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Adress

by the First President of the Supreme Court at the conference
of the Norwegian Association of Lawyers

"Restricting Judicial Independence and the Rule of Law in Poland"

Oslo, 16 October 2019

Dear Mr President of the Norwegian Association of Lawyers,

Dear Madam Chief Justice of the Supreme Court of Norway,

Dear Mr Director of Public Prosecution,

Your Excellencies,

Dear Distinguished Guests,

thank you very much for the honour of being invited to this conference. President Havard Holm has suggested that I deliver an address concerning restrictions imposed on the independence of courts and the rule of law in Poland. As a Polish lawyer, a judge and the First President of the Supreme Court of the Republic of Poland, it is not easy for me to talk about such a symbolic and essential matter today when the government appointed by a party which ostentatiously uses the word "law" in its name has been shunned by international organisations and the governments of nearly all European Union Member States. The day is fast approaching when the Court of Justice of the European Union will pronounce its judgments in the case of violation of judicial independence by lowering the retirement age of judges (case C-192/18) and lack of independence of the Disciplinary Chamber of the Supreme Court (joint cases C-585/18, C-624/18 and C-625/18); only days ago the Court registry has received another application of the European Commission against Poland concerning the system of disciplinary liability of judges.

In this context, the government majority clearly considers statements like mine to be an act of war and a pretext for most vicious attacks on whoever dares speak up. Nevertheless, I will ask a fundamental question: Are the accusations raised against Poland justified?

Rather than answering that question straight away, let me start with a hypothetical example. Imagine a nearby Nordic state, other than Norway, where a political party promoting a chauvinist and populist agenda takes power and gets the absolute majority of seats in Parliament.

Almost the very next day after the election, that party – which already has a sitting president coming from the same political formation – replaces judges of the Constitutional Court in breach of the Constitution, substitutes its loyal agents for employees of the public radio and television, and passes a new law on the public prosecution service. Aided and abetted by special services and public prosecutors, the media launch a PR campaign targeting judges, paid for with the taxpayers' money. The objective is to convince the people that the judiciary are a bunch of thieves and a privileged "caste". The most senior judges of the Supreme Court are named "communist henchmen" without a shred of proof and removed from office by a new law. The Prime Minister reiterates the message abroad, resorting to insinuations and ambiguous propaganda slogans at press conferences to convince the international community that the changes are necessary. Doubts raised by international organisations as to the direction of the changes are snubbed: the country is independent and the authorities have both the legitimacy and the right to reform its institutions.

A new law on the council of the judiciary is soon passed, replacing its members who formed a representative selection of judges with a group of former officials of the Ministry of Justice and judges recently promoted by the Minister of Justice, elected to the "new" council by MPs of the ruling party. That council nominates new judges of the Supreme Court, including in particular members of its newly created disciplinary body which replaces the legacy system; most of the candidates are prosecutors appointed by the sitting Minister of Justice/Prosecutor General who has in the meantime taken full control of the criminal prosecution and law enforcement system. The price of that immense power is relatively small: public prosecutors endorse every action that discredits the "enemies of the people". In addition to the political opposition, that latter group is usually considered to include judges. Public prosecutors, the government media and special services support the disciplinary prosecutors who now report directly to the Minister of Justice/Prosecutor General. Days before the next Parliamentary election, the president of the ruling party announces that "those who work for our enemies are and will be stigmatised" and suggests

that the courts will be remade from scratch in the next term of office of the Parliament so they only include vetted judges.¹ You can imagine who the “enemies” are.

What would you say about a country where all of that happens? Are these ordinary reforms? Or maybe the actual objective is very different from what the voters are told?

