In Judges We Trust? A long overdue Paradigm Shift within the Polish Judiciary (Part I)

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Once the Polish Constitutional Tribunal had been disabled, it took no time for the ruling Law and Justice Party (PiS) to identify ordinary courts as new adversaries standing in the way of building a "New Poland". The classic tenet of PiS' politics of resentment applies here as well: to attack, and take over the courts (read: corrupt institutions) that have been in the service of the allegedly discredited post-1989 regimes. The state must be cleansed of the old order's vestiges to give way to new virtuous judicial elites leading Poland to new heights. Wicked rhetoric aside, it begs the question, where do Polish ordinary courts stand on the constitutional debacle that has been going on in Poland since PiS won the elections in 2015? What should we expect of them at times, when the Constitution is at risk and the rule of law narrative, dominant for the last 25 years, is called into question, if not undermined altogether?

Polish judges and the constitutional crisis

Paradoxically, it is the constitutional crisis that engulfs Poland, which brought question(s) of the "ethos of judging" to the fore. Questions of philosophy of law, the system of values that case law should uphold and ultimately the sense of constitutional fidelity that had long been forgotten.

Crippling constitutional review and the incessant capture (see here and here) of the rule of law required also us lawyers to take stock and identify the shortcomings of the judicial system. It is necessary to come up with a road map for a much-needed debate on the state of Polish judiciary. If those opposing PiS want to win over the trust of average citizens and dent the ruthless and populist rhetoric, they must also recognize the importance of this transformation. As important as the case pending before the Polish Supreme Court on the legality of acts of the new President of the Constitutional Tribunal is, we should never lose sight of the bigger picture. This case is not the first, and certainly not the last, to test the judicial temperament and courage of Polish judges. I agree with M. Matczak about the importance of this case. It gives hope that the legal complex and mobilisation might be in the making to break the cycle of helplessness and passivity. Taking this case as a point of departure, I want to go further. As much as this case raises hopes of judges finally siding with the Constitution, it is also fraught with doubts whether Polish judges will indeed be up to the challenge of *principled* and *long-term* resistance. That full picture of the dynamics on the ground and the state of mind of ordinary judges will only be revealed by combining three perspectives: hopes, challenges and doubts. I have been calling for years now (for examples see here and here) on Polish judges to recalibrate their perspective away from the "authority of judging", understood as a privilege, to the "duty of good" judging that builds trust and adds to the public acceptance of courts. I asked what it means to be a good judge. What makes a good judge beyond independence and impartiality? How should judges communicate with the public to make sure that justice is perceived as well functioning? How should courts create legitimacy in the XXI century? How should they interpret the law? I could go on. Yet, every time I have spoken up, my voice was seen as a biased and unjustified attack on judges and their independence. Not one judge saw it as useful critique coming from an *amicus curiae* and an invitation to start true and long-overdue debate on these issues.

How and why does it all matter now? The answer is short: in a dramatic way. The judges are asked to defend the Constitution and the rule of law and take a

stand against the government in times of constitutional crisis. This is a tall order. The most important question, though, should be: Are the judges ready, mentally, temperamentally and intellectually, to take on the challenges thrown at them, and deliver in accordance with the expectations, that have been placed on them? Are we justified in our thinking and hoping that they will be up to the task? The lack of true debate and judges' stubborn refusal to own up to their own imperfections are haunting us now. Public confidence in the judiciary is at its lowest and the populist government takes full advantage of this anti-judicial sentiment. People do not understand why fighting for the judiciary is worth the effort and that indeed judicial independence must be the backbone of the rule of law. Their reply is simple, yet revealing: "*Why should we defend the courts and the system that have been failing us for years*?" As dramatic and shocking as this might be to an outsider, this answer should not come as a surprise, given the past, recent and more distant events.

