Burning the Last Bridge to Europe

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The recent judgment of the Supreme Court of Poland, which implemented the criterial CJEU judgment on the compliance of the new Polish National Judiciary Council (neoKRS) with EU standards, came as no surprise to the legal profession: a court that is not immune to political interference is *ipso facto* not a court. As the twenty-five member neoKRS includes six members of the legislature, two of the executive, and fifteen judges appointed by the legislature, neither it nor any of the judges it appoints can be said to be independent. Moreover, it has consistently and brazenly acted to weaken judicial independence since its inception. There is therefore no question that the new KRS is nothing more than a political tool for controlling serving judges, ensuring the tractability (or complaisance) of new ones, and making compliance with the wishes of the government a key promotion criterion.

I stress these two criteria (i.e. the method of appointing KRS members and its actions), because Polish government propaganda has been attempting to ridicule this rationale in the most crass manner imaginable: "If appointment by a politicised body disqualifies judges, then what can we say about those judges appointed by the Council of State of the communist People's Republic of Poland in the 1980s, and who are still working in the Polish courts? They're also condemned by the CJEU judgment!" This line of reasoning is symptomatic of the pathology that afflicts the Polish right, viz. the belief that the world is deeply hostile towards them, that the odds are stacked against them, and that, out of pure malice, different criteria applied to "communists" and those who fought against them. "'Communist' judges can decide, 'our' judges can't! Clear injustice!"

I have no doubt this line of reasoning will appeal to those who feel that they are hapless pawns kept down by an international conspiracy, to say nothing of those who feed on their frustrations. It is true that the judges appointed by the Council of State of the People's Republic of Poland were appointed by a politicised body. Since then, however, they have been vetted several times at successive stages of their careers and promoted in a democratic Poland. Many of them have even been appointed by socially conservative and Catholic presidents (including the late President Lech Kaczyński). Moreover, the KRS is not only in violation of EU standards by virtue of how its membership is appointed, but also on account of what it does. The Council of State of the People's Republic of Poland does not exert any pressure on judges today. Nor does it promote them or assess their performance. Judges today do not have General Wojciech Jaruzelski (1923-2014), the former head of the Polish communist state, breathing down their necks. They can hear cases without fear of his retribution in the form of disciplinary proceedings should they hand down a decision that displeases him. The same, however, cannot be said apropos Zbigniew Ziobro, the current Minister for Justice and Prosecutor General, who controls the neoKRS and the disciplinary proceedings.

And therein lies the problem of the neo-KRS – its subjugation to politicians is not only evident in the way it is appointed, but above all, in what it does and how it does it. There is no better example of this than in the way that it not only fails to defend judges attacked by politicians and senior public servants, but enthusiastically sanctions and legitimizes these attacks. Poland stands alone in Europe in that the vast majority of judges believe that a body putatively set up to safeguard their independence is an existential threat thereto. And we can rest assured that the next volley of ministerial propaganda will remind us that judges are appointed by political bodies elsewhere in the EU, e.g. in France and Germany. Conspicuously absent will be any mention of these bodies being

viewed as inimical to judicial independence by the judiciary and legal commentators.

The Polish legal system is infected by a virulent pathogen, viz. the neoKRS, which spreads its spores with each judicial appointment. The only deduction to be drawn from the recent CJEU verdict and the subsequent ruling of the Polish Supreme Court is that the neoKRS is an illegally constituted body that illegally appoints judges who deliver invalid judgments. The more illegally appointed judges, the greater the number of invalid judgments. Any government that valued the integrity of the nation's legal system would set about healing such a sick system without delay. The only serious approach in this situation would be to treat the disease at its source, so that it cannot metastasize. This means abolishing the neoKRS in its current form and re-establishing it in a way that renders it immune to political interference. A properly constituted KRS, whose members were appointed in compliance with EU and Polish standards, and which functioned with proprietary and impartiality, would then be qualified to legally appoint judges.

