Poland and the European Commission, Part I: A Dialogue of the Deaf?

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On 21 December 2016, the European Commission adopted an additional Recommendation regarding the rule of law in Poland, which it justified on two main grounds: important issues remained unresolved while 'new concerns' had arisen in the meantime (see press release; fact sheet and Recommendation).

The Commission's new Recommendation again pressed its old demands that the Polish government publish and comply with the judgments of the Constitutional Tribunal as well as permit the judges lawfully elected by the previous parliament to be seated (see Recommendation of 27 July 2016). It detailed the continued campaign of the Polish government to undermine the legitimacy and efficiency of Constitutional Tribunal while seeking to seize control of it, and noted the unsatisfactory response Poland had already given to the original concerns the Commission had identified starting nearly one year ago when it activated for the first time its Rule of Law Framework. It added some new issues to the list, in particular, the unlawful appointment of a new president of the Tribunal. But rather than invoking Article 7 TEU which would start a process whereby Poland may be eventually sanctioned for violating the rule of law, the Commission merely reiterated its old demands, added some new concerns and again held out the threat of Article 7 while apparently moving no closer to actually starting a sanctioning process.

It is not that the Commission was unaware of what was happening in Poland. In December, the Commission stood by and watched the Polish government capture the Constitutional Tribunal. The new Recommendation indicates that the Commission simply chose not to act to head off the final stages of the Tribunal's demise. By the start of 2017, the ruling "Law and Justice" Party (known by its Polish initials as PiS) had gained the Tribunal's majority, passing the very laws that the Commission had urged the government not to pass. Moreover, as the new Recommendation noted, the Polish government had created incentives for the early retirement of constitutional judges to speed the departure of the sitting judges. The premature resignation of Justice Wrobel on 20 December, the day before the Commission's new Recommendation, was clearly encouraged by the new early retirement scheme. With his imminent replacement, the seating of the three illegally elected judges whom the Commission had refused to recognise and the appointment of a new Tribunal President, the Tribunal will have eight judges appointed by PiS since it came to power in 2015 and only seven judges left from the bench that PiS inherited. Even after the capture of the Tribunal was a *fait accompli*, then, the Commission was still politely asking the Polish government to respect the independence of the Tribunal.

The new Recommendation was accompanied by an understatement from Commission First Vice-President Frans Timmermans about why the Commission took this route:

> *"The Commission has decided to send additional recommendations to the Polish government because new problems have arisen relating to the rule of law in Poland."*

The new Recommendation was met with the same belligerent attitude in Warsaw that greeted the Commission's earlier Recommendation. Jarosław Kaczyński, the head of the ruling PiS party and the power behind the throne in Poland, responded on 22 December 2016:

"It's an absolute comedy, because there is nothing going on in Poland that contravenes the rule of law."

In a number of previous posts published on this blog, we argued that (1) there was no point continuing a process of 'constructive dialogue' with Polish authorities considering their determined violation of EU values and failure to even acknowledge the reality of a threat to the rule of law, let alone the need to comply with the Commission's Recommendation of 27 July 2016 (see Pech, Systemic Threat to the Rule of Law in Poland); (2) notwithstanding the lack of discernible support from the Council, the Commission nonetheless had an obligation to promptly trigger Article 7 TEU considering the body of available evidence pointing towards the existence and implementation of a deliberate governmental strategy of systematically undermining checks and balances in order to solidify a one-party state (see Pech and Scheppele, Giving up on the Rule of Law); (3) finally, there was a compelling case to activate Article 7 against both Poland and Hungary considering that Hungary since 2010 has been engaged in a parallel sustained and systematic attack on the rule of law. If the Commission acted against both Hungary and Poland, it would not only blunt the criticism that the Commission has used double standards, but it would incidentally remove Hungary's 'fellow-traveller veto' should the European Council be asked to determine the existence of a serious and persistent breach by Poland and/or Hungary, a determination which requires the European Council to act by unanimity before the Council, acting by a qualified majority, "may decide to suspend certain of the rights deriving" from the EU Treaties, including but not limited to the country's voting rights in the Council (see Scheppele, Can Poland be Sanctioned by the EU? Not unless Hungary is Sanctioned Too)

