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Separation of powers or  
authoritarian backslide

The ancient lawgiver was a benevolent  
myth; the modern lawgiver is a  
terrifying reality

Bertrand Russel  
History of Western Philosophy

# Structure of my presentation

## **I. Appointment of judges in Poland**

- Who?
- How?
- Prosecutor or Judge
- Concerns

## **II. Polish National Council of Judiciary (KRS)**

## **III. The Minister of Justice or the President or judge**

- Mandatory prosecution/theory confronts reality/
- Disciplinary proceedings
- Managing retirement age of justices

## **IV. The European Association of Judges**

## **V. How to handle judges or sticks and carrots**

# Appointment of judges in Poland

## Who?

Judges in Poland can be appointed from among assessors\*, law professors, lawyers, public prosecutors or notaries

\*Graduates from Polish National School of Judiciary and Prosecution appointed to be assessors by the President of Poland (on average 90 % of candidates)

## **Appointment of judges in Poland**

### **How?**

1. each of candidate should present to the Polish National Council of Judiciary his/her achievements in the field of jurisprudence or theory of law. In the case of assessors they present their judicial decisions. Lawyers and prosecutors usually present cases in which they acted before the court
2. groups of members of the Council assess each candidate
3. these assessments are presented in the plenary public meeting of the Council
4. the Council vote over each candidature separately. Candidates who obtained majority of votes are presented to the Polish President
5. the Polish President appoints the most appropriate candidates from among those presented by the Council according to his will. Generally this decision may not be challenged
6. candidates who were chosen by the President are sworn to be a judges

# **Appointment of judges in Poland Concerns**

1. regarding the Polish Judiciary and Prosecution School (director, governing board, lecturers)
2. regarding the Polish Judicial Council (see below)
3. regarding Andrzej Duda the President of Polish Republic (the Guardian of the Polish Constitution versus a person strongly liaised with government)



# **National Council of Judiciary Composition**

1. the First President of the Supreme Court, the Minister for Justice, the President of the Supreme Administrative Court and a person designated by the President of the Republic
2. fifteen elected members from among the judges of the Supreme Court), the ordinary courts, the administrative courts and the military courts elected by the Lower Chamber of the Polish Parliament (Sejm)
3. four members elected by Sejm from among the members of Sejm and two members elected by the Senate from among the senators

# National Council of Judiciary

## Competences

1. examining and assessing candidates to serve as Judges of the Supreme Court and judicial positions in ordinary courts, administrative courts and military courts and assessors judicial courts
2. submitting applications to the President of the Republic of Poland for the appointment of judges in the Supreme Court, ordinary courts, administrative courts and military courts and to appoint judicial assessors in administrative courts
3. submitting applications to the President of the Republic of Poland for the appointment of the examined applicants of the judicial application and the prosecutor's application for the positions of judicial assessors in the ordinary courts
4. adopting a set of rules of professional ethics for judges and judicial assessors and ensuring compliance with them

# **Polish National Council of Judiciary Concerns**

## **Council, as newly composed, is**

1. formed by reducing the ongoing four-year term in office of the members of the previous body at that time
2. whereas the 15 members of the KRS elected among members of the judiciary were previously elected by their peers
3. the irregularities which could adversely affect the process for the appointment of certain members of the newly formed KRS
4. several member of the newly composed KRS are allegedly involved in smear campaign against independent judges
5. last voting in Sejm (the Lower Chamber of Polish Parliament)

# The Minister of Justice or the President or judge

## Mandatory prosecution/theory confronts reality/

**1.mandatory prosecution** is an aspect of certain justice systems in which the prosecutor is required to press charges when he has sufficient evidence to support a conviction. The lack of such a requirement in the United States tends to encourage plea bargaining

**2.models** of the guidance of penal preliminary proceedings:

- independent prosecution office (attorney general appointed by **the President or the Parliament**)
- **giudice istruttore**
- **minister of justice** and prosecutor general in one person (Poland)

