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“The spoken word prevails”

### **Fragility of the Rule of Law**

Speech – 24. Richter- und Staatsanwaltstag in Weimar

I would like to thank you very much for the invitation to this important and prestigious event. It is a great honor for me. I extend my special thanks to Judge Andrea Titz, Judge Dr Achim Scholz and Judge Claudia Keller for making it happen. I am impressed with organizational skills and long-term planning of this important event.

I am extremely happy that I may come here just after historical elections in Hungary that brought a little bit more hope to all those who believe in values of constitutional liberal democracy. But I would like to share with you some of my thoughts concerning transition in Poland. It is good that I have a chance to speak after the movie “1000 Robes” – this special march became a true symbol of solidarity of European judges.

In years of 2015-2023, Poland experienced rule of law and democracy backsliding. This process has been explained and clarified by number of scholars and commentators. Basically, it was about **step by step take-over of certain state institutions**, changing their traditional role in a constitutional state and thus dismantling mechanisms of checks and balances. The effect has been achieved through the mix of legal and political actions. Please note that “Law and Justice” did not have a constitutional majority (as compared to Hungary and reforms made by Victor Orban). But it had a loyal President coming from the same political camp. In consequence of legislative reforms, certain institutions lost their independence (such as the Constitutional Court, the prosecution service, public media). Some other were pushed to cooperate strongly with the ruling majority or at least not to interrupt in the political process. It concerned mostly judiciary. The end idea was to build a system of **competitive authoritarianism** (as described by Steven Levitsky and Lucan Way) – a system in which the incumbent has always the advantage over political competitors, guaranteeing victories in subsequent elections.

The process of democratic backsliding showed the fragility of constitutional protection. Constitutional guarantees that seemed to be written in the stone, proved to be not resistant to the process of political takeover. That is the reason why **the Constitutional Court was the first institution to be subject of political subordination**. Thanks to it, the ruling majority lost any constitutional check on the legislation – it enabled passing of several laws restricting independence of prosecution service, public media, civil service, secret services, as well as judiciary.

Attack on judicial independence concerned different aspects:

- Administration of judiciary – dismissal of court presidents;
- Rebuilding the system of disciplinary responsibility for judges and concentration of different powers in the hands of the Minister of Justice – thus creating the system of penalizing judges (including suspension) who disobey political expectations;
- Creation of new chambers in the Supreme Court and diluting the importance of existing judges with new judicial nominations;
- Changing the system of judicial nominations, through the change of composition of the National Judicial Council.

In Poland, judges should be free from any involvement into politics. Article 178 Section 3 of the Polish Constitution provides that *“A judge shall not belong to a political party, a trade union or perform public activities incompatible with the principles of independence of the courts and judges.”* For the purpose of judicial nominations, the National Council of Judiciary has been created in 1989, which is a hybrid body responsible for securing judicial independence. The NCJ is responsible for competitions for vacant judicial positions and its recommendations are passed to the President in order to make a judicial appointment.

The NCJ is composed out of 25 members, including 15 judges, President of the Supreme Court, President of the Supreme Administrative Court, representative of President, Minister of Justice and 6 members of Parliament. So, the majority in the NCJ is in the hands of judges. Those 15 judicial members were always elected by peers. However, in 2018 the Parliament changed the law – **those 15 judicial members were going to be elected by parliamentary majority, not by other judges**. This shift of power was regarded as contrary to the constitutional principle of separation of powers. But it became a **primary sin of the judicial reform in Poland**, resulting in numerous CJEU and ECHR judgments. But most

importantly, it led towards politicization of Polish judiciary. Those who got nominations from the NCJ in its new composition, were not regarded as lawful judges, although they got their power to adjudicate cases from the President. Over the time, there were 3.000 such judges (out of 9000), but their status should be differentiated. The youngest one did not have a choice – as graduates of the National School of Judiciary they had to accept nomination of this politicized NCJ. But other decided to participate in a nomination procedure voluntarily.

