

## Adam Bodnar: the anatomy of the crime against the Polish judiciary

*When I meet with people from all over Poland, I can see no severe opposition against damaging the judiciary system. The area is a complex one, and judges are a kind of "elite" with which not many people identify. Moreover, why all this alarm? After all, nothing is really happening. These are the common opinions. My role is thus to explain that the truth is completely different. That what is happening is a crime against the judiciary system, and that sooner or later its effects will be experienced by everyone. So I have to educate people on how to prevent those processes,* wrote Commissioner for Human Rights Adam Bodnar for Magazyn TVN24.

Polish original version of this article is available at: <https://tvn24.pl/magazyn-tvn24/adam-bodnar-anatomia-zbrodni-na-polskim-sadownictwie,256,4472>

Last Tuesday, Poland's president signed the act on courts. Despite numerous protests, Andrzej Duda took the decision as a result of which the Judicial Act of 20 December 2019 came into force and started to generate legal, international and social effects.

The surveys conducted prior to the act's signature indicated that most respondents were against it, but the majority was not a strong one. In the survey conducted by Kantar for the *Fakty* news programme broadcasted by TVN and TVN24, nearly half of the respondents (49%) gave a negative response to the question *In your opinion, should Andrzej Duda sign the act?* but 35% gave a positive response.

I understand why this is happening and why the dispute about the courts has become so difficult to understand for "an average citizen". When I meet with citizens, I can see why there is no severe opposition on the side of the society, or why possible concerns can be effectively weakened by the ruling party. Below are the most frequently encountered popular opinions. I will try to explain why it can be dangerous to accept those arguments and what solutions can be used in response.

### **Opinion 1: "All this is so complicated"**

It is true that the dispute over the system of justice in Poland has become extremely complicated. Not many people understand the significance of the application for resolving the dispute regarding the competences of courts, the issue of suspending judge Juszczyszyn, or the proceedings pending before the Court of Justice of the European Union. The war for the judicial system resembles a game played on a large chessboard where pieces are moved by two players. Yet, instead of moving the pieces, they use legal or rhetorical tricks and break the rules of the game (for example, the Sejm speaker refuses to implement a final judgment of the Supreme Administrative Court). Furthermore, the dispute has been ongoing for several years and is becoming more and more complex so citizens may get lost and may no longer recognize what is true and what is false. Unfortunately, as a result, the ruling party may implement the planned measures more easily and may publish information on this on the media influenced by it.

*Solution: It is necessary to remind people of the basic issues again and again: why the tripartite division of powers is important, or what role is played by courts in the society. If we speak about principles, people must have trust in authoritative figures, in persons whose entire lives show they followed the constitutional principles, even if they paid a price for it. Among such persons is Prof. Adam Strzembosz. We should listen to him carefully because he really knows and understands on which side of the great chessboard are those who really want to defend the independent judiciary system.*

### **Opinion 2: "Judges are detached from the real society"**

For many years, representatives of the judiciary in Poland indeed had no sufficient ties with the rest of the society. The role of court jurors was limited, communication between courts and so-called "ordinary people" was poor. Local communities were aware of the court buildings in their towns but were not really interested in what was going on there, and what cases were considered by those courts. Judges built walls that separated them from attorneys and legal advisers so as not to be accused of informal influence or collusion. In some cases, judgments may have been correct in view of the regulations but were detached from real life and its practicalities. Judges have already understood this and are trying to change it, as evidenced by their appearances on the media and their participation in various social activities. They take part in music festivals, meet people outside the courtroom, explain the complicated activities of courts, or conduct mock trials. When I tell my friends from other countries about it, they are truly surprised.

*Solution: It needs time and patience for the judiciary system to grow strong roots in the society. The system's institutional reforms are also needed. Therefore, it is necessary to demand the strengthening of the position of court jurors and to launch a real debate on the so-called justices of the peace.*

### **Opinion 3: "Why should I care, I have no cases pending before courts"**

The reform of the judiciary system may seem less important to us than the reforms of the systems of taxes, schools, retirement pensions or healthcare. We may have no personal experience regarding the work of courts and thus may see no risks of them losing independence. Even if we can imagine such experience, it may seem distant and unrealistic. The situation is similar as in the case of the climate change: we know that glaciers are melting and snowy winters are becoming a thing of the past but it is difficult for us to imagine how this impacts our own lives. If hurricanes or floods take place, they will definitely not influence our homes. We are relatively safe, here and now. It is a great challenge to have to speak about risks caused by the poor functioning of the overall system of democracy and to activate citizens' imagination. However, such attempts should be regularly taken, even if relative security (for example, social security) is perceived by citizens.