However, this serious and responsible approach is the one least likely to be adopted by the Polish authorities. Disbanding the neoKRS and abolishing the two newly appointed chambers in the Supreme Court would be a clear admission of political defeat. After all, judicial reform was a flagship project of the ruling Law and Justice (PiS) party. Abandoning it would be more galling for PiS than for Trump to have to personally dismantle his Mexico border wall (once it has been built). PiS can therefore be expected to remain in denial. Their propaganda will proclaim that the neoKRS is functioning well, and the Ministry of Justice, through its disciplinary ombudsmen, will continue to prosecute judges for the "crime" of applying EU law in Poland, as has already happened in the case of a regional judge from Olsztyn. However, the question that has yet to be answered is: What is to become of the litigant or defendant who receives a judgment from an illegally constituted court?

People go to court to obtain a binding and enforceable decision on the basis of which they can proceed, secure in the knowledge that it bears the imprimatur of the state. A court case is not a mental exercise. It is a hard-fought process that results in a verdict that e.g. allows someone to build a house on an actual plot of land, grants custody of a flesh-and-blood child after a divorce, or enables a company to recover a specified sum of hard-earned money. These verdicts are often the culmination of several years of trials and instances, and the personal and financial costs can be onerous. Imagine that when this verdict is finally handed down, it proves to be worthless, as it is guaranteed to be quashed by a higher court on the grounds that the judge was appointed in contravention of EU and Polish law.

The Ministry of Justice may well be able to intimidate Polish judges and illegally pressure them into not applying the CJEU judgment, it will not be able treat judges in other EU countries this way. This has repercussions for EU comity. For example, a French company will be able to happily ignore a Polish court order to pay money, and a German company will be able to rely on its Justice Ministry refusing to execute a Polish judgment regarding a building site. And they will have the law on their side, because CJEU judgments are binding everywhere in the EU. This raises the question of whether Poland wants to remain in the EU.

Therefore, every day that the illness, whose name is neoKRS, remains untreated is another day of needlessly wasting people's time, energy and money, and another day that the legal chaos unleashed by PiS is left to intensify. The law is clear – CJEU judgments oblige all EU and Polish courts to interpret their provisions and actions in accordance therewith. And the interpretation adopted by the CJEU and the Polish Supreme Court clearly states that the neoKRS is illegal in its current form. And despite the government's propaganda, there is no contradiction between these judgments and the Polish Constitution. The Polish Constitutional Tribunal has long since stated that both the accession treaties and the Lisbon Treaty are compatible with the Polish Constitution. And it is the treaty regulations that empower the CJEU to interpret them in a binding manner – which they should if EU membership is to mean anything.

Obviously, these are all mere words that will do nothing to stop this madness. The current Polish authorities will probably do everything in their power to neutralise the judgments of the CJEU and the Polish Supreme Court. They will probably get their commandeered Constitutional Tribunal to rule that there is an inevitable conflict between EU law and the Polish Constitution (even though this is demonstrably not the case), they may resort to the "extraordinary appeal" they introduced into the Polish legal system to enable any Supreme Court's judgment to be reheard, and they have already begun using their disciplinary measures to prevent the CJEU judgment from being applied in Poland. The only question is: to what end? To defend a dozen or so posts in the neo-KRS? To protect their own egos, which cannot countenance the possibly of ever being wrong? Unless the issue of the neoKRS and its judges is resolved quickly, people will suffer, and Poland's position in the European Union will weaken even further. The Polish courts will not have been repaired, and one of the last bridges connecting Poland with the rest of Europe will have been burned.

PS. This week, a group of Polish and international academics signed a letter addressed to the European Commission. This letter requests that the EU file a motion to the CJEU for an interim measure to prevent the Polish government from attacking Polish judges with disciplinary proceedings pending the final judgment on the Polish disciplinary system. Please support this letter.

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