# Is it worth being a Rejtan?

**Marek Safjan**

28.01.2020 doi: 10.17176/20200128-105700-0



At the end of my term of office at the Constitutional Tribunal my collaborators gave me a replica of Jan Matejko's painting 'Rejtan'.[1] The attitude of Rejtan has always been really close to my heart. Rejtan is a Polish Don Quixote – in a moment of helpless despair, Rejtan did not want to let the King and members of the Senate and the Sejm enter the Parliament hall in order to prevent the signing of the Treaty of the Partition of Poland. At that moment it was only a symbolic gesture. Rejtan's gesture was as ineffective or even useless as the one of Don Quixote's.

Is this a convincing analogy to my own stances? I am not sure, but perhaps the similarity results from the fact that I have always had a built-in opposition to whatever I sense to be in clear contradiction with my beliefs, sensitivity and worldview. The virus of discord which I contracted in 1968, at the very beginning of my student career, during the student strikes at the University of Warsaw, caused a feeling of helplessness, humiliation and shame. But that was only until 1980 – then everything radically changed. At that time, I experienced at Warsaw university an atmosphere of freedom and courage in expressing opinions. The Rejtan's attitude could be turned into action – from passive, silent resistance and gesture, transformed into action and a real change of reality. With the outbreak of what became known as the Solidarity Festival, I experienced for the first time in my life an authentic, collective feeling of regaining freedom. The experience of my generation.

I will never forget the joy of speaking out loudly and openly, expressing our views on everything we cared about, which made us feel anxious or outraged. The time of the peculiar catharsis – at the university it has a special dimension, because, by nature, there is no other environment more predisposed "to freedom" than the Academia, where freedom of thought and expression is a precondition for existence. I make no secret of the fact that I miss such a university, such an atmosphere and such authenticity, which, however, – as I do realise – was inherent to that particular time and those circumstances, to the unique nature of that situation which can never be brought back.

In the following years the feeling of helplessness, powerlessness did return, but the attitude of a passive witness to events never came back. Often, not to say almost always, before 1989 I sensed that nothing could change any more, it really seemed like the end of history in a purely negative sense. But at the same time, the gene of opposition carried the imperative to do something against this reality and the actual balance of powers – that was when I learned that staging a protest in support of a hopeless cause, perhaps *a priori* lost, also had an important moral value and, against all odds, could transform reality.

The Rejtan's true gesture – to disagree if something is not consistent with my fundamental beliefs, is it just an act of useless despair? Today I think about it differently. Expressing one's opinion, thoughts, views,

[1] ***Rejtan**, or the Fall of Poland* (Polish: *Rejtan. Upadek Polski*) is an oil painting by the Polish artist Jan Matejko, finished in 1866, depicting the protest of Tadeusz Rejtan (*lower right*) against the First Partition of Poland during the Sejm Session of 1773. Both a depiction of a historical moment, and an allegory for the surrounding period of Polish history, the painting is one of Matejko's most famous works, and an iconic picture of an emotional protest.

even if it does not bring directly any tangible, immediately visible result, it goes far beyond pure symbolism and translates into reality.

I have tried to keep this in mind also in my public activity as a judge.

## My adventure with the law

My adventure with the law is one of constant ups and downs, starting with my reluctant choice of this field of study. Thereafter, the feeling that something is wrong with the law bothered me for many years. I treated the law as an incredibly formalised, rigid field which was not entirely scientific. What can be scientific about the discoveries and truths that are always valid within certain time limit and that do not go beyond the specific framework of the text written by the legislator? The technicality of the rules was overlaid by formal logic, which did not always cope with the correctness or perhaps the ambiguity of a legal syllogism. Studying and practising law in the People's Republic of Poland was a real challenge, because on top of the structure of relatively solid rules and principles there was also the inevitable ideology layer, littering the young minds and blurring the true face of the old, noble constructs.

