Polish Chief Justice of the Supreme Court Under Pressure: What Now?

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These days mark the capture of the second-last central institution not yet fully under the control of the Polish Law and Justice (Polish acronym: PiS) party, namely, the Supreme Court (the last remaining one being the Ombudsman office). Having captured the Constitutional Tribunal, the National Council of Judiciary, electoral commissions, media regulation boards, prosecutorial offices and presidents of all local, regional and appellate courts, the illiberal revolution is eager to devour the highest court of the land.

This is all the more so since the Supreme Court is seen, largely with good reasons, as unwilling to subordinate itself to the will of the ruling party, and has issued a number of judgments unpopular with the party – for example, regarding the irregular "pardon" granted by President Andrzej Duda to high PiS officials even though the court judgment on whether there was a criminal breach of the law while in office was still non-final. Also, a number of Supreme Court (SC) judges including the courageous and dynamic Chief Justice, Professor Małgorzata Gersdorf (a labour law professor from the University of Warsaw), have taken the lead in criticising unconstitutional laws enacted by PiS majority since 2015. More threateningly to PiS, the SC often has made gestures that, in circumstances in which the Constitutional Tribunal was emasculated, the common courts and in particular the SC itself may need to undertake the role of constitutional review, albeit in a "diffuse " fashion. Since mid-2017, having effectively neutered the CT, PiS has taken up a fight with the courts, and in particular with the SC.

The new law, initially vetoed by President Andrzej Duda in July 2017 and redrafted by Duda himself, was enacted in December of that year. Its main – indeed only – aim was a thorough court-packing of the SC. The lowering of the new retirement age from 70 to 65 means that some 40 percent of judges of the SC (27 out of 73 judges) – and of course this includes the most experienced ones – have found themselves in the retirement zone, and compelled (if they wish to carry on judging) to make a demeaning declaration to the President, who maintains discretionary power on the matter: He may refuse to allow a judge to continue beyond 65 years of age. This also (in the intentions of the lawmakers, i.e. PiS) applies to Chief Justice Małgorzata Gersdorf, notwithstanding the fact that her term of office as Chief Justice is constitutionally defined as 6 years – Art. 183(3). As President Duda explained some time ago in a TV interview[1], the retirement age (brought about by a statute) takes precedence over the constitutional term of office. (When asked by the journalist conducting the interview whether he should not worry that if the opposition party comes to power, they may want to use the precedent and shorten his own term of office, Duda responded that he has a long way to go before reaching 65 years, clearly failing to grasp the nature of the problem). This is one of the most striking instances of changing the constitution by statute. As a commentator noted, "If a parliamentary majority ... may 'recall' the Chief Justice of SC, by enacting a statute at any time, and in this way influence the functioning of the most important court in our judicial system, no other judge or court in Poland can feel 'safe'. It produces a serious risk of creating a so-called chilling effect among judges ... which evidently threatens judicial independence...."[2]

[1] Remarks by President Andrzej Duda in a TV interview (26 November 2017, at TVN24).
[2] Mateusz Leźnicki, "Konstytucja czy karykatura?" [A constitution or a caricature?] Rzeczpospolita 8 February 2018 at A20.

The other face of court-packing is the huge increase of the number of seats on the Court, from the current 73 to 120 (including creation of two brand new chambers). All new judges will be appointed by President by recommendation of the National Council of Judiciary (Polish acronym: KRS), which is now elected by the parliament, and hence staffed by PiS nominees. In combination with the discharge of prematurely retired judges, it means that some 60 percent of judges on the SC will be nominated, or at least approved, by the ruling party.

Under pressure from the European Commission, in May 2018 the Sejm introduced a cosmetic change to the regime of retirement: now, when deciding about whether to accede to a SC judge's request for an extension of their term after reaching 65 years, the President will have to seek the opinion of the KRS. But considering that, as already mentioned, the composition of the KRS is totally subjected to political will of the majority party – and that in any event the advice is non-binding – this change does not make any difference and does not diminish the executive's control over the retirement situation of SC judges.

As already said, out of the 73 judges of the SC, 27 judges reached the age limit of 65 by the time the new law entered into force. 16 of those judges expressed a will to continue in office, but there was a significant division within this group. Nine submitted the application to the President as required by the new law (accompanied by medical certificates), while the remaining seven adopted a different strategy: they merely filed "declarations" or made "announcements" that, in accordance with the Constitution which guarantees judicial irrevocability, they intend to complete their service until the age of 70. They did not present it in the form of requests to the President (nor the medical certificates required by the new statute), but as declarations lodged with the office of the Chief Justice of SC. One of those judges, Stanisław Zabłocki (President of the Criminal Law Chamber) expressly announced later that his declaration is not an application under the new law but merely articulates his "readiness to perform the function of a judge of the SC in accordance with the principle of the irrevocability of judges".[3] It remains to be seen what will be their fate. The remaining 10 judges conceded the (apparent) inevitable and took their retirement as of 4 July 2018. The Chief Justice was the eleventh of those who had not made any formal written declaration.

