Defending the rule of law in the European Union: taking stock of the Polish situation

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1. ‘Rogue states’ within the Union?

Disquieting internal situations posing a threat to the founding principles of the European Union have recently emerged in the legal orders of the Member States. Suffice it here to mention Rumania, Greece, Bulgaria and Hungary. Poland represents the most recent example. In the past few weeks, a multitude of posts, blogs, and newspaper articles have addressed the issue from a political and legal perspective. The intention of this author is to contribute to the debate on the viability of the EU’s “rule of law mechanism” from a legal standpoint. Based on the first concrete steps taken against the Polish government pursuant to the European Commission’s Communication “A new EU Framework to strengthen the Rule of Law”, this brief essay will review the changes introduced in the Polish legal order and critically assess how the Commission has confronted the situation under the Communication of March 2014.

2. The political background

Before dwelling upon the legal aspects of the Polish affaire, it is perhaps useful to remind the reader that until October the country was governed by a coalition led by Civil Platform, a liberal-conservative political party founded by Donald Tusk in 2001. Dissatisfied and disenchanted with the government in power for the last eight years, voters turned to Law and Justice (PiS), a national-conservative political party created, also in 2001, by Lech and Jarosław Kaczyński. As a result of the elections held on 25 October 2015, the new government of Prime Minister Beata Szydlo can rely on a large majority of representatives, both in the lower Chamber (235/460) and in the Senate (62/100) and on the President Andrzej Duda, also a member of PiS.

3. The initiatives of Law and Justice in Poland

In June 2015 the previous Parliament had passed legislation that enabled the lower

Chamber to appoint all five constitutional judges whose mandate expired before the end of the year. Since the political elections were already scheduled for October, the opposition filed a complaint before the Constitutional Court. Notwithstanding, the outgoing government proceeded with the nominations and forwarded them, as required under national law, to the newly elected President Duda. The latter refused to swear in the selected candidates and halted the procedure. Having won the elections, PiS withdrew the action – which, however, was swiftly taken up by the opposition.

Before the Constitutional Court could hand down its decision, the incoming legislature presented the President with five new candidates, all of whom were sworn in on the midnight of the day before the judges were expected to render their judgment. On 3 December the Constitutional Court struck down the law adopted in June insofar as it allowed for the nomination of two additional judges by the outgoing legislature. And, on 9 December, the Court invalidated the bill through which the newly elected Parliament had repealed all previous appointments and declared the unlawfulness of an amendment introduced in relation to the organization of council chambers and the mandate of the President and vice-President of the Court (shortening their term). These judgments were effectively set aside by reason of the decision of the President. Moreover, against the predominant position of lawyers, politicians and parts of civil society, and openly disregarding the position expressed by the Commission's First Vice-President Frans Timmermans, on 28 December President Duda signed a law which substantially reforms the functioning of the Constitutional Court. *Inter alia* and most notably, the law – with immediate effects – raises the quorum from nine out of fifteen judges to thirteen and requires that the unconstitutionality of laws be decided with a qualified majority of 2/3. Finally, on 31 December, the Polish Senate substantially amended the law regulating the Polish public television broadcaster and public radio broadcaster. According to the new rules, the existing Supervisory and Management Boards are dismissed – again, with immediate effects – and the appointment of the new members will no longer be entrusted to an independent body, but will pass under the control of the Treasury Minister.

4. The reaction of the European Commission

The modalities which characterized the appointment of the five constitutional judges and the amendment of the Court's rules alarmed the European Commission. In fact, as anticipated, on 23 December – the day when the lower

Chamber (Sejm) was due to approve the law on the Constitutional Court – Frans Timmermans, as the Commissioner for Better Regulation, Interinstitutional Relations, the Rule of Law and the Charter of Fundamental Rights, sent a letter to the Polish Government in which he expressed all his concern for "the integrity, stability, and proper functioning of the national constitutional court". In compliance with Art. 2 TEU, there is a need to prevent the "emergence of situations whereby the rule of law in a Member State could be called into question". To that effect, he quite boldly affirmed that: "I would expect that this law is not finally adopted or at least not put into force until all questions regarding the impact of this law on the independence and the functioning of the Constitutional Tribunal have been fully and properly assessed." In addition, Mr. Timmermans asked that he be informed "about the constitutional situation in Poland, including the steps you envisage taking with respect to the two […] judgments of the Constitutional Tribunal and the last modification of the law on the Constitutional Court". Lastly, he recommended that the Polish Government work in close cooperation with the Venice Commission and forward its reply as soon as possible.

