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Justice speaking in its own voice

– building social trust through reasons for judgment

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I. INTRODUCTION

It is a trivial thing to say that the people's loyalty and obedience is an indispensable pillar of any power, as in the long run governing without some kind of recognition from the governed is a Sisyphean task. Nowadays such general acceptance of the state and its institutions, i.e. their legitimacy to exercise power, is no longer derived from the Mandate of Heaven, a leader's charisma, tradition or fear. In the times of what is sometimes described as the legitimacy crisis, people tend to question authorities and do not content themselves with a simple statement that those who run their countries are empowered to do what they do and that their actions are formally legal or just right.[1] Information societies in modern democracies expect that those in power act transparently and explain themselves in a convincing manner of why and how they act. Only if they succeed in satisfying these demands, may they gain the governed's trust and approval, which is the essence of the present day's legitimacy. However, a failure to live up to these expectations may deprive even a lawful and rightful authority of its social support.

Judiciary is no exception to this tendency – a gown, a gavel and a statue of the blindfolded justice no longer suffice to instil fear and respect.[2] However, due to its attachment to tradition, stability and independence from any external influence, judiciary is probably also the last of the three powers to acknowledge the existence of the legitimacy crisis and the resulting challenges. It still steers clear of excessive publicity or PR activity, and judges often avoid direct contact with the media or any public comments on their cases. Moreover, this is not only a matter of individual magistrates' reluctance to be exposed to public attention. Great reticence and circumspection in such contacts, or even their avoidance, are prescribed as a principle in numerous international and domestic ethical guidelines, including the Bangalore Principles of Judicial Conduct and the Judicial Ethics Report drafted by the European Network of Councils for the Judiciary (ENCJ). Such an attitude is supposed to guarantee judicial independence, impartiality and dignity by eliminating any suspicion of bias, public pressure or self-promotion as well as excessive involvement in a debate.[3]

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[1] Steven Van de Walle, "Trust in the Justice System: A Comparative View Across Europe" in *Prison Service Journal* (Issue 183), 24; Ewa Łętowska, "Pozaprocesowe znaczenie uzasadnienia sądowego [Extra-procedural meaning of judicial statements of reasons]" in *Państwo i Prawo* (1997, Issue 5), 8-9;

[2] Van de Walle, 23; Łętowska, 8-9, 13; see also the statistics presented later in the paper;

[3] European Network of Councils for the Judiciary Working Group's Judicial Ethics Report 2009-2010, 6; Bangalore Principles of Judicial Conduct (ECOSOC 2006/23), value 2; Commentary on The Bangalore Principles of Judicial Conduct, The Judicial Integrity Group, March 2007, 66-67; Zbiór zasad etyki zawodowej sędziów [Code of Judicial Ethics] of Krajowa Rada Sądownictwa [National Council for the Judiciary] (Poland, No.16/2003), § 13; Guide to Judicial Conduct of the Judiciary of England and Wales (March 2013), sect. 8.1.1;

As a result, **even though the society satisfies its interest in court proceedings and decisions mainly through the media, the judiciary's role in shaping their message is very limited** – not only by the said self-imposed restrictions, but also by the media's merchandising strategy. **Hence the principal and "default" means by which the courts provide explanation and arguments for their decisions have always been – and still remain – the written and oral reasons for judgment.**[4] Authors of the ENCJ Working Group's Judicial Ethics Report and those of the Commentary on the Bangalore Principles state explicitly that it is generally inappropriate for magistrates to defend their decisions publicly – even faced with a strong public or academic criticism, a judge should therefore speak solely through his or her reasons for judgment.[5] An example of such a clear-cut indication is to be found in the Belgian magistrates' ethical guide, yet a similar conclusion may be also derived from other national guidelines.[6]

Indeed, the statement of reasons for a judgment plays a crucial role in every court proceedings established in a rule-of-law state, regardless of its legal culture. Its fundamental procedural significance is underlined in the jurisprudence of virtually all democratic countries and their organizations.[7] However, the reasons for a judgment are also capable of exerting – and should exert – an important extra-procedural function, i.e. that of **convincing and building confidence in the judiciary and its decisions.**

The aim of the present paper is thus to analyse whether the reasons – be it written or oral – prove nowadays an efficient means of communication between the courts, the parties and the society, i.e. whether they help instil general acceptance of judicial decisions and trust in the judiciary as a whole. We shall also try to establish whether judges make a proper use of this tool and what can be improved to enhance its impact and efficiency and eliminate possible breakdowns in this communication. Our analysis shall be focused mainly on the Polish first instance court's decisions.

II. CONFIDENCE IN THE JUDICIARY - LEGITIMACY CRISIS IN NUMBERS

As it has been indicated, the society expects to be informed about the functioning of the judiciary and evaluates it based on the information it receives. The results of this evaluation vary significantly across Europe. The differences visible on the chart below show

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Guide pour les magistrats of Conseil Supérieur de la Justice (Belgium; D/2012/12847/2), 11-12; Recueil des obligations déontologiques des magistrats of Conseil supérieur de la magistrature (France; 2010), sect. f.7 and f.11;

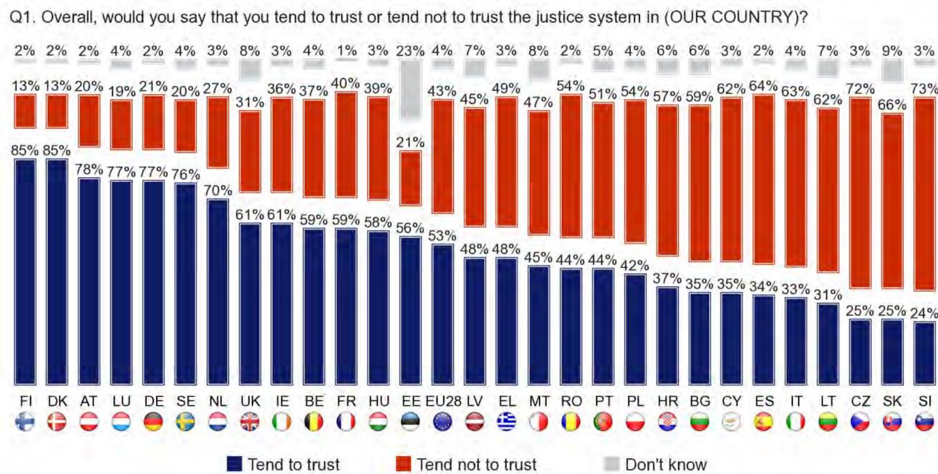
[4] Łętowska, 8-9, 13;