Ladies and gentlemen, the changes I am describing have been implemented one by one, gradually over the past four years. The end result is that the rule of law in Poland is not simply at risk: it is being erased. The grounds of my statement are straightforward: when you look at the legacy of European theory and philosophy of law, you will see that the key feature of the rule of law is, first, that everyone is equal before the law and, second, that independent courts have universal jurisdiction. That fundamental quality of the concept was emphasised by the father of the Anglo-Saxon theory of the rule of law Albert Dicey.² A state which relies on personal prerogatives and follows the principle that the central power is not bound by law (*princeps legibus solutus est*); a state where proceedings are to be initiated and penalties imposed at the personal whim of those in power; a state where the dignity of anyone can be downtrodden, condemning them to infamy without a court judgment thanks to obedient media and armies of internet trolls; such a state does not provide the fundamental guarantees of safety to its citizens.

We all know that independent courts and their legitimacy anchored in statutes are the key features of the judiciary in a state of law in the Western legal culture. To give more substance to my statements, let me offer a handful of examples reflecting the mechanisms which are deployed to influence courts in Poland in order to ensure that the executive branch can take control and exert pressure on judges. I leave the conclusions to you.

Look at panels assignments in courts. The mythic goddess Themis is blindfolded, which has two interpretations: on the one hand, judges should be impartial; on the other hand, judges should be allocated to cases without bias. When the party Law and Justice came to power, its president Jarosław Kaczyński said he wanted courts to be efficient and

¹ Kaczyński: Nowa polska elita władzy nie pracuje już dla naszych wrogów (9.10.2019), <https://dorzeczy.pl/kraj/116732/kaczynski-nowa-polska-elita-wladzy-nie-pracuje-juz-dla-nasznych-wrogow.html>; Wybory parlamentarne 2019. Jarosław Kaczyński: Wrócimy do reformy wymiaru sprawiedliwości i ją przeprowadzimy, (7.10.2019), <https://polskatimes.pl/wybory-parlamentarne-2019-jaroslaw-kaczynski-wrocimy-do-reformy-wymiaru-sprawiedliwosci-i-ja-przeprowadzimy/ar/c1-14483017>.

² “No man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint”; A.V. Dicey, *Introduction to the study of the law of the constitution*, 8th ed., London 1915, p. 110.

independent (he claimed the courts had not been independent before). In 2017, the existing system of allocating cases to judges in the alphabetical order of judges' last names was replaced by a new system of random allocation by computer. The new system was to be universal and unconditional, based on objective criteria. Is it, though? We do not know. The allocation algorithm and criteria have been kept secret from the general public;³ the software is administered by the Ministry of Justice. According to an old adage, any system developed by man can be influenced by man. Furthermore, there are courts where no random allotment is or will be allowed, in particular the Disciplinary Chamber of the Supreme Court created by Law and Justice, as well as the Constitutional Tribunal.⁴

The second critical point is court management. The independence of common courts in Poland has always been rather weakened; now it may become but an illusion. The Minister of Justice, who since 2016 is also Prosecutor General, has been authorised to replace, within a period of six months, all presidents of common (ordinary) courts in Poland. The requirement for candidates to be evaluated by the assembly of judges has been done away with. The Minister has been keen to exercise the new power, and he removed approximately 120 of more than 700 presidents and deputy presidents of Polish courts. His decisions were, to say the least, controversial: he appointed individuals sentenced in disciplinary proceedings and persons whose competences and authority in the judicial community are not beyond reproach.⁵ The intentions were clear: to install obedient officials who are appointed not by virtue of their skills but by party officials' fiat. Note that presidents of court in Poland have extensive powers. They can move "unwelcome" judges from one department to another. A well-known criminal judge with a 20-year track record suddenly has to find his bearings in family law. How does he appeal the decision? By filing the appeal with the new National Council of the Judiciary. The judge

³ Judgment of the Regional Administrative Court in Warsaw of 11 December 2018, II SAB/Wa 502/18, <http://orzeczenia.nsa.gov.pl/doc/C712B83438>.

⁴ S. Gregorczyk-Abram, System losowego przydziału spraw w sądach powszechnych, <https://archiwumosiatsynskiego.pl/wpis-w-debacie/system-losowego-przydzialu-spraw-sadach-powszechnych/>.

