Poland and the European Commission, Part III: Requiem for the Rule of Law

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Last week, Poland stuck its thumb in the eye of the European Commission, again. Responding to the complementary Rule of Law Recommendation that the Commission had issued two months earlier, the Polish government asserted that everything the Commission had complained about had been fixed. Since the government had compromised the independence of the Constitutional Court by both packing the Court with a working majority of loyalists and installing a more politically reliable Court president, the Polish government explained that there is nothing left to fight about. The Commission addressed Poland with law, and Poland responded with opposing facts on the ground.

Poland's defiant response to the Commission's requests indicates that the government is not planning to do what the European Commission believes it must. The Polish Law and Justice (PiS) government almost surely believes that the Commission will meekly accept defeat and allow another Member State to become an autocracy in plain sight, as the Commission already did with Hungary.

We believe that if the Commission does not defend the rule of law at this critical juncture, the rule of law will be honoured across the EU only in the breach. This is a fragile moment for Europe. Europe was built on law; it must defend the law to retain its identity and its future.

In this post, we will consider in more detail the Polish government's reply to the findings and recommendations of the European Commission regarding the systemic threat to the rule of law in Poland and explain what we believe the response of the Commission must be. It may be worth recalling in this respect that the Recommendation adopted on 21 December 2016 gave Poland two extra months to comply with the first set of requests adopted by the European Commission in its initial Recommendation of 27 July 2016. The Commission did however also lengthen the list of requirements by asking the Polish government to urgently address new rule of law issues that arose after to the adoption of its first Recommendation.

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 (see Pech, Systemic Threat to the Rule of Law in Poland);
2. Even without discernible support from the Council, the Commission ought to promptly trigger Article 7 TEU given how much evidence points towards the existence and implementation of a deliberate governmental strategy to systematically undermine checks and balances in order to entrench a one-party state (see Pech and Scheppele, Giving up on the Rule of Law);
3. There has been a compelling case for some time to activate Article 7 against both Poland and Hungary considering that Hungary has been engaged in a parallel sustained and systematic attack on the rule of law since 2010 and that Poland started down the same path in 2015 (see Scheppele, Can Poland be Sanctioned by the EU? Not unless Hungary is Sanctioned Too);
4. 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 last October (see Pech and Scheppele, Poland the European Commission: Part I Dialogue of the Deaf);

5. By giving more time to the Polish authorities to implement both 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. In the Commission's defence however, Member States in the Council have so far shamefully failed to support the Commission's enforcement of EU values directly against any EU country gone rogue, so Poland's rule of law probe is proving that Article 7's dissuasive power is close to nil (see Pech and Scheppele, Poland and the European Commission – Part II Hearing the Siren Song of the Rule of Law).

In this post, we will argue: 1) The Polish reply of 20 February 2017 to the European Commission's rule of law findings is so clearly absurd, rude and full of 'alternative facts' that the case to trigger Article 7 TEU promptly is more compelling than ever and 2) It is time for Member State governments to get their act together and make explicit their disapproval of a government that finds it acceptable not only to violate its national Constitution and EU values in plain sight but also to bully and disrespect EU representatives such as Frans Timmermans and Donald Tusk.

The Polish statement of 20 February 2017

The reply the Polish government sent to the Commission has not been published, but the statement published on 20 February 2017 (see website of the Polish MFA) is in line with the Polish government's past uncompromising stance and rude language (for an analysis of the previous Polish MFA statement, see Pech, Systemic Threat to the Rule of Law in Poland). Since the Polish government has not made public the 'substantive explanations', which it said it communicated to the Commission, we must rely on the public statement. It makes clear that the Polish government is unwilling to even accept that there is a potential problem on the rule of law front.

Let's briefly analyse the key claims made by the Polish government in the MFA statement of 20 February 2017.

According to the government of Poland, all is now well.

