Farewell to the Separation of Powers - On the Judicial Purge and the Capture in the Heart of Europe

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19.07.2017 doi: 10.17176/20170719-141352

Having regard for the existence and future of our Homeland,

Which recovered, in 1989, the possibility of a sovereign and democratic determination of its fate,

We, the Polish Nation - all citizens of the Republic [...]

Recognizing our responsibility before God or our own consciences,

Hereby establish this Constitution of the Republic of Poland as the basic law for the State, based on respect

We call upon all those who will apply this Constitution [...] to interpret its provisions and to apply them giving priority to paying res

Preamble to the Polish Constitutionof 1997

The Court celebrates its centennial and ... dies in silence

2017 was supposed to be a special year for the Supreme Court in the same way as 2016 should have been special for the Polish Constitutional Court. In the former case 2017 marks the centennial of the Court's existence (1917 – 2017), in the latter 2016 the 30th anniversary of the Constitutional Court's operation. It turns out that in both cases, rather than celebrating the past and looking into the future, the anniversary turned out to be the end of the road for both supreme jurisdictions.

Late at night on Wednesday, July 12, 2017, a legislative proposal amending the Act on the Supreme Court (draft no. 1727) has been pulled out of a hat like a rabbit and submitted to the Sejm. The date is important as it marks the end of the Polish Supreme Court as we used to know it, and heralds the death knell for the rule of law in Poland (for recap see statement by Professor E. Łętowska here and also analysis by M. Kisilowski here). The ruthlessness and take-no-prisoners strategy by the ruling party (PiS which in English reads „Law and Justice) are shocking even when considering the already established brutal standards of PiS. Whereas it took more than a year of relentless onslaught and careful legislative scheming to finally dismantle the Polish Constitutional Court, all that was needed to emasculate the Supreme Court and the National Council of Judiciary was a single legislative sleight of hand and one seating of the Sejm and Senate (on July 14, 2017).

They Came at Night: Farewell to the Separation of Powers

The most shocking of all the provisions of the draft is Article 87 which virtually constitutes an overnight demolition of the Supreme Court. Article 87 (1) reads: *„On the day following the date of entry into force of this Act, all judges of the Supreme Court appointed in accordance with hitherto binding provisions of law, excluding judges selected by the Minister of Justice, shall be granted a retirement status. On the day of entry into force of this law, the Minister of Justice shall designate in the Official Journal judges of the Supreme Court who shall remain in active service, taking into account a necessity of introducing organizational changes resulting from the new Law and of maintaining continuity of work of the Supreme Court*". According to Article 88 of the draft, if *„a Judge of the Supreme Court was granted a retirement under art. 87(1), tasks and competences of the First President of the Supreme Court shall be performed by the judge of the Supreme Court who is selected by the Minister of Justice*". These provisions shall enter into force within 14 days from the day of their official publication (Article 108).

To date, in accordance with the independence and separateness of the judicial branch, the power to