*Solution: It needs to be repeated that every person may, at some point in time, become a party to a court proceeding in connection with becoming a victim of an accident, with making a mistake in his/her life, or having to claim overdue remuneration from his/her employer. And at such point in time, every person should expect a fair judgment imposing a penalty on those who are guilty and confirming the sense of justice for those who have suffered damage. To build the perception of true justice, however, courts must be truly independent.*

### **Opinion 4: "Of course we want to be in the European Union but it may not impose on us its ideas about how our system of courts should be organized"**

Of course, the judicial system is the domain of the EU Member States. It is for the Polish authorities to decide whether we want district courts or provincial courts, regional courts or courts of appeal, or whether there should be special departments for family cases, for business cases, etc. It is also up to the member states to organize the highest judicial bodies. To organize a judicial system as such is, however, something different than to ensure that it is in line with the basic values arising from the Polish Constitution and the European law, to ensure that the courts are independent and provide legal protection to everyone. The legal protection is necessary not only inside the country. We have strong ties with other EU Member States now (because of business connections, family matters or even criminal cases taking place), and thus sufficient legal protection must be ensured to everyone across the European Union. Regardless of where we live, we must have a guarantee that the courts are equally independent, regardless of whether they are called a High Court, das Landgericht, Járásbíróság or Court of Appeal. Is it really possible to combine membership of the European Union with serious limitation

of the independence of the judiciary? In my opinion this is not possible. The European Union is based on common values that include the compliance with the principles of democracy, the rule of law and the protection of human rights. This triad is indivisible. There is no democracy without the rule of law. Human rights that protect people against the dominant majority must have guarantees of their protection. And courts are the key element of this protection. Even the best ombudsman cannot replace independent courts.

Therefore, limiting the independence of the judiciary undermines the principles on which the European integration has been founded. It can, first of all, lead to the so-called "legal Polexit". Judgments of Polish courts may cease to be recognized by courts of other countries (for example in family cases or business-related cases). Persons hiding from the Polish justice system in Spain, and going to sandy beaches there will no longer be brought to Poland pursuant to a European arrest warrant. There can be various types of sanctions against our country. The second stage (Poland leaving the EU) is difficult for me to even think of, as it would mean wasting the efforts of the generations who wanted to permanently root Poland in the Western form of civilization and a serious threat to our country in the geopolitical arena.

*Solution: It is necessary to keep explaining that it is in the interest of all citizens to have the right to an independent court in every Member State of the European Union, and that EU bodies are there to control this level of independence. Because if we move backwards the entire legal system of the EU will fall apart. It must be repeated that the reform of the judiciary system in Poland threatens our future as a member state of the European Union and that we must follow the guidelines of the EU tribunals relating to us because the EU law stands at a higher level than the national laws of all EU members.*

#### **Opinion 5: "Why the alarming voices, we are not Belarus or Turkey"**

Indeed, there are no political prisoners in Poland. Judges are not imprisoned either. What is more, they can even hold their own demonstrations, as was seen in the Thousand Gowns March, and can freely express their opinions on the media. Therefore, if politicians from the opposition party use such comparisons they may be exaggerating, making themselves sound like playing an old damaged record. Indeed, we are not Belarus and Turkey and I hope that we will never be. But for some reason, various rankings of the quality of democracy and the rule of law more and more often place us at lower positions. We are getting dangerously close to countries with which we would never want to be compared. This is because the various "fuses" that protect the democratic state ruled by law are removed, which together is building a rather frightening picture. It is true that the public authorities do not yet apply the whole arsenal of repressions available at their disposal but every next day it is getting easier, of which a good example is the harassment towards judges.

*Solution: The processes that are taking place in Poland have to be clearly named. Simple slogans do not reflect the nature of the gradual but regular erosion of the democratic system. If we are watching a plant growing in a pot for five minutes, we will not see anything happening. But if we use time-lapse imaging we will see the growth dynamics. We need to look at the changes using our own time-lapse technique. Let us look backwards and see how the democratic institutions in Poland looked like in 2014 or 2016, and how they may look, for example, in 2022.*

#### **Opinion 6: "The courts work really poorly and thus they need to be reformed"**

In courts in big cities there is indeed the problem of lengthiness of proceedings. In fact, since the time of the political transformation no comprehensive reform of the justice system has been carried out to adjust the system of courts to the real social and economic needs. The successive (and numerous) justice ministers tried to reform courts in ways that resembled repairing a ship sailing on water. The

ship continued sailing but kept changing its course, running aground, its sails were getting torn, and the captain had problems with building trust between him and the officers on board. Polish courts need reforms in the form of implementing good IT systems, recalculating the working time that should be devoted to every case by a judge, strengthening the administrative system and the system of court assistants, improving the system of serving court documents as well as the system of court experts. These changes are not spectacular. All they need is hard work, some patience, and building trust between those responsible for managing the budget, for legislative works and for administering justice on a daily basis.

