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

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*There was a time when it was thought almost indecent to suggest that Judges make law – they only declare it. Those with a taste for fairy tales deem to have thought that in some Alladin's cave, there is hidden the Common Law in all its splendor and that on a judge's appointment there descends on him the knowledge of the magic words Open Sesame. Bad decisions are given when the judge has muddled the password and the wrong door opens. But we (*judges – T.T.K.*) do not believe in fairy tales any more …* [1]

Former President of the Israeli Supreme Court Aharon Barak once wrote: [A*]t the core of judging is judicial temperament. That is the quality that allows the judge to listen to the parties' arguments with an open mind, without interrupting and without constantly seeking to educate them; that is the quality that allows the judge to restrain his power and to understand its limits; it is a quality of humility and the lack of arrogance that educates the judge to understand that he does not have a monopoly on wisdom.*"[2] To decide on others' rights and obligations involves listening to their stories in order to arrive at conclusions that conform to law, but where possible, also appear to be just. The list of challenges facing Polish judges is tentative and by no means exhaustive. One should be clear about one thing. For a judge, it is crucial to make a clear cut with the past, to reconsider judicial craft, and to capture challenges ahead. He needs a new model for dispensing with justice and new language for understanding his role in a democratic state governed by the rule of law. Only such rethinking will take him out of his comfort zone.

Sin of sins

Let us start the presumption that continues to reign in Poland and defines the judicial philosophy of an average judge: limited conception of law and sources of law. It equates law with "the law" (statutes, codes and other written enactments by the legislature). This assumption ties the hands and blocks the minds of Polish judges and is used as a convenient excuse. After all, their argument goes, they do nothing more (or less) than applying the law and this is what they are supposed to do! Despite the shift from law, acting as a sword to punish (post-communist heritage) towards law as a shield (new paradigm dictated by the rule of law) that protects the individual against the state, this process has not been embraced by the judges in Poland and Eastern Europe. "*Law as a sword*" still reigns in Polish courts and the minds of their judges. "*The law as a shield*" continues to be seen as an aberration. As a result, there is a gap between people's expectations (new rights, new procedures in the wake of EU law) and the performance of courts in providing[3]. Citizens still live in the shadow of the state and the role of law is seen in serving as a tool to punish with courts providing the state with swift and efficient "enforcement services". "*Living on the frontier*" is painfully verified by a judge who is not up to the challenge of "*adjudicating on the frontier*" and embracing the new protective rationale of the judiciary. As a result, people are relegated to mere case numbers. Courts are taken by surprise when litigants do claim rights and expect judicial protection and constructive interpretation of the law. They are surprised because formally speaking everything is correct as judges decide cases according to the law in force.

List of things to do and to change

With this in mind, I see the challenges facing Polish judges in the following way. *First*, a right to a court (aspect of *access*) must be complemented by a right to

a good judge (aspect of the *procedural quality* of the right)[4]. *Second*, we must move beyond the independence and impartiality paradigm and towards the aspect of good judging. We need a new "turn to judicial virtues" like discursiveness, openness, rationality, criticism, responsiveness, art of listening, wisdom of deferral, acceptance of limits as a judge, courage to reject opportunism and pressure to fall in line with judicial mainstream. These qualities constitute a right to a court as much as traditional first-generation independence and impartiality. They make up our "*right to a good judge*" today and should determine methodology of deciding cases. Third, a "*new public management*" approach to judging puts emphasis on presenting courts as user-friendly institutions with the judicial know-how necessary to balance arguments and wielding power of choice within the judicial zone of discretion. Participatory justice underlines that courts can claim democratic legitimacy based not on representativeness, but on accessibility and participation. Judicial proceedings need to be transparent, speedy and well-managed, user-friendly, ensuring full and fair participation for all interested (proverbial "have one's day at court"). Fourth, judicial temperament needs drastic reconsideration. Polish judges must be ready to make justice and not simply decide cases. Fifth, moving beyond result-based justice towards procedural thinking: The question is not *why* people go to courts in the first place, but rather why people *are ready to go back to courts*? The lack of appreciation for the procedural dimension of rights is a more general phenomenon that characterises the "post-communist mind" trapped between two extremes: either procedure will be "followed to a T" irrespective of consequences *or* neglected completely since procedures are said to limit judges' "freedom" and discretion. Sixth, a move away from formalism and new understanding of division of powers. Courts should be seen as actors with their own promises to live up to and expectations to fulfil. They are "courts of law", not only "courts of statutes". Seventh, building culture of justification where what counts is the *power of arguments*, not mere *arguments of power*. Judicial legitimacy is derived from transparency and from weight of arguments. What is important is not only "*who* says" (dominant approach "I, Supreme Court hereby rule …") but also "*how it is said*". Finally yet importantly, constructive interpretation must take place of the reigning infatuation with literal interpretation. The latter overpowers and incapacitates Polish judges almost to a point of intellectual embarrassment. Mere attempts to consider the text in the light of the general scheme or the law's *ratio legis* are viewed suspiciously and treated as inadmissible judicial activism. In the XXI century, constructive and holistic legal interpretation builds discursive legitimacy of the courts. Literal interpretation might become an evil and a good judge should learn how and where to draw the line. Judges who keep denying that their interpretation is creative are simply liars[5].

