Polish Constitutional crisis goes to Europe - or does it?

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The latest move by the Polish government in its attempt to disembowel the Constitutional Court looks, on first sight, like a conciliatory gesture: The Minister of Foreign Affairs has submitted two proposals amending the Act on the Constitutional Court to examination by the Venice Commission, the expert body on constitutional issues of the Council of Europe. Does this turn to Europe signal a change of heart in the revolutionary zeal on the part of the Polish government? Not so fast. On closer inspection, the request appears conspicuously ambiguous. The motion does not even specify in sufficient detail what text(s) the Venice Commission is to provide its opinion on.

According to the information on the website of the Venice Commission, the Polish government has asked for the Commission's opinion on

> *"the constitutional issues addressed in the two proposals for the legislation amending the Act on the Constitutional Court of 25 June 2015. Both instruments were introduced into the agenda by the Polish Parliament by two groups of MPs, respectively on 2nd and 15th December 2015 (Parliamentary Text Nos. 129 and 122)."*

If one takes into account all information available on the Ministry's and on the Venice Commission's websites, it would appear that the texts submitted to the Venice Commission by the Ministry of Foreign Affairs are the first drafts of proposals put before the Polish Parliament (Sejm) on 2nd and 15th December 2015 respectively, rather than the text which was substantially amended during the draft's second reading at the Parliament. The latter is the text under Sejm's No 144, much more radical in "the court packing" than the original proposal contained in text No 122, and which culminated in the Law adopted by the Sejm on 22nd of December, approved by the Senate on 23rd of December 2015 and just now signed by the President.

It is too early to judge the true intentions or construe the motives behind the seizure of the Venice Commission. Taking into account though the ambiguity pointed above on the scope of issues submitted (or not) for consultation by the Venice Commission, a few words of caution are in order.

First, the Venice Commission should beware of the danger of being manipulated and drawn into domestic Polish politics dominated by instrumentalization of the law and the institutions. It is of paramount importance to make sure that the opinion it is asked to give will be more than just a *fig leaf* and will indeed deal with *real constitutional issues* that endanger the Polish constitutional order, rather than some randomly selected issues of fleeting importance. One of the draft laws the Ministry submitted for examination, for example, regards a completely uncontroversial matter: the selection of the constitutional judges by two-thirds rather than an absolute majority (No 129). This amendment should raise no major constitutional doubts. To the contrary, it has been called for by the Polish doctrine of constitutional law for years now!

Second, the future opinion should take into account the law at force at the moment it will be given and pay attention to the normative picture in its entirety. The opinion given by the Venice Commission on the limited issues proposed by the Ministry, would not only lack any legal significance but be hailed as a victory of the government and proof that all is well constitutionally in Poland, after all.

The stakes are very high as the Venice Commission's prestige, authority and credibility are on the line. If it turns out that the seizure by the Foreign Ministry of the Commission is indeed as limited as suggested above on the basis of the Ministry's press release, the government's tactics should not stand in

the Commission's way to fully evaluate the Polish constitutional landscape. This is not the time for *literal* interpretation and bickering about legal subtleties, but for standing up and saying clear and loud *what the constitutional fundamentals* are.

Last but not least, should the Commission acquiesce in the "*constitutional cherry – picking*" and reply to questions on out-of-date and taken-out-of-context issues, it might play (unwittingly) its own part in the narrative orchestrated by the ruling majority. Based on the Ministry of Foreign Affairs website and the press release available on the Venice Commission's website, true constitutional concerns that *brought about* (emphasis and past tense used are not accidental here) the demise of the Polish Constitutional Court are nowhere to be found in the seizure of the Commission.

As a result this sudden "turn to Europe" might in the end be, mildly speaking, half-hearted. Europe should not be fooled by grand gestures and empty rhetoric. Rather it must finally get down to business with the Polish government and truly call out Poland on its fidelity to constitutional essentials like constitutional review, judicial independence and separation of powers.

The recent letter of 23rd December 2015 by the Vicepresident of the European Commission, Frans Timmermans, to the Polish Foreign Minister might suggest a long-overdue change in tone. But the clock is ticking and, as of now, both the EU and the Council of Europe are relegated to the role of passive spectators. The time of benign neglect by "the European powers that be" of Poland must be coming to an end. The adoption on the 23rd December 2015 of the amendments to the Law on Polish Constitutional Court makes a very strong case for the Venice Commission (and EU) to step in decisively and reassert itself now, not back down.

The "European manipulation" was on full display, when Ministry of Foreign Affairs has admitted that its initial seizure of the Venice Commission did not include the amendments to the Law on Polish Constitutional Court adopted on 23 rd of December and promised to do so soon! This only shows how the media and vigilant citizenry in Poland in 2016 must never take the words and actions of the new majority for granted. Indeed we are all in for a long season of "constitutional cherry picking".

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