered in the decalogue of the judge's commandments.

And here we are proposing this decalogue.