Constitutional justice in Handcuffs? Gloves are off in the Polish Constitutional Conflict

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On 31 of August 2016 the influential newspaper *Rzecz-posplita* published an interview with the Deputy Speaker of the Polish Parliament,Ryszard Terlecki. under the ominous title "We will remove judges of the Court who do not apply the law". In the interview he vows to finally solve the „problem" of the Court. He speaks of removing recalcitrant judges that hurt the Court's image and are not ready to bow down to the parliamentary majority. He likens upholding the Constitution by the Court to the „the cabaret that must end now" and promises: „we will end it".

In normal circumstances the interview would not be worthy of a minute of attention. Threatening the sitting constitutional judges would sound the death knell for a politician behind such statements. At best, he would be looked at as a fringe trouble-maker. However, these are not normal circumstances.

The idea of „removing the judges" the speaker alludes to makes more sense in the light of previously reported revelations that already signalled a more radical version of „court packing". The pro-democracy daily and champion of post-89 transition *Gazeta Wyborcza* has already raised the alarm by reporting in January 2016 that judges will be handcuffed by the police and removed from the Court's buildings. As hinted in exasperation by one prominent journalist („How will the Court die"), allowing three judges unconstitutionally elected by PiS to sit now on the Court would require the assistance of the BOR (Polish acronym for the special task force „Office for the Protection of the Government"). The most dramatic article, though, was „Arrest President Rzepliński". It was written in response to a direct plea by one of the politicians of PiS Janusz Wojciechowski (member of the European Parliament and himself a former judge (!)) who called on the Police authorities to arrest Chief Justice Andrzej Rzeplinski. The condemnation from the press and the uptick in the EU's interest in Polish case silenced these voices, but not for long, as attested by the interview.

This interview is important and must be taken seriously, because the Deputy Speaker of the Parliament is not just rank and file of his party. His words carry special weight and must not be looked at as one-off aberration. He clearly lays down a path now to be followed by PiS, characterized by anti-democratic sentiments, apotheosis of the will of the parliamentary majority and the preponderance of its own understanding of what „the law" means in Poland. Rule of law sensitivities are treated as burdensome technicalities, and the Court is seen as a vestige of a past corrupt regime.

There are *four* important and interrelated constitutional takeaways from all this.

1. Real constitutional clean-up starts now … or very soon

The interview shows that today all options are on the table and PiS might soon deliver on its plans and threats. As shocking as this might look at first for the European audience, it has become "*business as usual*" these days in Poland. Indeed, the talk of the town has been for weeks that after the lazy summer season[1], the ruling party will go on the offensive and a "*no-prisoners*" approach will prevail this time. Given the resistance of the Court's bruised and shrinking majority of judges to statutory court-packing, dealing with the unruly Court would now have to transition into more forceful phase. The message contained in the interview is crystal clear: „Our patience is running out and we are coming after you".

2. European day of reckoning looms large

As far as the Polish authorities are concerned, the compromise with the EU along the lines suggested by the Venice Commission in its March, 2016 opinion, and later approved by the EU Commission's Rule of Law Recommendation, is not even considered at this stage. PiS' resolve gets stronger by the day, and lack of tangible actions by the EU will only embolden the ruling party. Europe should know by now with whom it is dealing, plan its actions accordingly and, most of all, and reject any short-term sweeteners and dishonest assurances from the Polish government. The stalemate will not be resolved by futile exchange of letters, memoranda, grand words etc., (even though PiS would love to play the game this way *ad infinituum*), but by decisive step(s) taken by the Commission that would show that Europe is ready to bite, and not only bark[2].

Writing with his usual perspicacity Wojciech Sadurski argued that EU is increasingly becoming a community of values rather than merely a community of interests: "*EU can be mobilized against nationalistic, xenophobic, authoritiarian trends and there is a degree of transnational solidarity on the part of liberal democratic forces that can count on the political resources of the EU*". More crucially he enlarges on an argument which might be conveniently called "containment" where the EU is seen as a forum to constrain national self-determination and mitigate its excesses. He says: "*with the awareness that a possible lapse into a nationalist-authoritarian option in the new Member States of Central and Eastern Europe is not merely an 'internal domestic affair" but rather immediately becomes a 'European' problem penetrating public opinion in these states, the political mechanisms for preventing and countering such collapse are themselves becoming more resilient. Accession to the EU may not be a panacea for all the problems of democracy but it provides reasonably good protection against possible future disasters*"[3].

The day on which his prognosis and faith will be put to the test is coming. Rethinking its strategy vis-a-vis Poland looms large for the EU. Will it be ready to take a real stand, rather than set new time limits for compliance that will never come? Time will tell, but I have serious doubts. At least, the sincere expression of PiS' intentions in the interview saves EU the future embarassment of having to claim that „we did not know and we were taken by surprise". Europe now KNOWS beyond any doubt what to expect of the Polish government.

3. Welcome to Poland where anything can happen now

It is clear that in Poland A. D. 2016 anything can happen, as threatening to handcuff judges and instigate criminal prosecution against the Chief Justice are viewed as viable instruments of pressurising the Court into obedience. When it comes to the Court, PiS means business and won't stop.

However, and this is a novel element, should the „handcuffing option" materialize and charges against the President of the Court will be brought before an ordinary court, we would be no longer talking of the *constitutional crisis*, but rather of the *constitutional coup*. We are on the verge of moving away from *stealth authoritarianism*[4] (legal instruments and procedures are used and abused by the regime to consolidate its grip on power) to *overt authoritarianism*. With the latter, statutory tinkering and legislative plotting would be replaced with sheer force and democratic subtleties thrown out the window altogether.

4. European Commission: read in Polish too!

Last but not least, there is one more practical piece of advice to be given here. In case of any doubts (there should be none, but still) as to the real intentions of Polish powers that be, I suggest that the European Commission should read more in Polish these days. This is where clear and real picture of PiS intentions and plans with regard to the Court and Poland's rule of law has been shaping up. Otherwise, it will be a never-ending fool's errand for the Commission, and as such, exactly what PiS has scripted for Europe.

[1] „Lazy" is a relative term here, as July/August 2016 was not your usual off-season. July saw another attempt at statutory court packing and in August, the Court was able to thwart (again) this most recent attempt.

[2] Linking the persistent and systemic non-compliance with the suspension of EU funding might be one of the solutions to the current impasse. The necessity of such a tactical shift in the Commission's thinking has been already suggested and convincingly argued by K. L. Scheppele, *Enforcing the basic principles of EU Law Through Systemic Infringements*, in C. Closa, D. Kochenov, (eds.), *Reinforcing rule of law oversight in the European Union*, (Cambridge University Press, 2016), pp. 127-131.

[3] *Constitutionalism and the enlargement of Europe*, (Oxford University Press, 2012).

[4] I borrow the term from O.O. Varol, *Stealth authoritarianism*, (2015) 100 Iowa Law Review 1673.

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