On 30 December Mr. Timmermans sent a second letter asking the Ministers of Foreign Affairs and Justice to explain how the new bill on media would take EU law into account. In particular, the Commissioner reminded the government representatives that "Freedom and pluralism of the media are crucial for a pluralist society in a member state respectful of the common values on which the Union is founded".

5. The legal and political follow-up

Harsh criticism against the Polish government followed, animating the legal and political debate. On 3 January 2016, for instance, Gunther Oettinger, Commissioner for Digital Economy and Society, accused Poland of threatening common European values. And on 10 January President Schultz spoke of a creeping coup in Poland and a "dangerous 'Putinisation' of European politics". The reaction to the letters and the public statements on the part of Poland was immediate and firm. On 11 January, Justice Minister Zbigniew Ziobro retorted: "I ask you to exercise more restraint in instructing and cautioning the parliament and government of a sovereign and democratic state in the future, despite ideological differences that may exist between us, with you being of a leftwing persuasion". However cautious (and somewhat embarrassed), the President of the European Council, Donald Tusk, also exhorted EU institutions and Member States to refrain from expressing

"exaggerated opinions" on Eastern Europe's largest country. According to him, in fact, there is a risk of awakening "nationalist emotions under the pretext of defending national dignity".

Meanwhile, the Commission announced that it would discuss the state of the rule of law in Poland during a meeting to be held on 13 January. On that occasion, evidently unimpressed by the replies sent by the Polish government on 11 January, the College of Commissioners decided to activate the preliminary assessment phase under the Rule of Law Framework and launch a structured dialogue with Poland. According to the resulting document: a) the judgments of the Constitutional Tribunal have not been implemented; b) the combined effects of the amendments to the law concerning the Constitutional Tribunal seem to render the control over the constitutionality of the laws passed by the Parliament "more difficult" and "to increase political involvement in disciplinary matters"; c) the Polish Parliament did not await the opinion of the Venice Commission it requested on 23 December "and the law has meantime entered into force". As to the bill regarding the media, instead, above and beyond very general remarks on the rule of law and fundamental rights, the only statement to be found in the document is that it "raises issues relating to the freedom and pluralism of the media".

These arguments were resumed in the plenary session of the European Parliament on the 19 January. To be sure, Mr. Timmermans made it clear that "[T]he main reason for beginning this assessment under the 2014 Rule of Law framework is the situation concerning the Polish Constitutional Tribunal, and in particular the dispute about the nomination of a number of judges of the Tribunal".Although this may appear as a purely internal issue – to be dealt with by that judicial body – because of the amendments relating to its composition and functioning "we risk seeing the emergence of a systemic threat to the Rule of Law".Mr. Oettinger, in turn, singled out the two main criticalities of the so-called small law on media: on the one side, the exclusive power of the Treasury Minister to appoint the members of the Supervisory Board; on the other, the possibility for the latter to dismiss at any time the Board of Directors.

6. The Communication of March 2014 and the rule of law mechanism

Against this background, it is now time to consider the affaire from a strictly legal perspective. According to the Communication of 2014, in the presence of clear indications of a systemic threat to the rule of law in a Member State, the

Commission may initiate a structured exchange with that Member State. As to the notion of the rule of law, the latter is deemed to include: “legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law” (pt. 2). As to the systemic threat requirement, reference is made to “situations where the authorities of a Member State are taking measures or are tolerating situations which are likely to systematically and adversely affect the integrity, stability or the proper functioning of the institutions and the safeguard mechanisms established at national level to secure the rule of law” (pt. 4.1). By contrast, “individual breaches of fundamental rights or by a miscarriage of justice” are left to the national judicial systems and possibly to the ECHR (pt. 4.1).

