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THE SUPREME COURT—BEFORE AND TODAY*

I. The 1 of September 2017 marks the 100th anniversary of the establishment of the Supreme Court—the oldest and most important institution in the judicial system of modern Poland. It is worth noting, as was pointed out by Michał Pietrzak, that 'the establishment of the Polish court system, headed by the Supreme Court, took place even before Poland regained independence', and that 'the organisation of Polish courts in 1917 was a manifestation of the will and intent of Polish lawyers to create their own statehood'[1].Indeed a big contribution to this process came from the representatives of the bar of that time.

Unfortunately, on this anniversary we are dealing with an unprecedented attack on the judiciary by both the executive and legislative branches. This also means an attack on the separation of powers provided for in the Constitution. I am sorry to say that this attack and the introduction of a new 'order' in the judicial system (which makes courts significantly dependent on the Minister of Justice and, in the long term, limits the civil right to a fair trial) will lead to the limiting or even the disappearance of the separation of powers.

Let us recall a piece of history by drawing on the paper published in *Palestra*,[2] written by an excellent researcher into Polish history—Professor Robert Jastrzębski.

II. In his study, Prof. Jastrzębski writes that the outbreak of World War I had revived Poles' hopes of regaining independence. After the withdrawal of the Russian army from the Kingdom of Poland, the Judicial Department of the Warsaw Citizen's Committee, headed by Henryk Konic, an attorney-at-law, started organising citizens' courts. After only a month in operation, they were abolished at the beginning of September 1915 by the German occupying authorities. Very significant was the Act of the 5th November 1916, issued by the German Kaiser Wilhelm II and the Emperor of Austria and King of Hungary Franz Joseph, which announced the creation on Polish territory of an independent country with a hereditary monarchy and a constitutional system. A Provisional State Council was established in January 1917 and in

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[1] M. Pietrzak, Sąd Najwyższy w II Rzeczypospolitej, *Czasopismo Prawno-Historyczne* 33(1),1981: 101.

[2] *Palestra* 2017, no. 4: 70.

August of the same year it defined, among other things, the Provisional Rules for establishing a judicial system in the Kingdom of Poland. The Rules were published in the first issue of the Official Journal of the Department of Justice of the Provisional State Council in August 1917. Pursuant to Article 2, courts and judicial offices were to be termed Royal-Polish and act on behalf of the Polish Crown. The structure of the Judiciary included: Magistrates' Courts, Appellate Courts and the Supreme Court (SC) made of two Chambers: Civil and Criminal.

The inauguration of the Royal-Polish courts was not lavish. It took place at 11 a.m. on 1 September 1917 in the Krasiński Palace (the Palace of the Republic of Poland) following a celebratory mass in St. John's cathedral church at 9:30 a.m. The participants included: the Director of the Department of Justice Stanisław Bukowiecki, the Deputy Director Wacław Makowski and the First President of the Supreme Court—Stanisław Śrzednicki.

Stanisław Bukowiecki stated then that:

> this day will be a historic moment in the process of the formation of the Polish State because from now on Polish courts will perform their duties as Royal-Polish courts on behalf of the Polish Crown, i.e. as a legal Polish government institution. Our coat of arms is an autonomous white eagle, not one spread out on the chest of a two-headed eagle, and symbolises the new independence of the courts in the Kingdom of Poland which they have not had since 1795.

Kazimierz Rudnicki in turn, wrote in his memoirs that: 'judges were mainly attorneys from the Congress Kingdom and later they also included Polish judges arriving from Russia and, to lesser extent, judges from Małopolska (Lesser Poland).' Famous advocates who had been called to the court included: Jan Jakub Litauer, Leon Supiński, Aleksander Mogilnicki, Stanisław Patek, Leon Papieski and judges the First Chief Justice of the Supreme Court—Stanisław Pomian Śrzednicki, judge Antoni Żydok and judge Jan Jakub Litauer.

The decree issued by Józef Pilsudski on 8 February 1919 defined the organisation and the rights of the Supreme Court. The pre-World War I fundamental laws provided that the Supreme Court was appointed for civil and criminal litigation. The Supreme Court operated alongside other judicial institutions named in the constitution such as the Supreme Administrative Tribunal, the Competency Tribunal or the State Tribunal. Further provisions concerning the organisation and activities of the Supreme Court resulted from the work of the Codification Commission. The Law on the organisation (regime) of common courts was drafted and was subsequently implemented in January 1929 as a binding decree of the President of the Republic of Poland of 6 February 1928.

