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THE ROLE OF BAR LEADERS IN DEFENDING THE JUDICIARY FROM ATTACKS BY THE MEDIA AND POLITICIANS

The end of lawyers? A few years ago, when Richard Susskind first published his renowned book „The end of lawyers? Rethinking the Nature of Legal Services", no-one – neither the supporters nor the opponents of his theses – could have foreseen the current changes.

The aforementioned changes we can observe today indicate the importance of his thought, thus proving - although in a different manner than he himself recalled – its validity and accuracy.

The media's and politicians' criticism of the judiciary branch. Many countries are currently observing a rapidly-growing public tendency to question the position and authority of an independent judiciary and, subsequently, the role of legal professionals as vital parts of a healthy rule of law state. Said trend is reason enough to fear the end of lawyers is actually upon us.

This danger is tightly correlated with politicians' accusations, purporting the judiciary's alienation and its functioning somewhat „outside" the spectrum of the principle of checks and balances. Courts are perceived as independent in the most absolute sense (as positioned somewhat beyond the scope of the law itself). Therefore the fact that they are the ones who's role it is to resolve questions of political and systemic nature is considered to be more and more questionable. Such attacks are often supported by the claim that said branch lacks sufficient democratic legitimacy and that its decisions spoil or significantly alter many actions undertaken by politicians, who indeed can boast such a social mandate. Moreover, the fierce critics assert, instead of merely interpreting the word of legal provisions, courts tend to overstep their competence and create the law themselves, thus stripping the legislature and executive branches respectively of the possibility to fulfill their electoral stipulations through the either legislative process or later its practical application. We cannot lose sight of the fact that the representatives of those branches were, indeed, chosen in a general election. The judges were not.

Most of such claims are rooted in populism and instrumental abuse of the society's dissatisfaction with courts. In a sense they also stem from the imminent clash between the rule of law principle on one had and the majority rule innate to all democracies on the other hand.

The situation in Poland. The aforementioned phenomenon can be observed with particular clarity in Poland. Over the course of the

last 2 years the process of external interference in the judiciary's independence has radically gained momentum. The other two branches of government constantly attempt to limit judicial independence and subordinate courts, thus making their rulings dependent on current political trends, whatever they may be.

Arguments supporting the criticism and the need for change. Actions undertaken by the legislative and executive branches are being justified with the following arguments:

1) lack of democratic legitimacy of the judiciary, stemming from the fact that judges are de facto chosen among themselves, without the possibility of real material input from either the members of Parliament or government representatives;

2) too much leeway when it comes to judicial review and the interpretation of the law, which is rooted in general and ambiguous constitutional or statutory provisions;

3) malfunctioning of courts when it comes to the effectiveness and time-efficiency of dispute resolution;

4) organizational paralysis, which is a result of inefficient internal court body governance;

5) lack of objective control over judges and fictitiousness of the disciplinary mechanisms, which are only amplified by the constitutional rule stating judges' irremovability from office;

6) the existence of strong personal bonds between members of judicial and legal profession – now often referred to as „the special caste";

7) the fact that there was no verification process for both judges and lawyers who were active during the Communist period (before the change of the system into a democratic one).

The changes can be illustrated with three following examples:

Annihilation of the Constitutional Tribunal. The process of politicisation of the judiciary was initiated with the vast changes in statutory regulations regarding the Constitutional Tribunal. The main reason for such aggressive alterations was the fact that the previous majority in the Parliament was accused of having conducted a „hostile takeover" of 2 vacancies in the CT, which according to the Constitution should only have been filled after the 2015 elections. The rapid radicalization of the new majority's views resulted in the final questioning of not 2, but 5 CT positions which had been filled by the previous Parliament. Moreover, the politicians in power indicated that letting those judges preside over cases would automatically mean that there would be an instrumental blockage when it comes to the review of the constitutionality of any normative changes made after the 2015 elections. It can be easily observed that the arguments were of strictly political nature. The politicians assumed – although to date no-one dared to openly cast such an accusation – that the CT judges resolve disputes presented to them in accordance with current political themes and trends. The election of new CT judges in lieu of the 5 unfortunate victims of a political battle was supposed to guarantee the new government favor with the highest tribunal in the country. Instead, it caused a complete and utter paralysis of the Constitutional Tribunal. Although the grand name has remained, little can be said anymore of what once was the bastion of constitutionality of the statutory law in Poland.

The concept of dispersed constitutionality control as a source of regulatory changes. One of the consequences of the „neutralization" of the CT was notion that it is the Supreme Court and the common courts who should now bear the burden of conducting judicial review. As this concept gained momentum among legal professionals, the Parliament quickly initiated changes so as to eliminate the risk of said courts making decisions based solely on the Constitution, omitting the statutory law should they deem it unconstitutional. One must keep in mind that there is in fact no Constitutional Tribunal anymore, no-one else to keep guard. In order to convince the society of the righteousness of their plans, the politicians readily proclaimed a „fundamental and urgent" need

to alleviate court malfunctioning through the process of eliminating corrupt or unethical judges and, most importantly, transforming courts into „civic-minded" institutions.

