"What is Going on in Poland is an Attack against Democracy"

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15.07.2016 doi: 10.17176/20160718-104348

The governing Law and Justice party recently has announced that it intends to draft a new constitution for Poland. What do you make of that?

There has been a Law and Justice draft for a new constitution in 2010, but that has been withdrawn and the party never tried to put it back on the table. Since then I have heard only soundbites and slogans, never anything coming close to anything like a coherent idea about what this new constitutional project would be. My feeling is, they won't do it. The political costs of putting on the agenda the issue of a new constitution would be for them too high. They will pursue that idea only if there is a political payoff, if they need it as a diversion from the economic and diplomatic costs of their policy. Other than that, they will not give themselves the headache to take on such a big project that would only attract the attention of all their critics. They just don't need it.

Why not?

Because what they have been doing over the past months was already a de facto change of the constitution. That is why I think that the way of describing what is going on in Poland is basically a constitutional coup d'état.

That is a strong word…

Yes, and I am using it not to vent my anger and be emotional but rather in a very technical, descriptive sense. A de-facto change to the constitution without following the amendment procedure but through sub-constitutional laws is what I call a constitutional coup d'etat. The principle of supremacy of the constitution is that you cannot change the constitution by simple statutes. Constitution controls statutes, not the other way around.

And that is what the Law and Justice government has been doing since it came to power in 2015?

Yes. The most blatant example is the law on the Constitutional Tribunal, of course. There had been a first law in December 2015 which has been subsequently invalidated by the Tribunal – a decision the government keeps refusing to acknowledge – and found untenable by the Venice Commission. Last week, the Law and Justice majority in parliament has adopted a new law. Government propaganda tried, apparently with some success, to sell this law as a step towards reconciliation. But on closer look it is the exact opposite.

How would you describe this new law on the Constitutional Tribunal?

The new law contains three sets of provisions, each absolutely toxic in its own way. The first set is about immunizing all new laws adopted by the new ruling elite from effective control. The second set is about paralyzing the operations of the Constitutional Tribunal in the long term. The third is about giving the executive an immense influence over the Constitutional Tribunal. In addition to that, there are a number of smaller, but nasty provisions – dirty tricks, if you will – such as limiting the duty of the government to publish the judments of the Tribunal to judments issued after 10th of March, which is exactly one day after the most important judgment of all, the one on the first law on the Constitutional Tribunal, was issued. For most of these provisions, there is no principled rationale whatsoever. Even if we adopt the most charitable and generous view, it is impossible to defend them with a straight face. They are simply very ad-hoc, very nasty ways of making the Tribunal powerless. That is what this law is about.

The first set you mentioned, provisions immunizing laws enacted by PiS from constitutional scrutiny – what does it contain?

The most important was a principle already strongly criticized by the Venice Commission which strictly requires the Constitutional Tribunal to hear cases in the order they come in. That means that the Tribunal, and this is unprecedented, cannot control its docket and make some cases more urgent than others. Imagine a doctor had to conduct surgery strictly in the order in which patients arrive at the hospital! The Tribunal has a backlog of about 100 cases. If it has to decide on these first it is totally unrealistic that it will be able to even start considering the new laws enacted by the Law and Justice government, some of which are blatantly unconstitutional.

Such as?

First, the law about public media. This law totally subordinates public radio and TV to the government, not in a subtle way, but in a very explicit, simple and crude way. For example, the Director General of public TV is appointed by the minister of the Treasury. This is obviously inconsistent with the fundamental principles of independent media and, therefore, freedom of speech. The second is the total politization of public service. An idea of independence of public service as a requirement of a democratic state based on the rule of law. All guarantees of this have been abandoned, such as the requirement of open competitions to fill vacancies. Thirdly and much closer to direct threats to individual liberties, there has been a law against terrorism which gives police and security services very strong powers of suspending e.g. the rights to public assembly. Finally, another example is the so-called invigilation law that gives the police and the secret service much broader powers to monitor and surveil citizens, including tapping telephones, controlling their internet moves, basically outside of any judicial scrutiny. The only requirement the security services have that every half year they have to produce statistical information to the judge about how many actions had been undertaken, without any need to individualize, to justify etc. These four laws alone contain a great number of, to put it mildly, constitutionally highly suspect provision which are now in force.

Are you saying that Poland is moving in the direction of a police state?

If we take into account the potentials and capacities amassed by the secret branches of the executive, we are not far from becoming a police state. But let me get back to the immunizing strategy. If, in the future, the government wants to enact a law that might be declared unconstitutional there is a very efficient way to do so. There is another provision that makes it sufficiently simple to inundate the Tribunal with motions about all sorts of laws, even trivial ones, just to build up the docket. So the law the government wants to be constitutionally immunized will have to wait in the queue for years to come. But suppose, just for the sake of the argument, the Tribunal somehow manages to get rid of the whole backlog, it might still find itself unable to do its job. Any new law can be considered by the Tribunal only after 30 days minimum.