One should underline that those major judicial reforms were heavily protested – by all judicial associations, bar association or numerous law faculties. But there were number of legal stakeholders, who decided to take personal advantage. There were judges who decided to participate in promotion proceedings before politicized NCJ, who took position of disciplinary judges or presidents of courts. There were prosecutors, attorneys and scholars who decided to join the judiciary. **It shows that any judicial reform, in order to be implemented, must have people ready to join ranks of new power.** It is important that in order to justify legally their choices, they preferred to look into formalistic legality, thus ignoring potential non-compliance of those “reformed” institutions with constitutional values. In short, *lex* prevailed over *ius* in their personal choices, what should never happen if someone is a judge (or is aspiring to this position). Moreover, they should be aware that it is not just a choice of the profession or the advancement of career, that they indirectly authorize building a new system of government that may have nothing in common with constitutional liberal democracy.

The change in judiciary could be also analyzed looking beyond institutional and personal choices. Over the last decade, **we may see that judiciary is subject of growing criticism, evaluation and reflection as a result of the social media use.** Every citizen in almost real-time could be a spectator, observer and critic of the judicial power. At the same time, judiciary itself – using traditional and restrictive means of communications – is not able to immediately respond to accusations or undue comments. This **paradigm shift** has been used by populist government in Poland in order to attack judiciary. Any disciplinary incident of a judge has been extrapolated in order to justify political reform. Any mistake or unclarity in a judgment was used by governmentally friendly media to attack individual judges. Simply, social media environment was a fertile ground to build negative attitudes in a society around judiciary and thus to justify the need for political changes and legislative reforms.

By the middle of 2023, the illiberal regime brought a change to a number of institutions. The Constitutional Court was not any longer independent judicial review institution. The National Council of Judiciary was a politicized body. The Supreme Court had two chambers that were under question from the point of view of its independence, and numerous judges appointed after 2018, within a politicized procedure. The Minister of Justice, being at the same time Attorney General, had tremendous political impact on disciplinary cases against judges and on weaponization of prosecution service for political purposes. Upon this background of the concentration of power, **parliamentary elections of 15 October 2023 brought a political change** – the pro-democratic and pro-European coalition won elections and promised rule of law recovery and reinstatement of Poland to the family of democratic states.

There were several reasons, why at all Poland was able to exit the democratic decline situation.

First, Polish judges, prosecutors, lawyers and civil society organizations never stopped to protest against changes. They were constantly reminding why the rule of law and independent judiciary is important to the democracy and to citizens. Some of them paid enormous price. There were a few judges, who have been subject of suspension, as a result of bringing criminal charges against them and lifting their immunity. They became heroes, but also symbols to other judges, but also to the general public. Their cases before the European Court of Human Rights are now could be read a dramatic chronicle of difficult days (see e.g. *Igor Tuleya v. Poland*, *Waldemar Żurek v. Poland*, *Paweł Juszczyszyn v. Poland*). Please look that also in Hungary judicial associations appeared protesting against changes, with the most notable example of *Res Iudicata Association*.

Second, the protest was organized not only by judicial associations, but also by civil society organizations. They have provided judges with the solidarity support, by observing trials, providing legal representation, but also through raising public awareness regarding the importance of fight for judicial independence. Civil society organizations were also engaged into cooperation with international organizations. They have also established transnational bonds, including with German partner organizations as well as members of German academia. Please note that civil society also transformed itself throughout the whole period. In the beginning (2015-2017) **we could see the emergence of so-called “street opposition” – citizens who decided to participate in massive demonstrations or other forms of protests**. Later on, the energy of street protests was not so

massive, and the leadership has been taken over by organizations specialized in monitoring, advocacy and strategic litigation. In the final stage, there were organizations who were actively engaged into supporting different vulnerable groups – victims of rule of law decline, in general civic education and in empowerment of citizens at the local level.

Third, the rule of law decline at certain point was not just a problem of legal and political circles. Different actions and reforms taken by the ruling majority started to affect different social groups, such as LGBT+ community, women organizations (mostly due to restriction of the access to legal abortion), activists fighting for proper management of forests, entrepreneurs (mostly due to unjustified or improperly explained restrictions during pandemics and lack of proper remedies), local self-governments or journalists (due to take-over of private media, attempts of censorship and use of SLAPP litigation). Those problems were coupled with a growing frustration due to the corruption, nepotism and different scandals in the public sphere. All of this contributed to the feeling that there should be a change of government as a result of elections in 2023.