⁵ For instance, a person who applied for the position of judge 52 times without success due to a negative opinion of the National Council of the Judiciary; B. Grabowska-Moroz, M. Szuleka, *Od kadr się zaczyna. Zmiana prezesów i wiceprezesów sądów powszechnych w okresie od sierpnia 2017 r. do lutego 2018 r.*, Helsinki Foundation for Human Rights: Warsaw 2018, <http://www.hfhr.pl/wp-content/uploads/2018/04/HFPC-Od-kadr-sie-zaczyna.pdf>, p. 21.

has to step down from pending cases⁶. The new judge will be randomly selected by a computer at the Ministry of Justice.

The third critical point is the system of judge nominations and promotions. Promotions are now handed around in exchange for services rendered or, at best, as a reward for keeping silent. The “reformed” National Council of the Judiciary no longer represents judges: it represents members of Parliament, which has elected all of its 15 members who are judges. We do not know how and why; the endorsements needed for candidates to be proposed have been kept secret even after the Supreme Administrative Court ordered them to be disclosed.⁷ The rumour has it that valid endorsements are missing and the candidates could have endorsed themselves. The endorsements were filed with the Speaker of the lower house of Polish Parliament; he is the only person who could dispel the doubts. The professional track record of the current members of the National Council of the Judiciary varied. Some were for many years officials at the Ministry of Justice responsible for supervising courts. Others, suddenly switched affiliation under the current government, moved from the public prosecution service to the judiciary, and quickly made it to top positions in the judicial hierarchy. Is the Council in its new formation going to pursue the interest of the judiciary and principles of ordinary decency, or will it make best efforts to satisfy every whim of the politicians in power?

Point four: disciplinary proceedings. There is no more independent disciplinary judiciary in Poland. There is Disciplinary Chamber at the Supreme Court. In fact, it is not part of any organisation as it has its own budget and chancellery; moreover, the Chamber has the power to review and “manually steer” all disciplinary cases pending before lower courts. The President of the Disciplinary Chamber can freely remove presidents of lower disciplinary courts from office during their term. No rules of random selection or allocation of cases apply. The safeguards of the right to defence of accused judges are weaker than in cases of plain manslaughter! The judge has to present evidence and clarifications within 14 days of charges being raised, and proceedings before the court may continue even in the judge’s excused absence. The Disciplinary Chamber is not only a cassation court; it can overturn judgments given on merits by any lower court even if those are lawful. The Chamber is made up also of lay judges with no legal education, which is unprecedented on a global scale. In the current composition of this body, there are almost no professional

⁶ D. Mazur, *Sędziowie pod specjalnym nadzorem, czyli „wielka reforma” wymiaru sprawiedliwości*, [in:] Ł. Bojarski et al. (ed.), *Konstytucja, praworządność, władza sądownicza. Aktualne problemy trzeciej władzy w Polsce*, Warsaw 2019, pp. 279-280.

⁷ Judgment of the Supreme Administrative Court of 28 June 2019, I OSK 4282/18, <http://orzeczenia.nsa.gov.pl/doc/EA1208209B>.

judges, there are former prosecutors. The mass media in Poland reported the case of an interrogating of a suspected woman in the delivery room; she later lodged a complaint against Poland with the European Court of Human Rights, alleging a violation of the prohibition of torture and inhuman treatment. In 2013, the government concluded a settlement with the applicant, voluntarily paying the just satisfaction to her.

The effects are evident. Judge Alina Czubieniak of the Regional Court of Gorzów Wielkopolski has been penalised for ordering the release of a detained suspect who had no lawyer in the detention proceedings, which is a binding requirement. She was punished for expecting the obvious of the public prosecution service: the right of defence. But not everyone is punished. According to many media reports, Judge of the District Court of Nowe Miasto Lubawskie, Michał Lasota, made a beginner's mistake: he interrogated a minor girl who had been allegedly raped by her brother without the participation of the parties. The interrogation could not be rerun as that would re-victimise the victim; the alleged perpetrator went unpunished.⁸ But judge Lasota was delegated to the District Court in Warsaw and promoted to deputy disciplinary prosecutor of judges of common courts. Now he is the accuser, not the accused.

