The Commission vs Poland: The Sovereign State Is Winning 1-0

Dimitry Vladimirovich Kochenov

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Studying Soviet legal theory is probably one of the most tedious activities imaginable, but it can teach us a great deal, sadly, about the contemporary reality in some of the Member States of the EU: a reality captured by Uładzisłaŭ Belavusaŭ's catchy phrase 'Belarusization' of the EU with enviable precision. Not a single person familiar with the basics of the principle of the Rule of Law could possibly be in doubt that what is going on in Poland now is a partly Soviet-style dismantlement of the Western values of democracy and the Rule of Law. By having started its famed Pre-Article 7 Procedure against Poland the Commission made four drastic mistakes and did not move any closer to stopping Polish backsliding.

The core idea behind the Rule of Law is one: the law should be checked by law. That is: not all the law is at the whim of politics – checks and balances have to survive and be strong to ensure that both democracy and the Rule of Law survive and are well. To put it simpler, the sovereign (the people, the King, the parliament) cannot be placed above the law. Once the Rule of Law goes, democracy will as well: abuse of the law by the sovereign entrenches his in power, no matter how democratic the first election and, much more importantly, what the people think of those in power afterwards.

The Rule of Law as a way to make sure that law is checked by law has never been accepted by problematic regimes. Soviet lawyers would not support the idea of the Rule of Law as the necessity to ensure that legal checks on the sovereign are in place. The meetings with foreign lawyers led nowhere (Marsh 235ff). Of course the Soviets believed in law. For them, however, the Rule of Law was in complete opposition to what they called 'Sotzialisticheskaja zakonnost'' (Ioffe & Shargorodskij, ch. V). The latter implied that a direct connection exists between the sovereign people, the Party, and the law. The core idea of the Soviet law was that the people, acting via the Party, would produce, reproduce, and alter the law to progressive Marxist ends. We know where such treatment of the law and the denial of the checks and balances leads us. Sovereignty – a term which can mean liberation through freedom and capacity to achieve the nation's destiny – becomes without the Rule of Law nothing but an effective enslavement and the denial of freedom. This is why Poland, in order to be sovereign, needs the Rule of Law, not unchecked party rule. This is something, I believe, that even those in charge of the country understand, but pretend – as Brezhnev did before them – not to grasp or deem important.

An added value of the European Union lies in its perceived ability to help the backsliding countries turning back the clock to recreate Soviet times style democracy by largely saving them from themselves. This was the whole idea behind the Copenhagen political criteria of democracy and the Rule of Law, implemented meticulously, albeit not too successfully, by the European Commission. Now that Poland is following Hungary on the Frankenstate path, it is time for the EU to deliver on the old aspiration and the promise of its values. The Commission, seemingly, has acted.

The key tool to defend the values in the Union's disposal is Article 7 TEU which essentially has three key elements. A shaming procedure requiring 4/5 majority of states but not implying sanctioning (1); and a biting procedure, requiring unanimity (minus the potentially offending state)(2); which can translate into sanctions (3). Alongside Article 7 there is a 'Pre-Article 7 Procedure' of dialogue between the Commission and the potentially backsliding state which could lead to the Commission's advice to move on to activat-

ing Article 7 proper. Lastly, there are also obviously other mechanisms, including *ad hoc* sanctions following the Austrian Haider affair model and numerous other enforcement techniques. Fundamentally, however, it is Article 7 that was designed by the drafters of the Treaties to be the main instrument of dealing with the Belarusization issue. The Commission made four strategic mistakes in dealing with Poland, which make Article 7 much more difficult to use, thus undermining an already problematic instrument.

1. Activating Pre-Article 7 Procedure implies that the Commission is not convinced that the situation is bad enough to warrant at least the shaming stage of Article 7. From what we observe in Poland, this assessment of the Commission is most likely wrong. So the activation of the mechanism leads to PR and, most importantly, the loss of time.
2. Activating Pre-Article 7 Procedure implies that the Commission expects Poland to cooperate, by establishing a dialogue about the Rule of Law. It is puzzling how the Commission could conclude that based on the reading of the Soviet-style letters (and impolite too) with the absurd references to sovereignty in the sense of a carte blanche to illegality that Poland has been sending. Most likely there will be no constructive dialogue at all.
3. Activating Pre-Article 7 Procedure instantaneously crippled Article 7, since now the 'pre' step would rightly be regarded by any backsliding state as necessary, making Article 7, which is complex enough to deploy, even more difficult to use.
4. Lastly, activating Pre-Article 7 Procedure in the current circumstances makes the deployment of the 'biting' part of Article 7 impossible. Since unanimity is required, and given that Mr Orbán will make sure that there is no unanimity – a constellation which was all too easy to predict – starting the Pre-Article 7 Procedure against Poland alone means that the Commission is *not* minded to actually use all the legal tools in its disposal.

The four mistakes allow questioning whether the Commission's PR move was actually meant to make a difference. Is it an act of short-sighted naïveté, or simple sloppiness in legal reasoning? Could it be an attack on the *effet utile* of Article 7? No matter what the answers to these questions would be, it is abundantly clear how the Commission could do better. First: forget about Pre-Article 7 Procedure, which cannot generate change if there is no cooperation; Secondly: stop undermining Article 7 by introducing even more unnecessary political thresholds to its activation – it has enough already; Thirdly: do not pursue one recalcitrant Member State when it is known that there are more than one and unanimity is required. It is always wonderful to shout about one's successes – the Commission has been doing a lot of this with Hungary – but the rhetoric of action will not turn back the tide of Belarusization. The first point in the fight goes to the sovereign (People's Republic of) Poland.

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ABOUT THE AUTHOR

Dimitry Vladimirovich Kochenov
Prof. Dr. Dimitry V. Kochenov leads the Rule of Law Research Group at CEU Democracy Institute in Budapest and teaches at CEU Department of Legal Studies in Vienna.

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