A long time had to pass before I began to look at the law from a different perspective, in a more favourable manner, to see its strength and intellectual qualities. Surely it was the attitude of my professors, masters, people who introduced me gradually into the world of law that helped me find this different perspective. It was only during the seminars on private law that I began to understand the meaning of the dispute over individual rights and interests and felt the power of law as an instrument to achieve various goals while following its methods, basic rules and principles as well as the accepted hierarchy of norms. I understood the skill and value of interpreting the law, and how much this depended on culture, knowledge, erudition, imagination, and the broadness of the interpreter's vision.

The better I understood what the law could be (or rather what the law should be), the greater my doubts and dilemmas were. Around me I could see a reality that was dull, grey, far removed from what I taught students at our university. Is it possible to be a lawyer in a country where the domination of ideology over the law was too apparent? In private law, the infiltration of ideological elements, although much smaller than in other fields, seemed particularly dangerous because it disfigured the essence of the structures designed for a different reality, for the real market and for free citizens. What about freedom of contract, if a contract is compulsory, then what about ownership, if the true owner is the State and only the State, what about the rules of equity, if in the clash between the interests of the State and the individual only the former always gains the advantage?

And yet I quickly understood that the law, especially private law, if it came across wise, well-educated and imaginative interpreters, could turn into a sophisticated instrument for modifying the reality and sometimes a very effective measure for protecting individual interests. Like writers, journalists and creators in communist times who achieved their goal by using metaphor, historical analogy, specific symbolism, lawyers pushed the boundaries of the protection of legitimate interests and achieved quite a lot with their skill, precision and robustness of their constructs, e.g. in the field of consumer protection, manufacturer's responsibility, state responsibility or protection of personal rights. It turned out that the sphere of personal rights protection was in fact a substitute for the protection of the fundamental rights of individuals *in lieu* of non-existent constitutional guarantees. It was a time of good, solid legal doctrine, a kind of legal positivism, which, by consciously narrowing the field of interpretation, at the same time provided a strong foundation for the principle of certainty and predictability of the law, creating a barrier to the infiltration of ideology. What a paradox it was, understandable only in the context of that time, that our very formalist approach to the application of norms was dictated by the imperative to better protect the rights of individuals! It is worth remembering this today when we discuss the nature of interpretation and the advantages of functional interpretation.

My attitude to the law today, to its functions, goals, as well as my understanding of interpretation as a means of achieving the equitable law, is largely determined by my judicial experience over a period of more than 20 years – both in the Constitutional Tribunal and the European Court of Justice. Based on this experience, I have begun to understand much better that the law is meant to be a real and effective instrument for seeking justice and ensuring balance against the background of conflicting, intersecting interests. The law of constitutional rank and value gave me real tools to achieve this goal, provided that it was used skilfully and wisely, eliminating the temptation to make arbitrary decisions and the excessive freedom of interpretation.

At this level, it is necessary to keep in mind the objectives and tasks of the legal order as such. The principles and values at the top of the legal system allow us to look down at the whole system. Such an approach in fact makes it imperative to search for ways of finding new content within the framework of seemingly worn-out old constructions, and enable a more effective protection of individual rights. This is a fascinating task for any lawyer, and at the same time something that requires humility and self-restraint in order not to fall into the trap of voluntarism.

My experience of adjudication in the European Court of Justice is, to a certain extent, similar. The interpretation of European law is by its very nature functional, strongly influenced by the task of ensuring the effective operation of the whole legal order of the *acquis communautaire*, while respecting and giving priority to general principles, values and fundamental rights. This is very well illustrated by the Court's more recent jurisprudence concerning the rule of law and judicial independence, which reveals the true radiant power of the EU's fundamental values for the functioning of the entire legal order.

Today, the wise and imaginative use by judges of the most important principles and values of the Constitution and the instruments resulting from the application of EU law can, as it turns out, be the most effective way to protect what we call the rule of law. We are now seeing this very clearly. Defending the principles of the rule of law in the sphere of practical application of the law by judges has in fact become the most important and effective instrument for guaranteeing Polish democracy when other institutions, until recently considered indestructible, are being weakened. The law interpreted and understood in this way becomes a particularly important link with the legal space of the European Union.