[5] Commentary on The Bangalore Principles of Judicial Conduct, 66-67; ENCJ Working Group Judicial Ethics Report, 6;

[6] Guide Pour Les Magistrats (Belgium), 11-12; Recueil des obligations déontologiques des magistrats (France), sect. f.7 and f.11;

[7] See later in the paper;

that judiciaries in different European countries, all being exposed to similar public appraisal, differ importantly in their ability to gain public confidence – either because of the actual quality of their functioning or because of how they present themselves – or are presented – to the public.[8]

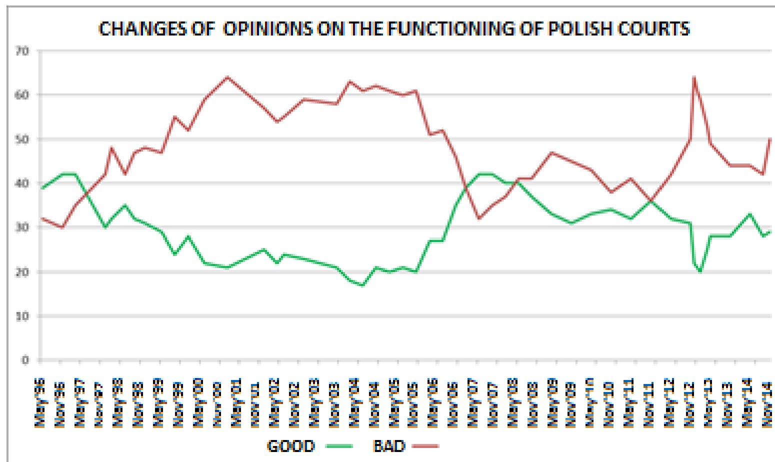


The legitimacy crisis has visibly taken its toll on the Polish judiciary. A 2014 survey provides far less optimistic results than the above Eurobarometer poll, showing that Polish courts are assessed positively by only 28% of the society, ranking far behind the Army (67%), the Police (66%), local governments (62%), the Central Bank (58%) and the Catholic Church (57%). At the same time they occupy the forth position in terms of negative opinions (50%), outstripped only by the traditionally disdained Social Insurance Fund, National Health Fund and the National Assembly (Sejm).[9]

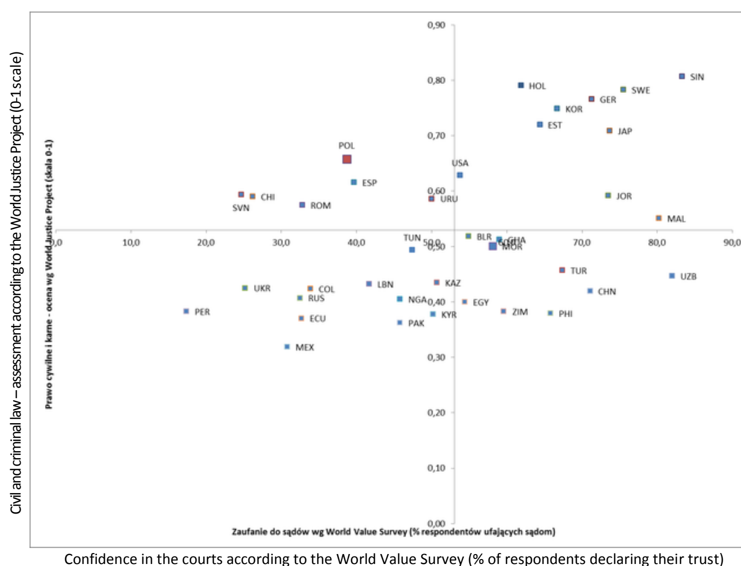
Whether the above is a result of poor functioning or poor communication can be at least partly explained by a more detailed look at the statistics. Obviously, the vast majority of the information which serves as a basis for public opinion is provided by the media.[10] It is a trivial thing to say that their message often happens to be oversimplified, biased and focused on negative and scandalous incidents.[11] The example of Poland well illustrates the mass media's influence on social perception of the judiciary. All the major slumps in its reputation have coincided with widely publicized – real or alleged – failures of the judiciary or its individual representatives – just to mention the sharpest drop in autumn 2012 which was

[8] Flash Eurobarometer 385 – Justice in the EU (November 2013), ec.europa.eu/public_opinion/flash/fl_385_en.pdf, 14;
[9] Komunikat z badań CBOS – Oceny działania instytucji publicznych [CBOS Survey Report – Opinions on public institutions] (No. 36/2014), www.cbos.pl/SPISKOM.POL/2014/K_036_14.PDF;
[10] The media constitute the main source of knowledge about the justice system for over 60-70% of Poles – see: Komunikat z badań CBOS – Oceny działania instytucji publicznych [CBOS Survey Report – Law abiding and functioning of the justice system in Poland] (No. BS/5/2013), www.cbos.pl/SPISKOM.POL/2013/K_005_13.PDF; Van de Walle, 1.
[11] Włodzimierz Chróścik, „Wymiar sprawiedliwości jak niedobry news [Justice System as bad news]", http://prawo.rp.pl/artykul/1082791.html;

a repercussion of scandals surrounding the fraudulent bankruptcy of Amber Gold – a big shadow-banking business.[12]



The discrepancy between the actual quality of the judiciary and popular beliefs about it is made even more visible by the comparison of two pieces of global research carried out by the World Justice Project and the World Value Survey. The former was supposed to measure the objective performance of justice systems across the globe and the latter – the level of trust they enjoy.[13]



Civil and criminal law – assessment according to the World Justice Project (0-1 scale)

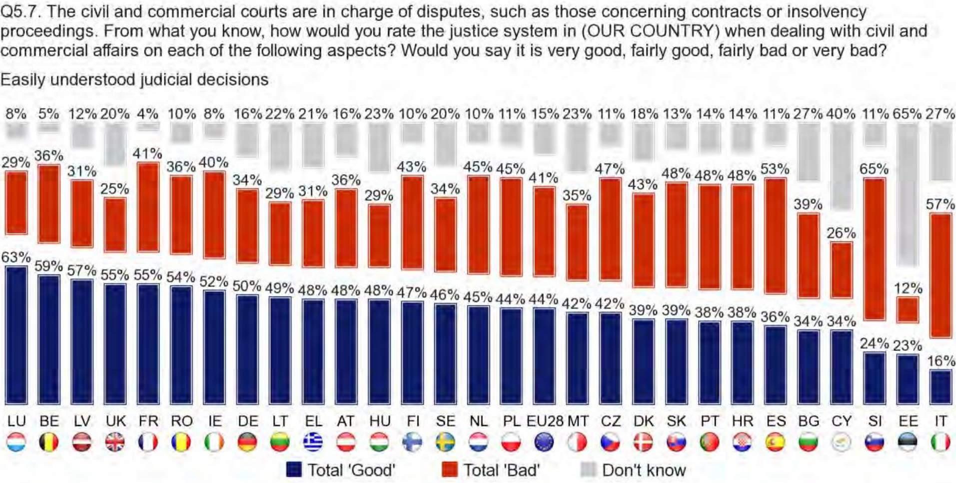
Confidence in the courts according to the World Value Survey (% of respondents declaring their trust)