In this post, we will defend two main points and in our next post, we will defend a third:

(1) The effective capture of the Polish Constitutional Tribunal and the reactions of both the Polish president, Andrzej Duda, and Poland's de facto ruler, Jarosław Kaczyński, to the Commission's complementary Recommendation further demonstrate beyond any doubt that Article 7(1) TEU ought to have been triggered when the deadline for implementing the first Recommendation of 27 July 2016 expired;

(2) By giving more time to the Polish authorities to implement the 'old set' and the 'new set' of rule of law Recommendations it issued, the Commission has failed to learn from its prior dealings with Hungary and the successful capture of the Hungarian Constitutional Court by the government of Viktor Orbán. As the Commission has already seen in the Hungarian case, the only way that the EU can actually prevent constitutional capture from occurring is to act before the capture is complete. Once an institution is packed with regime supporters, the EU's tools for fixing the problem become less useful as it must demand that current occupants of key positions be dismissed in order in order to roll back the values-violating actions. This in turn risks a new offense to European values, by requiring the firing of "independent" officials.The EU has a general tendency to assume that stalling for time solves most crises, but constitutional capture must be intercepted before it achieves its goal or else it becomes very much harder to undo;

(3) Finally, this last episode shows that Article 7's dissuasive power is close to nil in the absence of the willingness at Member State level to support the Commission's enforcement of EU values directly against an EU country gone rogue. This is not only highly regrettable but also short sighted as the consolidation of majoritarian autocracies (sometimes wrongly called 'illiberal democracies') represents more of an existential threat to the EU's existence and functioning than the exit of any of its Member States. Any aspiring demagogue with an authoritarian streak will conclude from the EU's latest failure to do anything meaningful against Polish authorities that you can brutally undermine the rule of law in the EU and expect no response until you have already consolidated all power in very few hands.

1. What did the Commission decide?

On 21 December 2016, the Commission decided to issue a complementary Rule of Law Recommendation

so as to take 'into account the latest developments in Poland that have occurred since the Commission's Recommendation of 27 July 2016' (see Memo/16/4479). This complementary Recommendation was justified on the basis that some 'important issues remain unresolved' while 'new concerns have arisen in the meantime' (Recommendation, § 61).

The new concerns are linked to the Polish Constitutional Tribunal. They pointed out the Tribunal's ongoing inability to ensure effective constitutional review of legislative acts as well as the continuing actions and public statements by Polish authorities that are undermining 'the legitimacy and efficiency of the Constitutional Tribunal.' Three new issues are particularly highlighted (see Recommendation, § 25 et seq):

1. The adoption in December of three new laws ('Law on the status of judges'; 'Law on organisation and proceedings' and the law implementing these two laws) that further facilitated the packing of the Tribunal by PiS and permitted the President of the Republic to name a temporary Tribunal President, changing prior practice and making clear that the Polish government had decided to dig in to defending its criticised practices rather than correcting the flaws identified by the European Commission;
2. The appointment of a new acting President of the Constitutional Tribunal who, two days later, became the new President of the Constitutional Tribunal even though her acting and subsequent permanent appointment was made on the basis of the three laws mentioned above and whose constitutionality is highly doubtful, which is why one of the Commission's new Recommendations is "to ensure that the Constitutional Tribunal can as a matter of urgency review' their constitutionality. One should note in passing that the new President is Julia Przyłębska, one of the three "PiS judges" legally nominated by PiS and who had sought to paralyze the functioning of the Tribunal until her appointment. It will say something about her relationship to European institutions that she quite publicly accused the Venice Commission of bias when it evaluated of one of the new controversial laws.
3. The replacement of the departing President of the Constitutional Tribunal (Prof Andrzej Rzepliński) with an acting President of the Tribunal rather than with the existing Vice-President caused concern (the Commission speaks of "serious concerns as regards the principles of separation of powers and the independence of the judiciary", § 56), since it seemed to indicate that normal procedures that would thwart the governing party were being bypassed. Moreover, the acting President blocked the three judges "lawfully nominated" in October 2015 while admitting to the Tribunal the three judges unlawfully nominated by the PiS dominated legislature in December 2015. The judges appointed by prior parliaments boycotted what came next, which was the nomination of candidates for the permanent president of the Tribunal. The six PiS judges (including the three whom the Tribunal had previously deemed illegally nominated) then nominated two of their own to be President of the Tribunal and the President of the Republic then picked the acting President as the permanent President (see Recommendation, recitals 25-26). Within the space of one day on 21 December 2016, then, a PiS judge became the acting President and then the permanent president. And this was on the same day that the Commission issued its complementary Recommendation.