A web of legal inconsistencies

Which brings us to the situation of Chief Justice herself. Professor Małgorzata Gersdorf was appointed to a constitutionally guaranteed term of office of six years, starting 30 April 2014 – hence until 2020. She announced that she intends to complete her term until 2020, and that she is not going to request permission from the President because it is an unconstitutional condition, both on the basis of creating a restriction on an explicit and unconditional constitutional term of office of six years, and also by subjecting the fate of a judge to the discretionary will of the executive branch. The Chief Justice obtained massive support from her own colleagues: on 28 June 2018, almost in the eleventh hour before the statute-dictated purge, the General Assembly of Judges of the SC declared unanimously (with 63 judges participating in the meeting; the reasons for absence of the remaining 11 are unclear) that she would remain the Chief Justice until 30 April 2020. The Resolution is just one-sentence long and is worth citing:

> *"We, the justices of the Supreme Court … mindful of the oaths of office we made and allegiant to the Constitution of the Republic of Poland, which is the supreme law of the Republic of Poland, state that Justice of the Supreme Court, Professor Małgorzata Gersdorf … shall remain – according to Article 183 section 3 of the Constitution … directly applied under Article 8 section 2 of the Constitution … – the First President of the Supreme Court, heading of [sic] the institution in which we perform our service to the public, by 30 April 2020".*[4]

The crisis came to its apex, with a good deal of theatrical effects, on 3 July 2018, i.e last Tuesday. PiS and the President declared that they believed that it was the

[3] Cited in Łukasz Woźnicki, "Wyrok na sędziów odroczony", Gazeta Wyborcza 26 June 2018 at 5.

last day in office for Professor Gersdorf while Gersdorf herself, supported by her colleagues on the Court, maintained that she was continuing to serve as Chief Justice until 2020, in accordance with an express constitutional provision. The speculations in Warsaw abounded: Who will blink first? Will Gersdorf maintain her position; will President appoint someone else; will the authorities use physical force to prevent Gersdorf from coming to her office the following day? Manifestations by democracy supporters were announced for that evening and the following morning.

A rather puzzling thing happened on 3 July 2018. Both Professor Gersdorf and President Duda nominated (ostensibly separately and independently of each other) Judge Józef Iwulski, the most senior judge on the SC (and the president of Labour Law Chamber) as a "Judge standing in for her during her absence" (in the language of Professor Gersdorf) or as "acting Chief Justice" (in the language of President Duda). The difference in nomenclature is significant. Under the old law on the SC, in the part not abrogated by the new law, Chief Justice may appoint another Judge to be her deputy during her absence (Art. 14(2) of the old statute on SC, the provision still in force). In turn, Duda *could have* cited the provision of the transitional arrangements of the new (PiS-enacted) law which mandates the President to appoint an acting Chief Justice (art. 111 (4) of the new statute on the SC) for a period before a permanent Chief Justice can be nominated (i.e., only after the Court counts at least 110 judges). The fact that he did not use this device, which after all has been invented for his own statute, means that clearly he could not find any judge on the Court willing to undertake this task. So he simply referred to the same provision as Gersdorf did, but with an additional (oral) proviso that Gersdorf's mission is terminated, so Iwulski was not her "deputy" but rather an interim successor. But Article 14(2), on which hapless Duda in the end relied, provides no role for the President at all! Rather, it is a routine provision which may exist in all sort of organizations, about an official (here: CJ) appointing a deputy for a limited period of illness or other absence from office. By jumping on that bandwagon already set up by Gersdorf and saying that Judge Iwulski enjoys full confidence of the President, Duda hoped perhaps to acquire some legitimacy for his action, but it had no legal grounds or effect.

At the time, though, it seemed like a face-saving arrangement for both sides, with Professor Gersdorf claiming that she was about to take leave of absence anyway. For Duda, nominating Judge Iwulski was fraught with legal inconsistencies. Iwulski is older than Gersdorf (he is 66 years old), hence all the more he belongs to the group of judges in the retirement zone, and he did not make an application to the President in the procedure provided by the new law (just as many other "intransigent" judges). To the contrary, he made a declaration of his will to continue, making direct reference to the Constitution. In addition, Judge Iwulski was one of those who voted for the two resolutions of the SC of 28 June 2018, mentioned above. This means that President Duda accepted the continuation in office by a judge who, under Duda's own law, had his term of office terminated because he had reached 65 years and did not ask the President for a right to continue in office! By using Article 14 of the old law (on temporary replacement for the current CJ), rather than Art. 111(2) of the new law (on interim successor) the President, perhaps unwillingly, accepted that Małgorzata Gersdorf was still Chief Justice.