Why 30 days?

No-one knows. The only rationale is that it makes it impossible to fast-track laws which are found to be particularly urgent and important. Now, add to this the fact that the Law and Justice government has abandoned the practice of *vacatio legis* and that all of its most sensitive laws have been adopted with the proviso that they enter into force immediately. That means that there will be a minimum of 30 days in which any ever so unconstitutional law will enter in operation and create a fait accompli.

What about the second set, provisions designed to paralyze the Tribunal in the long term?

A number of provisions can only be explained by the rationale to make it as difficult as possible to invalidate laws. The most striking one is the rule that in the full bench the majority required to invalidation is two thirds. You need 11 out of 15 judges now. Law and Justice already has three judges on the bench, and three more waiting. They will have an effective veto. Apart from that it is patently unconstitutional, as the Constitution itself says unequivocally that the Constitutional Tribunal decides with “majority of votes”, which means „simple majority“ because whenever the

Constitution requires an absolute or qualified majority, it expressly says so. Additionally, there is a new provision that gives any four judges a right to demand postponement in any case without giving reasons for three months, twice. So, even if there is a 2/3 majority, four judges can delay any decision for half a year. The third example is even more cynical. In a number of cases the participation of the Attorney General is mandatory. If he does not show up at the hearing the case cannot be considered. Just by failing to perform his formal duty he can stop the procedure.

And that would be legal for him?

Perfectly legal.

You mentioned provisions designed to give the executive control over the Constitutional Tribunal. What do you mean by that?

Three examples. First, the exclusion of a judge for disciplinary reasons by the General Assembly of Constitutional Tribunal judges can now be vetoed by the President. The Law in Justice party anticipates probably that some of its judges will be of such low moral standing – some of the judges already voted in by the President belong to that category – that they may be subject to disciplinary action, so the President will be able to quash these decisions. Second, the President and the Attorney General, both active politicians, have a right to make a motion of deeming specific cases as being particularly complex and therefore have to be heard by the full bench of judges. That is not just a technicality. It raises the standard of invalidating a law much higher. Finally, the President will have the authority to change the sequence in which the Tribunal has to adjudicate its cases. These laws shift a lot of power from the judicial branch to the executive.

Doesn't it take a constitutional amendment to give the President more powers?

Of course it does. These competences are given to the President by a simple statute, and this in itself, whether we like it or not, is obviously unconstitutional, which is why I call this a constitional coup d'état. The constitution lists the competences of the President in an enumerative and exhaustive way.

The Law and Justice party, you say, aims to neutralize the Constitutional Tribunal as an institution which holds its executive and legislative actions to constitutional scrutiny. What about the rest of the judiciary? Would other judges be able to step in and fill the gap left by the Constitutional Tribunal?

You put a finger on perhaps the most intriguing and puzzling issue here. If we assume that the Constitutional Tribunal will cease to exist or become a mere façade institution, then obviously the whole weight of judicial scrutiny, also of constitutional scrutiny, would be shifted upon the regular judiciary. Now, the big question is: Will the so-called regular judges, civil, criminal, administrative etc., be able to carry this burden? I must say that I am moderately optimistic about it, especially when it comes to the Supreme Court.

Most constitutional orders try to monopolize constitutional review in one specific court to prevent legal fractioning…

Sure. We had these debates and intra-judiciary conflicts in Poland, too. But now, when we contemplate very seriously the possibility of a maybe permanent disablement of the Constitutional Tribunal, I think – but very strongly as a second-best – we need to invest some hope with the regular judges, that each of them has to see him- or herself as a constitutional judge, that they are bound more by the constitution than by statutes and may set aside a statute if they believe it to be inconsistent with the constitution. Polish judges will have to start acting in this way.

And this would be viable in terms of constitutional doctrine, for an ordinary judge to set aside a legal provision because of its assumed unconstitutionality?

Absolutely. When they develop reasonable doubts about the constitutionality of a law, each single judge has a legal duty to stay the proceedings and to formulate a question to the Constitutional Tribunal and wait for the answer that will be binding. But if we add to that a variable that the Constitutional Tribunal is powerless there will be no-one to ask, and therefore the judge will have to do it him- or herself.

Wouldn't that undermine legal certainty if one judge finds a law unconstitutional and another doesn't?

Yes. That would be one of the consequences. We would have to dispense with this sort of Kelsenian idea

of absolute total coherence of the law. It would be a situation of legal pluralism. In countries where the law is often of very low quality and laws themselves contain all sorts of gaps and blurs, inconsistency of the application of the law is not something unqualifiedly bad. I don't believe in that sense of the rule of law that says that law must always be fully and perfectly coherent. Coherence is not an independent value. Yes, we then have a situation in which in a similar case a judge in Krakow will decide differently than a judge in Gdansk. Too bad! That doesn't frighten me.

