Poland, Hungary and Europe: Pre-Article 7 Hopes and Concerns

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The European Commission's opening of a rule of law dialogue with Poland in the new pre-Article 7 format developed last year is an important test of European constitutionalism both on the EU and on the Member State level. The mechanism is meant to address systemic violations of the rule of law in several steps, in the format of a structured dialogue. The new procedure does not preclude or prevent the launching of an infringement procedure by the Commission. The probe into Poland's measures against the Constitutional Tribunal and its new media regulation is expected to test the viability of an EU constitutional enforcement mechanism against a Member State.

The Commission's proposal for this pre-Article 7 mechanism was adopted in part at the urging of the European Parliament in light of constitutional developments in Hungary. The very existence of the procedure is an acknowledgement that the Article 7 mechanism (dubbed the "nuclear option") is politically not salient to invoke even in light of relatively straightforward violations of the constitutional underpinnings of the Union. It may also be read as an admission that infringement procedures cannot address systemic violations of founding premises of European constitutionalism. The Commission's proposal of this new procedure aiming to impose European limitations on the constitutional options of Member States is a major step for the EU (short of treaty amendment), despite its clear meekness. It is less robust than the Copenhagen Commission the EU Parliament was hoping to see, yet, more serious than the Council's preferred solution in the form of an annual rule of law dialogue (as was pointed out by Dmitry Kochenov and Laurent Pech soon after it entered the scene).

It is suggested by many commentators that subjecting Poland to the pre-Article 7 dialogue alone will accomplish little: as a minimum, for the new procedure to be take seriously Hungary should also be included in the Commission's efforts. After all, the latter's Prime Minister is in the business of building an illiberal democracy, which aims to be a work-fare state and not a welfare state. These aims are hardly compatible with the fundamental constitutional premises of the Union as expressed in Article 2 TEU. As well known, despite widespread criticism the Hungarian government was left relatively unscratched by the EU thus far. The few infringement procedures which ended with the CJEU finding Hungary in violation of EU law (in the cases of the forced early retirement of judges and the removal of the data protection of the ombudsman as a result of constitutional transformation) were not decided as constitutional cases: instead the CJEU pointed to violations of secondary EU law despite the salient rule of law concerns these cases raised. Hungary keeps benefitting from EU funding and has become a politically salient voice in the most recent crisis of the Union with handling the migration and refugee crisis.

On the one hand, it is clear that the responses of European constitutional actors to national constitutional developments are becoming increasingly interlaced. The Venice Commission's opinions draw on a wide range of Council of Europe instruments and the jurisprudence of the European Court of Human Rights (ECtHR). The European Parliament in its famous Tavares report on Hungary relied extensively on the Venice Commission's guidance as well as ECtHR jurisprudence. It is against this background that it remains to be seen how the pre-Article 7 process performs in practice. As the new mechanism is already subject to widespread criticism, it is worth recalling some of the concerns raised, putting critical remarks

and reservations in their broader constitutional, comparative and political perspective.

(i) The pre-Article 7 process is an early warning mechanism which is based on dialogue and cooperation from the affected national governments. As an early warning mechanism it may be somewhat obsolete: the Venice Commission – provided that it is invited – gets to intervene much earlier, already in the drafting phase of constitutional and legal developments. The new pre-Article 7 mechanism can only be activated when systemic threats to the rule of law are detected. Presumably, for a threat to be systemic there needs to be more than one or two attempt to this effect. Thus, it appears that the Venice Commission will remain the primary line of defense against creative governments.

To remind: the Hungarian government requested only one opinion from the Venice Commission. The review of the newly adopted Fundamental Law was requested not by the Hungarian government, but by the Monitoring Committee of the Parliamentary Assembly (PACE). Although the Venice Commission's opinion on the act on the reform of the judiciary was initiated by the Minister of Foreign Affairs (and not by the minister of justice), this request was made in response to a letter by the Secretary General of the Council of Europe, thereafter the amended judiciary law was again referred to the Venice Commission by the Chair of the Monitoring Committee of the Parliamentary Assembly, and not by Hungarian actors. The Act on the Constitutional Court was also referred not by the Hungarian side, but by the Chair of the Monitoring Committee in PACE. Finally, the Fourth Amendment was referred to the Venice Commission by the Secretary General of the Council of Europe, one day before the Hungarian Minister of Foreign Affairs also made a request to the same effect.

While the Venice Commission may be alerted to domestic constitutional developments by watchdog organizations, concerned citizens or the suppressed political opposition, the latter in themselves cannot trigger the intervention of the Venice Commission, no matter how alarming national developments appear already at first sight, as happened with the early reform attempts of the current Polish government of Prime Minister Beata Szydlo, targeting the Constitutional Tribunal.

(ii) Any European multi-step dialogue of the kind foreseen by the Commission takes time and assumes the cooperation of the national government involved. While tactfulness and founding premises of the Union may well call for such a gradual and diplomatic approach, experience shows that the engagement of national governments with European constitutional actor is not necessarily driven by the spirit of cooperation. Therefore, it may be worth to reflect on what the foreseen European constitutional dialogue aims to achieve.

The dialogue has to aim for something other than making the national government see what the applicable European constitutional standard is. Admittedly, the Hungarian Government often appears to be aware of what the European minimum standard is that they are violating: when pressure is mounting they make an attempt to minimize the fallout by taking hasty measures to conform to what may be expected by European constitutional actors. This was apparent in the case where a fine was imposed on deputies for disorderly conduct in parliament. The law did not permit a remedy against the fine. Shortly after the ECtHR communicated the application to the government (and way before the judgment), the law was amended to include a remedy. (Note: the case is currently pending before the Grand Chamber).