**3.vital points**

- who decides on indictment or discontinuing of preliminary proceeding
- preliminary proceedings terms (in rem and in personam phases)
- preliminary measures (custody, supervision, bail)

# **The Minister of Justice or the President or judge**

## **Disciplinary proceedings**

### **1. The current new disciplinary regime in Poland does not guarantee the independence and impartiality of disciplinary proceedings because:**

- disciplinary Chamber of the Supreme Court is composed solely of judges selected by the National Council for the Judiciary, which is itself politically appointed by **the Polish Parliament (Sejm)**
- the President of the Disciplinary Chamber in Supreme Court is empowered to determine, on an ad-hoc basis and with an almost unfettered discretion, the disciplinary court of first instance to hear a given case brought against an ordinary court judge
- the disciplinary commissioners are appointed by **the Minister of Justice** at full discretion.

### **2. Polish Judges are subjected to disciplinary investigations, procedures and sanctions on the basis of:**

- the content of their judicial decisions, including even the exercise of their right under Article 267 of the Treaty on the Functioning of the European Union to request preliminary rulings from the Court of Justice of the EU („flagrant abuse of law”)
- Exercising their freedom of expression (violation of the “dignity of the judiciary”)

## **The Parliament or the Minister of Justice or the President or judge** Managing retirement age of Supreme Court Judges

- In 2017, **Sejm (the Lower Chamber of Polish Parliament)** introduced a comprehensive reform of its justice system.
- In particular, the retirement age for judges of the Sąd Najwyższy (Supreme Court, Poland) was lowered to 65, unless within the specified time period, they submit a declaration that they are willing to continue in their posts and a certificate of good health, and **the President of Poland** consents to their continuing in their posts.
- Prior to granting his consent, the President of the Republic is required to consult the National Council of Judiciary which provides him with an opinion.
- **Those measures were held by the Court of Justice of the European Union to be incompatible with EU law in its judgment of 24 June 2019, Commission v Poland Judgment of 24 June 2019, Commission v Poland (Independence of the Supreme Court) (Case C-619/18), see also Press Release No 81/19)**

**The European Association of Judges** decided to point out in its numerous resolutions that the current destruction of the independence of the judiciary in some Member States including Poland has grave consequences for European citizens, for the investments of companies and for the mutual trust between countries.

In particular, judiciary being just an instrument of the government cannot uphold the fundamental rights of the citizens<sup>2</sup>.

# How to handle judges or sticks and carrots

## Introduction

recognition judiciary	career judiciary
life wisdom, experience, performance at the Bar, taking into account political criteria	climbing the ladder of judicial hierarchy



# How to handle judges or sticks and carrots

## part I

sticks	carrots
<b>disciplinary punishments:</b> reprimand, salary reduction, removal from the position of a chamber president, suspension of a judge, relocation, demotion, <b>forced retirement</b> , dismissal from judicial office	<b>promotion</b>
<b>complaints against individual judges</b>	<b>secondment</b>
<b>retention reviews</b> refer to a periodic process the aim of which is to decide whether a judge should stay in office	<b>temporary assignment outside the judiciary</b> (separation of powers at stake)
<b>reassignment</b> to a different panel or refusal to assign to a panel of judges	<b>Appointment to the position of a court president or vice president</b>
<b>relocation</b> from one court to another court (commuting)	
<b>demotion</b>	
<b>civil liability and criminal liability</b>	

# How to handle judges or sticks and carrots part II

## Dual mechanisms

judicial performance evaluation

a volatile salary

a volatile non monetary benefits

case assignment

**I have nothing against the independence of  
judges, as long as I promote them.**

Adolf Leonhardt, the Minister of Justice of the German Empire

**Bibliography:**

David Kosar. Perils of Judicial Self-Government in Transitional Societies, Cambridge University Press

Thank you for your attention!  
I invite you to discussion