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Report on
the Situation of Polish Judiciary

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„Iustitia”

"The first thing we do is kill all the lawyers."

said the character in Shakespeare's Henry VI,

Contrary to popular belief, the proposal was not designed to restore sanity to commercial life. Rather, it was intended to eliminate those who might stand in the way of a contemplated revolution -- thus underscoring the important role that **judges** and lawyers can play in society.

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1. Introduction

1. Following the parliamentary elections in autumn 2015, the Law and Justice Party (PiS) which won the parliamentary election in Poland, receiving only 37,5% of the votes, due to the skewed effects of the electoral law, obtained the majority of seats to establish a government. One of the main targets of the Law and Justice Party is to ‘redefine’ Polish judiciary system.

2. **Sovereignty** has become a very popular word, and Article 4.1 of Polish Constitution the most often quoted: ‘Supreme power in the Republic of Poland shall be vested in the Nation’. Other provisions safeguarding the separation of and balance of power between branches of government, and guaranteeing the independence of the judiciary have to queue behind sovereignty. The judiciary, the government asserts, must be totally transformed and brought back to the Poles.

3. During the legislative process the judiciary is not being consulted; there is no debate but startling draft laws, seemingly processed at the speed of light.

4. All critics, both international and national, are portrayed as inaccurate or mistaken, having ulterior intentions, or simply as enemies, traitors, and citizens of the ‘second sort’.

5. The public media, politicians, MPs and members of the government on daily basis attack the judiciary as a whole, courts and particular judges, often quoting ‘polls’ showing low public trust in the judiciary, and claiming the need for reform. The list of accusations and labels is long and very creative, sometimes vulgar: government ‘will end with the extraordinary judicial cast’ and ‘finish judicial cliques’.

Here it goes a sample of the kind of this propaganda:

- Hi!

- Do you know that 8 in 10 Polish people support reform of the judiciary?

- Despite this there has been great commotion about this matter and **they** have turned the cat upside down.

- By the way, why do courts irritate us so much?

- In case you steal a wafer you will be put to jail and judges?

- Pah! They just present their corporate card and they are free to go.

- They are all friends and they judge each other. Give me a break!

That's why disciplinary chamber In Supreme Court is a good idea.



Comment about this clip

1. A survey published on 25 April 2017 reveals that more than 50% of respondents see Polish courts in bad light, and 70% think they need reform. Nevertheless, only 21% support the idea that the Minister of Justice has in his mind.
2. Polish judges indeed has enjoyed partial immunity from petty offences excluding traffic ones according to the Law on Ordinary Courts
(petty offence is under the penalty of max 30 days of arrest or 1 month of community service or max fine of 1200 euro)
3. Disciplinary courts have been existing and have undertaken 310 disciplinary motions within last four years.

Comment about the fresh insulting campaign

1. It started after Polish President had vetoed the Law on the Supreme Court & on the National Council of the Judiciary enacted with votes of Law & Justice MPs.
2. It is 100% public expenditure with a budget which amounts to 4.400.000 euro

2. Description of the main regulations focused on the widening of the control over Polish judicature concerning:

a. Constitutional Tribunal – current situation

- **The election of Polish Constitutional Tribunal concerted by the PiS current majority in Polish Parliament has been widely considered as unconstitutional thus Tribunal has had no credibility and respect among Polish authorities.**

- The motions which were filed before December 2016, have been systematically withdrawn by Ombudsman, the Judicial Council, local governments etc., to prevent more confusion in Polish legal system.

- On the contrary, representatives of the current government file willingly motions to the Constitutional Court, to fossilize the legal acts forced by the government and governing majority in the Parliament

e.g. on 26 October 2017 rendered two rulings which are widely assessed as unconstitutional*

- **For now it is considered that it has been up to common court judges to review the compatibility of the legal acts with the Constitution.** However, the verdict of the common court doesn't have its abstract scope. What's more, there were threats from the Ministry of Justice, that a judge who will not apply the verdicts of the current Constitutional Court may challenge disciplinary proceedings.

b. Supreme Court

- President Duda vetoed the draft on the Supreme Court Act proposed Law & Justice party
- The draft on the Supreme Court Act proposed currently by President Duda, is equally noxious, particularly because of its numerous unconstitutional provisions. Instead of the immediate replacement of all Supreme Court judges (as proposed by Law and Justice in July), the President has set their retirement age at 65 years. On reaching this age, a judge retires unless the President agrees to his or her continued service. In effect, about 40% of Supreme Court judges will lose their positions over a short time. In addition, given that the First Chairperson of the Supreme Court, Małgorzata Gersdorf, will soon be 65 years old, she will be deprived of her function as court president before the end of her term of office, even though the Constitution guarantees a term of office of six years. The draft Supreme Court Act expressly provides for the procedure to be applied when a court president retires and gives the President the right to appoint his/her replacement. Such provisions are openly unconstitutional and the fact that they are less explicitly so than the ruling party's earlier ones does not make them legitimate.
- The secret debate on Supreme Court between President Duda and Law & Justice party leader Jarosław Kaczyński has been still in proces.

