President Duda is Destroying the Rule of Law instead of Fixing it

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Were the president of any country to propose acts of law that remove almost half of the members of its supreme court, interrupt the constitutional term of office of the chairperson of such court, give himself the right to appoint a new chairperson of the court, and finally, interrupt the constitutionally defined term of office of a judicial council responsible for appointing judges, the consequences of such manifestly unconstitutional solutions would be massive public opposition and accusations of a *coup d'état*. And yet in Poland, where this is exactly what is happening, the President's proposals are met with understanding. Why? Because they are perceived as better than the even more unconstitutional proposals put forward earlier by the ruling party, Law and Justice.

The first act of law proposed by the President is one on the Polish Judicial Council (PJC). The solutions incorporated in this draft sustain the unconstitutional solution earlier proposed by Law and Justice. It envisages that judicial members of the Polish Judicial Council (as distinct from the non-judicial members, who are appointed by politicians and are a minority on the Council) are selected not by other judges but by members of parliament. The Polish Constitution clearly provides which PJC members are appointed by representatives of the executive and which by the legislature. As regards judicial members, the Constitution does not specify who appoints them because the principles behind the separation and balance of powers regulated in Article 10 of the Constitution require judges themselves to do it (the same follows from an analysis of legislative history of enacting the 1997 Constitution.) Nevertheless, President Duda, just like Law and Justice, accepts that it is possible to presume certain powers of parliament not expressly stipulated in the Constitution.

The President's proposal for an improvement in the way in which judicial PJC members are to be appointed is still by the Sejm (the lower chamber of the Polish Parliament), but by a qualified one of three-fifths of votes rather than an ordinary majority. The President has supplemented this proposal, originally announced in July, with an additional solution: as a qualified majority may lead to a standstill if members of parliament are unable to agree upon a candidate, the President should appoint judicial PJC members. President Duda stated that he was aware that granting him such competences would be a breach of the Polish Constitution, therefore, he suggested … amending it.

The proposal is a good illustration of the President's attitude towards the Constitution – if it does not agree with his actions, then it is the Constitution rather than those actions needs to be amended. The President seems not to understand that the provisions of the Constitution are not disparate ornaments which may be selectively changed but are interrelated elements which create a systemic whole. A change in the Constitution giving the President (or parliament) influence over the composition of the council responsible for appointing all Polish judges would not be a minor amendment resolving a technical problem (which, by the way, the President himself has caused) but a systemic change, contradicting the idea of the separation of powers.

Since the parliamentary opposition has predictably refused to countenance any amendment to the Constitution, the President suggested a new solution to prevent a future standstill in the election of judicial members of the PJC. Under this solution, if they are not elected by qualified majority, voting on candidates will be based on the "one MP – one vote" principle. The effect would be that the majority of

judicial members of the PJC would thereby be appointed by Law and Justice.

As if that were not enough, the most outrageous element of the draft act on PJC is that it envisages the interruption of the constitutional term of office of current Council members and re-election of their replacements, all at once, under the new regime. In effect, this solution would give parliament the right to replace the entire PJC practically overnight.

The second of the proposed drafts, the Supreme Court Act, is equally noxious, particularly because of its numerous unconstitutional provisions. Instead of the immediate replacement of all Supreme Court judges (as proposed by Law and Justice in July), the President has set their retirement age at 65 years. On reaching this age, a judge retires unless the President agrees to his or her continued service. In effect, about 40% of Supreme Court judges will lose their positions over a short time. In addition, given that the First Chairperson of the Supreme Court, Małgorzata Gersdorf, will soon be 65 years old, she will be deprived of her function of court president before the end of her term of office, even though the Constitution guarantees a term of office of six years. The draft Supreme Court Act expressly provides for the procedure to be applied when a court president retires and gives the President the right to appoint his/her replacement. Such provisions are openly unconstitutional and the fact that they are less explicitly so than the ruling party's earlier ones does not make them legitimate.

Other solutions proposed by the President are equally controversial, and one in particular will destabilize the legal order in Poland. The draft introduces the so-called extraordinary complaint, which may be lodged also by politicians (e.g. 30 MPs, 20 senators, the Public Prosecutor General – Z. Ziobro), under which it will be possible to re-open any case on which a non-appealable court ruling was issued within the last 20 years. Such cases would be reviewed by a newly established Chamber of Extraordinary Control and Public Affairs, to be composed of judges elected under the new appointment regime, and jurors appointed by the Senate – thus two groups ultimately appointed by politicians. What is more, the draft does not address how opening the possibility of challenging 20 years of judgments will affect Poland's perception abroad as a legally stable environment for investment.

For the future, an extraordinary complaint may be lodged against any final and (previously) unappealable judgment within five years of its issuance. Given that the main problem the public has with Polish courts is the protracted nature of proceedings, it is hard to understand how introducing a further court instance solves this issue. Finally, the draft does not explain the relation between the extraordinary complaint and the Constitutional complaint, which it duplicates in covering judgements which are perceived to violate constitutional rules, rights and freedoms.

Another solution that raises serious concerns also refers to the Chamber of Extraordinary Control and Public Affairs, namely conferring on that body the right to decide on the validity of parliamentary, presidential and local elections, as well as referenda. With members appointed by the current government, as described above, this new Chamber is a threat to the foundations of democracy because there are no mechanisms to ensure unbiased oversight of the legality of future Polish elections (assuming they too will not be replaced with an improved mechanism to enhance the power of the current government).

To recapitulate, the recent solutions presented by the President are noxious because they blatantly violate the Polish Constitution. They allow the legislative and executive powers to have control over the process of appointing and removing judges. They ensure politicians will have control over the chamber of the Supreme Court, which is of key importance for democracy in Poland, and they destabilize the Polish legal order. The only light in which the President's solutions can appear favourably is in comparison to Law and Justice's previous proposals. Unfortunately, that is the light in which they are most commonly seen.

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