„Do not go. Do not vote“: an Interview with WOJCIECH SADURSKI

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The Polish President Andrzej Duda has published a list of questions about the Polish constitution he intends to present to the people in November. What do you make of that?

President Duda has been talking about a constitutional referendum for a number of months already. There is nothing wrong for any politician and in particular the President to suggest that constitutional change is important. But he has not produced one single argument about any particular urgency of the need to have a new constitution or amend the old one. So we don't know what is answer to the question ‚why?' would be. The second point is that it is particularly inappropriate to suggest the change of the constitution for a President who has been guilty of multiple and obvious breaches of the current constitution. If there is something wrong about the current constitutional situation in Poland it is that it is not taken seriously by those who are meant to enforce it. For him to stand before the public and call for a new constitution is a bit rich. It's not credible.

But legally, he is entitled to initiate such a referendum?

Legally, of course, every politician is entitled to make that proposal, however not in that particular procedure. The current constitution does not provide for this sort of constitutional consultative referendum that he has in mind. In Poland, there are consultative referenda on matters of particular importance, such as the accession to the European Union, for example. Or there are constitutional referenda to ratify constitutional amendments already adopted by the national assembly. When it comes to referenda in a constitutional context, the only way the current constitution provides for is an ex-post referendum. There is no such thing as an ex-ante consultative referendum based on generic questions as opposed to a document which you can have a meaningful discussion on. Procedurally speaking, he invents a totally new legal construct. Asking such vague questions on things all over the place as a first step in the procedure of constitution making – that doesn't make any sense. That has never been done in constitutional history, and for very good reasons. Each constitutional reform process begins with a worked-out draft. Then, people can read it and make their minds up about it.

Would you say that this procedure would be a breach of the constitution by itself?

I'm not saying it would be against the constitution, but it is certainly extra-constitutional. It would be a breach of constitutional continuity, a new constitution not based on the process provided by the current constitution.

Couldn't one say that the question of having a new constitution is a matter of particular importance which warrants a consultative referendum?

Then it is not a constitutional referendum. The only constitutional referendum the constitution provides for is ex-post, at the end of the process, when you have a bill that can be discussed and people can make their minds up about. The question is why the President doesn't want to follow that clear path. The only explanation I can see has to do with Duda himself. He is a pathetic figure, in some ways comic, in some ways tragic. He occupies the highest position in the state basically having no political identity of himself. He knows that he is seen as a puppet of PiS Chairman Jarosław Kaczyński. A year ago, when he vetoed of two of the three „judicial reform“ laws some thought that he acquired finally an independent identity, but those who thought so were painfully disabused of this hope when he came up with his own

bills which were just as unconstitutional as the bills he had vetoed in the first place. It was not a sign of protest of the guardian of the constitution but a petty act by a person who wanted to get for himself some of the competences of control over the courts which the initial laws had reserved to the Minister of Justice.

So, why does he want to have an ex-ante constitutional referendum?

I think it is basically a PR strategy. He hopes that from now on until November 2019 when he wants the referendum to take place, public opinion will focus on his office. With an ex-post referendum, all focus would be on the constitutional committee in the Sejm and Senate. With an ex-ante referendum run by his office, however, he may hope that the next year he will be in the limelight. It's a bit of an ad personam argument, I realize that. But it is the only explanation I can find.

What do you make of the specific questions he intends to present to the Polish people?

There is only one question that is meaningful. The rest is either meaningless or redundant or detrimental. A meaningless question is, for example, the one about whether people want protection of „alimentary safety". That is just ridiculous.

It sounds like a signal to the agricultural, rural voters.

Maybe, but it has absolutely no consequences. You might just as well ask: Do you want the state to make sure everyone is healthy, good-looking and young. These are so-called „motherhood questions". Are we against motherhood? Who would be against alimentary safety? It doesn't make any sense at all. The second group of questions are those that are redundant in the sense that they are about things that already are in the constitution. A reference to „Christian heritage" in the preamble – it is already there! For Duda to make that point is, of course, a signal to the Church. But in terms of constitutional law, it makes no difference if you refer to Christian heritage once, twice, or five times. It doesn't add anything.

At least it doesn't hurt either, does it?