*Solution: Things should be called by their names. The ongoing changes of the system of courts are not about reforming the judicial system as such but about the political supervision over courts. Reforms cannot be carried out without building trust between the executive and the judiciary powers. Such trust must be based on the respect for the constitutional principles, in particular that of the independence of the judiciary.*

#### **Opinion 7: "Judges do not bear responsibility for their actions"**

One of the reasons for the implemented changes is the conviction that judges, allegedly, do not bear responsibility for anything they do, and that the disciplinary liability system does not work. We hear about examples of improper approaches or decisions of judges, and some of them indeed must be assessed negatively (as in the famous case of a judge who stole parts of an electric drilling device from a store and who was suspended). However, the question arises whether the individual "black sheep" cases can be used to justify changes that affect all judges, and whether those cases do not provide just a convenient argument for introducing changes with clearly political objectives. And the question should be asked again whether judges, in reality, do not bear any responsibility for their actions. This is not true. Disciplinary proceedings have been in use for years. Moreover, since 2001 they have been open to the public which means people may read about the decisions taken in them. Judgments issued by judges are subject to higher-instance supervision. If a judge has made many mistakes, he/she cannot expect promotion. People may also file complaints with higher-instance courts with regard to lengthiness of proceedings (which is done by several thousand citizens a year). The case files of a given judge may be analysed by a so-called inspector judge. A judge who has committed a crime may have his/her immunity waived and may be subject to liability under penal law provisions.

*Solution: Judges bear responsibility for their work, in different forms. However, steps should be taken to provide commonly accessible and reliable information to the public about the disciplinary liability mechanisms and other forms of ensuring the quality of judges' work. The efficiency of procedures in this area should be ensured. However, disciplinary procedures should never be used to exert political pressure on judges.*

#### **Opinion 8: "The reform's opponents are defending the 'judicial elite'"**

In the public debate, "judicial elites" are shown in opposition to "ordinary" citizens i.e. the main part of the society. There are about 10,000 judges in Poland, and they are indeed a minority compared to the whole society. But their number is lower than those of doctors, teachers or civil servants, and thus it is more difficult for them to defend themselves. One may not expect sympathy and understanding for people whose judgments may put other people behind the bars. Statements of some politicians who refer to "the elite", the caste" and the "judgeritarian system" may suggest that as a result of completing the university degree, then the traineeship period, and then passing one of the most difficult examinations in the country, one may acquire the status of "an enemy of ordinary people." We find it difficult to understand that effective management of the state matters has to be based on

competences. And in every democratic state, knowledge and experience should be appreciated and respected.

*Solution: Judges may be criticized for their judgments, which is natural in a democratic state. However, if they are attacked just because of the fact of performing this difficult profession (put in opposition to the rest of the society), the legal security of the citizens is undermined. The citizens may perceive constant threat if the alleged "judicial elites" are replaced by officials with the mentality of serving those in power. And this message should be sent across the society.*

**Opinion 9: "The poor quality of issued judgments is clearly seen by everyone"**

From time to time, there is a wave of discussions on the media on some really bad-quality judgment of a court. People comment on that, exchange tweets, discuss the subject with journalists on TV shows, evaluate the work of judges and courts. Usually, however, most commentators do not know the full details of the case. And sometimes the details matter most. Only after a few days, when corrections or more in-depth analyses are published it turns out that the judgment was in fact different than everyone thought. But by that time, the public debate is at a different place. Of course, sometimes it happens that the court makes a mistake but the higher-instance supervision is there to correct such mistakes. We also tend to forget that in the public debates, just several cases are discussed but courts issue judgments on daily basis, in hundreds of other cases too (perhaps without major mistakes).

*Solution: The picture of how the judiciary system works in reality should not be based just on single cases. We should look for grounds for our opinions in scientific research, in the analysis of hundreds of court files of different cases. We should take steps to find out what the real content of a given judgment really was, and not how it was summarized in a 280-character tweet.*

\*\*\* I believe that the signing of the "Judicial Act" on 20 December 2019 does not mean the end of the independence of the Polish judiciary. I believe that the internal sense of independence, professional integrity and decency of judges will be a source of effective defence against the attempts of the executive branch of power. However, an in-depth analysis should be continued of the factors that have made, and are still making, the crime against the Polish judiciary possible, and of how to prevent such processes in the future.

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