"Marbury Moment" in Poland v the weight of the past

To understand the enormity of the task, and to temper far-fetched expectations of those opposing PiS, one should consider the historical baggage of the Polish judiciary. Poland adopted a bureaucratic model of the judiciary that sees judges as well-paid civil servants. While in Western Europe the model evolved towards more independence of the judiciary, in Poland (and Eastern European countries in general), the trend was the opposite. Judges post-1945 were expected to be the vanguard of socialist change and functioned as part of the unitary state machinery. The Communist Party held all the power and the obligation of lower bodies was to obey the directives of the higher ones[1]. The Constitution was thought of as a purely declaratory document with no normative content and no role to play in the judicial resolution of disputes. Judges were looked at as part of the unitary governmental structure, engaged in furthering the cause of building a classless society. Independence of the judiciary and the direct application of the constitutional document as a source of individual rights was not part of the communist playbook. The ideal judge was subservient, passive and an uncritical enforcer of a statute, unwilling and unable to glean from the text anything beyond literal interpretation, no matter how unreasonable and unjust the results. Heavy political and educational indoctrination left no space in which an independent and critical judiciary could grow. Judging was purely mechanical exercise in syllogism, free of value choices and critical thinking. Judges accepted positive law as equivalent to the law. As a result, the statutes and the law were the same. The ideology of bound judicial decision-making as developed by the leading Eastern legal theoretician and philosopher of law, Jerzy Wróblewski, has kept Polish judges captive for decades now[2]. This ideology rests on the textual positivism and formalism and stands for limited law and limited sources of law. As a result, Polish judges have rightly been described as perfect examples of "textual judges"; impervious to the context in which the legal text operates. The so-called presumption of "rationality of the legislator" assumed the legislator can do no wrong and provides *ex ante* for all possible circumstances in which law in the only form known to judges – inscribed in codes – will be applied in the future. Should the existing law prove to be insufficient, it is not the business of the judge to override the textual meaning of the text, but for the legislator to amend accordingly. I would argue that more than 25 years after transformation, the approach marked by the mechanical approach to law and by textual positivism continues to be one of the most long-lasting legacies of communism. The fear of being creative and critical is omnipresent and every attempt to interpret the statute beyond the text is seen as an example of judicial overreaching and dismissed with scorn as inadmissible judicial imperialism. What follows is the self-imposed image of a judge, who, in the words of one commentator, resembles "an anonymous grey mouse, hidden behind piles of files and papers, unknown to the outside world [...]." Who is not used to "stand by his opinion and defend them in the public". As one leading textbook on the subject succinctly put it: "*the courts* (writing of Central and Eastern Europe in

general) *try to follow the letter of the law, however problematic and absurd the results may be which this course produces*"[3].

Trust must always be earned, never taken for granted

Polish judges are true believers in what Lord Reid ridiculed 40 years ago as a fairy tale in which good results are produced by knowing all the right passwords. Indeed, he believes bad decisions are given, when he muddles the password and in most cases uttering "Sesame open up" will do the trick. As a result, when a case calls for more than textual reconstruction, judges turn towards the legislator pleading for ... more text. The legislator acquiesces and enacts new text, which is only good until new controversy arises – A vicious circle.

All this clouds our hopes for a change through ordinary courts with uncertainty and lingering doubts. After all, our hopes of judges rising up now are implicitly based on the rejection of the belief that any case can be decided by relying on textual statutory arguments. Only such rejection could take ordinary judges out of their comfort zone as it would make the Constitution part of the judicial decision-making process. This in turn would entail critical evaluation of statutes and become a source of empowerment, as judges would embrace the long-forgotten role of being judges over the "Constitution *and* statutes", not judges applying and interpreting *only* statutes.

If there is one particular lesson to be learnt from the *Marbury* precedent, it is the "*principle supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void and it is the duty of the judges to say what the law is*"[4]. The very moment Polish judges take true ownership of the constitutional essentials, Polish rule of law and the Constitution will be given a new lease of life.

Martin Shapiro famously wrote about the consequences of the choice made by constitution makers to resort to a court as conflict resolver. Such choice entails the acceptance of

> *"the inherent characteristics, practices, strengths and weaknesses of that institution ... and some law-making by courts and a certain capacity for judicial self-defence of its law-making activity. The issue of whether such law making and self-defence are somehow anti-democratic or anti-majoritarian is uninteresting. If the demos chooses the institution, it chooses the judicial law-making and judicial self-defence".*

His "self-defence"-thesis applies now to the Supreme Court and sets the stage for its decision. The Court will decide on much more than the question of legality of acts adopted by the newly elected President of the Constitutional Tribunal. Primarily, it will become a judge of the Constitution and its place in the Polish legal order. Will the Supreme Court be ready to forego its "business as usual" of treating the Constitution as an after-thought, and of playing its preferred role of a dispassionate bystander? Or will it instead show courage and constitutional imagination? Undoubtedly, standing up against the government will set the Court on a collision course with the Polish powers. That would also send out a more precious and promising message. That message would be that Polish judges are ready to forego the traditional and comfortable *non possumus* and defend the foundations of Polish constitutional order with strong backing of their Supreme Court.

In a recent courageous appeal addressed at Polish judges, the First President of the Supreme Court explicitly called for judicial courage, engagement and resistance against the dismantling of the rule of law. Yet, if anything is to change for better at the bottom of the judicial ladder, the example must be set at the top. The constitutional fidelity (on the concept see my analysis here) and judicial temperament must first inform the actions of the highest jurisdiction in the land and then trickle down to lower courts with a strong message of empowerment and judicial ethos. Then, and only then, we could indeed start building our hopes on more stable foundations and look forward with more optimism. The road ahead is

bumpy, yet there is hope, as I will try to demonstrate in part II.

[1] M. Brzezinski, *The Struggle for Constitutionalism in Poland*, (MacMillan Press Ltd, 1998).

[2] See English version of his most famous treatise *The Judicial Application of Law*, (1991), translated by Zenon Bankowski and Neil MacCormick.

[3] Z. Kühn, *The judiciary in Central and Eastern Europe. Mechanical jurisprudence in Transformation?*, (2011) at p. 201 (my emphasis).

[4] Chief Justice John Marshall *Marbury v. Madison*, 5 U.S. 1 Cranch 137, 180 (1803).

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