> *'the appointment of a new President of the Constitutional Tribunal by the President of the Republic of Poland on 21 December 2016 and the entry into force of the aforementioned new legislative regulations have created the proper conditions for the Constitutional Tribunal to be able to operate normally. Poland hopes that from now on all acts taken by the Constitutional Tribunal will comply with the applicable law.'*

Let us unpack this misleading statement: The Polish government adopted a set of laws in breach of its Constitution and captured the Polish Constitutional Tribunal with the unconstitutional appointment of Julia Przyłębska as acting and then as the new president of the Tribunal. As one of her first acts of office, she seated the unconstitutionally elected PiS judges, so that the government now has a working majority on the Court. She did this while the European Commission was warning the Polish government against authorising the appointment of a new Court president. The Polish government is now using Orwellian doublespeak to argue that the situation has returned to normal because it no longer is in conflict with the Court it has just subdued. These actions followed from an earlier and persistent refusal by the Polish government to publish the judgments of the Tribunal with which it disagreed, judgments that would have prevented PiS officials from undermining the effectiveness of constitutional review in Poland. Those judgments remain unpublished.

We predicted in a previous post (Pech and Scheppele, Poland and the European Commission – Part II Hearing the Siren Song of the Rule of Law) that the Polish government would deliberately make deceptive claims to pretend that it had in fact fixed problems

created by the alleged 'political bias' of the former President of the Constitutional Court and the other sitting judges who were appointed before what Professor Wojciech Sadurski has perceptively described as a 'constitutional coup d'état' organised by PiS. To maintain the fiction that the Polish Constitutional Tribunal is now 'operating normally', the Polish authorities can be expected to refer some controversial measures to the Tribunal if only to preserve appearances (see Reuters, 29 Dec. 2016), get a judicial rubber stamp when needed, and convince uncritical outsiders that the system is now working fine.

Having taken control of the Tribunal, the Polish government can rest assured that the new President of the Polish Constitutional Tribunal will do her best not to disrupt their plans to consolidate autocracy in Poland. Indeed, the PiS judges may in fact help the ruling party accomplish this goal by adopting whatever interpretation of the Constitution is required to achieving the establishment of a one-party state regime and the implementation of its illiberal agenda. It was therefore unsurprising to hear Mr Waszczykowski, the Polish Minister of Foreign Affairs, arguing recently that the European Commission should allow Poland 'to respect our own constitution', not the Commission's 'vision of our constitution'. This led Mr Timmermans to rightly point out that 'we are really now in alternative fact territory' (see this Financial Times article).

Indeed, Mr Waszczykowski failed to mention that 'his' vision of the Polish Constitution not only flies in the face of its provisions but also of the case law of the pre-captured Polish Constitutional Tribunal, which is why his government has, among other things, outrageously and unlawfully refused to implement the judgments of the Constitutional Tribunal of 3 and 9 December 2015 on the legal status of judges elected under both the prior and current governments, as well its refusal to publish and implement in full of the judgment of 9 March 2016 that found aspects of the new law regulating the Court itself to be unconstitutional.

Mr Waszczykowski's disregard for facts specifically and the rule of law more generally should not surprise anyone given his understanding of how a democracy should work. In a radio interview on 2 January 2017, he argued that Poland should become a 'democracy without adjectives', that is, not a liberal democracy but a 'normal democracy' where those winning an election should 'have the right to rule, to achieve their plan and programme'. In his view, it is apparently just too bad if the implementation of the ruling party's plan and programme means violating the rule of law, breaching human rights or undermining all checks and balances.

According to the government of Poland, simply answering questions is enough to demonstrate cooperation with the EU even if the answers are rude.

> *'At the same time Poland would like to recall that in the spirit of sincere cooperation between a Member State and the European Commission it has been communicating substantive explanations concerning the situation in Poland for over a year now.'*

It is difficult to assess the accuracy of the 'substantive explanations' allegedly provided by Poland in the absence of any publication of these explanations. As for the reference to the spirit of sincere cooperation, it may be worth recalling some of the public statements made by key Polish actors, beginning with the Polish Prime minister who stated on 27 October 2016 that her government would not introduce any of the 'politically motivated' changes recommended by the Commission. When not busy attacking the former President of the Polish Constitutional Tribunal, the Polish President also publicly accused the European Commission of having 'overstepped its bounds'. Finally, one may cite Jarosław Kaczyński, the head of the ruling PiS party and the power behind the throne in Poland, who referred to the Commission's rule of law probe on 22 December 2016 as 'an absolute comedy, because there is nothing going on in Poland that contravenes the rule of law.'

According to the government of Poland, there was never a problem.