The bottom left quarter indicates countries such as Russia, Ukraine, Mexico, Nigeria or Pakistan, where the functioning of the justice system leaves a lot to be desired in terms of objective standards – and such is the general opinion about it. The ideal location is obviously

[12] CBOS Survey Report No. BS/5/2013, see note 9;
[13] The World Justice Project – Rule of Law Index 2014, www.worldjusticeproject.org/sites/default/files/files/wjp_rule_of_law_index_2014_report.pdf; World Values Survey Wave 6 (2010-2012), www.worldvaluessurvey.org/WVSDocumentationWV6.jsp (WV6_Results_v_2014_04_28.pdf); Marek Solon-Lipiński, „Sąd nisko oceniony [The Court Assessed Poorly]", http://temidalight.natemat.pl/119033,sad-nisko-oceniony;

the upper right quarter, where the positive objective evaluation of the judiciary corresponds to its high reputation, outstanding examples being Singapore, Sweden, Germany or the Netherlands. More striking, however, is the upper left quarter of the chart. In countries like Poland, Spain, Romania and Slovenia the judiciary performs relatively well, and yet fails to attract public confidence, which indicates possible communication problems. On the other hand, the opposite bottom right quarter (China, Philippines, Uzbekistan) contains countries, where democratic information societies have not fully developed and where the legitimacy crisis, as defined above, is yet (if ever) to come. As a result, poor standards of the judicial systems do not invoke criticism and do not undermine their position, which explains their positive assessment (rather than extraordinary communication techniques).

Results of yet another survey indicate the existence of a relationship between the level of confidence in the judiciary and its performance in terms of communication – especially the direct one carried out through judicial decisions and, as we may assume, the reasons. In only eight out of 28 EU countries more than 50% of people believe that decisions issued by civil and commercial courts can be easily understood, with Luxembourg (63%), Belgium (59%) and Latvia (57%) topping the list and Poland located roughly in the middle at 44%. The lowest ranking countries include Italy (16%), Estonia (23%) and Slovenia (24%), who place themselves far below the EU average (44%).[14] The opinions on the understandability of criminal courts' decisions are slightly better with 13 countries having at least 50% of positive answers and the EU average at 46%.[15] The same countries occupy roughly similar positions in both rankings. **It is worth noting that the results of understandability survey generally correspond closely to those of the confidence measuring survey** – a notable exception being Estonia, where this relation seems loose.



[14] Flash Eurobarometer 385 – Justice in the EU, 36;
[15] Flash Eurobarometer 385 – Justice in the EU, 50;

Obviously one should not imagine that the problem of low confidence in the judiciary can be solved solely through improved communication. Suffice it to say that the most criticised aspect of the Polish justice system is the excessive duration of proceedings, a shortcoming confirmed by numerous ECHR rulings, which can hardly be amended by any communicational measures, including the reasons (which is not to say that there is no relation between the two issues, which we shall discuss later in the paper).[16] Nevertheless, the above considerations point to the fact that **building confidence in the judiciary through improved communication remains an important challenge in many countries and the reasons for a judgment, being a principal tool at a judge's disposal, play a crucial role in this task.**

III. FUNCTIONS AND ADDRESSEES OF THE REASONS

Various actual and potential roles of the reasons can be most generally divided into two categories: internal and external.[17] The former encompasses all the functions which the statement of reasons plays in court proceedings. We have already pointed to the evident fact that providing reasons for a judgment is an act of paramount procedural importance in a due process of law, to the extent that in some countries this duty is explicitly enshrined in the constitution (article 149 of the Belgian Constitution or article 93 sect. 3 of the Greek Constitution). In many others, such as France or Poland, it is attributed a constitutional value by the jurisprudence.[18]

The crucial procedural role of the statement of reasons has been discussed in a number of ECHR rulings, where the right to a reasoned decision under the European Convention on Human Rights is derived from its article 6 § 1, which guarantees a fair trial. Implementation of this right may differ between judicial systems of the contracting states, as they enjoy considerable freedom in choosing appropriate means to comply with the Convention, but the ECHR case-law boils down to a conclusion that "the national courts must indicate with sufficient clarity the grounds on which they based their decision"[19].

The procedural role of the reasons involves a number of different aspects. First of all, the act of providing reasons "concentrates the mind" of a judge and inspires self-control by obliging him or her to thoroughly analyze facts and arguments put forward by the parties, thus assuring a correct decision – an observation shared by the England and Wales Court of

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[16] CBOS Survey Report No. BS/5/2013, see note 9;
[17] Łętowska, 8 and 11.
[18] Decision of 3rd November 1977 of the French Constitutional Council, n° 77-101; ruling of 16 January 2006 of the Polish Constitutional Court, SK 30/05;
[19] Tatishvili v. Russia, Appl. No. 1509/02, judgment of 20 January 2005 No. 1509/02, ECHR 2007-III, § 33; Hadjianastassiou v. Greece, Appl. No. 12945/87, judgment of 16 December 1992, ECHR Series A No. 252, § 33; Suominen v. Finland, Appl. No. 37801/97, judgment of 1 July 2003, ECHR, § 36;

Appeal in *Flannery v. Halifax Estate Agencies Ltd* and in a number of rulings of the Polish Constitutional Court.[20] This way the statement of reasons serves yet another vital purpose pointed in one of the opinions issued by the Consultative Council of European Judges (CCJE) – it constitutes a safeguard against arbitrariness or partiality.[21] Finally, as it follows from national and ECHR case-law, the reasons enable the parties, especially the losing party, to decide whether or not to bring an appeal against a decision and, subsequently, allow its proper review by an appellate body, which is often seen as the core element of the procedural function.[22]