According to these regulations, the Supreme Court was divided into two chambers: civil and criminal. The main roles of the Supreme Court in the days of the Second Republic of Poland were: to act as the court of cassation in civil and criminal cases and to ensure the uniform interpretation of the law by 'formulating the legal principles that constituted a binding interpretation of the law'. In addition to this, the Supreme Court functioned as a disciplinary court, ruled on the validity of elections to representative bodies—the Sejm and the Senate, and, following the implementation of the decree of 8 July 1935 also ruled on the validity of presidential elections and considered all electoral

complaints against the election of the Head of State. The First President of the Supreme Court who chaired the State Tribunal played a significant role. His role was strengthened by the Constitutional Act of 23 April 1935, according to which he was appointed and recalled by the President of the Republic. The First Presidents of the Supreme Court during this period, apart from the aforementioned S. Śrzednicki (1917–1922), were only members of the then bar, namely: Franciszek Nowodworski (1922–1924), Władysław Seyda (1924–1929) and Leon Supiński (1929–1939).

III. After Second World War, due to the destruction of the Polish capital, the Supreme Court resumed work in Łodz, in a new political-systemic-socio-economic reality. As of May 1950 the Supreme Court was moved back to Warsaw. Initially it acted on the basis of provisions issued before September 1939. In 1945 attorney Wacław Barcikowski became its first Chief Justice and held the position until 1956. The next Chief Justices until 1990 were: Jan Wasilkowski (1956–1967), Zbigniew Resich (1967–1972), Jerzy Bafia (1972–1976), Włodzimierz Berutowicz (1976–1987) and Adam Lopatka (1987–1990).

The Constitution of the Polish People's Republic adopted on 22 July 1952 shaped the systemic position of the Supreme Court, that was based on the principle of the unity of State power, which rejected separation of powers.

In the period of real socialism a milestone was the Act of 1962 on the Supreme Court. What was novel was the election of judges by the Council of State for a five year term.

Later changes in the organisation and activities of the Supreme Court had to do with the founding of the Supreme Administrative Court in 1980 and the introduction of the State Tribunal and the Constitutional Tribunal (by Constitutional amendment in 1982) as well as with the criticism of the current activities of the supreme judicial body.

Systemic changes at the turn of the eighties brought about significant changes in the organisation and work of the Supreme Court. Adam Strzembosz was elected the First President of the Supreme Court in 1990. The Act of 20 December 1989 introduced the 'irremovability' (permanent tenure) of Supreme Court judges (instead of appointments for a term of office) and also removed the institution of guidelines for judges in order to emphasise the independence of the judiciary. Also at that time, the National Council of the Judiciary was established, to consider candidates for appointment as judges, including those of the Supreme Court. The National Council of the Judiciary was intended to be a constitutional body independent of the authorities and not a judicial corporation; in the same way that the prosecutors—in my opinion—are not investigators, as is today being said of them (unless they have been demoted). The Supreme Court, on the other hand, pursuant to the Act of 13 July 1990 on the appointment of appellate courts, stopped functioning as a court of second instance and the review of rulings given at first instance by regional courts became a matter for the courts of appeal.

The current Constitution of the Republic of Poland was adopted on 2 April 1997. According to its Article 183 the Supreme Court supervises the activities of common and military courts in terms of adjudication and also performs oth-

er activities specified in the Constitution and statutes, while the First President of the Supreme Court is appointed by the President of the Republic of Poland for a six-year term, chosen from a list of two candidates presented by the General Assembly of Supreme Court Judges. The subsequent First Presidents of the Supreme Court—Lech Gardocki (1998–2010) and Stanisław Dąbrowski (2010–2014) as well as the (current) First President-in-Office were all elected in this way, although this last appointment was formally challenged by fifty MPs of the Law and Justice Party who filed their objections with the Constitutional Tribunal.

The Act on the Supreme Court of 1984 was repealed by the Act on the Supreme Court of 23 November 2002. Pursuant to the provisions of the latter, which have subsequently been amended, the Chambers of the Supreme Court are headed by respective Presidents of the Supreme Court appointed for a 5-year term by the President of the Republic of Poland at the request of the Chief Justice (First President of the Supreme Court).

The powers of the Supreme Court include *de lege lata*, primarily, consideration of cassation appeals, the resolution of legal issues, recognition of electoral challenges and the validation of elections to the Sejm and the Senate, the election of the President of the Republic of Poland and the recognition of election protests in elections to the European Parliament.

The anniversary of the establishment of the Supreme Court in 1917, along with the anniversary of the creation of the Polish judiciary, were celebrated as early as in the interwar period 1919–1939, the first occasion being the fifth anniversary in 1922 and the 90th anniversary in 2000. In 2017 the 100th anniversary is being celebrated.