> *'Poland has once again emphasized that the existing political dispute over the rules governing the*

> *functioning of the Constitutional Tribunal cannot be used as grounds for arguing that there is a systemic threat to the rule of law in Poland.'*

This is perhaps the claim that explains why there cannot be any fruitful dialogue with the current Polish government. Violating in plain sight their own constitution and undermining the independence and effectiveness of the Polish Constitutional Tribunal is for PiS politicians a political matter. The truth of the matter however, as candidly admitted by Kaczyński himself is that PiS is willing to destroy the Polish judiciary starting with the Polish Constitutional Tribunal in order 'to ensure there are no legal blocks on government policies' (it has since emerged that PiS is now seeking to pass a seemingly unconstitutional law to undermine the functioning of the National Council of the Judiciary so as to de facto control the process by which new judges would be appointed: see Christian Davies, 'Polish judges urged to 'fight every inch' for their independence', The Guardian, 26 February 2017).

According to the government of Poland, all attacks on what it has done are purely political.

> *'Poland interprets the actions and comments made by Frans Timmermans as politically motivated and serving to stigmatise one of the Member States. We call on the Vice-President of the European Commission to stop such acts.'*

The MFA statement does make clear which specific 'actions' and 'comments' the Polish government has found 'politically motivated' and stigmatising. There is however ample examples of rude statements made by Polish officials. One may for instance recall here how in a radio interview, Mr Waszczykowski referred to Donald Tusk, the President of the European Council, as 'icon of evil and stupidity'.

This is not the first time that Poland has responded this way. As noted in a previous post, in a statement published on the website of the Polish Ministry of Foreign Affairs (MFA) on 27 October 2016, the MFA denounced the 'interferences into Poland's internal affairs' in violation of the principles of 'objectivism [sic], or respect for sovereignty, subsidiarity, and national identity.' The MFA further claimed that the Commission's rule of law recommendations reflect 'incorrect assumptions' deriving from 'incomplete knowledge about how the legal system and the Constitutional Tribunal operate in Poland', before concluding that the Commission's Recommendation of 27 July 2016 is 'groundless'. The Polish government used similar immature language following the Venice Commission's adoption of a critical Opinion on the Polish Act on the Constitutional Tribunal of 22 July (see document here).

With a 'dialogue' like this, it is clear that Poland has nothing constructive to say.

Meanwhile in the Council…

While the European Commission was doing its best to address the systemic attacks on the rule of law in Poland, the Council was busy gathering the views of the EU-28 national governments as part of its so-called 'annual rule of law dialogue'.

The decision to establish such a dialogue among all Member States within the Council was adopted in December 2014. In a nutshell, the official aim is to promote and safeguard the rule of law in the EU via an annual dialogue 'conducted on a non partisan and evidence-based approach' and taking place once a year in the Council (see Kochenov and Pech, From bad to worse? On the Commission and the Council's rule of law initiatives). The first dialogue was organised by the Luxembourg presidency and took place on 17 November 2015. Its main point of focus was the rule of law in the age of digitalisation (no, this was not meant to be a joke). The second dialogue took place in May 2016 under the Netherlands presidency and focused on migrants' integration and EU fundamental values. One could easily think of more pressing and relevant rule of law problems to discuss rather than one which led some countries emphasising migrants' duties to respect the values of the 'receiving societies.' Moreover, rather than unifying Member States around shared values, the dialogue on migration emphasized points of strong disagreement across Member States and therefore did nothing to create the solidarity that the Council would need to call out its own members

for undermining the rule of law. The first two editions of the Council's rule of law dialogue led some to justifiably regret 'the Council's lamentable inaction in the face of this profound crisis of the EU's values' (see Oliver and Stefanelli, Strengthening the Rule of Law in the EU: The Council's Inaction).

In September 2016, the Slovak Presidency circulated an unpublished questionnaire to evaluate the 'experience acquired on the basis of the dialogue' (following a successful request for access to documents submitted to the Council last December, readers can find the full text of Council document no 12205/16 here). All of the EU Member States replied to this questionnaire, with only Bulgaria and the Slovak Republic failing to comply (One must assume they had better things to do than reviewing an alleged key instrument when it comes to upholding the rule of law in the EU.) The end result was a compilation of the 25 replies of the national governments minus Romania, which failed to explicitly authorise the Council to disclose its contribution. All of these documents were obtained via the same request for access to documents mentioned above (See Council of the EU, Rule of Law – Compilation of replies to the Presidency questionnaire, 13230/1/16, 3 November 2016, document available here).