The rule of law mechanism, which is intended “to provide clarity and enhance predictability as to the actions [the Commission] may be called upon to take in the future” (pt. 3) and “to enable the Commission to find a solution with the Member State concerned in order to prevent the emerging of a systemic threat to the rule of law in that Member State that could develop into a clear risk of a serious breach” (pt. 4), is based on the following principles: the equality of Member States, the objectivity of the Commission and the duty of sincere cooperation. The process comprises three phases (pt. 4.2). Firstly, the Commission will conduct an assessment of the situation on the basis of information collected by specialized bodies (such as the Agency for Fundamental Rights and the Venice Commission) or received directly from the Member State concerned (*preliminary assessment*). Should the risk of a systemic threat be detected, the Commission may issue an opinion substantiating its concerns and offering the Member State in question the possibility to reply (*rule of law opinion*). Secondly, in the presence of objective evidence and in the absence of active cooperation on the part of the national authorities of that Member State, the Commission will indicate its concerns and recommend the swift solution of the relevant problems within a fixed time limit (*rule of law recommendation*). If appropriate, the Commission can formulate specific suggestions on how to tackle the situation. Thirdly, the Commission will verify compliance with the indicated solutions, monitoring, *inter alia*, regulations and practices (*follow-up*). It may do so, seeking in particular the assistance of members of the EU judicial networks (Supreme Courts, Councils of State and Supreme Administrative Jurisdiction and Judicial Councils). In the event of no

satisfactory response within the time limit set, the possibility of activating one of the mechanisms set out in Art. 7 TEU will be appraised: on the one hand, the determination of a clear risk of a serious breach of the values referred to in Art. 2 TEU, which requires a majority of 4/5 of the members of the Council and the assent of the European Parliament (para 1); on the other, the determination of the existence of a serious and persistent breach of those values, which requires unanimity within the European Council and the consent of the European Parliament (para 2). In this last scenario, a qualified majority in the Council will suffice to suspend certain of the rights deriving from the application of the Treaties to the interested Member State, "including the voting rights of the representative of the government of that Member State".

7. Commentary

Two central questions arise from the above: do the recent developments in Poland anticipate the emergence of a clear systemic threat to European values? Why did the Commission choose to recur to the rule of law mechanism (instead of proceeding through infringement procedures and bilateral meetings) in the case of Poland and not Hungary?

As to the former question, it is important to consider, on the one side, that the Commission has just started the preliminary assessment phase, and, on the other, that Poland represents the first example of structured dialogue within the meaning of the Communication of 2014. However, the fact remains that the objections against Poland fail to meet the threshold one would expect to be applicable in such (politically) delicate cases. To summarize, the Polish government is blamed for: a) appointing three constitutional judges who should have been appointed by the outgoing majority; b) increasing the quorum required to review the constitutionality of the laws passed by Parliament; c) passing legislation that may hinder the freedom and pluralism of the media. These conducts are certainly alarming, but, for the purpose of demonstrating the emergence of a clear risk of a serious breach, they cannot be appraised out-of-context: the democratic legitimacy of the incoming government is undisputed; the new appointments were possible by virtue of a law passed by the previous majority; during a debate held at the Sejm on the Constitutional Court, as an act of protest, the Civic Platform representatives walked out of Parliament leaving the other main opposition party (Modern) alone to argue against the initiatives of the incoming government; the previous coalition had appointed nine of the fifteen constitutional judges (and

intended to appoint five more).