By time governments become better in the art of dialogue with the Commission without making serious advances towards reigning their policies back in the EU fold. Much lamented double-talk by national governments aside, unwilling governments easily and equally capitalize on the both the technical legalese (familiar from impeachment proceedings) and also on the diplomatic niceties of advise and recommendations from European constitutional actors.

In the latter respect important lesson from the Venice Commission's multiple exchanges with the Hungarian government is the significance of clarity when guidance is given to straying national actors. In its early opinions on Hungarian constitutional reform

ideas the Venice Commission was rather circumspect, outlining general principles and then – pointing to possible objections in side remarks – as afterthoughts. In its communications the government tended to emphasize how the Venice Commission "by and large" praised the government's plans, failing to mention those minor remarks. In the course of their exchanges, the Venice Commission's opinions became sharper in response to the government's defiance of its recommendations (especially on judicial administration).

(iii) Whether they surface in the course of constitutional or political dialogue, or litigation, it remains the case that responses of European constitutional actors reach the national scene by considerable delay. The bad ideas of yesteryear are long forgotten in the national capitals by the time European actors speak on them. National constitutional actors which depart from European constitutional norms are increasingly aware of this delay and can turn it to their own political advantage. Measures of populistic appeal reap their fruits translated to popular support today and tomorrow, while the fine will need be paid years from now.

Also, as European (especially EU) responses to national constitutional experiments are often rendered in highly technical and fragmented terms, when they reach the national sphere, they make less of a bang than the initial violation did. Unless a national government cries wolf and throws dramatic tantrums to protest against the violation of its sovereignty, or even better, constitutional identity, it takes a lot of skill and effort to re-frame the matter in the domestic political discourse in constitutional terms. This work often falls on a weak political opposition, its supporters and civil society organizations, And even if the latter manage to (re)capture the message, they still need to explain the point of reheating a long forgotten debate. This political exercise becomes all the more challenging if a member state decides to constrain the activities of such watchdog organizations in a controlled media spaced.

(iv) European constitutional checks enable the exportation of dissent to an external arbiter or political forum. While this process may be read as a feature of multi-layered constitutionalism, another reading is that this exportation creates parallel constitutional universes: one national where true patriots play along with the government's plans, and one European where dissidents attack the government. The less genuinely cooperative a national government becomes in the process of dialogue with European constitutional actors, the more disconnected these two layers become due to the tension between the two layers.

Importantly, however, the connection between the national and the European layer may also be lost due to the lack of resonance of European concerns and guidance on the national level. As the recent reform of judicial administration in Bulgaria demonstrates, compliance with EU-mandated constitutional reforms can take place in a parallel universe even on the national political scene even with a cooperative government. While the Bulgarian parliament was struggling to adopt a constitutional amendment to separate the administration of the judiciary and the prosecution in the national Supreme Judicial Council under pressure from the Commission, the Supreme Judicial Council itself stumbled from one highly mediatized scandal to the next. The scandals involved court-ordered illegal wiretaps of anti-government demonstrators against the previous government, while later the focus shifted to the leaking of wiretaps of unknown provenance between senior judges, discussing political interference in judicial matters. At the height of the scandal in January 2016 the Prime Minister stormed the meeting of the Supreme Judicial Council after he received a text message from one of its members that his involvement is being discussed at the meeting. Punitive political measures against the Supreme Judicial Council followed in due course.

(v) The peril of creating parallel constitutional universes is all the more worthy of attention as European and national political biorhythms are not synced. European condemnation of national developments can be expected if nothing more important is happening in Brussels. A European crisis which shatters the architecture of the Union (may that be the Euro crisis or the migration and refugee crisis) will take precedence over monitoring national constitutional developments. Even such processes as the selection of the new

Commissioners could pre-occupy European constitutional actors to the point of dropping the ball on some national developments which were considered worrisome earlier.

(vi) Furthermore, as national actors involved in the business of creative constitutional engineering learnt with great relief, political, legal and economic conversations are disjointed in the EU. Political condemnation is hardly ever turned into legal sanctions. Once sanctions are dispended, their implementation of course takes the cooperation of the national government. Lack of cooperation in one sectors does not result in consequences in another arena. This lack of connection reduces the willingness of national governments to cooperated in domestic constitutional matters which they find symbolic. Why bother to play along when hard consequences (e.g. a freeze on spending) do not follow?

(vii) In the course of European constitutional conversations of the kind foreseen by the pre-Article 7 process, the language of national constitutional identity is most likely to be pitched against European constitutional identity. Defending national constitutional identity against EU intervention may sound like the most legitimate mission. Such as national constitutional actors, European constitutional actors also find this challenge intriguing, as an identity argument is hard to resist. However, as these conversations are as much about the future of the European constitutional project as about national constitutional and political aspirations, it is most important to tell bluffs apart from genuine claims.

For instance, in response to comparative constitutional references which aimed to place the Hungarian Fundamental Law among garden-variety democratic constitutions the Venice Commission pointed out in its opinion on the new Fundamental Law that this Constitution contains a number of particular variations of European guarantees which can partly be found in a limited number of European constitutions. Most of them are linked to national traditions and identity. These are considered to be an important factor in European Union law (Art. 6 TEU) and also accepted under the ECHR. ... [W]hile a number of these special guarantees may be seen as part of national constitutional autonomy, other guarantees must be analysed in the light of European standards, above all the case law of the ECtHR.

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