Finally, important role was played by the European Union. Taking lesson of Hungary, the European Commission was aware that Poland cannot become another illiberal democracy in the middle of the EU. First political actions on the basis of Article 7 TEU were later supported by infringement proceedings brought against Poland with respect to different judicial reforms. Also Polish judges supported the cause by bringing preliminary reference questions. The European Commission has also **suspended the EU Recovery Plan with respect to Poland**, due to non-implementation of CJEU judgments concerning judiciary. The Commission and the CJEU contributed to slowing down the process of judicial reforms, to freezing some of the attempts. Thanks to it, Polish rule of law fighters had a hope that a political change may soon come.

**After elections of 2023, Poland is in the process of rule of law recovery. It is a difficult and sometimes demanding process, due to following reasons.**

First, the full rule of law recovery process requires comprehensive legislative change. However, both the previous (Andrzej Duda) and the new President of Poland (Karol Nawrocki) assess the period of 2015-2023 in a relatively positive way. They are protectors of *ancient regime*, but also they count on destabilization of the current ruling majority and the right-wing parties coming back to power. Therefore, they use their veto power and do not allow for entry

into force of laws repairing the judiciary. Certainly, they are not interested in undermining the judicial nominations, despite ECtHR and CJEU jurisprudence. It means that the ruling majority has limited means to make rule of law recovery, namely using existing legislation to repair what is possible, to bring back basic judicial independence standards.

Second, the judicial system operates now with a significant presence of those institutions, whose independence has been hi-jacked in recent years (e.g. the Supreme Court, the Constitutional Court, the National Council of Judiciary). They use their powers in order to defend status quo and to oppose any policy of the government. Even if there is an attempt to repair institutions in a constitutional way, on the basis of existing legislation, they are stopped with different resistance mechanisms (including judgments of politically biased and loyal Constitutional Court).

Third, there are numerous legal stakeholders, who are beneficiaries of the previous system (judges, prosecutors, former attorneys or scholars). In order to protect their **own position**, they use existing legal instruments to prevent any change regarding their situation. They use formal legalism as an argument against any judicial reform or decisions of bodies that could evaluate their situation. Such a situation leads to the erosion of trust into judiciary and into divisions.

Fourth, this is a process of repairing sails on a sailing ship. When sealing holes and repairing sails, one must still take into account that there are many people in this system who have been appointed in a questionable manner. These are primarily judges appointed after 2018 who, despite their flawed nominations, still put on their judicial robes every day and pass judgement. Therefore, the entire repair process must not lead to the ship sinking. This is all the more so because, in the light of the case law of the ECtHR and the CJEU, these judgments may be challenged.

Finally, citizens are interested not only in institutional aspects of the judiciary, but also in its daily efficiency. Any reforms must take this aspect into account, including the use of new technologies in judiciary and growing expectations from citizens regarding quality of public services. Citizens may ignore whether their case is decided by lawful judge or judge with flawed nomination. But they will not understand why they have to wait three years for the divorce or settlement of easy business dispute by the court.

After elections in Hungary we should also consider what may happen with its judiciary and prosecution service. Peter Magyar and its TISZA have constitutional majority. They may adopt any law, they may change cardinal laws, they may go towards adoption of the new Constitution of Hungary. But the big question is what is the damage in the mentality of judges and prosecutors. Can you rebuild easily the system where for 16 long years judges and prosecutors were trained to be passive, subordinated and formalistic? How can you make an accountability for past abuses, when most of the judges or prosecutors (at least indirectly) were beneficiaries of the system. I can imagine it will be a long and painful process, taking into account Polish experiences.

To sum up, the situation in Poland should serve as a warning. We could have avoided many problems if we had taken a different approach to interpreting the relationship between the judiciary and citizens or the significance of constitutional guarantees. At the same time, the process of rebuilding the rule of law shows that we really must do everything possible to prevent such a dramatic situation from arising. **What may seem natural and stable in a given situation, what is considered part of political tradition and legal culture, may not necessarily be interpreted in the same way by populists, but also by citizens who may perceive individual guarantees or institutions in a completely different way.**

Thank you for your attention.