propose judges to the Supreme Court lied in the hands of the National Council of the Judiciary and the candidates approved by the Council were then appointed by the President of the Republic. There was simply no role for the Minister of Justice to play in the appointment process. The amendment, however, will now change the equilibrium in a dramatic way and lead to the Minister of Justice taking over the independent Court and enjoying (unchecked) power to pick and choose those judges that will fit his vision of a court subordinated to the executive branch and that will fall into line with the aspirations of the political power. The Minister of Justice will also be granted the power to delegate judges from inferior courts to the Supreme Court and thus build „a new Supreme Court" to its liking from ground up. Importantly, the draft does not provide for any criteria of the selection of those judges that will remain in active service. Knowing how paranoia-driven parties like the PiS operate, the Minister will surely go after those judges who participated in the issuance of judgments not to the liking of the majority, while leaving in place those who were and will remain loyal (whatever that means). Likewise on the day of entry into force of the new law, the current First President of the court will be dismissed and a judge appointed by the Minister of Justice single-handedly will take her place (Article 88 quoted above). In this way the constitutional protection and fixed term of office (6 years) of the First President of the Supreme Court are relegated to legal technicality. This also means that the electoral power given to the General Assembly of the Judges of the Supreme Court and to the President of the Republic by Article 183 (3) of the Constitution actually becomes an illusion. The draft does not specify how long such an interim First President of the Supreme Court shall fulfil his/her duties. Following the entry into force of the draft the Minister of Justice will also have the power to appoint a candidate for the office of the (permanent) First President of the Supreme Court. The National Council of Judiciary is not even mentioned in this „new" and clearly unconstitutional procedure. It will also be the Minister who will select the candidates for judges of the Supreme Court in the first recruitment procedure. The draft provides that the Minister shall submit one candidate for each vacant judicial position to the National Council of the Judiciary, which will then have 14 days for consideration of this candidature. On the expiry of this 14-day period, the candidates picked by the Minister shall be submitted for appointment to the President of Poland. In practice, it will therefore be the Minister of Justice who will play a decisive role in the nomination of Supreme Court judges, instead of the President and the National Council of Judiciary, whose function will be reduced to rubber-stamp the Minister's will. Appointments will not be preceded by any meaningful assessment of the candidates' qualifications and the competent organs of the Supreme Court (in accordance with the now in force Law on the Supreme Court of November 23, 2002, the General Assembly of the Judges of the Supreme Court selects candidates for the judges of the Supreme Court and the candidates so approved and selected are then notified by the First President of the Supreme Court to the National Council of the Judiciary), will be deprived of any input in the assessment of the candidates. Consequently, the self-government of the Court and the independence of the judiciary are reduced to naught.

The capture of the Court at the level of appointment process is further reinforced by the organisational and procedural powers granted to the Minister of Justice (drafting the rules of the court specifying the number of judicial positions, the purview and the organisation of the newly created chambers – see below).

The amendment additionally demolishes the internal structure of the court. Where there used to be chambers which corresponded to the jurisdiction allocated to the Court (civil, criminal, labour and military), the draft now replaces them by three new chambers: public law, private law and disciplinary. The disciplinary chamber will be „a court within a court" with a separate registry and budget. Its judges will receive better remuneration (higher by 40 %) than „ordinary" judges of the court. This chamber will be responsible for disciplinary proceedings of members of all legal professions in Poland (judges, public prosecutors, attorneys, public notaries and legal advisers). The

Minister of Justice will exercise the actual supervision over the disciplinary proceedings with respect to the judges of the Supreme Court, ordinary courts and military courts, which includes the right to issue binding instructions concerning the course of these proceedings.

Last but not least, the purge extends to other employees of the Supreme Court as it provides for a special vetting procedure. The wording of the draft is extremely open-ended on this point (Article 90 (2)), for good reason. It would be pointless to leave the staff of the "old" court intact while purging the court itself from the „old" judges. We have already seen how the new broom of capture swept clean the Constitutional Court by not only forcing PiS-backed Judged onto the bench *per fas et nefas*, but also by dismissing the staff of the „old" court. The same script is followed with regard to the Supreme Court. The First President of the Court is now given a discretionary power of appraisal of the employees. The draft provides that new terms of employment „may" be proposed to the employees of the Court. When such new terms are not proposed, or, when they are not accepted, the employment will be terminated.

To say that the draft strengthens the position of the Minister of Justice, would be the understatement of the century! The draft completely rewrites the separation of powers (Article 10 of the Constitution) by making the court, and individual judges, fully subservient to the Minister of Justice. Yet, the implications of this most recent populist foray into the rule of law do not stop at the Court's doors. The entire legal landscape in Poland has been altered up to the point where the character and identity of the State ruled by law has been affected. The draft now awaits the thumbs-up from the PiS ultra-loyal President. Given his record of unashamed rubber-stamping of all PiS-led initiatives so far, not even his last-minute „stand" on the reform of the judiciary changes this assessment, since his true motives and political calculations remain unclear right now. One must be very cautious before hailing Mr. Duda as an objective and constitution-minded broker of a compromise. He continues to be a „PiS President" for all intents and purposes and in order to shake off this label and earn constitutional trust much more is needed than a one-off salvo and cosmetic exercise of disobedience. As a result, 14th of July 2017 will be remembered as a paradigmatic date. It marks the completion of the unconstitutional capture that has been engulfing Polish public life and discourse for the last two years.