I take this opportunity to express my appreciation and gratitude to the Polish judges for their stance.

## On decency

In my experience, it is impossible to separate our manner of reflecting on, studying and practicing the law from being a decent person. Certainly, there is such a thing as scholarly neutrality (especially political neutrality) and also a value known as judicial objectivity. I am convinced, however, that neither neutrality nor objectivity stands in the way of being guided by honesty, integrity, and courage in expressing one's views, using arguments *ad rem*, never *ad personam*, avoiding double-thinking or mere hypocrisy, and finally also avoiding conformism. The distance between the view we proclaim, the truth we discover, the assessment we make and the reality becomes unbearable if we ourselves deny what we preach by the way we live our lives. Let me recall the words of Jan Lechoń, a Polish poet who said: "*Intelligence without heart and morality seems to be ruder than heart and honour without intellectual panache*".

For us lawyers, this message is perhaps even more important than for other professions, because the views we proclaim and our actions in public life are constantly intertwined. Is it possible to pledge commitment to the rule of law and democratic values while accepting political control of the justice system, is it possible to proclaim views on the role of the constitution and its primacy over other norms, and at the same time to accept violations of the constitution and participate in the practical activities that lead to it? These are rhetorical questions, but unfortunately, they are not merely theoretical ones, and they are based on the perception of our reality.

Until recently I thought that the era of double-thinking was over, as more than 30 years have passed since the fall of communism. But it turns out that the experiences of one generation are not automatically transferred to those of the younger generations. Olga Tokarczuk, in her Nobel Prize speech on 7 December 2019, said:

> *"Events are facts, but experience is something inexpressibly different. It is experience, and not any event, that makes up the fabric of our lives. Experience is a fact that has been interpreted and situated in memory. It also refers to a certain foundation we have in our minds, to a deep structure of significations upon which we can unfurl our own lives and examine them fully and carefully. I believe that myth performs the function of that structure. Everyone knows that myths never really happened but are always going on […]".*

Every new generation has the chance to make their own fundamental choices about their own future and their own path, and I hope that the next one will come out of this process strengthened, wiser with the wisdom that can only be acquired through their own experience.

Personally, I owe a great deal to my professors because at the time when teaching proper legal standards was not encouraged, they were able to maintain a high, academic level of knowledge, but also – and just as importantly – knowledge based on honest axiology, on a system of values that perfectly prepared my generation to join actively in the revolution of Solidarity in 1980 and in 1989 to build a democratic state ruled by law. I was lucky to benefit from the knowledge passed on by eminent professors. I owe them not only the knowledge, but also the academic style of reasoning, argumentation, view of the reality, method of discourse and correctness of reckoning. My master and later on great friend Tomasz Dybowski taught me what it means to be honest, decent and that it is worth paying every price to proclaim the truth and make a decent choice in borderline situations.

The search for justice and equity requires, in my opinion, Rejtan's gestures, even if they seem to be of little use in a concrete and practical dimension. Perfect Justice, equity is the goal we are aiming at but can never achieve in the sphere of law. Seeking justice is a constant process of approximation through trial and error. But it is always worth keeping in mind the purpose of our actions. Especially today, when, unfortunately, once again in history, we face fundamental choices and ask ourselves what to do in order to preserve the values of the democratic state based on the rule of law.

*This speech has been given on the occasion of the reception of the author's Liber Amicorum at the University of Warsaw on 9 January 2020. English translation by Anna Dziegiel & Pawel Granicki (redacted).*

ABOUT THE AUTHOR

**Marek Safjan**

Marek Safjan served as President of the Polish Constitutional Tribunal and later as a Judge of the Court of Justice of the European Union.

SUGGESTED CITATION

Safjan, Marek: Is it worth being a Rejtan?, Verfassungsblog, 28.01.2020, doi: 10.17176/20200128-105700-0.

Licensed under CC BY-SA 4.0.

Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20200128-105700-0.