The less tangible "external" function of the reasons, which is of particular interest for the purpose of this paper, refers to their social and psychological impact, i.e. to how they can build legitimacy and trust in the judiciary, both in the parties and in the general public. This role is also noticed by the judiciary itself. While a court decision is *per se* an act of administering justice, it is not complete unless its grounds are apparent and acceptable to the parties and to the society. In other words, justice must not only be done but be seen to be done – and such is the role of the reasons, as it was aptly stated in *English v. Emery Reimbold* by the England and Wales Court of Appeal.[23] Also the ECHR stresses that giving reasons for decisions fulfils the obligation of every authority to justify its activities and to demonstrate to the parties that they have been heard.[24] Moreover, reasoning a decision is the only way to ensure that the administration of justice can be publicly scrutinized.[25] This way **giving proper reasons for a decision contributes to both individual and general acceptance of a specific decision and of the entire justice system, legitimizing its whole activity**.[26]

Obviously both functions overlap to a significant extent and are carried out in the very same way. They are also interdependent – the external function cannot be fully accomplished if the internal one fails. As we have demonstrated in the *statistical* part of this paper,

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[20] Decisions of 16 January 2006, SK 30/05 and of 11 April 2005, SK 48/04; England and Wales Court of Appeal, Flannery & Anor v Halifax Estate Agencies Ltd [1999] EWCA Civ 811, 18 February 1999;

[21] Cour de Cassation (France), Rapport Annuel 2010 – L'obligation de se justifier ou d'expliquer – L'obligation de motivation,
www.courdecassation.fr/publications_26/rapport_annuel_36/rapport_2010_3866/etude_droit_3872/e_droit_3873/obligation_se_justifier_expliquer_3875/obligation_motivation_19404.html#_ftnref4;
Opinion No. 11 (2008) of the Consultative Council of European Judges (CCJE) on the quality of judicial decisions, Strasbourg, 18 December 2008, point 35,
https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE(2008)5&Language=lanEnglish&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864;

[22] Suominen v. Finland § 37; Hadjianastassiou v. Greece, § 33; Hirvisaari v. Finland, App No. 49684/99, judgement of 27 September 2001, § 30; England and Wales Court of Appeal, Flannery & Anor v. Halifax Estate Agencies Ltd;

[23] England and Wales Court of Appeal, English v Emery Reimbold & Strick Ltd. [2002] EWCA Civ 605, 30 April, 2002;

[24] Suominen v. Finland, § 36-37; Taxquet v. Belgium ECHR, App No. 926/05, judgment of 16 November 2010, § 63;

[25] Suominen v. Finland, § 37-38; Hirvisaari v. Finland, § 30; Tatishvili v. Russia, § 58;

[26] Opinion No. 11 (2008) of CCJE, 35; see also decisions cited in note 20;

developing social trust in the judiciary is normally unfeasible without its proper functioning, with the few non-European exceptions rather proving the rule. On the other hand, the research presented also shows that sound functioning itself is no guarantee of trust, and building legitimacy also requires efficient communication with the parties and the general public. However, the two functions are not just complementary. Paradoxically, they can also collide in a number of ways, creating serious dilemmas, which we shall discuss in this paper.

The statement of reasons is an act of communication which serves a variety of ends and thus involves diverse addressees. They may have different knowledge of law and of the facts of a case, use different language and thus have completely different expectations. Certain scholars propose to divide them into the intended addressees, at whom the judge directs his or her message, and actual recipients, whom the reasons reach regardless of the author's intent.[27] However, an ideal situation when these two categories are identical is not always the case.

The choice and priority of addressees corresponds closely to the functions that a judge expects to fulfil and differs importantly between spoken and written reasons. **This is also the point where the two functions are likely to go apart and may be on a collision course.**

Concentration on purely procedural functions, which is usually typical of written statements, usually means that the primary readers a judge has in mind are insiders of the justice system – members of an appellate body and the parties' professional lawyers (rather than the parties themselves).[28] These are the persons that usually exert a direct influence on the proceedings, e.g. decide on bringing an appeal and upholding or cancelling a decision. Such a selection of addressees implicates specific style and possibly concentration on different issues. As a result, it often leaves no room for the laypersons participating in the procedure, not to mention other possible recipients whose existence the judge may ignore, such as the general public outside the courtroom.

The predominant *target group* of the external function are outsiders to the justice system – mostly laypersons, be it parties, accidental observers of the proceedings or other members of the general public. This function may often be carried out more easily through oral reasons. What makes them different from the written ones is that their actual recipients are usually present in the courtroom, which has two important consequences. First of all,

[27] Iwona Rzucidło-Grochowska, „Adresaci uzasadnienia sądowego a jego treść (przykład sądownictwa administracyjnego) [Addressees of the judicial statement of reasons and its content (example of administrative courts)]" in *Jurysprudencja* (Issue 3/2014), 146;

[28] Written reasons provided by higher instance or supreme courts often involve particular categories of recipients such as legal practitioners or scholars, yet they exceed the scope of this paper;

the judge can easily identify them and has an opportunity to adapt his or her statement to the actual listeners and even respond to a certain extent to their reactions. Secondly, unless the spoken reasons are officially recorded and transmitted to an upper instance court with an eventual appeal, usually no appellate judge will ever get to hear them. Thus the strictly procedural function of the spoken reasons may be significantly reduced, enabling more direct communication with laypersons in the courtroom and allowing the judge to focus on gaining their acceptance of his or her decision. The importance of convincing direct participants or observers of the proceedings in building general social trust in the judiciary cannot be underestimated. Such a local success may contribute to a global change, as their first-hand accounts and opinions are spread by word of mouth or via the Internet.

Nevertheless, the most powerful means of spreading the message of the reasons are obviously the media. They do not act, however, as a mere conveyor belt, as they constitute addressees in themselves – journalists interpret, filter, assess, cut or even manipulate the content they receive before they share it with the public. The scope of their intervention depends on the type of media – TV, radio, press or Internet, as well as on their target group. Spoken reasons are by far most attractive for them as they are provided right after the decision is issued, when the news is still *hot*. Their draw is even stronger in countries such as Poland, where it is allowed to record and broadcast them. The presence of the media in the courtroom is thus both a particular opportunity and a particular challenge for the judge in terms of building social trust – his or her message has to be adapted not only to the particular type or types of media but also to a virtually unlimited circle of actual recipients, most of whom have little or no notion not just about the law, but also about the facts of the case.

