



A relief showing the goddess Themis in the courtyard of the court building at Al. Solidarności 127 in Warsaw, still bearing the scars of bullets fired in WWII

NO CIVIL SOCIETY, NO DEMOCRACY

The conflict over the Constitutional Tribunal, law, and civil society through the eyes of **Prof. Ewa Łętowska**, lawyer and an ordinary member of the Polish Academy of Sciences (PAS), a corresponding member of the Polish Academy of Learning (PAU), a member of the Scientific Council of the PAS Institute of Law Studies, the first person to hold office as commissioner for human rights in Poland, a Highest Administrative Court judge in 1999–2002, and a Constitutional Tribunal judge in 2002–2011.

ACADEMIA: Two branches of Poland's government, the legislative and the judicial, are clearly deadlocked in a clash over the Constitutional Tribunal.

EWA ŁĘTOWSKA: When the three branches of government clash, the judicial branch proves less powerful than the legislative and the executive. Incidentally, these two branches, especially the executive, have always had a tendency to tilt the existing separation of power to their own advantage, to encroach on the powers of the judicial branch, which after all has no army at its disposal. That's why we imagined that things might end up in such a deadlock. That's a very serious issue. We have two rulings of the Tribunal, which have been published but not honored by the executive (including the president). Its representatives believe that their own assessment of constitutionality should prevail. Meanwhile, the Constitution clearly designates the Constitutional Tribunal to perform such evaluations. On top of this all, lawmakers ultimately came to the executive branch's assistance. Shortly before Christmas 2015, parliament enacted a law "correcting" the statutory law regulating the Constitutional Tribunal, which used various instruments to curb the Tribunal's independence. In practice, such changes prevent effective judicial review of laws. The reform forces the Tribunal to work around three times more slowly, turning this institution into a façade in terms of reviewing legislation in the abstract (in the absence

of an actual case). That's a great shame. Especially because this change paves the way for other similar adjustments in the functioning of the state. The record for the period between November 2015 and January 2016 includes changes of a fundamental meaning for the political system of the Republic of Poland. Two amendments were enacted to the Act on the Constitutional Tribunal, there were amendments to the Act on the Civil Service, the Act on the Police (known as the surveillance act) and the Act on Public Media, along with a new Act on the Prosecution. After all, the ruling authorities have vowed to change the organization of other courts, civil service, and taxation. Probably also the election law. If there is no safety catch, no one will be there to evaluate the constitutionality of such legislative amendments. But a parliamentary majority is not the same thing as a constitutional majority. Historically, the purpose of constitutional courts is to prevent the Constitution from being subject to creeping changes.

Let's start with what purposes the law should actually serve.

In theory, the law is a stabilizing factor. Such stabilizing occurs at two levels. One is formed by ordinary laws, which put into effect the ruling camp's political objectives within the scope of their broader strategies on such issues as the retirement age, privatization of the media, and guaranteeing mi-

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nority rights. For example, the altercation over same-sex civil unions was a typical political battle over whether the rights of minorities, in this case sexual minorities, should be protected to a greater or to a lesser degree. The second level of stabilization is formed by the Constitution, whose task is to prevent the parliamentary majority from taking unlawful measures, especially in what is a typical situation in Poland, namely when a parliamentary majority has been achieved by a very narrow majority of voters. That's because using the D'Hondt method to calculate the allocation of seats in elections means favoring certain parties. The winning party took 37.58% of the vote, which translated into slightly over 50% of the votes in parliament. But if we factor in those who decided not to vote, which means practically half of eligible voters, it turns out that the parliamentary majority won the votes of less than 20% of the nation – a word that has been recently mentioned quite often. Such a majority has no authority to amend the Constitution. But it may use its position as a parliamentary majority to push through what are referred to as creeping changes of the Constitution. Instead of looking for supporters in other groups in parliament, instead of wooing over parliamentary deputies from other caucuses, it merely needs to dismantle the safety catch. And that's what has happened. The Constitution acts as the chains that protect minorities, both in and outside of parliament, from the parliamentary majority. In our country, the non-parliamentary minority is a majority in terms of absolute numbers. That's why these constitutional shenanigans that we are witnessing serve to find a way around this principle, to turn a safeguarding institution into a mere façade.