c. National Council of the Judiciary

- President Duda vetoed the draft on National Council of Judiciary Act proposed Law & Justice party
- The first act of law proposed by the President is one on the Polish Judicial Council (PJC). The solutions incorporated in this draft sustain the unconstitutional solution earlier proposed by Law and Justice. It envisages that judicial members of the Polish Judicial Council (as distinct from the non-judicial members, who are appointed by politicians and are a minority on the Council) are selected not by other judges but by members of parliament. The Polish Constitution clearly provides which PJC members are appointed by representatives of the executive and which by the legislature. As regards judicial members, the Constitution does not specify who appoints them because the principles behind the separation and balance of powers regulated in Article 10 of the Constitution require judges themselves to do it (the same follows from an analysis of legislative history of enacting the 1997 Constitution.) Nevertheless, President Duda, just like Law and Justice, accepts that it is possible to presume certain powers of parliament not expressly stipulated in the Constitution.
- **Iustitia** presented an alternative proposal to ensure a more democratic procedure. However, it was dropped and instead political election has been proposed.
- The secret debate on Supreme Court between President Duda and Law & Justice party leader Jarosław Kaczyński has been still in proces.

d. Common Courts

Act amending the Law on Organisation of Common Courts:

- **allows the Minister of Justice to remove with no justification all presidents and vicepresidents of all common courts in Poland within 6 months from entering Act into force;**
- gives the Minister of Justice **the exclusive right** to nominate **new presidents** or vicepresidents of any court (before the Ministry had to act in concordance with the judicial self government and the Judicial Council);
- the president of a court can be dismissed by the Minister of Justice in case of “low efficiency” of his/her supervision over judges;
- the Minister of Justice may reprimand the president of a court in case of not sufficient surveillance over judges and it can be combined with reducing president’s responsibility bonus;
- in case of positive Minister’s of Justice opinion over a president’s surveillance, he/she can be awarded with extra responsibility bonus;
- the Minister of Justice may order supervision over judges of a particular court to the “**Service of Supervision**” (new body to be established within the Ministry of Justice, consisting of judges delegated to the Ministry, and loyal to the Minister of Justice);

3. Latest developments

- **On 28 July 2017 the European Commission** has launched an infringement procedure against Poland for breaches of Article 157 of the Treaty on the Functioning of the European Union (TFEU) and Directive 2006/54 on gender equality in employment contained in the Law on the Ordinary Courts Organisation.
- **On 11 October 2017 the Parliamentary Assembly of the Council of Europe**, in Resolution 2188 (2017), requested an opinion of **the Venice Commission** on the compatibility with the Council of Europe's standards on the rule of law of the Polish law of 12 July 2017 on the Ordinary Courts Organisation, as well as of the two draft laws recently submitted to the Sejm by the President of the Republic, on amending the law on the National Council of the Judiciary and on the Supreme Court.
The opinion will be submitted for adoption by the Plenary Session of the Commission in December 2017.
- **On 27 October 2017 Diego García-Sayán** UN Special Rapporteur on the Independence of Judges and Lawyers, Former Minister of Justice of Peru and former President of the Inter-American Court of Human Rights after having visited Poland expressed his concerns on the planned reform of the judiciary as posing a grave threat to the rule of law in Poland
- **On 30 October 2017** National Council of the Judiciary effectively objected to vesting the authority of judge in 265 “assessor judges” who before had been appointed by Minister for Justice.

4. To sum up

- The aforementioned reforms goal is to undermine institutional constraints on the power of transient democratic majorities
- In the name of sovereignty, politicians seek to take over the administration of justice, the appointment of judges, and the election of members of National Council of the Judiciary
- **The Polish experience amply demonstrates that fleeting majorities may use political power to undermine and break constitutional principles through ordinary legislative processes without changing a single word in the constitution**

5. Appendix

- **"I can't imagine what this place would be -- I can't imagine what the country would be -- with Donald Trump as our president ... For the country, it could be four years. For the court, it could be -- I don't even want to contemplate that."** Ruth Bader Ginsburg, Justice of the Supreme Court of the United States.
- A line from the American poet Theodore Roethke brings some hope to what I have been trying to describe: **"In a dark time, the eye begins to see."**

Thousands of common citizens have signed a petition defending the independence of judges and organize street performances. Thousands of lawyers organize three congresses (the last one for 2,500 people) devoted to discussion on threats to judicial independence. Members of Iustitia explain to the public the threats connected with this „reform” on daily basis. Many international authorities and associations send petitions to Polish president, parliament and government to support Polish Judiciary.



6. Main sources

- *Marcin Matczak President Duda is Destroying the Rule of Law instead of Fixing it, VerfBlog, 2017/9/29,*
- *Łukasz Bojarski Redefining judicial independence in Poland*

Thank you for your attention!
I invite you to the discussion