Nonetheless, treating the above distribution of functions and addressees between the two forms of reasons as clear-cut would be overly simplistic. First of all, it may often be inevitable to combine both functions in the spoken reasons. This happens whenever not only laypersons but also attorneys are present in the courtroom when the reasons are provided. This is also the case if oral reasons are recorded and submitted to the parties and to an appellate body instead of a written statement, as it may occur in the Polish civil procedure.[29] Secondly, it is also desirable to include the external function in written reasons. In no way are they reserved for professional lawyers and especially the parties with no attorney at their disposal have every right to rely on such a statement and should be able to comprehend it. Moreover, the media's and general public's curiosity in complex cases may not be satiated by the usually

[29] Article 328 § 1[1] of the Polish Code of Civil Procedure;

brief and simplified spoken reasons. Also the positive practice of publishing lower instance courts' written reasons on the Internet makes them accessible to a large group of readers of different backgrounds.

IV. THE EXTERNAL FUNCTION AND JUDICIAL ETHICS

As it follows from the above, a judge, when giving reasons for his or her decisions in whatever form, regularly faces the dilemma of whom to speak to and, in consequence, how and what to say. In many cases it may be hardly possible to address attorneys, the appellate body, the parties, the media and the general public at the same time and with equal attention, keeping the reasons at a sensible length and preserving their clarity. **Eventually, none of the two vital functions may be completely abandoned, but usually one of them has to prevail.**

Even though both of them are of paramount importance, observance of the procedural function of the reasons often seems to produce more tangible and immediate effects, at least for a Polish judge – it directly influences the appellate court's decision on upholding or overruling the first instance judgment and thus the course of the judge's career. In a way, it is also an easier option, as communication with professional lawyers requires no intralingual translation from the legalese and thus no extra effort on the judge's part.

However, a somewhat different clue to this dilemma may be found in a number of ethical guidelines for magistrates. The Magna Carta of Judges states that judicial decisions, together with their reasons, shall be drafted in an accessible, simple and clear language.[30] Such is the stance presented in an opinion issued by the CCJE, according to which the statement of reasons should, among others, make the decision easier for the litigants to understand and be accepted as well as enable the society to understand the functioning of the judicial system – it should therefore be consistent, clear and unambiguous.[31] The ENCJ Judicial Ethics Report stresses that good communication should be present in both written and oral judgments and reasons, which are supposed to be intelligible so that everyone involved can understand the logic on which the judge based his or her decision. The reasons also constitute one of the means by which the judge plays his or her educational role in support of the law and gives the public information on the functioning of justice.[32] Similar appeals for intelligibility of the reasons for all the parties involved, including laypersons, can also be

[30] Magna Carta of Judges – Consultative Council of European Judges (CCJE), Strasbourg, 17 November 2010 (2010)3, pt. 16;
[31] Opinion No. 11 (2008) of CCJE, 35-36;
[32] ENCJ Working Group Judicial Ethics Report, 16;

found in a number of national ethical guidelines, including those concerning Poland, France, Belgium or Norway.[33]

A clear answer to the question of how and whom to speak to through the reasons in the first place has been given by the Polish Supreme Court in its judgment of 4th November 2003 (V KK 74/03). The Court has pointed that the goal of the reasons is not just to convince the appellate court that the first instance's decision is correct – this body is able to assess such correctness based on the evidence and records gathered in the files. Therefore, **the reasons are first of all supposed to convince the parties and the media,** as apart from their procedural function the reasons should also build the judiciary's authority. How this is and should be put to practice based on the example of Poland shall be the subject of our further considerations.

V. MODELS OF REASONING

The method of reasoning a decision is primarily rooted in the culture of law. Traditionally, a common law decision is identified with an argumentative, substantial and personalised style of reasoning, while its syllogistic, legalistic and bureaucratic counterpart is said to dominate in the civil law system[34]. In the latter, a decision is seen as the only logical possibility of applying the law to the facts given. On the other hand, the argumentative manner of reasoning displays a range of alternatives and picks the one that has the strongest arguments. In this model a trial embodies a dialogue between the judge and counsels, which is then transferred to the statement of reasons. By justifying his or her decision the judge explains differences between cases, specifies rules and makes the law, which is the most significant distinction between the common and the civil law reasoning. Undoubtedly, the former involves a more extensive form, where the judge relies on arguments of social, economical or ethical nature, while legalistic attitude is closely attached to statutory law.[35] Finally, a personalised decision is linked to a judge's name, and the bureaucratic one constitutes an anonymous act of public authority.

However, the clear-cut distinction between civil and common law reasoning no longer reflects the reality. Faced with the present-day pluralistic civil societies, some of the civil law

[33] Code of Judicial Ethics (Poland), § 11 pt 1; Guide pour les magistrats (Belgium), 23; Recueil des obligations déontologiques des magistrats (France), sect. e.15; Ethical principles for Norwegian judges – Norwegian Association of Judges, 1st October 2010, pt 7;

[34] M. Taruffo, R. Summers, "Interpretation and Comparative Analysis" in N. MacCormick, R. Summers, *Interpreting Statues*, Ashgate-Darmouth 1991;

[35] This division may correspond to the doctrines of judicial activism and judicial restraint. The former postulates to correct the legislator's errors by eliminating their obviously unjust practical consequences, while the latter calls for strict adherence to the law;

judiciaries have been forced to take up a dialogue with their addressees, adopting a more argumentative style of reasoning. Some countries, like Germany, followed this path, while others, such as France, stick to the old continental style.[36] Thus, the continental model may be divided into two types – French and German. The former features an uncritical quotation of law provisions and any uncertainty as to the law or facts tends to be hidden under a firm and short argumentation. This kind of reasoning avoids polemics or referring to any divergent views. The German approach, in turn, involves an erudite dispute over a case, displaying various standpoints and interpretation options.

The style of reasoning adopted by the Polish judiciary is located somewhere between the French and the German styles. In simple cases lower courts adopt a rather syllogistic model, so their chain of reasoning is usually concealed. Meanwhile, a more argumentative model is adopted by higher courts in more complex cases.

In order to properly comprehend the practice and problems of giving reasons in Poland it is important to know that, after pronouncing the judgment, the presiding judge states orally the most important reasons behind it. A written statement of reasons is issued at the request of a party which is submitted in a large number of cases. There are no significant differences between Polish criminal and civil procedures as far as the structure of the statement of reasons is concerned. Both the written and spoken statements should specify the grounds for judgment, namely the facts proven, the evidence on which the court relied, reasons for which the court rejected other evidence and the legal basis for the judgment, including reference to relevant regulations.

VI. CUTTING THE LONG STORY SHORT

A typical Polish statement of reasons certainly differs from the French one in its length. The example is set by the top – a perfect instance of the French conciseness is the decision of the Constitutional Council of 3 November 1977 (No. 77-101 L), which explains the constitutional significance of giving reasons on less than one page. On the other hand, despite its polemical nature, the German model still seems to display concrete argumentation for a case without unnecessary theoretical considerations.