These constitutional shenanigans are...

As the saying goes, every man is a king in his own house – that's the source of altercations between neighbors. Harassing one's fellow neighbors, such as by pretending to repair the roof while actually causing water to pour through a neighbor's ceiling, may manage to cause the harassed neighbor to leave

while the harasser is ostensibly doing nothing unlawful. Having neighbors with different lifestyles naturally causes certain inconveniences. But exceeding the limits of what is normally permissible means abusing the law. So please don't ask me at what point an abrupt dialectical change occurs. If we start pulling out someone's hair, can we say when exactly they go bald? That's what we have started to do to the Constitution.

What makes this process possible in the first place?

Laws that are not rooted in custom, actual practices, and civic traditions are by nature very soft. In Germany, if a street is closed, it is closed for everyone. In Poland, a closed street is not closed for those who feel more important and whose obedience is not enforced by the authorities. And that's the answer. It's like being in a lab. Studies show that social capital and the levels of trust in the law remain very low in Poland. On top of this, there is a tendency to disregard the law and there is no general knowledge of the principles of democracy. How can we explain to a man on the street what advantages are linked to the division of government into the legislative (parliament), the executive (government), and the judicial (courts)? Every parliamentary majority has an inclination to elbow more room for itself, so the system of checks and balances is there to rein it in.

If so many people have no grasp of these issues, is that not because public debates lack such clear comparisons?

When it comes to the Constitutional Tribunal, it is extremely important to use plain language. From the perspective of the average Pole, the Constitutional Tribunal may be seen as a group of people wearing funny hats who express completely incomprehensible opinions. That does nothing to create civil society. It is beyond my comprehension why the judges did not make appearances in the media after such important rulings to explain their decisions. In the past, that was the norm.



Is that only a matter of will?

Of course. The need to engage in dialogue, the ability to conduct it. Aside from that, all those things may have been written in simpler words. Anyway, I believe that Polish society can't communicate well at all. We lack means of expression and we cannot write well in Polish. So we either lay things bluntly on the line, or beat about the bush to such an extent that the message becomes completely unintelligible. For that reason, the way I understood my role, for example as a commissioner for human rights, was that I should also explain things and educate people without dictating to them. Unfortunately, there is currently no willingness to show understanding; instead, there is only a desire to use the law and legal measures as ways to bolster one's own strength, in the service of political gamesmanship. Meanwhile, the law consists of strength and reason, which must be balanced against each other. Reason without strength is ineffective. One example of such subversiveness in 18th-century Polish history was Samuel Łaszcz, who walked around wearing a coat lined with unenforced court rulings.

What is more, our media sources have become bogged down in a state of communicative chaos. Engaging in real dialogue does not mean having two talking heads from two ideological camps come in and sit down opposite each other and then watching them bicker – while the host just twiddles his thumbs, not understanding anything, capable of being talked into accepting the worst rubbish. And politicians feel “people will be dumb enough to buy it.” What we have is merely a semblance of pluralism.

Who should enlighten the public?

People of science, to some extent.

The PAS Committee on Legal Sciences reacted very quickly to the ruling camp's actions.

Adopting a position statement required an extreme effort from the Committee, because there was strong internal resistance, which manifested itself in a minority opinion. But there's another issue that I'd like to raise here. Such position statements can be

written “against” someone: demanding that someone's hand be cut off, demanding punishment, condemning someone. But we can also opt for a positive wording: defending certain values, arguing in support of this or that. Is there a difference? Of course, there is. If you push your opponents to the wall, they will do their utmost to prevent you from adopting a position.

That route leads straight to confrontation?

Of course. That said, I myself have clearly become more radicalized in this conflict, this constitutional crisis. There's no point equivocating: there are constitutional provisions that say that the Constitutional Tribunal's rulings must be published “without delay” and the standard is that compliance with the Constitution is assessed by the Constitutional Tribunal. In addition, the choice of judges who sit on the Constitutional Tribunal is made by the Sejm, the main legislative body, not by the executive. If the president is saying that all five judges, not only two of them, were chosen in violation of the Constitution, then he is contesting the Sejm's choice! That's why we can again see a negation of the constitutional principles. And given that this is the case, I myself am using a stronger language, too. I'm not talking about totalitarianism, the end of democracy, or a coup. But I am talking about a deepening constitutional crisis and a shift away from the rule of law, from the principles we have worked out under the Constitution and in the practice of constitutional law in recent years. Something has come to an end here. There is less democracy, which is demonstrated by the style of parliament's work, mockery of the opposition, the treatment of parliament as a rubberstamp machine, disregard – even in the formal sense – for the very rules of procedure that the ruling camp instituted, treatment of adverse opinions from social groups *per non est*. We are getting closer and closer to what is being called a “democratorship.”

