Reviewing the Holocaust Bill: The Polish President and the Constitutional Tribunal

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President Duda decided to sign off the controversial law allowing to punish those who publicly accuse the Polish nation and the Polish state of taking part in the Holocaust and in any war crimes. The law will now come into force – a circumstance which is unlikely to calm the international discussion it has generated.

Having decided to sign the law, the President announced that he will file a motion to the Polish Constitutional Tribunal to check its constitutionality. Two issues bother the President: whether the law does not violate the freedom of speech, and whether its wording is sufficiently precise to assure the predictability of its application. There is no time limit for the Tribunal's verdict, and given the recent significant slow-down in the Tribunal's operations, the decision may take months rather than weeks

The President's decision is questionable. If the President has doubts about the constitutionality of the new law, he should have resolved them before signing it, not after. The Polish Constitution stipulates two competencies for the President to file a motion to the Constitutional Tribunal: a preventive constitutional control, as described in art. 122 point 3 of the Constitution, and a general right to question the constitutionality of the law, as described in art. 191.

In the case of the IPN law, the President should have used art. 122 point 3. It was specifically designed for a situation in which the President has doubts as to the constitutionality of a newly enacted bill and wants to consult the Constitutional Tribunal before signing it into law. The article reads as follows:

> *"The President of the Republic may, before signing a bill, refer it to the Constitutional Tribunal for an adjudication upon its conformity to the Constitution. The President of the Republic shall not refuse to sign a bill which has been judged by the Constitutional Tribunal as conforming to the Constitution."*

However, instead of using art. 122 point 3, the President signed the bill – thereby allowing it to come into force – and decided to use a general competence to question its constitutionality. This competence is stipulated by art. 191 point 1 of the Polish Constitution:

> *"The following may make application to the Constitutional Tribunal regarding matters specified in Article 188: 1) the* ***President of the Republic****, the Marshal of the Sejm, the Marshal of the Senate, the Prime Minister, 50 Deputies, 30 Senators, the First President of the Supreme Court, the President of the Supreme Administrative Court, the Public Prosecutor-General, the President of the Supreme Chamber of Control and the Commissioner for Citizens' Rights".*

The practice of using a general competence rather than a specific one has has proved controversial in the past (e.g. when used by President Komorowski for the law on private pension funds). It is of some political value when a president wants to display his independence to the general public without blocking the legislative process undertaken by the parliament. From a legal point of view, using the general competence for an *ex post* constitutional review – instead of the dedicated *ex ante* option – may be perceived as a constitutional delict. If the president is aware that the law may be unconstitutional and has at his disposal legal tools to check it yet allows it to come into force, he can be accused of constitutional recklessness.

What next? There are three possible verdicts of the Tribunal:

a) The law is found constitutional, in which case the law stays as it is and can be applied in the future.

b) The law is found unconstitutional, in which case the law is removed from the legal system and cannot be applied any longer (from the moment the verdict of the Tribunal is published). Moreover, regular court verdicts issued on the basis of the new law between its coming into force and the Constitutional Tribunal's verdict can be reopened and overturned.

c) The Tribunal may issue an interpretative verdict, namely it may indicate the interpretation of the IPN law which the Tribunal finds constitutional; this interpretation can later be accepted by regular courts but there is no obligation for them to do so.

One should bear in mind that whatever verdict the Tribunal issues, the validity of that verdict will be questionable if any of the Tribunal's illegally appointed judges (so-called "anti-judges") is involved in the process of issuing it. This scope for doubt shows the grave legal consequences of PiS's takeover of the Tribunal: a decision that is to definitively solve a controversial issue will itself be open to question.

President Duda's decision to sign in the bill and pass it on to the Tribunal may have another, unexpected consequence, thereby becoming a paragon not of problem-solving but of problem enlargement. Specifically, the decision will bind Poland's current conflict with the USA and Israel to the ongoing issue of the independence of the Polish judiciary. Once the President passes the new law to the constitutional court, the independence of the Polish judiciary will become an issue of relevance for both the US and Israeli governments.

The recently established lack of independence of Polish judiciary in general and the Constitutional Tribunal in particular is likely to be thrown into stark relief. Since its usurpation by the government, the Tribunal has actively supported PiS's politics. The current case is no exception: the Head of the Tribunal, Justice Przylebska, has already publicly supported the new law – an extraordinary step for an allegedly independent judge. The defenders of the rule of law in Poland may only hope that the international outrage the new law provokes will positively impact the rule of law crisis. The hope is that this escalation of the crisis from a national to a European to an international issue will prompt its resolution.

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