In its new Recommendation, the Commission stated that some of the issues raised in its last Recommendation "have been addressed" (§ 61). Regrettably, however, the Recommendation does not make it easy to understand which issues were satisfactorily addressed or how. There is just a passing mention to "certain improvements" as compared to the Law of 22 July 2016 (§ 61, third point; see also § 24 for brief list of these improvements), which was strongly criticised by the Council of Europe's Venice Commission in its Opinion of 14 October 2016:

> *127. By adopting the Act of 22 July … the Polish Parliament assumed powers of constitutional revision which it does not have when it acts as the ordinary legislature, without the requisite majority for constitutional amendments. 128. Individually and cumulatively, these shortcomings show that instead of unblocking the precarious situation of the Constitutional Tribunal, the Parliament and Government continue to challenge the Tribunal's position as the final arbiter of constitutional issues and attribute this authority to themselves. They have created new obstacles to the effective functioning of the Tribunal instead of seeking a solution on the basis of the Constitution and the Tribunal's judgments, and have acted to further undermine its independence. By prolonging the constitutional crisis, they have obstructed the Constitutional Tribunal, which cannot play its constitutional role as the guardian of democracy, the rule of law and human rights.*

The European Commission implicitly admitted, however, that the three laws mentioned above and signed by the Polish President of the Republic on 19 December 2016, largely duplicated the Law of 22 July 2016 and as such, continued to "seriously threaten the legitimacy of the Constitutional Tribunal and consequently the effectiveness of the constitutional review" (§ 60). It logically followed that "the situation of a systemic threat to the rule of law in Poland … remains" (§ 61), a situation that Polish authorities have been requested to address "as a matter of urgency" (§ 62) within two months of receipt of the Commission's complementary Recommendation. In a thinly veiled warning, the Commission finally pointed out that "Recommendations adopted under the rule of law Framework do not prevent the mechanisms set out in Article 7 TEU being activated directly, should a sudden deterioration in a Member State require a stronger reaction from the EU" (§ 69).

2. What should the Commission have decided?

Two days before the Commission adopted its complementary Recommendation, the Polish President decided to appoint judge Julia Przyłębska as acting President of the Constitutional Tribunal, a position that did not exist before the rapid enactment of one of the offending laws of December 2016. She then promptly admitted to the Tribunal 'the three judges nominated by the 8th term of the Sejm without a valid legal basis' (Recommendation, recital 25) to take up their positions in the Tribunal, before getting herself nominated for the post of President of the Constitutional Tribunal by only six judges, including the unlawfully seated three PiS judges. (The remaining judges on the Tribunal, all of whom had had been appointed by prior parliaments, did not participate in the nominations meeting, which went ahead nonetheless without a quorum.) As one of the laws already declared unconstitutional specified, the PiS judges put forward two nominations – but as the law did not require, they selected two of their own number (Przyłębska and Muszyński). The President of the Republic then picked the acting President as the permanent President, which is how the new president of the Tribunal went from being an ordinary judge to acting president to president so quickly.

Despite this blatant disregard for the Polish Constitution (see the recent and excellent analysis provided by Koncewicz, 'Constitutional Capture in Poland 2016 and Beyond: What is Next?' and the joint statement by four former presidents of the Polish Constitutional Tribunal here), in a procedure which the Commission itself rightly considered as 'fundamentally flawed as regards the rule of law' (§ 59), the Commission decided not to trigger Article 7 TEU. Polish authorities were instead offered two additional months to solve the problems identified by the Commission in its original and complementary Recommendations.