The questionnaire itself was about evaluating the 'experience acquired' [sic] by asking national governments to explain how the dialogue could be improved; their views on the possible involvement of other EU institutions, other international organisations or NGOs in the process; or how the impact of the Council dialogue could be evaluated and increased, among other things. Reading the available replies to the questionnaire and the document summarising the outcome of the council meeting of 15-16 November 2016 ('The Council evaluated the experience gained so far from the annual rule of law dialogue' and that's about it…), one can be forgiven for being torn between a deep pessimism about the usefulness of the Council's 'rule of law dialogue' as currently organised and a deep worry that a number of national governments are still in denial about the urgent need to address democratic and rule of law backsliding in countries like Hungary and now Poland. Some (Hungary and Poland, of course, but also and rather unhelpfully countries such as France and Spain) have even argued against the rule of law dialogue at all, with the ludicrous argument that the EU Treaties would not allow for a periodic review process of the rule of law situation in Member States (see Council document no 13230/1/16 which, as previously noted, we obtained via a request for access to documents and which is reproduced here).

The Slovak presidency proposal to organise a more structured preparation of the discussions and more focused topics to ensure a coherent exchange of views is certainly a good one as is the idea of turning the dialogue into an annual peer review process. It would be more effective however for national governments to lend their clear support to the European Commission whenever it has identified a potential systemic threat to the rule of law under its 2014 Framework and to work with the European Parliament to look into the possible establishment of a recently proposed new mechanism which would incorporate existing rule of law instruments into a more coherent framework and subject all member states to a permanent monitoring mechanism. We could however do without an internal, confidential and superficial peer review process taking place within the Council, as this would just provide another fig leaf for countries such as Hungary and Poland, and help justify the Council's lack of effective action against these illiberal not to say authoritarian regimes.

With its rule of law dialogue, the Council appears to be doing something about the rule of law problems in the EU while in fact doing nothing to address the most serious and glaring problems. In fact, since Hungary started down the road to autocratic government and now with Poland following in hot pursuit, the Council has said virtually nothing at all (with just very few national governments being brave enough to openly stating the obvious: see for instance the recent intervention of Luxembourg Foreign Minister: 'Asselborn: Poland would not be allowed into the EU now', Euractiv, 27 February 2017). The EU simply cannot function as a values Union, as the Treaties now commit it to being, if the intergovernmental part of

the Union institutions operates to hide values problems in the member states.

Next steps

Regrettably, but in line with its previous reluctance to confront the reality of a belligerent government bent on violating the rule of law in plain sight, the European Commission appears to be planning informal consultations with EU member states as its next step. 'The idea is to gauge EU governments' views and support for moving forward,' said one senior EU official cited in this Euractiv article, as if the Commission does not have the power to trigger Article 7 on its own.

We agree with the Commission when it said that it is 'politically color blind when it comes to the rule of law' and it was entirely right to point out that its concerns on Poland were shared by the European Parliament, the Council of Europe, the UN human rights body and other EU governments (not to mention the US under Obama as well as the OSCE). But we cannot entirely agree with the implications of the Commission's next statement: 'When the rule of law in any member state is in question it is an issue for all member states … Such is the nature of being part of the European Union.'

Of course, all member states should take seriously a systemic undermining of the rule of law in any EU country. Indeed, in the interconnected legal framework of the EU, the current systemic threat to the rule of law in Poland seriously endangers the whole EU legal framework which, to quote the Court of Justice, 'is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU' (Opinion 2/13, para. 168).

