How to Demolish an Independent Judiciary with the Help of a Constitutional Court

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On 20 June, the Polish Constitutional Tribunal, with three anti-judges among its members, decided that certain provisions of the Act on the National Council of the Judiciary of Poland were unconstitutional. By doing so, the Tribunal unanimously conceded to the motion of the Minister of Justice, who had questioned those provisions in the course of work on reform of the National Council of the Judiciary. The reason why the current Polish Government unexpectedly suspended the process of usurping control of the national judicial system in order to enlist the help of the constitutional court can be understood with the help of a metaphor.

Let us assume that: i) the Constitution is an approved building project design; ii) the party that has formed the government is building a house; iii.) the Constitutional Tribunal is the Central Construction Inspector; and iii.) we are all neighbours.

In normal circumstances, when a builder does not build in conformity with the approved design, neighbours would go to the Inspector and ask him to determine whether the builder is breaching the approved building project design. The Inspector, who is independent of the builder, reviews the matter, determines the incompliance and orders that anything that is not consistent with the approved design should be removed. The builder conforms with the Inspector's decision and the matter is settled.

In the present situation in Poland, the builder breaches the project design on several instances, not fearing the Inspector at all. Why? Because the Inspector is under the control of the builder, and the Inspector's office is staffed with the builder's people, some of them appointed illegally and some fully loyal towards the builder. The inspector may even go so far as to declare that he represents the builder (in fact, one of the anti-judges of the Polish Constitutional Court, Professor Morawski, did exactly so during the conference in Oxford in May this year). So the builder does what he wants.

Let us now move from the Constitutional Tribunal to the National Council of the Judiciary, the constitutional body which protects the independence of courts. An act of law restructuring the National Council of the Judiciary is already going through Parliament which, if passed, will cause courts to become fully politicized.

Applying our metaphor, let us imagine that the National Council of the Judiciary is a sizeable building which gets in the builder's way, and the builder wants to demolish it completely. The demolition will make it possible for the builder to take over all regional and local construction inspector offices, and consolidate the previous takeover of the Central Construction Inspector's office. Of course, such a demolition is in breach of the approved building project design (i.e. the Constitution). The builder could demolish the inconvenient building unchecked because the Inspector would not say anything. However, the builder is somewhat deterred by the neighbours' loud protests.

But the builder is resourceful. He sends a letter to the Inspector, in which he requests an inspection, claiming that two steps were incorrectly built next to the door and some windows are uneven. The Inspector does as he is told and fully concurs with the builder's assessment. The builder can now go to the neighbours and say that the target building has significant defects, which were confirmed by an independent Inspector, and must be completely demolished and rebuilt from a scratch, under his control and according to his plan. The neighbours say that it would be enough to replace the steps and windows but the builder has already

gone on to give a television interview on the matter (he has considerable influence in television too).

And here the metaphor ends, but the game continues. The government's motion to the Constitutional Tribunal regarding the National Council of the Judiciary is a smokescreen to confuse the public and take control over courts at a lower political cost. Its trivial challenges against the Act on the National Council of the Judiciary are doubtful (a charge of unproportional representation of judges) or absurd (a charge concerning institutional vs. individual term of office). Even if they were justified, Minister Ziobro should address only those two issues in the planned reform.

However, the Minister challenged the provisions that include the words "election of judges to the National Council of the Judiciary" and "term of office of a member of the National Council of the Judiciary" on purpose in order to be able to say at a press conference that those two areas in general require a decisive and broad intervention from the Parliament, even if this intervention is totally disproportionate to the unconstitutionality found in the challenged regulation. And now, with the help of the Constitutional Tribunal, the Minister will demolish the independent judiciary.

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