

# The Law to Take Out Tusk

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Wojciech Sadurski

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“The U.S. Government is concerned by the Polish government’s passage of new legislation that could be misused to interfere with Poland’s free and fair elections. We share the concerns expressed by many observers that this law to create a commission to investigate Russian influence could be used to block the candidacy of opposition politicians without due process. We call on the government of Poland to ensure this law does not preempt voters’ ability to vote for candidate of their choice and that it not be invoked or abused in ways that could affect the perceived legitimacy of elections”.<sup>1)</sup>

The language of US diplomats is, well, diplomatic. But make no mistake: it hides a deep irritation in Washington, accompanied by a [similar anger in Brussels](#). Poland has been a top ally of the United States in the geopolitical quandary caused by Putin’s aggression against Ukraine, and President Andrzej Duda – whose signing of the new law triggered the statement quoted – has so far been a privileged interlocutor of the Americans. Compared to Jarosław Kaczyński, the autocratic and suspicious of foreigners leader of the ruling PiS party, and the mendacious Prime Minister Mateusz Morawiecki, Duda seemed a “moderate”. Especially now, half-way through his second term of office and with no opportunity for reelection, Duda has been seen as the least distasteful of Polish nationalist-populist leaders. Not anymore.

The law signed by Duda sets up a new body: a commission to track Russian influence on Polish public officials and other public figures which may have resulted in the undermining of Polish security. A determination that a given person, investigated by the commission, has acted against Polish interests under such improper influence may result in various “remedial measures”, the most important of which is a ban on performing public functions (related to the expenditure of public funds) for 10 years; hence the de-facto “political death” of a person. Even in the absence of such a penalty, the very fact of public hearings and of suspicions that a politician or another public figure had acted in Russian interests is deeply stigmatizing, especially these days, after the Russian invasion.

On 29 May, President Duda has peremptorily signed this law into force, meeting Kaczyński’s timetable under which the new institution should start waiting straight away, to be able to affect the developing electoral campaign. The unprecedented speed is a symptom of the unprecedented weight that the ruling party attaches to this initiative – and President Duda was more than happy to oblige, also using this opportunity to attack critics of the new law. Bizarrely, the President announced that he would also initiate ex-post scrutiny of the new law before the Constitutional Tribunal. Quite apart from the fact that the institution now calling itself “[Constitutional Tribunal](#)” is but a façade, simultaneously signing the law and foreshadowing ex-post scrutiny by the same official reveals a certain constitutional schizophrenia (even

if, formally speaking, allowed). Launching constitutional scrutiny must be based on reasonable doubts as to constitutionality of the law, but the President, who has reasonable doubt about constitutionality, as the guardian of the Constitution<sup>2)</sup> is not allowed to sign it.

Indeed, this monster of a law has so many defects, pathological features and outright conflicts with the rule of law, even at its very basis, that it is hard to know where to start.

## **Procedure**

The law was processed and fast-tracked in an extraordinary procedure made possible by presenting it as a private member's bill while obviously it was a government-prepared act. This trick has been used frequently by authoritarian populists around the world, and in particular in Poland.<sup>3)</sup>, as it allows sidestepping various mandatory road-bumps on a bill's road to its final adoption. No audits, expert opinions etc are called for, although the bill had to go through Senate scrutiny, with various expert opinions produced at that stage, and with a devastating rejection of the proposal albeit no substantive effect on the final text.

The law entered into force immediately, without any *vacatio legis* which, as a default rule, in Poland is 14 days. This frantic pace on an issue which, on the face of it, does not have any special urgency, suggests suspect motivations of its proponents.

## **The composition of the new body**

The "Commission on Russian influences on internal security of Poland in 2007-2022" will consist of 9 members, elected by the Sejm with a simple majority, thus virtually assuring that the ruling party will have a majority, and considering that the parliamentary minority intends to boycott this Kangaroo Court (and rightly so!), it will have all its members. The Chair of the Commission will be appointed by the Prime Minister whose office will also provide full administrative support to the Commission. So it will be a thoroughly politicised body, clearly dependant on the executive branch, and accountable to the Prime Minister.