Speaking of Polish courts and judges, Professor Ewa Łętowska, first democratically elected Ombudswoman and former judge of the Constitutional Tribunal, perfectly captured the challenge(s) ahead:

> *"I do not know how to reform Polish judiciary. I see potential for change in reasonable, calm, decisive, steady, rather than playing-to-the-gallery, building of the authority of courts by courts themselves […]. What is most disturbing in the practice of Polish courts is the acceptance of methodological nihilism and interpretative reductionism together with denying the right to a court on the pretence of allegedly commendable judicial restraint. While judicial restraint is one thing, interpretive deficit is quite the other".*[6]

Judges judging the crises. Are they ready?

Polish courts have been squandering the capital invested and hopes placed in them for years. Regaining trust and confidence will not happen overnight. It will take years. Any attempt of criticism was, and is, castigated as an assault on their independence. Now with the Constitution in shambles, the Constitutional Tribunal disabled and constitutional debacle at the door of every judge, the question of "what judges are for" becomes more dramatic than ever. Before PiS came to power, one could have detected first signs of a public revolt against the rule of formalism in Polish

courts and growing critique of the methodology adopted by judges. The judges themselves started to understand and feel that "business as usual" is no longer a tenable alternative.

The effortlessness with which the ruling majority dismantled the rule of law in the name of democracy is startling and disconcerting. It is time to recognise that Polish courts do have both mandate and means to break this unconstitutional capture. Whether they will, is a different question altogether. One that hinges on the uneasy combination of *Hopes*, *Doubts* and *Challenges*. One thing must be beyond doubt, though. Passivity is no longer an option. The way they respond to the constitutional exigency of today, will reverberate in the years to come. The decision by the Supreme Court will either keep the *status quo* and confirm the *carte blanche* of the majority and passivity of the judiciary, or it will start a process of true soul-searching among Polish judges. This admonition and plea come from a true *amicus curiae* to Polish courts and judges and should be read as such. Again, as A. Barak reminds us in the final sentence of his book: "*As you sit at trial, you stand on trial*". With this, the time for true constitutional reckoning for all Polish judges has finally arrived.

[1] Lord Reid, *The Judge as Law – maker,* 12 Legal Studies 22 (1972).

[2] A. Barak, *The Judge in a Democracy*, (Princeton University Press, 2005), pp. 309-310.

[4] *Le droit à un bon juge* is the term used also by S. Guinchard, *Droit processuel*, (2011), at p. 415.

[5] See classic analysis by M. Shapiro, "*Judges as liars*", (1994) 17 Harvard Journal of Law and Public Policy 155.

[6] E. Łętowska, *Rzeźbienie państwa prawa. 20 lat później*, (*Sculpting the state governed by the rule of law. 20 years later*), (2012), p. 149, 165. Written well – before the rule of law has collapsed in Poland, It is a must-read for anyone interested in finding out *what* and *why* went wrong with Polish courts and *how* to move forward (my own translation).

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