No, but there are other questions which are positively detrimental. He asks whether people want to have certain welfare benefits, such as the „500+" payments for children and the lowering of the retirement age, constitutionally entrenched. Now we are talking about something very serious. If there will be a change of the government and of social policies, its hands will be tied. Many economists consider these policies very detrimental. They are popular now, because we are in an economic boom. But when the crisis returns to Poland, we will need to economize. To put it in the constitution would basically freeze certain economic policies which may or may not be rational and which normally would be very much within the legislative discretion.

Which one is the meaningful question?

That is about whether we should move, from the semi-presidential system we have today, into either a full-blown presidential system with enhanced powers for the directly elected president, or into a parliamentary system with the president elected by the national assembly. That is a serious choice. Some may say that semi-presidentialism as we have it in Poland – the president's powers limited but he is elected in general elections – is inherently instable and you better choose if you want either presidentialism, French style, or full parliamentary democracy like in Germany. But I think Polish semi-presidentialism has worked very well; there is nothing unstable about it, under the condition that the Presidents takes his office seriously. Duda's predecessors were strong personalities who managed to infuse the office with their serious sense of mission. In normal times, the most important of the limited presidential competences is the veto: They can be overriden only by qualified majorities in the Parliament. That means that the President can have a reasonably strong control over the legislative process. The problem with Duda is that he hardly ever exercised it. He has stronger powers than he actually uses. There were many laws that were clearly problematic where he acted in a strange way. The most obvious case would be the law about the Holocaust – punishing for attributing to Poland co-responsibility for Nazi crimes. Duda, rather than vetoing it, signed it and sent it to an ex-post scrutiny to the Constitutional Tribunal. Which is incoherent. You cannot do both. If the President signs an act, he implicitly says that he doesn't have

any constitutional doubts about it. If he then sends it to the Constitutional Tribunal, he says that he does have doubts. For Duda to ask the population this question about presidential powers carries an implicit message: I feel uncomfortable with my position of president, I have the legitimacy of an elected president but not have the powers that match his legitimacy. That is what his advisors say. But that is simply not credible. His powers aren't so narrow. He just doesn't use them.

This is not a simple yes-or-no question but a choice between three alternatives – presidential system, parliamentary system or status quo. How do you even determine a majority with such a tripartite question?

There are many badly crafted questions in this referendum. Another quite absurd question is: Are you in favour of constitutional regulation of our membership in the EU and NATO? What if your answer is Yes for EU and No for NATO, or vice versa? How do you answer that question? The reason EU and NATO were bundled together is that some weeks ago at the initial conference about constitutional change he and his advisor presented 15 questions, with EU and NATO in separate questions. Then, the general response was, well, 15 are too many. So they decided to simply reduce the number of questions., by bundling them together

So how, do you think, should Poles react to this referendum proposal?

The idea of the referendum is so totally disingenous, it is not based on any identification of problems with the current constitution, it is proposed by a President accused of many breaches of the constitution – the only way for people to respond is simply to ignore it. Do not go. Do not vote.

Is there a minimum quota?

For a constitutional ex-post referendum, there is no minimum participation , and the majority must be in favour. For a referendum on „matters of particular importance", there is a requirement of minimum 50 percent turnout of those eligible in order for the result to be binding. But President Duda called this referendum consultative, so it cannot be legally binding anyway. In terms of political legitimacy, much will depend on the turnout. If it's very high, which is unlikely, it will exert strong pressure on the parliament to come up with a new constitution that would follow the outcome.

Unlike Fidesz in Hungary, PiS does not have a constitutional majority. Do you think that this is an attempt to change the constitution anyway?

I am not sure. That would make sense if Duda had strong support of PiS. Unless it is all a particularly Macchiavellian play, which I don't know, PiS seems not to know what to do with the President's proposal. They reacted in a way that, to put it mildly, was unenthusiastic. What if there is a low turnout? That will be soon before the parliamentary elections and the presidential elections. I doubt they will put their weight behind it. And Kaczyński doesn't need it. He may not have a constitutional majority, but these two and a half years of PiS in power have shown that the absence of a constitutional majority is not a problem for him, that he can govern against the constitution quite easily. Few people know or remember that PiS, in their time of opposition, had drafted a fully fledged constitution – very illiberal, very restrictive, but at least they came into the open. That is an honest way of discussing constitutional change. But that draft has been very quietly withdrawn, you don't find it on the PiS website anymore, no-one talks about it any more. Because they think they don't need it.

Questions by Maximilian Steinbeis

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