And to make things even worse, Duda failed to hand Professor Gersdorf any written declaration regarding her stepping down, even though the law (Art. 39 of the statute on the SC) requires that such a declaration (countersigned by Prime Minister) be issued by President regarding any SC judge stepping down from his or her active duty: while it is declaratory rather than constitutive, it is nevertheless mandatory. On the eve of 3 July, a presidential advisor had suggested that the President would hand in such a decision to Professor Gersdorf. Later on, however, the official line from the presidential office was changed into a theory that Gersdorf's retirement occurs *ex lege* so no additional presidential action was needed –

[4] *Resolution of the General Assembly of the Justice of the Supreme Court of Poland on the term of the First President of the Supreme Court, 28 June 2018, on file with the author.*

something contradicted by express wording of Article 39.[5]

One speculation for all these incoherent actions by the President was they were made in order to stop the procedure of infringement against Poland in CJEU: if Professor Gersdorf is still a CJ (though her functions are performed by her deputy), the argument goes, what is the point of an infringement action? But this argument is clearly inconsistent with the President's frequently repeated official conviction that Gersdorf definitely terminated her office on 3 July 2018…

The oddness persisted after the 3 July awkward double appointment of Judge Iwulski the following day. On 4 July 2018, surrounded by her colleagues and applauded by thousands of demonstrators (some of whom stayed overnight around the SC building in the beautiful Krasiński Square near the Old Town), Judge Gersdorf returned to the Supreme Court, thus symbolically showing her disregard for the official statements about the expiry of her term of office. At a press conference Professor Gersdorf and Judge Iwulski kept repeating that Gersdorf is still the legitimate CJ and Iwulski merely stands in for her during her absences. But from his office not far from the SC building, President Duda and his lawyers maintained their theory that Gersdorf stood down *ex lege* from her office on the day before, and Iwulski is now the acting Chief Justice, until a regular appointment of the new CJ. The latter interpretation, it needs to be repeated, was fatally undermined at the very outset of Iwulski's appointment, since he was not appointed under the new law (Duda's statute) providing for the appointment of an acting CJ, but under the old law (in this respect, still in force) permitting the Chief Justice to nominate her replacement for a limited period of time (when, of course, she maintains her status as the CJ). Duda's version is also impossible to maintain with a straight face due to the fact that Iwulski apparently has not agreed to that status; in fact, he made it clear that his status is due to Gersdorf's decision, not the President's.

So, for the time being, the President is caught in a web of legal inconsistencies, which was brought into sharp relief by the language of President's officials who from 4 July on neither used the language of "acting chief Justice" nor "a deputy to stand in for CJ during her absence" to describe the status of Judge Iwulski but some vague phrases such as "leading the work of the Supreme Court" which have no legal meaning. However, since the legal basis for this was said by those same officials to be the old law's Article 14(2), the inevitable implication was that Gersdorf is formally still Chief Justice since the provision speaks about standing in for Chief Justice during his/her absence. The absence of whom? "Chief Justice Gersdorf" is the only answer – but these implications either escaped or were ignored by the President and his lawyers.

A leave or a resignation?

Much, if not everything, now depends on Małgorzata Gersdorf. If she seriously treats her leave of absence as a short holiday and soon returns to her office, she may have a chance for a victory (temporary, at least) over the anti-constitutional plot masterminded by PiS and executed by the President. If, however, the "leave" is just a proxy for a de facto stepping down, leaving the space for PiS and the government to fill the vacant positions on the SC and elect a new Chief Justice – this will be very bad news for Polish democracy. As the infringement action by the European Commission against Poland concerning the rule of law violation related to the Supreme Court is now slowly (very slowly) underway, Polish rulers will have to hurry in order to create a fait accompli. Professor Gersdorf has a historical chance to make their job more difficult.

Whatever happens, one thing is already abundantly clear. To push through their illiberal and antidemocratic package, Polish rulers do not consider the Constitution to be an obstacle. In pursuing their aims, they are prepared to breach it, and to engage in legal inconsistencies of the sort visible to a first-year

[5] Article 39 of the law on S.C. states: „the date of transfer of a judge of S.C. into the retirement or moving a judge of the SC into the retirement is stated by the President of the Republic of Poland", and the practice has been that this presidential decision requires a written form and counter-signature by Prime Minister.

law student. And this applies first of all to Andrzej Duda, doctor of laws, lecturer in administrative law on leave from the renowned Faculty of Law of Jagiellonian University in Cracow, an official constitutionally described as the guardian of the Constitution.

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