Point five: hater groups. A new secretive body was appointed at the Ministry of Justice in 2018 under the name of "Team for actions taken by the Minister of Justice in disciplinary proceedings against judges and trainee judges".⁹ The genuine purpose of that move became clear only recently. According to the nation-wide internet portal Onet, members of the team apparently participated in concerted efforts to communicate information, rumours and reports about "enemies of the people" among judges to pro-government papers and social media via WhatsApp messenger groups and troll factories.¹⁰ Rumours were spread online: the president of an association of judges allegedly urged his friend to abort a pregnancy; someone else was ridiculed for having started his professional career as a court usher (as if that were something shameful). The group allegedly included a disciplinary prosecutor of judges and a Law and Justice nominee to the Disciplinary Chamber of the Supreme Court. The matter has gone public, including copies of messages and chats among the participants, who are obviously denying everything. The response of the Ministry of Justice was obvious, too: the

⁸ *Przesłuchanie wykorzystanej seksualnie dziewczynki przez sędziego Lasotę to skandal - uważa Cwiakalski* (30.5.2019), <https://www.rp.pl/Prawo-karne/305309965-Przesluchanie-wykorzystanej-seksualnie-dziewczynki-przez-sedziego-Lasote-to-skandal---uwaza-Cwiakalski.html>.

⁹ Official Journal of the Ministry of Justice, 2018, item 268.

¹⁰ More at <https://wiadomosci.onet.pl/afera-lukasza-piebiaka-ministerstwo-aprobowalo-hejt-na-sedziow> (accessed on 13 October 2019).

Minister/Prosecutor General was not aware... The team, which may have been a front for the whole operation, was quickly disbanded.¹¹

Ladies and Gentlemen,

What I am telling you today is but a small fragment of a series of threats to the rule of law that have been spreading in the Polish legal system and judiciary in the past years. Is Poland still a state of law? Is the rule of law our motto, as it is for the whole civilised Western world? My country has seen a ruthless political strife waged by methods disallowed in democratic states. Respect for all public institutions is being brutally eradicated. Can it be rebuilt? At what price? We are living in a regime which could be named electoral authoritarianism: the façade of free elections (whose validity is checked by the new Chamber of Extraordinary Control and Public Affairs) disguises a diktat of one party. The elections are but a show of popular support for the government. Some of the people do not understand what is going on, others – not the majority – even like it. Some like to watch victims being burnt at stake, even if the only transgression was to have one's own opinions.

To conclude, may I make an appeal to the Norwegian people, who have always subscribed to Western freedoms and values. Here in Oslo on 5 October 1983 a prominent Polish politician, whom at that time the government of the People's Republic of Poland liked to call a "private individual", was awarded the Nobel Peace Prize. Contrary to what you may hear from politicians and diplomats, Poland has not squandered the credit of confidence granted by European nations, including Norway. That is why I believe that, notwithstanding the current problems we are grappling with yet again due to political players, we will live up to the challenge. Polish judges are well aware of the commitment of the entire society, supported so wonderfully by our friends in the dark night of the 1981 martial law and thereafter.

I wish to make a personal request to Norwegian lawyers. Tell the world about the Polish conundrum; watch closely what Polish politicians are doing; speak on behalf of the international community and tell Polish politicians that they must respect the European Convention of Human Rights. Encourage the Polish government to return to the fold of the Western community of values. Invest in bilateral contacts with Polish universities and legal professions. Poland is closer than you might think. Hard-working Polish men and women are making a contribution to the welfare of Norway. We still need your friendly

¹¹ *Ministerstwo Sprawiedliwości likwiduje zespół ds. etyki sędziów* (28.8.2019), <https://dorzeczy.pl/kraj/112208/Ministerstwo-Sprawiedliwosci-likwiduje-zespol-ds-etyki-sedziow.html>.

support. The Polish people do not deserve being deprived of the rights won in the victory of the Solidarity movement.

Thank you for your attention!