But when the Commission points out that the threat to the rule of law is an issue for all member states, such a statement appears to serve an excuse for the Commission not to fulfil its role as Guardian of the Treaties. Regardless of whether the other EU bodies are prepared at the moment to go along with its assessment, the Commission must take the lead in attempting to persuade them. The Commission has already gathered evidence about Poland's violations of the rule of law; the Commission's new rule of law framework enabled it to assess the situation while it gave the member state the chance to correct the error of its ways. Now that the Polish government has rudely refused to cooperate and stand down from its attempts to capture the Constitutional Tribunal, but has instead accelerated its takeover of that institution, the Commission has all of the information it needs to move forward. In particular, once the dialogue between the Commission and one or more member states fails in ways that indicate that the rule of law problem is in fact serious, the Commission has the obligation as the Guardian of the Treaties to sound the alarm by moving to trigger Article 7 TEU. Under paragraph 1 of that provision, the Commission may start the process when there is 'clear risk of a serious breach by a Member State of the values referred to in Article 2' TEU. While the Council has obligations that supplement those of the Commission under Article 7 TEU, the Commission does not need the Council's permission to start the process.

One may therefore find it peculiar for the Commission to seek to gather the views of national governments informally at this stage. Perhaps it wants to know in advance that the Council will approve any proposal it makes before triggering Article 7. But the Treaty on the European Union does not condition the Commission's action on Council approval; rather the reverse. The Commission has independent authority to trigger Article 7 TEU. If the Commission is to adequately guard the Treaties, it must take this role seriously. At a minimum, its solemn obligations as guardian counsel that the triggering of Article 7 TEU is not and should not be conditioned by the preliminary informal agreement of most national governments.

Numerous NGOs recommended in an open letter to the Commission on 16 February 2017 that the time has come to trigger Article 7 TEU. We agree with their statement that:

> *… the Polish government has continued to enact legislation in complete disregard for the Commission's recommendations, and in a way that further entrenches rather than corrects the problems*

> *identified. …It is necessary for the Commission to prevent the situation from deteriorating even further. Past experiences with other Member States which faced similar threats have shown that time does not solve the problems but rather risks entrenching them. Further delaying resorting to Article 7 TEU would risk undermining the Commission's credibility. It would indicate to other Member States that they can undermine the founding values they signed on to respect and still expect no strong response by the EU.On the other hand, recommending resort to the Article 7 TEU procedure would send a strong signal to Poland and other Member States, as well as the public, that the Commission is committed to ensuring compliance with the EU's founding values and that it is ready to do what is needed to preserve them from attacks. It would open up a new phase in which both the Polish government and all the EU institutions will have to face up to their own responsibilities to uphold these values. Finally, it would send a strong signal to civil society in Poland that the Commission stands by its side in its fight for a society in which democracy, the rule of law, human rights and the other values protected under Article 2 TEU are upheld. …*

In our opinion, the Commission should immediately trigger Article 7(1) TEU without further procrastination. As rightly noted by the Commission itself in its Communication 'EU law: Better results through better application':

> *The European Union is founded on the rule of law and relies on law to ensure that its policies and priorities are realised in the Member States. The effective application, implementation and enforcement of the law is a responsibility entrusted to the Commission by Article 17(1) of the Treaty on European Union … Beyond infringement management, the Commission has developed the Rule of Law Framework which it has applied where the 'national rule of law safeguards' no longer seem capable of effectively addressing a systemic threat to the rule of law in a Member State, and where such a threat cannot be addressed through infringement proceedings. This reflects the fact that upholding the rule of law is a prerequisite for upholding all rights and obligations deriving from the Treaties.*

The time has come not to simply talk the talk but walk the walk.

It is clear, as we have watched first Hungary and now Poland fall out of the family of constitutional-democratic states, that EU member states find it hard to criticise another member state and act decisively even when faced with outrageous behaviour. Leaders of the other EU member states have tried to bury their heads in the sand and hope that purely national factors will change the situation from within. But entrenching one-party rule – capturing the courts, muzzling the media, attacking the opposition and gutting the independent civil service – results in disabling the very domestic institutions that would permit a successful recovery of EU values from within the member state, so that the problem can no longer be fixed peacefully from within the member state's own structures. This is why the EU must act now before things get worse.

Post-communist European states were eager to join the EU after the Soviet influence on their governments disappeared. They were eager to do so because they wanted to improve their standards of living and to become members of one of the most exclusive clubs in the world. But they were also eager to join the EU as a sort of insurance policy against being brought the boot of authoritarianism again. If the EU institutions stand idly by as unconstrained majoritarianism undermines domestic constitutions and threatens the basic values of the EU in these member states, many will wonder whether the EU is really a community of values after all.

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