Compared to these models, a typical Polish written reasoning is peculiarly excessive in length, regardless of its syllogistic or argumentative form, and a general unwritten rule seems to be *the longer, the better*. The size of written reasons frequently results from their theoretical overload, which is often superfluous or unrelated to the case. A good common example are long deliberations

[36] Łętowska, 3-5;

on whether a car can be qualified as a motor vehicle under the Criminal Code, which often appear in reasons for judgements in drunk driving cases. Another instance are vast treatises on all possible ways of property acquisition in cases concerning solely usucaption.

In the case of Poland, the example is also set by the top – it was the Supreme Court that started the trend of writing voluminous statements of reasons, often resembling academic dissertations and counting tens of pages. Before the WWII, the reasons stated by this Court had been brief and able to explicate complex issues on a few pages, yet in the 1990s this tendency was reversed. The Supreme Court's style has been subsequently adopted by the courts of appeal and, eventually, by the first instance courts.[37]

The postulate of a more argumentative form of reasoning obviously cannot be interpreted as requiring an academic lecture, but indicating facts and arguments relevant to a specific case. Therefore, judges should not be afraid of giving brief reasons, whenever this is sufficient. As it follows from the ECHR case law, the article 6 of the Convention is not infringed as long as the reasons address the issues submitted to a court's jurisdiction which are fundamental to the outcome of the case.[38] The ECHR goes further and claims that the obligation to give reasons cannot be understood as requiring a detailed answer to every argument presented to the court during the trial.[39] The ECHR also accepts a practice, whereby courts implicitly reject a party's submission, as long as the reasons behind it can be inferred from the context of the case and the decision itself.[40]

Another common Polish example of over-zeal in giving reasons consists in discussing all of the legal and factual problems of a case even though it is dismissed, e.g. because the statute of limitations has expired. This is often done *just in case* the appellate court should have a different view as to the limitation, making it again the principal addressee of the reasons.

It must be noted, however, that overly long and ambiguous reasons, which do not carry any important content for their readers, are not solely a Polish problem. In a meaningfully entitled article "Justices are long on words but short on guidance" NYT complains about the ever growing volume of US judicial decisions and their decreasing intelligibility, pointing that their median length

[37] Wiesław Kozielewicz, „Wystarczy arkusz uzasadnienia [A page of reasons should suffice]", *Rzeczpospolita* 2014, No. 65, http://archiwum.rp.pl/artykul/1236326-Wystarczy-arkusz-uzasadnienia.html;
[38] Helle v. Finland, App. No. 20772/92, judgment of 19 December 1997, § 60; Taxquet v. Belgium, § 63; García Ruiz v. Spain, Appl. No. 30544/96, judgment of 21 January 1999, § 29; Van de Hurk v. Netherlands, Appl. No. 16034/90, judgement of 19 April 1994, Series A No. 288, § 61;
[39] Van de Hurk v. Netherlands, § 61; Hiro Balani v. Spain, Appl. No. 18064/91, judgement of 9 December 1994, § 27; Hirvisaari v. Finland, § 29; Suominen v. Finland, § 34; Ruiz Torija v. Spain, Appl. No. 18390/91, judgment of 9 December 1994, § 29; Helle v. Finland, § 55; Tatishvili v. Russia, § 58;
[40] Hiro Balani v. Spain, § 28; Ruiz Torija vs. Spain, § 30;

was around 2,000 words in the 1950s, while nowadays it is at 4,751, with some of the list-topping decisions being equal or longer than "The Great Gatsby".[41]

Lengthy written statements of reasons overflowing with theoretical considerations are simply counterproductive in terms of their both functions – they often fail to grasp the core of the problem in a case and explain it to the readers. They are also unintelligible and confusing even for lawyers, let alone laypersons, which weakens the authority of the judiciary and deprives them of any trust-building role – it is probably true that as the length of the reasons increases, the number of its readers drops. Thus the objectives set in the previous part of this paper require a proper balance between conciseness and the proper explanation of a decision, bearing in mind that European countries, where reasons are kept short, frequently enjoy a much higher level of confidence in their judiciaries than Poland.

VII. COPY & PASTE

There is an unquestionable connection between the extensive length of judicial decisions and the computerization of Polish courts, which, among others, introduced the copy paste function. This tool, relied upon heavily by judges at all level of courts, certainly increases productivity of their work, at the same time posing serious risks. First of all, it may result in pasting completely erroneous data or fragments from other reasonings, which, apart from constituting a serious infringement of ethics, may convince the readers that the judge had no idea about the facts of the case.[42] There is also a strong temptation to reuse extensive passages from previous reasonings as well as from academic papers and higher courts' decisions. These may often include content completely irrelevant to a given case, inflating the length of the reasoning. This may explain the shortcoming of numerous Polish decisions concerning detention on remand pointed to by the Council of Europe – in spite of their length, they fail to address concrete circumstances of a given case as they are full of general clichéd phrases and quotes from the Supreme Court rulings.[43] A particularly negative instance of copy-pasting may be observed in certain Polish criminal cases, where the judge's factual findings are largely copied from the indictment, which may cast grave doubt on his or her independence and impartiality. Over-reliance on quotes from higher courts' decisions or academic works may also suggest that a judge evades the responsibility for his or her decision

[41] Adam Liptak, „Justices Are Long on Words but Short on Guidance" in *New York Times,* 17 November 2010, http://www.nytimes.com/2010/11/18/us/18rulings.html?_r=0;

[42] Adam Bodnar, „Oburzony [The Outraged]", in *Na Wokandzie*, 2012, No. 1(11), 55;

[43] Interim Resolution of the Committee of Ministers of the Council of Europe of 6 June 2007 CM/ResDH(2007)75 concerning the judgments of the European Court of Human Rights in 44 cases against Poland relating to the excessive length of detention on remand;

– a statement which is in fact a patchwork of copied passages can hardly be perceived by its readers as explaining a decision of an independent judge.

VIII. LANGUAGE MATTERS

As we have already pointed, in order for the reasonings to reach their addressees and carry out their external function, they need to be communicated in a proper, i.e. intelligible and plain language, a recommendation put forward in numerous ethical guidelines.

