



SĄD NAJWYŻSZY

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**Speech to Mark the Occasion of the Conference Organised by the Federal
Court of Germany (*Bundesgerichtshof*): *Polish Rule of Law: Missed
Opportunities?***

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Madam President Limperg!

Ladies and Gentlemen Justices of the Federal Court!

Dear German Friends!

I thank you very much for your invitation to this conference. I consider such decision to be something beyond a simple gesture of friendship I was offered, a gesture deserving respect out of sheer courtesy. Yet my presence here arises from two other, more profound reasons. Firstly, I wish to express a personal belief that today more than ever we should cherish the German-Polish friendship in a united Europe. There is nothing more important than mutual discovery and debating values uniting us as European Union citizens and as lawyers. Secondly, and this argument ties in with the first, I also wish to share my observations and concerns with you; while these concerns focus on Poland and the Poles, it seems to me that they should not be neglected by ostensibly more politically stable countries of the western part of our continent or the EU either – and hopefully you might find them of interest as well.

Pursuant to Article 2 of the 1997 Constitution of the Republic of Poland, Poland is a democratic state under the rule of law, following all principles of social justice. This is a significant norm, proving that our constitutional order is akin to the vision of the German *Rechtsstaat* – a state under the rule of law as defined by the Basic Law of the Federal Republic of Germany. On the one hand, it operates at all levels in conformity to legal procedure (formal aspect); on the other, it protects the

fundamental rights of individuals (material aspect). As of 1990, an identical clause has been part of formerly binding constitutional provisions. Countless rulings of the Polish Constitutional Court and common courts of law have been conferring conspicuous meaning upon it over twenty-five years of our gradual emergence from a state of communist dictatorship. How, therefore, has it come to pass that we are now considering a crisis of the rule of law in Poland?

The historical moment not only Europe but the whole world has found itself in, remains the fundamental reason for Poland's current predicament. The world's economic centre has been gradually shifting to the east. The brawn of new global powers is on the rise, as is the threat of war in territories surrounding Europe – a source of increasing immigration pressures. The post-war democratic consensus has been undermined. Leadership has waxed mediocre, values abandoned – or disregarded at the very least. Economic performance has become of paramount importance. European societies have been objectivised, their role reduced to no more than voting machines. They have been feeling betrayed – or (in the best-case scenario) under threat. Under such circumstances, it is no wonder that extreme forces are surfacing, all hostile to human dignity, freedom of the individual and rule of law. They have donned clever masks and are fencing with the use of fraudulent rhetoric to take over all power. This is how things have always been – this is how things are today.

Poland continues to be a young democracy. As one of the weakest links in the European chain of nations, she is a litmus test for the condition of the entire European Union. I could embark upon a lengthy description of Polish historical experience of the last two hundred years, which has been casting a shadow on contemporary national dispute – and yet I believe such deliberations have little sense, as every nation carries such murky crannies within its soul. Nonetheless, there is no doubt that the most disastrous experience – the forty-five years of real socialism rule – continues to remain an albatross around our necks.

“*Solidarity*” movement events of the 1980s have changed multiple developments for the better. They have altered public awareness, opening us up to new intellectual trends and preparing ground for peaceful transformation into a democratic system. Yet the process of democratising the country was not

accompanied by sufficient debate or mass-scale educational campaign. Citizens have not been shown what law is, how it operates, and why it has to be complied with. On the contrary: law has frequently been perceived as an obstacle on the path to swifter state modernisation, an obstacle one does not have to be excessively concerned with, as the ultimate effect is what truly counts: increased wealth of the state and its citizens. Introducing Poland to western political structures has been “checked off” as a huge and permanent achievement, the superficial focus on assorted statistics rather than on profound structures, inevitably subject to long-term change.

Some might well ask at this juncture – and such questions have been tabled, after all – has, then, accepting Poland as part of the European Union family not been a mistake? Absolutely not! The last fourteen years of Polish presence in the EU have been an enormous and generally positive lesson. The current circumstances are another such lesson. We have grasped that a state under the rule of law is not a condition one achieves but rather an ideal one needs to continually strive for. Otherwise today’s accomplishments will become a harbinger of tomorrow’s failure. Let us not fool ourselves: nihilistic attitudes, political extremism and anti-legalism have also been noted in ostensibly stable countries with time-honoured democracy. The scale of such phenomena may be the only difference – and they are rearing their heads in times of the social and economic crisis we have been suffering of since the early 21st century. Poland and Hungary – where the rule of law has been openly contested – are not the only countries aware of related developments. Every nation and system, all latitudes and longitudes may breed cynical players, “*rentiers of the revolution*”¹, impeccably analysing weaknesses of the society and state to use them as building blocks in developing autocracies. Courts of law – the weakest of all powers and safeguarding individual rights – will always fall victim to ruthless political battle.

¹ J. Ellul, *Autopsie de la révolution*, Paris 1969; see R. Pipes, *The Russian Revolution*, New York 1990, p. 146.

In closing, I wish to share two other reflections with you.

Firstly, lawyers cannot keep their silence in the face of evil brought upon the Polish judiciary by legislation passed over the past two and a half years. Damage is regrettably extensive and there seems to be no hope for remedy in the near future. The independence of the Polish constitutional court has been destroyed, its judiciary panels manipulated in response to expectations of the governing party. The Minister of Justice is also Prosecutor General. He now holds all instruments allowing real impact on all judicial proceedings, under criminal law in particular. Court presidents report to him; to add insult to injury, he has staffed over one-half of the National Council of the Judiciary with people without constitutional mandates, who now owe him everything. The party machine can crown or destroy anyone and everyone at the whim and will of those in rule. The Supreme Court has undergone a cleansing masked by a retrospect change to the retirement age. The content of vital judiciary-related legislation changes incessantly, within a few days as of the motion date, with no consultations or opinion seeking exercise.

What can a president of the supreme judiciary instance do? All she is left with are words. And yet she cannot remain “*apolitical*”, since constitutional compliance has become a political matter, *par excellence*. Such are Polish circumstances today – may they not be Germany’s tomorrow!

Secondly, as a Polish judge I would like to use this opportunity to appeal for more Europe within Europe. We are grateful to the European Commission, and to its First Vice-President Timmermans in particular for his vehement defence of rule of law principles. Yet the mandate of European institutions is definitely too weak, especially in the face of authoritarian and nationalistic tendencies we have been witnessing, not only on European territory, although regrettably on our continent as well. I am well aware that some member state governments (albeit I believe that Germany is not among them) have displayed inclinations to consider the so-called reform of the Polish judiciary as an in-house concern, one should not excessively interfere with. And yet it remains a priority, an investment in our common future! Once the European Union and her members pass in a rule of law-related dispute, the Union’s trademark – respect for human and fundamental rights – may soon dwindle into a distressing memory.

We all need one another. This is why I would like to use this opportunity to propose the organisation of a Pan-European Congress of the Bar, in the course of which we could learn more about each other and discuss the future of a rule of law-founded Europe. The European Union remains established upon the strength of her citizens, and should not be left to politicians alone. Federal chancellor Konrad Adenauer once delivered a sentence occupying a special place in my memory: *“History is the sum total of things that could have been avoided”* (*Die Weltgeschichte ist auch die Summe dessen, was vermeidbar gewesen wäre*).

Ladies and Gentlemen! At this difficult historical juncture, we European lawyers and judges are charged with unique responsibility. Let us not allow evil populist forces destroy the beautiful European idea. If we succumb, our children and grandchildren may never forgive us. Let us thus become advocates of the rule of law. Such is my message to my German friends from a neighbouring country.

Thank you for your attention.