Purge at the Service of Capture

(Un)constitutional capture is a generic and novel concept[1] that poses a challenge for the EU by showing that liberalism and democracy no longer animate national constitutions. Unconstitutional capture and the piecemeal undermining the liberal democratic state also pose new challenges for the rule of law as well as external constraints for the domestic *pouvoir constituant*[2] As forcefully argued by K. L. Scheppele and L. Pech, "*consolidation of majoritarian autocracies [...] represents more of an existential threat to the EU's existence and functioning than the exit of any of its Member States*". The capture plays a pivotal role in disabling the checks and balances. It renders the constitution a "sham"[3] as it strips the constitution off its limiting and constraining function. The principle of the separation of powers becomes illusory as the capture opens gate to unchecked arbitrariness. As shown by the demolition of the Supreme Court, the capture is not merely a one-off aberration. It is rather a novel threat to the rule of law as it is not limited to one moment in time. It is a process of incremental taking over the independent institutions and the liberal state. For some time Hungary was a prototype of a "captured state" and one would assume that the European Commission had learnt from its passivity

[1] For the concept see also J. W. Müller, *Rising to the challenge of constitutional capture*.

[2] C. Dupré, *The Unconstitutional Constitution: A Timely Concept*, in A. Von Bogdandy, P. Sonnevend, (eds.), *Constitutional Crisis in the European Constitutional Area. Theory, Law and Politics in Hungary and Romania*, (Oxford/Portland, Hart Publishing, 2015); K. L. Scheppele, *Unconstitutional constituent power;* A. Barak, *Unconstitutional constitutional amendments*, (2011) 44 Israel Law Review 321; R. Albert, *The Theory and Doctrine of Unconstitutional Constitutional Amendment in Canada*; R. Albert, *Four Unconstitutional Constitutions and their Democratic Foundations*. For EU perspective see R. Passchier, M. Stremler, *Unconstitutional Constitutional Amendments in European Union Law: Considering the Existence of Substantive Constraints on Treaty Revision*.

and acquiescence to V. Orban's tactics of capturing the state. The lesson has been taught loudly and clearly and yet it was missed by the Commission then, and now. While Polish authorities seek to methodically implement Orban's constitutional capture rulebook, the Commission is repeating its past mistakes. The Commission is once again displaying the same naïve belief in the virtues of dialoguing with autocrats, giving them all the time they need to subvert the national constitutional order, whereas the only way to hinder constitutional capture, or to "constitutionally recapture the unconstitutional capture", is to act preemptively, before the capture is complete. In order to thwart the capture, counter act is necessary at the very beginning, not later. Waiting on the sideline, talking to the perpetrators and hoping for their change of heart, will only embolden and entrench the regime. The regime knows that and will do anything to buy more time to entrench the capture and make the recapture very unlikely. The leaders of Hungary, and now Poland, know very well how to play this game, with the EU further and further extending time limits and engaging in a futile dialogue, while the capture is becoming more and more entrenched, difficult to roll back and, last but not least, emboldened as the demise of the Supreme Court painfully shows. Knowing that nothing will happen anyway, PiS did not even make an effort to disguise its unconstitutional ambitions this time and simply annihilated the court with one single piece of legislation.

The sequence of the capture in Poland makes perfect sense: The Constitutional Court was targeted first because that would ensure that next phases would sail through without any scrutiny from its side. Who cares that the new legislation flies in the face of the constitution since there is no procedural and institutional avenue to enforce constitutional rules? As of today, not only is the Polish Constitutional Court gone; the Supreme Court has followed and joined the list of fallen institutions. Both were turned into facade institutions that shall rubber-stamp any, and all, initiatives of the majority, and serve their political masters.

