"A Bad Workman always Blames his Tools": an Interview with LAURENT PECH

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Anna Wójcik: **Many critics of the judicial reform pushed by Poland's ruling party fear that the lack of further decisive activity on the part of the European Commission will lead to the establishment of an undemocratic system of government in Poland. What are the biggest mistakes made by the European Commission in this dispute so far?**

Laurent Pech: While one can be critical of the Commission's efforts so far, and I have myself been quite strident in my criticism, the Commission should be commended first for activating the rule of law framework in January 2016 and then activating for the first time ever, Article 7(1) of the Treaty on European Union in December 2017. Very briefly, Article 7 is the provision which allows the Council of the EU to give a warning before a serious breach of the foundational, common values of the EU has materialised in a specific EU country. I would also like to commend the Commission for the quality of its rule of law recommendations.

Article 7 was, however, activated too late. I personally recommended its activation in November 2016 before the all-too-obvious forthcoming unconstitutional capture of the Polish Constitutional Tribunal which took place at the end of December 2016. The Commission repeated the same mistake in 2017, and should have triggered Article 7 in July rather than giving another window of opportunity to Poland's ruling party to subjugate the rest of the judiciary. Sometimes I feel the Commission is unable, or rather unwilling, to learn from its past mistakes. However, in the Commission's defence, it is at least attempting to do something. By contrast, the Council of the EU has been missing in action.

How is the EU position on Poland different now in May 2018 than it was after the July 2017 protests against the reform of the judiciary?

In December 2017, the Commission finally accepted it had to confront reality, that is, that there is no point attempting to dialogue with a government which was not even willing to accept the existence of any problems on the rule of law front. Activating Article 7, albeit at least five months too late, was the right thing to do. When the Commission did so, it gave three months to the Polish government to implement its recommendations. However, this deadline passed with no implementation whatsoever by the Polish authorities. Instead we were offered a so-called White Paper whose content was so unconvincing, to put it politely, that it was very quickly forgotten.

In the past few weeks, some movement can be seen with the Polish government seemingly starting to feel the pressure for a number of reasons and attempting to find a way of out the crisis it has created by offering some cosmetic concessions. It is to be hoped that the Commission will not settle for a meaningless 'save-the-face' compromise, repeating past mistakes that it made when it first sought to do something about the initial signs of Hungary's descent into autocracy in 2011-13.

Does the EU have any coherent strategy towards Poland (except for appeasement) and any clear goal now?

The EU is not a monolithic organisation and it is not unusual to see different EU institutions, and within these institutions, multiple actors promoting different diagnoses, strategies and solutions. With respect to Poland, it seems to me that Frans Timmermans may have initially believed that the rule of law framework would be enough of a pressure point to constrain or limit the Polish government's worst autocratic impulses. To some extent, I believe this reflected a failure to fully understand how the new breed of

autocrats aim to annihilate the rule of law and an erroneous belief in the urban legend that the Commission had been successful in its past dealings with Orban's regime.

To return to your question, it would appear that the Polish ruling party, but also the Commission and a number of national governments, are anxious to leave Article 7 behind as quickly as possible. The ongoing discussion on a new mechanism which would allow the Commission to essentially suspend access to EU funding on rule of law grounds appears to be in part an indirect attempt to nudge the Polish government into making concessions.

Should the Polish government make meaningful ones, the Commission would then be in a position to justify the "untriggering" of Article 7 and possibly, we could then also see the new proposed rule of law mechanism being watered down by the Council. Regardless of what the Commission and Council may do or not do, we should not forget about the Court of Justice which is due to give an important ruling about the state of the rule of law in Poland in July or so.

While the Polish government is offering some "concessions" regarding the judicial changes it has made, we have seen Constitutional Tribunal judge Mariusz Muszyński's calls for the dismissal of the Polish Ombudsman Adam Bodnar. Is Warsaw outsmarting Brussels with this new tactic?

I find it unhealthy not to say shocking to see a sitting judge use a dissenting opinion to launch personal attacks against the office holder of a constitutionally-protected institution. This suggests that Poland's ruling party will not rest until every single independent institution is captured and one can see the attacks against the Ombudsman as part of the constitutional capture strategy I previously mentioned.

It may also be worth recalling that the European Commission has expressed its most serious concerns regarding the legality of the appointment of the current President of the Polish Constitutional Tribunal. The Commission also found that Mr Mariusz Muszyński was nominated by the Sejm without a valid legal basis.