The implementation of changes in the judicial branch. The introduced alterations included 4 aspects:

1) modification of the rules governing the election of judges. This was done through increasing the political influence in 2 respective fields: firstly, enabling politicians' to choose their own representatives to the judicial electorate body (previously members of said body had been chosen solely by judges) and secondly, by introducing the possibility to veto its decisions;

2) modification of the rules governing the appointment and withdrawal of court chairmen and judges serving in court structures through vesting the decision powers on the Attorney General/Minister of Justice (in Poland those positions are combined);

3) introducing systemic changes in the Supreme Court, which were supposed to enable AG/MJ to make decisions when it comes to the Justices retaining their status;

4) radical modification of the disciplinary jurisprudence through the creation of special „disciplinary divisions" and greatly increase in the AG/MJ's influence on the disciplinary proceedings. One of the ramifications of said changes was the shortening of the Supreme Courts' First Chairwoman's tenure.

The RP's President's position. The aforementioned theses were implemented through the amendments made to three statutes: Law on the system of common courts, Law on the National Judicial Council and Law on the Supreme Court.

Law on the system of common courts introduced a possibility of without cause appointment and withdrawal of court chairmen by the AG/MS, thus enabling him to fill said positions according to his own personal needs. This statute has not been vetoed by the President of RP.

Law on the National Judicial Council included an amendment which stipulated the right to appoint the members of the NJC would now be vested on the Parliament, rather than the judiciary branch as it had been before. It enabled politicians to shape the composition of the council. Said method of appointment is commonly regarded by legal professionals and academics as unconstitutional. Furthermore, it created a division of the NJC into two departments: judicial and political, including an upfront rule that any decision made by the judicial department can be overruled by the political one. This statute has been vetoed by the President of RP.

Law on the Supreme Court included an amendment transposing all of its judges' decommissioning with a right reserved for AG/MJ to discretionally indicate who can remain active. Is also created a new disciplinary department. This statute has been vetoed by the President of RP.

Evaluation of the changes. None of the enacted statutory amendments included solutions which could lead to an actual increase in the efficiency of court proceedings, speeding the process of delivering decisions, denormalizing procedure, increasing transparency of cases, changing the judges' attitude to a more „civic-oriented" one nor alleviating the pecuniary burden associated with required court fees. In this respect, although the proposed amendments were justified with the need to eliminate judiciary's faults important from society's perspective, in reality they lead to a radical politicization of the process of justice. Moreover, they resulted in a material limitation of the independence of the judiciary.

The concept currently developed in Poland is also deeply rooted in the courts' constraint stemming from a formalistic approach; according to which interpreting the law should be done by strictly adhering to the literal sense of its provisions, with little or no regard to other methods of interpretation (i.e. the constitutional context). This means of clarifying the word

of law is further „boosted" by a so-called authentic interpretation - in this case done by government-subordinated prosecution. Helpful in achieving this goal is the aforementioned personal combination of the functions of the Minister of Justice and Attorney General.

All of the above stated facts seem to lead to one grief conclusion: critical actions of the main player on the Polish political scene indicate that they are hardly willing to accept what has been neatly put to words by Justice Neil. M. Gorsuch. Namely, that „in a properly functioning judicial system, the government can lose in its own courts and accept the judgement of those courts".

The role of media. The described phenomenon is more than dangerous. The late Polish experiences indicate that demands to radically limit judicial independence have been successfully planted in society's common awareness and are constantly gaining momentum. One cannot underestimate the role of media as a means of igniting and stoking up social frustration and dissatisfaction with the justice system.

Possible defences? It is in this context that we now have to establish the role of the leaders of bar associations in protecting judicial independence from omnipresent populist attacks. Such a protection required not only addressing the other side's arguments (which I have presented in the first part of my speech), but also – even more importantly – convincing citizens more or less thoughtlessly supporting said tendencies that annihilating independent courts is nothing less than annihilating their own rights and freedoms. For they need to realize that the implementation of current government's vision of the judiciary will essentially result in lack of any control over the other 2 branches, providing them with space to abuse their powers. That it will lead to authoritarianism, in a sense.

It is the role of the representatives of legal profession to stress the importance of social resistance and to encourage people to take the necessary countermeasures. Alas, as the Polish example clearly shows, it is far from being easy.

Bar associations' role. One of the fundamental basic function of the bar is offering aid to those in need, ensuring that the law is abided by and protecting civil rights and freedoms. Therefore it seems that in this particular situation member of the bar and their leaders should undertake the following steps:

Firstly, we should strive to build a social awareness when it comes to the role and importance of the separation of powers and independent judiciary, especially through showing people that they are the guarantors of freedom. That their role is to make sure that one's rights are respected. That they are the last bastion fighting to stop government's self-willed and arbitrary actions. In this respect, the bar might be seen as a counterweight for the media criticisms and attacks.

Secondly, we should try to influence the law-making process (especially through lawyers who were elected as MPs, members of government or serving other public offices).

Thirdly, we should – together with members of the judiciary – try to rebuild the social trust that was once vested on courts by working on improving the efficiency of their functioning and enhancing the transparency and clarity of their process.

Nevertheless, I strongly believe that international cooperation could provide for an excellent tool in the fight to protect the judicial branch from political and media attacks. A good example of such a cooperation would be setting international standards of conduct for judges and procedural guidelines for courts.

Finally, we must remember to engage in the legal education. For it is in law school were the young generation's values and beliefs regarding the legal system are shaped. Among them, the one that stressed the fact which has been the focal point of this speech. Namely, that independent judiciary is the most important guarantor of the proper functioning of any state.