As A. Barak rightly points out "[...t]*he response to an incorrect judgment is not to abandon communication and break the rules of the game but to use the existing relationship to create a situation in which the result of the mistake will be corrected. Breaking the rules of the game crosses the red line, and is likely to take on many forms: wild and unrestrained criticism of the judgment, attacks on the very legitimacy of the judicial decision, recommendations [...] to narrow the scope of the courts' jurisdiction, threats to create new courts in order to overcome undesirable judgments, attempts to increase the political influence on judicial appointments and promotions, calling for prosecution of judges [...], demands to terminate judicial appointments [...] All these lead, in the end, to the breakdown of the relationship. This is the beginning of the end of democracy*"[4]. We have seen all this and more unravelling in Poland, with Europe reduced to a passive by-stander. Worst of all, the capture is not over yet and it will continue unhindered and more emboldened than ever.

Reading the Constitution in Times of Constitutional Humiliation

For any reasonable democrat the conclusions should already be clear so that any detailed commentary is obsolete. So in lieu of an academic summary, let the Polish Constitution speak up itself. Reading the constitution in times of the rejection of the constitutional text and the capture of institutions, is worth more than a thousand words and might be more powerful even than the most sophisticated legal commentary.

The Polish Constitution provides in plain and elegant words:

Article 2

The Republic of Poland shall be a democratic state rule

Article 8

[3] "Sham" (sometimes also called "facade") constitutions fail to constrain or even describe the powers of the state. On the concept see D. S. Law, M. Versteeg, *Sham Constitutions*, (2013) 101 California Law Review 863.
[4] A. Barak, The Judge in a Democracy, (Princeton University Press, 2006), p. 239 – 241.

1. The Constitution shall be the supreme law of the Republic of Poland.

2. The provisions of the Constitution shall apply directly, unless the Constitution provides otherwise [...]

Article 10

1. The system of government of the Republic of Poland shall be based on the separation of and balance bet

2. Legislative power shall be vested in the Sejm and the Senate, executive power shall be vested in the Pres

Chapter VIII COURTS AND TRIBUNALS Article 173

The courts and tribunals shall constitute a separate power and shall be independent of other branches of po

COURTS Article 175

1. The administration of justice in the Republic of Poland shall be implemented by the Supreme Court, the c

Article 179

Judges shall be appointed for an indefinite period by the President of the Republic on the motion of the Nati

Article 180

1. Judges shall not be removable.

2. Recall of a judge from office, suspension from office, transfer to another bench or position against his will

3. A judge may be retired as a result of illness or infirmity which prevents him discharging the duties of his o

4. A statute shall establish an age limit beyond which a judge shall proceed to retirement.

5. Where there has been a reorganization of the court s

Article 183

1. The Supreme Court shall exercise supervision over c

2. The First President of the Supreme Court shall be ap

Article 186

1. The National Council of the Judiciary shall safeguard

2. The National Council of the Judiciary may make appl

Article 187

1. The National Council of the Judiciary shall be compos

1) the First President of the Supreme Court, the Ministe

2) 15 judges chosen from amongst the judges of the S

3) 4 members chosen by the Sejm from amongst its D

2. The National Council of the Judiciary shall choose, fr

3. The term of office of those chosen as members of th

4. The organizational structure, the scope of activity ar

In the light of the above, are there any doubts left as to what had happened in Poland on July 14, 2017? As I read the Preamble to my Constitution, its foundational principles and its chapter on courts again and again, I remain heart-broken. I have never felt my hopelessness and helplessness more acutely.

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SUGGESTED CITATION

Koncewicz, Tomasz Tadeusz: Farewell to the Separation of Powers – On the Judicial Purge and the Capture in the Heart of Europe, Verfassungsblog, 19.07.2017, doi: 10.17176/20170719-141352.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20170719-141352.