The Polish government has met with remarkable resistance from the EU Commission, so far. Some complain that this shows a lack of respect towards Polish democracy. What would you reply?

What is going on in Poland is an attack against democracy. And it is not something that happens at the margins of democracy. It happens at the core. This is qualitatively different from ordinary squabbles about right or wrong constitutional policy among reasonable democrats. This is an assault on the very foundations of democracy. A question like whether the president may have control over the constitutional tribunal is not just some technicality. That is a fundamental issue of separation of powers. Would you in Germany be happy if your Minister of Justice were able to control what is going on in Karlsruhe in any particular case? It is as bad as that! This is not hyperbolic. If you accept these laws, then you accept the fundamental undermining of democracy.

How optimistic are you that external pressure can make a difference at all in current Polish politics?

I think it can make a difference. To be effective, the pressure must be synchronized between European Union and the US administration. The rule of law framework procedure now set in motion by the EU Commision will certainly not end with a suspension of voting rights of :Poland in the Council. That is totally unrealistic. But it might end with a determination of the dangers to the rule of law, which would already be a huge reputational loss for the government of Poland. But even if it doesn't come up with this formal ending, the very fact that the procedure would be going on would be something that the government of Poland would not be able to simply ignore.

With respect to Hungary, whose government did things comparable to the Polish policies in many ways, was treated much more leniently than Poland by the EU. How is Poland different?

The Hungarians managed to get away with their illiberal provisions both in their constitution and in various laws for a combination of reasons which do not apply to Poland. The fundamental factor is that the Hungarian Prime Minister Victor Orbán had a constitutional majority. He could change the constitution, so you couldn't simply say, your actions are unconstitutional. You can say they are illiberal, populist, cruel, undemocratic, but not unconstitutional. They have adopted a bad constitution, an illiberal constitution, but a constitution nevertheless. Jaroslaw Kaczynski, much to his regret, doesn't have a constitutional majority. So what he tries to do is clearly a constitutional coup d'état.

What do you mean by that?

The factual change of the constitution through subconstitutional measures. If you do that it exposes you much more openly to a rule of law scrutiny. The new procedure run by the Commission is a rule of law procedure. That makes a difference. If it is about democracy one may discuss and disagree. If it is about the rule of law it is much more difficult to disagree if you go against the constitution.

What other factors do you see that distinguish the Hungarian case from the Polish?

Orbán and his people are much smarter and much more cunning than our government. They kept saying to the Commission: Oh yes, we see what you are saying, you may be partly right. They changed their laws here and there, pushed and pulled back – very smart. Kaczynski is the opposite. He doesn't know and doesn't trust the European Union. His people are insulting EU officials, reacting defensively and aggressively at the same time. Also, their opposition to the EU is much more ideological than the Hungarians whose main interest seems to be to build up a new financial oligarchy around Orbán. One of the few good things that can be said about Kaczynski and his people

is that they are not oligarchs. They are not predominantly into big money making. They pursue an ideology of Poland as a proud sovereign state based on Catholic national identity etc. – things Orbán would only say to please someone. In Poland, they actually believe it.

Do you still have hope that Poland might find a way out of its constitutional predicament any time soon?

One of the very few sources of optimism for me is the hope of a possibility of external intervention. I am not afraid to use that word. There is no such thing as internal affairs in the European Union. The European Union has a duty to intervene when fundamental principles of Art. 2 TEU are in danger. Then there is the pressure applied by the US government. And one must not forget that there is also a growing movement of grassroots resistance within Poland which will generate over time a strong potential of civil disobedience. That are the only sources of hope. I do not credit the current elite with any good faith because they have shown enough already of their real face.

Did the Brexit referendum change the picture in some way?

The prospect of the UK leaving the Union brings in a new political dynamic in Europe. I fear, and the Polish government hopes, that the focus of public opinion now shifts to other things. But maybe even more important is the fact that the Brexit referendum reveals them to have been in alliance with people who are fundamentally against the European Union. I don't think that Kaczynski wants a Polexit. He holds obsolete ideas about the European Union, but he has no intention to leave it. But the fact that his main allies in Brussels are all sort of crazies really exposes them. It lays bare his fundamental strategic mistake that he has failed to make allies with whom he can make anything positive within the European Union.

Questions by Maximilian Steinbeis

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SUGGESTED CITATION

Sadurski, Wojciech; Steinbeis, Maximilian: "What is Going on in Poland is an Attack against Democracy", Verfassungsblog, 15.07.2016, doi: 10.17176/20160718-104348.

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