## **Immunity**

The statute peremptorily immunized all members of the Commission against any liability for any conduct related to the Commission. This means that, whatever they say and do in connection with the Commission's work – its members will not be liable for any misconduct, for instance defamation. They will enjoy a degree of impunity that no judge, no public official, no one, can ever dream of. In fact, they operate in a law-free zone, which obviously contradicts the rule-of-law principle that all public officials and institutions must act within legal constraints (Art. 7 of Polish Constitution).

## **Liabile persons**

The catalogue of persons who may be liable for conduct “to the detriment of Polish domestic security” is long and vaguely articulated. It includes “public officials” as defined by other Polish statutes, but also “other persons” whose actions significantly impact Polish internal security or harm Polish interests, for instance by influencing mass media, NGOs, trade unions, political parties etc.

The list of Russian “influencers” is also extremely broad. It includes “representatives of public authorities of Russia”, but also “persons known” (by whom?) as “close collaborators” of those representatives, or “persons connected personally, administratively or financially” with such persons, etc. If you have ever talked to a Russian who knows a Russian public official, you may be called before the Commission.

Take yours truly: probably most of the Russian academics whom I had met over the years know some high official or another, and at the same time I belong to a category of “other persons” because I have been trying, for years, to influence Polish media; whether it harmed Polish national interests remains to be determined by the Commission.

## **The act in question**

The central concept of “influence” is never defined (despite a long list of other statutory definitions in Art. 2 of the act). It may be anything, ranging probably from acting under blackmail or under instructions, for money, to being just a sympathetic hearer of your Russian interlocutor’s point of view.

The official title of the act is misleading if not straight deceitful: it speaks of Russian influence upon the internal security of Polish Republic. But throughout the text of the act, “internal security” is used interchangeably with harming the interests of Poland (e.g. Art. 4(2) and 5(2) of the Act). Arguably, these are not synonyms: the latter is much broader than the former. This ambiguity either results from sloppy drafting or is deliberate: either way, it creates additional scope for arbitrary actions by the Commission.

## **The nature of the Commission**

Functionally, the Commission is a court. It conducts hearings, acquaints itself with evidence, metes out punishments, including removal of an important civil and political right (eligibility for public functions). It imposes penalties of a criminal character; for instance, the sanction of a temporary ban on performing public functions already figures in the Polish Criminal Code (Article 39). Calling penal measures “remedial measures”, as the Act does, does not render them non-penal.

And yet it is not a court, by its attributes. It is not independent, its members do not need to be lawyers and undergo judicial training. It is a court-like institution but

placed firmly in the administrative structure of the state, right at its very top. And it is not a parliamentary commission: if it were, it would have to be discontinued at the end of the current parliamentary term, which is only a few months away. It is an extraordinary, hybrid body, performing actions of a criminal court without any guarantees for the “accused”.

## **Guarantees for the “defendants”**

There are none. The Commission will have a right to mete out harsh penalties for actions which were not necessarily prohibited at the time of their commission, thus expressly contradicting the principle *nulla poena sine lege*. It may find some actions punishable *ex post*, therefore offending against the principle of non-retrospectivity.

“Defendants” cannot refuse to testify or to provide evidence demanded by the Commission, hence offending the privilege against self-incrimination.

There is no presumption of innocence: the Act does not explain what exactly should be demonstrated in order to determine that a “defendant” acted to the detriment of Poland. No standards of liability are specified: Should there be intention, or recklessness, or negligence, or is it simply a strict liability standard?

The Commission will have full competence of unlimited search and seizure, with no judicial or oversight. The “defendants” have no right of defence: There are no provisions that they can be accompanied by their lawyers, or that their lawyers may speak on their behalf. “Trials” are public, and lifting of publicness is fully at the discretion of the Commission. So is the presence or the absence of media at the hearings. In contrast, deliberations of the Commission (other than hearings) are secret. The only privilege against testifying is that of a priest concerning the contents of the confession: other privileges: lawyers’, doctors’, journalistic privilege of confidential sources etc are all annulled.

## **Judicial oversight**

There is none. There is no right of appeal (as required by the Polish Constitution in Article 78) or a pathway to judicial review of the decisions. The only avenue is a standard review by an administrative court, but such review, under Polish law, is allowable only on formal grounds: the administrative court will not review the Commission’s determination on its merits, with scrutiny of the evidence etc. Also, an appeal to an administrative court does not automatically result in the suspension of an administrative decision under appeal but rather such suspension is in the discretion of the administrative court. Administrative court procedures take years. So for all practical purposes, decisions of the Commission are final, instantly enforceable, and not reviewable.