The changes of the 1990s, the irremovability of judges and the establishment of the National Council of the Judiciary constituted the foundations of judicial independence. Professor Adam Strzembosz, who himself participated in building this independence, talked eloquently about the process of building it on a negative model. What he meant was that what was bad in the period of real socialism, had to be changed so that the judiciary could become truly independent. In order to achieve this, judges must have appointments that are stable and not subject to revocation and internal disciplinary procedures within the judicial body must be in place as well. Judges are not lenient towards one another. It is a very demanding profession and the few cases of judges breaking the law that the Minister of Justice has dished up are just one drop in an ocean of ten thousand judges in Poland. Judges are not, as suggested, a special caste or a profession at especially high risk to justify the creation of a dedicated unit within the Public Prosecutors Office to investigate crimes committed by judges and prosecutors. I see these actions as an attempt to exercise pressure on judges and also, indirectly, as a threat to their independence. It may also be added here that independent research carried out in Europe has not found the Polish judicial system corrupt either.

As I said at the beginning, the changes that are currently being implemented erode system that has been based on separation of powers doctrine. This erosion is going on in the midst of media noise and the satisfaction of

some members of the public who view the activities of the courts through the prism of individual affairs, often their own. It is unfolding before our eyes and we are observing the process of liquidating the judiciary which used to be independent of the Minister of Justice.

What is most terrifying to me is that society can so easily jump to the conclusion that the justice system needs to be overhauled because it is inefficient, sluggish, lazy and even corrupt. Even the most reputable TV stations allege, if nothing else, the sluggishness of judicial proceedings, which incidentally is not true. In comparison to the rest of Europe—we are placed right in the middle of the ratings in respect of tardiness so the presumed delays in hearing cases are not really that pronounced. Of course, some may say that they have been waiting a long time for a final verdict. This, however, is not the judge's fault, but rather is due to the number of cases that fall on one judge (in family courts, the judges have, they say, seven hundred cases 'on the boil') as well as the procedures and staff shortages in courts of lower instance. Is it possible to improve on this? Certainly, but that would require hiring more legal assistants, administrative clerks and above all—as I have been suggesting for a long time—limiting the scope of jurisdiction of the courts. While the fact still remains that despite the courts being 'slow' citizens continue to 'bring' all kinds of matters thereto. This is the contradiction in our situation. As citizens we do not like the courts, but we still insist on bringing our disputes before them.

I would like to conclude this presentation with the following appeal: if we do not all object to the negative assessment of the courts which is propagated among the public, and if our youth are fed these negative ratings, things will never get better. Eventually we will run out of 'heroic judges' and there will be no independent courts anymore.

We need to see it all in a broader context. An independent judicial system is the basis of separation of powers. Undoubtedly, substantial changes should probably be made in the administration of the courts; the judges should be given new equipment and better access to legal databases. I do not know, because I have never investigated it myself, whether there is any truth to allegations that four thousand judges who hold specific functions in courts do not hear cases at all. In my days, the heads of department did adjudicate—but to a lesser degree. The head of department cannot be replaced by a computer, he may be still be a trial judge; the court requires existence of a head of department whose function is for its proper functioning. The expanding powers of the Minister of Justice over the courts must be opposed. Let us remember that the procedure is set up to protect both sides in every case. This means that these lengthy trials often result from the need to apply procedural rules, and in particular, let me emphasise again—from the case load each judge must deal with, which is so big that it frequently does not allow the judge to focus properly on or settle the nuances of each case as there is always another case waiting. Other than the procedures and the scope of court cognisance, delays may be also caused by a shortage of court rooms and legal assistants.

Let us hope that the down-grading and demoting of the judiciary carried out under the banner of freeing the judges from the influence of heads of departments will end; that as a society we manage to curb these attempts by

the executive power. Otherwise, the reorganisation of the judiciary will first bring about chaos and subsequently make the judicial system dependent on the executive, as in the days of real socialism; in other words it will be no better than in the 1960s. This, of course, might not be too important in civil cases but would be at the very least disturbing in criminal cases.

Małgorzata Gersdorf
First President of the Supreme Court of the Republic of Poland

THE SUPREME COURT—BEFORE AND TODAY

S u m m a r y

The establishment of Polish courts in 1917, which took place even before Poland regained independence, was a manifestation of the will and intent of Polish lawyers to create their own statehood. This is the reason why it is worth talking about the imponderabilities related to the independence of the judges and the judiciary especially today, in the current political situation, on the first anniversary of the attack of the executive and legislative power on the judiciary, and the introduction of the 'new order' in the judiciary system, the aim of which is to limit, if not eliminate, the separation of powers, hence implementing a significant dependence of the judiciary on the Minister of Justice, and consequently, in a long run, to implement a restriction of the civic right to a fair trial.