As we have previously argued, Article 7(1) TEU should have been immediately triggered following the Polish government's explicit refusal to comply in any way with the initial set of rule of law Recommendations when the deadline to implement them expired at the end of October. The latest set of reactions of the Polish authorities make the case for immediately triggering of Article 7(1) TEU even more compelling that it

already was. To mention only but three key actors, President Duda has accused the now former President of the Polish Constitutional Tribunal of having broken 'the law and the constitution' while also claiming that the European Commission has 'overstepped its bounds' (see this article in politico.eu). In August, as the European Commission insisted that the government honour the decision of the Tribunal that the illegal "December judges" not be seated, the Polish Prosecutor's Service opened a criminal investigation into the former Tribunal President for failing to seat these very judges (Recommendation, recital 12; see this article published in Deutsche Welle). Finally, Jarosław Kaczyński, the head of Poland's ruling party, was similarly and not for the first time, uncompromising and one-dimensional in his determination to move forward with constitutional capture despite the first Recommendation of the European Commission (speaking to Reuters, he candidly admitted that the controversial "reforms" to the Constitutional Tribunal "were needed to ensure there are no legal blocks on government policies").

The Commission's timidity in the face of overt provocation is puzzling. Poland's clear rejection of the Commission's demands makes its failure to activate Article 7 even more difficult to justify. Legally speaking, it is important to recall that the Commission itself explained, in its 2003 Communication dedicated to this very provision, that the preventive arm of Article 7 (that is, Article 7(1) TEU), can be activated where there is a clear risk of a serious breach inter alia of the rule of law in order to send 'a warning signal to an offending Member State before the risk materialises'. One could actually argue in the present case that we have in fact already moved beyond this situation and are facing instead an actually existing serious and persistent breach as contemplated in Article 7(2) TEU. The Commission's claim in its complementary Recommendation that we are facing a continuing systemic threat to the rule of law in Poland has long since met the threshold set in Article 7(1) TEU.Because the preventive arm of Article 7(1) TEU operates independently of the sanctioning arm of Article 7(2) TEU, the Commission could go straight to the latter option without passing through warning stage (while the situation in Poland has attracted criticism that goes beyond the European Commission to Council of Europe, the OSCE as well as the UN Human Rights Committee, see e.g. here and here, only the EU institutions can invoke Article 7).

The latest postponement in deciding what is so obviously required, considering the available evidence of a deliberate governmental strategy of systematically undermining checks and balances in Poland, may be criticised on three main grounds: (i) Legally speaking, the Commission is failing in its duty to ensure the application of the Treaties and act as the Guardian of the Treaties; (ii) Politically speaking, the Commission's belief that it must secure the Council's backing before activating 7(1) TEU adds a political element which we consider ill-advised for an institution which is supposed to act independently and whose insulation from politics was institutionally organised to enable it to take 'difficult' decisions when it comes to ensuring the application of Union law; (iii) Pragmatically speaking, triggering Article 7 would have finally obliged national governments, meeting in the Council, to face up to their own responsibilities to keep European values at the centre of the Treaties. Instead, the ill-fated decision to give Polish authorities two additional months will give a rogue government the opportunity to further entrench its capture of the Constitutional Tribunal and use this capture as a vehicle both to disregard the Polish Constitution and to serve as a buffer against the Commission.

As we have seen then, the situation in Poland goes far beyond posing a risk to the values outlined in the European Treaties into the territory of actually breaching such values. While we appreciate that the EU institutions are facing a "perfect storm" of difficult problems, for the European Commission to simply put a few more questions to the belligerent government of Poland and to politely extend its deadline for complying with its reasonable demands makes a mockery of the European Treaties and the Commission's role as their guardian. It is long past the time when the Commission should have moved forward with Article 7 in order to prevent a constitutional capture from

occurring. With the installation of a majority of judges at the Constitutional Tribunal and a compliant political puppet president in place at the Tribunal, constitutional capture has already taken place right under the nose of the European Commission as it politely requested that the Polish government stop.

In our next post, we will consider what lessons one may draw from EU's rule of law monitoring of Poland and more broadly, what the Commission's present and past failure to prevent illiberal regimes from consolidating within the EU means for the future of the EU itself.

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