The academic style of reasonings inspired by the Supreme Court involves not only their length but also their wording – many of this Court's justices are law professors without experience of sitting in lower courts, who do not necessarily realize the importance of direct communication with laypersons. Also the aforementioned practice of inserting extensive fragments of academic papers into the reasonings contributes to the quantity of legalese they contain. We have already mentioned the reasons why sticking to such a register may be tempting for a judge. Obviously, it is also inevitable to use certain legal terms and expressions in, what is after all, a legal discourse. A certain degree of formality is also necessary to make the judge's utterances sufficiently solemn and serious. However, overly formal and even pompous reasonings, which are not uncommon in Polish courts, are simply incomprehensible for any laypersons to whom the decision may appear arbitrary and unfounded.[44] The very same effect may occur whenever a judge, in order to make reasonings shorter, uses only article numbers and abbreviations for the names of statutes instead of giving their full content and titles. Secondly, bombastic reasonings are likely to create the impression that the judge is out of touch with real life and normal people. They may even seem ridiculous, especially when portentous words are used to describe trivial factual findings. Hiding behind unintelligible terms and article numbers may also be perceived not as a display of authority, but that of weakness and being afraid to speak one's mind. Finally, as we have already stated, the excess use of legalese is in no way necessary for an upper court or attorneys to comprehend the reasons and assess the decision. These shortcomings are obviously devastating for the image of the whole judiciary in the society, making it appear as locked in an ivory tower and mechanically applying provisions rather than administering justice.

The above problems are especially apparent in written reasonings, which is a result of their concentration on the procedural function.[45] They do also appear, albeit to a lesser degree,

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[44] Karol Pachnik, „Język polski (język prawny, język prawniczy, język prawa) a uzasadnianie orzeczeń [Polish language (juridical language, legal language, language of law) used in the statements of reasons]" in *Kwartalnik Krajowej Szkoły Sądownictwa i Prokuratury*, No. 1 (7)/2013, 21-22;

[45] Łętowska, 11;

in spoken reasonings. The chance to reach a wide range of addressees that they offer may thus be turned into a *weapon of mass destruction*, spreading the negative image of the judiciary in the general public. This phenomenon may be deepened by the new solution applied in the Polish civil procedure, i.e. a possibility of replacing the written reasonings with a recording of the spoken ones. Such a move will certainly accelerate the proceedings, yet it may also mean that there will be no way of providing reasons reserved for the laypersons, and that the internal function will dominate also in the oral reasoning.

An apt illustration of the above communication problems is an urban legend passed around in Polish courts, which has it that a plaintiff, after having listened to extensive oral reasonings, asked the judge: *OK, but have I actually won or lost?*

On the other hand, an outstanding example of adapting the language and the content of the oral reasons to the audience and its reactions is the murder case of Jerzy Popiełuszko, a dissident Catholic priest killed by the communist secret police. The defendants accused of instigating the crime were acquitted due to insufficient evidence, which caused an uproar in the courtroom. Responding to the public's reaction, the judge decided to explain in simple terms the elementary rules of criminal procedure, in particular the presumption of innocence and the burden of proof, by which he reached, if not an acceptance, then certainly an understanding of his judgment.[46]

Finally, it goes without saying that the reasons must be free of any insulting remarks and should be formulated in a neutral and professional manner without excessively displaying the judge's emotions, which could undermine his or her impartiality.[47] Failure to meet these standards is also punishable by disciplinary measures. This does not mean, however, that it is prohibited to express criticism or even condemnation of certain facts and behaviours (as well as appraisal of others). Once again, a perfectly neutral machine-like judge, even presenting flawless legal argumentation, can hardly appeal to his or her addressees, particularly laypersons who often expect to *call a spade a spade.* Moreover, convincing them obviously requires using some rhetorical devices. Therefore, certain subjective remarks should not be considered as unacceptable. For instance, calling a defendant an alcoholic in spoken reasons is not a misconduct if such a fact follows from the evidence and is relevant for the decision.[48] However, doubts arise as to the precise limits of such rhetoric.

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[46] Łętowska, 10.
[47] ENCJ Working Group Judicial Ethics Report, 14; Opinion No. 11 (2008) of CCJE, pt 38; Recueil des obligations déontologiques des magistrats (France), sect. e. 2;
[48] Resolution of the Supreme Court of Poland of 5 June 2011 r., SNO 26/12;

This issue has been widely discussed in Poland on the occasion of a high-profile case of a renowned cardiologist accused of bribery. In the spoken reasons judge Igor Tuleya criticized methods used by the investigators (overnight witness interrogations or provoked bribes) comparing them to those adopted in communist Poland by the Stalinist secret police. This statement generated outrage among many people, who argued that the judge violated ethical standards as his arguments were exaggerated and went beyond the need of effective reasoning. On the other hand, especially law practitioners maintained that judge Tuleya's statement was based on the evidence and on his previous judicial experience (he had presided over trials of Stalinist criminals). He thus presented his oral reasons in a direct and understandable way, rightfully condemning the abuses of state officials.

IX. NON-VERBAL COMMUNICATION

Issuing a written statement of reasons is perceived by Polish judges as one of the most time-consuming and burdensome tasks. It is not a secret that sometimes the perspective of drawing them up is in itself a reason a judge delays handing down the judgment, even though the case is ready to be decided.

A good opportunity to avoid it are the oral reasons presented right after a decision has been pronounced. Whenever the judge succeeds in convincing the parties that the judgment is right, they are likely to be dissuaded from submitting a request for a written statement. Regrettably, this potential is still underestimated and oral reasonings are often perceived as a mere formal necessity. Their advantage over written reasoning results not just from the fact that they come first – as we have pointed, a judge in the courtroom is also capable of identifying his or her addressees and adjusting the content and style of his or her utterances. Moreover, the message of such reasonings can be enhanced with nonverbal communication, particularly body language, paralinguistic aspects of speech, emotions and situational context of a courtroom.

To support this conclusion let us consider three examples. Firstly, imagine a judge pronouncing reasons for his or her judgement, who wears his or her gown sloppily, crumpled or unbuttoned, speaks quickly and indistinctly, stares at the bench or fidgets. Then visualise another judge who addresses the parties in a raised and menacing voice, frowns and adopts a closed posture. Finally, compare the two with a judge who sits in a straight position, conveys the reasons with a calm, far-reaching and restrained voice, maintaining eye contact with the parties and the public. Undeniably, the latter's attitude has the greatest power of persuasion, which contributes to the increase of trust and authority of the court.

It is important to remember that discrepancies between verbal and nonverbal communication result in a mixed message being conveyed to the recipients. In such a case nonverbal communication, which is said to represent two-thirds of all communication, usually prevails.[49] If we also consider that it appeals directly to one's emotions and sense of trust, its meaning for the success or failure of the external function appears paramount. Therefore, it is crucial to keep the two levels of communication consistent, which requires that a judge should be conscious of his or her body language and able to control it. This is an ability judges often lack and underestimate.