## Temporal range

The Commission will investigate cases of Russian influence from 2007 until 2022. Why this particular range? No reasons have been given, but it just so happens that 2007 was the first year of the liberal-democratic coalition of Civic Platform and the Peasant Party, after “the first PiS” rule of 2005-2007 ended. The final date of the period under scrutiny is also arbitrary: Has Russia finished trying to influence Poland on 1 January 2023?

## Autocratic legalism

This law fully meets the criteria of “autocratic legalism”, described famously by Kim-Lane Scheppelle.<sup>4)</sup> There is nothing subtle or sophisticated about these legalistic tricks; indeed, it is striking how vulgar and simplistic they are. And come to think of it, if after more than 7 years in power, with PiS having unlimited control over all the secret services, counter-intelligence and law enforcement agencies, all enjoying immense resources and competences, none of these state institutions turned out effective enough to detect and neutralize “Russian influence”, what does it say about the state PiS has built, over two parliamentary and two presidential terms of office?

Why this law, and why now? The answer is a name: Donald Tusk.

The former Polish Prime Minister, founder and leader of the now leading centrist-liberal party (Civic Platform), and a former President of the European Council (2014-2019), Donald Tusk is by a long shot the most successful and experienced Polish politician on the non-PiS side of politics. If there is anyone who can play, in Poland, a role of Lula winning against Bolsonaro, it is him.

Which is not to say that he is universally admired. In fact, his so-called negative electorate is vast: just [over 50% Poles say they do not trust him](#). This is largely due to the relentless propaganda of hate and falsehoods run against him by state-owned media, and in particular, the broadcaster TVP.<sup>5)</sup> Tusk is daily depicted as a Russian and/or German agent, anti-patriotic, non-Polish, corrupt; and news stories on TVP about Tusk often use subliminal video shots depicting Tusk after Stalin or Hitler.

Still, Tusk’s public meetings are fantastically popular, and the opinion polls predict a lead of roughly 10 percent for the democratic opposition parties over PiS and its junior coalition partners.

Kaczyński and his party cannot afford to lose. A system of immense systemic political corruption and state clientelism has produced a large category of people for whom a transfer of power would be a catastrophe, and not just in terms of loss of wealth and lucrative positions, but often of criminal liability. In this sense, for the ruling coalition and its clients, these elections will have an existential, not merely a programmatic weight. In turn, for the opposition a loss will mean a heavy consolidation of populist authoritarianism, just as in Hungary.

The cliché in Poland that these elections will be as important as those in 1989 rings true. It is clear that Kaczyński wants to remove Tusk (and any of his collaborators, for that matter) from electoral competition. In fact, PiS does not hide that Tusk figures highly in the legislative motives for the new law. They made it express in the official rationale provided for the Act during the legislative proceedings.

But even if, for whatever reasons, Kaczyński decides not to use the “nuclear option” of having the Commission declare Tusk ineligible in the elections, a weaker use of the Commission will be extremely advantageous for PiS, too. Just parading various Civic Platform politicians (including Tusk) before the Commission will give PiS and its powerful media tremendous propaganda material. Even without any sanction resulting from those show trials, associating Tusk and his collaborators with the words “Russian influence” and “harming security” and “damaging national interests, repeated hundreds and thousands of times, will create a great political dividend for PiS. Their opponents will enter public imagery as “Russian agents”.

In other words, Kaczyński wants to do to Tusk something functionally equivalent to what Putin did to Alexei Navalny in the “elections” of 2018. Though, admittedly, with gentler methods.

## References

- Press Statement, US Department of State, 29 May 2023.
- His prime constitutional role, see Art. 126 of Polish Constitution.
- See my Poland’s Constitutional Breakdown, OUP 2019, pp. 133-34.
- Kim Lane Scheppele, “Autocratic Legalism”, The University of Chicago Law Review 85 (2018): 545-583 at 556.
- Disclaimer: civil defamation proceeding by TVP against me are still pending; a criminal libel suit against me by TVP has been dismissed on appeal, and had its finale, to my advantage, before the Supreme Court