Relevant provisions stipulate that the Constitutional Tribunal's rulings must be published “without delay.” That seems to leave

“Justice is the bulwark for the strength and endurance of the Republic” – Andrzej Frycz Modrzewski's words and a paraphrase of the Roman jurist Ulpian's Latin maxim *justitia fundamentum regnorum est* (justice is fundamental to reign), inscribed on the pediment of the court building at Al. Solidarności 127 in Warsaw

a certain room for interpretation. Why wasn't it possible to set an exact deadline, for example two days after announcement?

That's because the law does not tolerate such casuistry well. But I do know for sure: "without delay" means that waiting one week is already too long. The law provides a general framework: a certain level of social capital, mutual trust, must be taken for granted.

But that's difficult to achieve when two lawyers express two different opinions, present different interpretations of a single provision.

That's because the study of law falls within the scope of humanities. We could, for example, include the chemical symbol of the red color in the Polish flag in relevant legal provisions. But such terminological precision would complicate everything. It would be a needless struggle for literalism.



Prof. Ewa Łętowska during the December session of the PAS General Assembly

Maybe that would prevent situations like the one that is now unfolding in Poland.

I don't think so. I'm not an expert on national characters, but I do believe that the Poles are quarrelsome, have little proclivity for compromise, and are preoccupied with their dignity, proud as peacocks of their feathers. Clearly, in any country, some people are more conciliatory while others are less so. In Poland, the latter group is much larger. In any case, they are overrepresented among politicians. For that matter, a creeping shift away from principles requires faithful Janissaries, who do not have very subtle souls.

Is it possible to say what will happen next?

The next step will probably involve changing the election law. There will probably be some gerrymandering of constituencies, to "make things better." Simply put, we are witnessing a violent cleanup as part of efforts to build, to reinstate the Fourth Polish Republic. Also, there is an ongoing race for control of people's

minds, the activity of the broad masses of people. But the broader masses only muster if they really feel that the situation not only failed to improve but has even gotten worse. But that will take time.

An American who has lived in Warsaw for many years told us that what was happening in Poland might simply be a test of democracy, something we just need to go through. Would you agree with him?

He's right. While learning how to knit, how many mistakes will you make before you make one good sweater? Democracy is hellishly difficult and, as I said at the December session of the PAS General Assembly, lawyers are members of a cursed profession. They know various regularities that apply to the legal instruments they use and they know how the law works. At the same time, what lawyers see as knowledge of their field, others, especially politicians, see as tools they can take and use. They are right: the law is there to be used, for various purposes at that. But if lawyers, out of respect for the regularities they know and understand as experts, protest and say to a politician "you're using it wrongly," what will the politician do? He will say "you want to achieve something in the battle that I'm fighting by using your tools." But what is happening now means not only questioning the purity of the intentions of the lawyers who defend certain rules but also attempting to ban them even from joining the discussions to prevent them from becoming a party in this dispute. It is evident, though, that society has made great progress nonetheless and it is starting to see through manipulations of the law.

Does this mean that a civil society is emerging?

Yes. Joining the European Union meant much faster development. After all, the EU takes a certain level of democracy for granted. Free elections? Yes, no rigged ballots. Free media? Yes, for now (on 13 April 2016, the European Parliament adopted a resolution expressing concern at the condition of the rule of law in Poland, including in view of the government and president's neglecting rulings of the Constitutional Tribunal). Maybe people will now come to appreciate the idea of privatization of the media, because it is after all harder to control privately-owned media outlets than public ones. We will see the difference when the planned Media Act comes into force.

Yes, we Poles do indeed have a test to pass. Although we can imagine a democracy without the rule of law, we cannot imagine the rule of law without democracy. If there is no civil society, there will be no rule of law. That's what this relation looks like.

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