One of the key elements of such control concern face muscles. While it is not recommended to express too much emotions in this manner, especially negative ones, a common mistake of judges is getting rid of any facial expression and wearing a face mask, which often accompanies the abundance of incomprehensible legalese and adds to the ivory tower effect.

Also, the eye contact is an essential regulator of interpersonal communication – its avoidance can seriously undermine the message and authority of a judge, but excessive duration should be avoided as well. Studies suggest that it has a positive impact on the retention and recall of information[50]. Therefore findings encourage judges to search for eye contact in order to explain and coax to their argumentation.

Perhaps the most visible and meaningful element of a judge's body language, especially when shown on TV, is the body posture – a judge sitting bolt upright may be again seen as overly formal and stressed. On the other hand, a frequent image in Polish courtrooms is a judge leaning on his or her hand, with the chain and eagle (the presiding judge's badge of office) dangling loosely from his or her neck, quite obviously suggesting a disinterest in what he or she is saying to the audience. However, excessive use of gestures is not desired as well, as it does not comply with the preferred model of restrained communication.

Also paralinguistic aspects of speech such as voice pitch, loudness and rate do matter – reciting oral motives in a monotonous cadence adds to the above impression of boredom, stiffness and detachment from the audience.

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[49] K. Hogan, R. Stubbs, *Can't get Through 8 Barriers to Communication,* (Grenta, LA: Pelican Publishing Company 2003);
[50] C. Fullwood, G. Doherty-Sneddon, "Effect of gazing at the camera during a video link on recall" in *Applied Ergonomics March 2006 vol.* 37 (2), 167–75; K. Mayer, "Fundamentals of surgical research course: research presentations" in *J. Surg. Res.* 128 (2), 174–7; C.A. Estrada, S.R. Patel, G. Talente, S. Kraemer, "The 10-minute oral presentation: what should I focus on?" in *Am. J. Med. Sci.* 329 (6), 306–9;

X. THE ROLE OF JUDICIAL CLERKS

In 2001 judicial clerks were introduced to Polish courts. Their fundamental task is to prepare drafts of written statements of reasons for judges. Their help is obviously of paramount importance, yet it also has a side effect – the clerks' style is one of the important factors behind the increasing length of written reasons. It is so because the clerks, usually right after a law school, have a tendency to describe in a detailed way issues obvious to experienced lawyers. They lack the ability to omit unnecessary details or grasp the key issues of the case and thus have a strong need to elaborate on almost its every aspect, which has been also observed by the US Supreme Court justices.[51]

Furthermore, the clerks' contribution to drafting reasons may involve certain ethical dilemmas – it is not uncommon that they are given the files of the case including an already issued decision, without being told what arguments the judge had in mind. Such a statement of reasons reflects a clerk's rather than a judge's thoughts. This may have a detrimental effect on the parties' trust in the judiciary, as the oral reasons pronounced by a judge directly after issuing a judgment may differ importantly from the written statement.[52] Such a situation raises doubts as to the actual author of the decision and as to whether the case had been thoroughly analysed before being decided.

XI. CONCLUDING REMARKS

The above considerations show that communication with the society in general and with its individual representatives in the courtroom is of paramount importance for building confidence in the judiciary. Providing reasons for judicial decisions constitutes basic means of this communication and, when used wisely, may prove invaluable. However, a wrong approach to the duty of reasoning may produce – both directly and indirectly – detrimental effects.

Overly long written statements of reasons are not only unintelligible – they are also extremely time-consuming and become the main task in a judge's work, thus delaying his or her other duties, including issuing decisions. This adds to the gravest problem of the Polish judiciary – the excessive duration of proceedings, a stain on its image, which can hardly be removed by any communicational measures.[53] As a consequence, providing lengthy reasons

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[51] Interviews with US Supreme Court Justices John Paul Stevens and Samuel A. Alito Jr. in *The Scribes Journal of Legal Writing* (Vol. 13, 2010), 42-43 and 176, www.scribes.org/scribes-journal-legal-writing;
[52] Bodnar, 55;
[53] Resolution of the Parliamentary Assembly of the Council of Europe of 26 January 2011 1787/2011 concerning the implementation of judgments of the ECHR;

may collide with the citizens' right to a fair trial, which it is supposed to guarantee, which has been noticed by the Polish Constitutional Court.[54] The analysis of judges' disciplinary cases in the years 2002-2013 confirms this problem, as a failure to issue written statements of reasons on time has been the only commonly condemned misconduct relating to reasoning.

However, in the long run the above issues cannot be tackled through disciplinary sanctions or even amendments of the procedure – a change of approach is necessary. It is vital to realize that overly long reasons do not build confidence, but rather express the lack of it, both between the society and the judiciary and within the judiciary itself. It is not uncommon that appellate courts focus on judging the first instance's written reasons rather than the case as such.[55] The result is that the statement becomes an act of internal communication within the justice system and loses its external function.

For this reason it is also necessary that judges be able to see beyond the direct procedural objectives of the reasons and properly balance their internal and external function, appreciating their role in building general trust in the judiciary.

A perfect opportunity for solving an important part of the above problems seems to be the improvement of spoken reasons, which are more suitable for addressing laypersons. Convincing oral reasons may also discourage the parties from demanding a written statement, thus limiting the resulting workload. Moreover, the more communicable they become, the more interest of the media and of the general public they could attract, allowing the judiciary's own voice to be better heard. This requires yet another mental change, as the media are still unwelcome in Polish courtrooms and are perceived as disturbing intruders.

The problem of lengthy written reasons has been recently noticed by the legislator, which has resulted in certain procedural amendments. These include the possibility for a judge to substitute the written reasons with a recording of their spoken version in the civil procedure as well as the requirement of "concise" written reasons and the prohibition of quashing a judgment because of their shortcomings in the criminal procedure.[56] However, without the new approach described above, these provisions may remain the *law in books*.

Obviously, the reasons are not a magic remedy, especially when faced with the traditionally distrustful society. However, since they remain the principal tool at a judge's disposal, it would be highly unwise not to use their full potential.

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[54] Decision of 11 April 2005, SK 48/04;

[55] Łętowska 11-12;

[56] Articles 424 § 1 and 455a of the Polish Code of Criminal Procedure entering into force on 1 July 2015; article 328 § 1[1] of the Polish Code of Civil Procedure.