The situation in Hungary is of great interest to people in Poland and not merely because of Viktor Orbán's visit to Warsaw on 14 May. Why is the Commission still differentiating between Poland and Hungary, despite the Hungarian government packing the judiciary with loyalists and using openly anti-Semitic and xenophobic rhetoric?

In a nutshell, the Commission is of the view that the situation in Poland is not comparable to the situation in Hungary. To oversimplify, the argument is that the Hungarian government has not openly and repeatedly violated its national constitution unlike what has been happening in Poland. The Commission has also argued that national rule of law safeguards would still work in Hungary. It is worth noting that the European Parliament has repeatedly disagreed with this diagnosis and having grown tired of the Commission's reluctance to decisively act, it has adopted last May a resolution which may lead to a possible activation of the same Article 7 procedure which was activated against Poland last December.

Have Poland and Hungary established and implemented one common model of "resistance" to the European Union?

To a large extent the "constitutional capture" blueprint being implemented by Poland's ruling party reflects a blueprint first implemented by Orban and which itself is reminiscent of what has been done or attempted by would-be autocrats in a number of non-EU countries.

The dismantlement of checks and balances has however been done in a more cautious and less obvious manner in Hungary. Hungarian authorities, until last year, were also less openly defiant and antagonistic than Polish authorities have been in 2016 and 2017.

What seems to be happening now is a process of mutual learning between autocrats with Orban apparently planning a total takeover of the Hungarian judiciary which seems to reflect in part the aggressive tactic used by Poland's ruling party. Looking beyond a number of common traits when it comes to the means and tactics used to systematically undermine the rule of law, Hungary and Poland present some important differences. So it is perhaps more accurate to view

them as two types of autocratic regimes driven by different motivations, which is not surprising considering their different histories, cultures, etc.

Does the EU consider the situation in Poland and Hungary as a real threat?

Two years ago, I wrote that "the consolidation of 'illiberal' regimes within the EU itself is however more likely to endanger it than any country withdrawing from it". I stand by this assessment and it is positive to see a growing realisation that illiberal regimes represent a pressing threat which needs to be tackled. The problem is that the EU has indeed been simultaneously confronted by a frightening number of pressing if not mutually reinforcing crises. This environment makes it difficult for EU actors to focus their attention on the ongoing process of democratic and rule of law backsliding that we are witnessing, as EU unity is required to deal with a number of competing and difficult problems. However, I would argue that from a legal point of view, what is happening in Hungary and Poland fundamentally threatens the EU's DNA and the very functioning of its interconnected legal system and indirectly the future of the EU's single market.

Does you see any reason why the EU has been so reluctant to effectively answer threats to democracy within the block?

To its credit, the European Commission presided by Barroso quickly identified the emergence of a new problem and Barroso himself spoke in 2012 of new threats to the legal and democratic fabric in some EU countries. The process whereby would-be autocrats seek to dismantle checks and balances was, however, I think misunderstood. And rather than acting decisively against Orban's regime, a number of key actors have been living in denial ever since or have sought to justify the limited effectiveness of their answers on the toolbox available to them.

In this respect the EU seems to be persistently engaged in a new-instrument creation cycle. Rather than acting decisively using existing tools in a mutually reinforcing and forceful way, there seems to always be a persistent temptation to blame the instruments available to either justify their non-inactivation, or their timid use. I am not sure for instance that even if the proposed mechanism to suspend EU funding on rule of law grounds were to be adopted that the Commission would end up using it forcefully. As the saying goes, a bad workman always blames his tools, and I am afraid I have seen several examples of this in the past few years.

In addition, effective EU action has been undermined by a number of factors among which I would highlight the feeble support coming from a number of key national governments; the often short attention span of political actors and a tendency to prioritise short term party politics over compliance with democratic and rule of law standards; the loss of institutional memory when the Barroso Commission's mandate came to end; and more generally speaking, the EU's default tendency to hope that dialogue, no matter how vacuous, and stalling for time may lead problems to go away.

Do you think that perhaps the EU no longer has the ambition to remain a community of values, and its member states would be perfectly satisfied with an economic and security union?

It is not an ambition but a legal obligation. The EU and its Member States must comply and promote compliance with the foundational values laid down in the Treaties. This is not simply for Europeans to feel good about themselves. As the Court of Justice has made clear, the EU legal framework, and I quote, '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'. If you remove this from the EU equation, the very existence of the EU as currently constituted will come under direct threat. In a recent speech, the Dutch Prime minister made this point very compellingly: 'erode the rule of law and you erode the single market. Erode the single market and you erode the Union.'

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