A joint reading of the document resulting from the meeting of the College of Commissioners earlier this month and the closing remarks of Mr. Timmermans during last week's Plenary of the European Parliament suggests that what worries mostly the Commission is the disapplication of the judgments of the constitutional court (which were, *de facto*, superseded by the decision of the President to swear in the judges confirmed by the incoming legislature) and, consequently, the respect of the separation of powers. In addition, specific emphasis is put on the refusal of the Polish Parliament to await the opinion of the Venice Commission (asked on 23 December, i.e. not in the final version approved shortly thereafter), as well as on the fact that meantime the law has entered into force. In this regard, while it is true that "there is no hiding behind national sovereignty" and that sincere cooperation is a general principle of EU Law (Art. 4(3) TEU), as well as an element to be taken into account when assessing the seriousness of the threat (pt. 4.2 of the Communication of 2014), it seems excessive – and in any case *ultra vires* – to demand legislative self-restraint following the first warning by Mr. Timmermans (of 23 December). Furthermore, it is difficult to understand why a higher quorum within the Constitutional Tribunal endangers, *per se*, the respect of the rule of law. By contrast with the concern expressed in relation to the constitutional reforms, the preoccupation generated by the small media law is notably played down. As signaled by Mr. Oettinger during his closing remarks at the Plenary, the shortcomings of that piece of legislation may promptly be remedied in the process leading to the adoption of the big media law, which will be presented in February or March. Still, the issue has not been removed from the assessment agenda of the Commission.

Turning our attention towards the second question, it will be recalled that since 2011 the Orbán government – with strong 2/3 majority of all MPs – removed the 4/5 vote rule to approve constitutional amendments in Parliament with the following results: the number of constitutional judges was increased from eight to fifteen with seven new positions filled with 'friendly' candidates; the Election Commission, entrusted with the power to control referendum initiatives, was re-shaped; the Media Council was created to assist the Media Authority (which had previously been set up under EU law to protect pluralism) and the president of the latter was substituted with an affiliated individual. The list could be expanded. As is well known, it was precisely the inadequacy of infringement procedures and

diplomatic pressure that triggered the elaboration of the Communication of 2014. However, following the publication thereof, Hungary adopted draconian measures to control its borders, the compliance of which with international obligations is more than doubtful. And yet, the rule of law mechanism was not activated. Even MEP Rui Tavares (the main promoter of the structured dialogue solution) recently acknowledged that the situation may seem unfair to Poland given the more conspicuous number of violation attributed to the Hungarian government with respect to those attributed to the Polish government "over the last couple of months". Meanwhile Prime Minister Orbán has lost support – now governing with a simple majority – and his capacity to hinder the rule of law has drastically diminished, but this is arguably insufficient to justify a differential treatment. Regardless of the margin of discretion inherent in the management of the procedure, and most notably in the determination of the existence of a "clear" risk, the persistent inertia of the Commission with respect to Hungary is deemed to negatively impact on its authority as the guarantor of the rule of law in the Union.

8. Final remarks

To conclude, the practice inaugurated by the Commission under the new rule of law mechanism leaves an eerie sense of uneasiness and perplexity. As suggested, the alleged breaches have not (yet) attained the level of danger sufficient and necessary to trigger the rule of law mechanism. Of course, this does not mean that PiS did not violate the rule of law, but it is difficult to grasp why and how the latest developments in Poland indicate the emergence of a clear risk of a systemic threat to the rule of law. Precisely because Art. 2 TEU enshrines 'European' values, the determination of the relevant legal standard should take duly into account the constitutional provisions and practices in (virtually) all Member States. This endeavor is of paramount importance in terms of legitimacy. Italy's recent experience, for instance, provides a good example of how demanding this exercise might prove to be. In accordance with Art. 135(1) of the Constitution, 1/3 of the members of the Constitutional Court (i.e. five) are appointed directly by the President of the Republic. As it turns out, Mr. Ciampi and Mr. Scalfaro have consistently appointed judges with their same political orientation. Is this situation really less threatening than the Polish one? Is there not a clearer and higher systemic risk?

Independently of this last consideration, the Commission has evidently interpreted the rule of law mechanism as an instrument of great political pressure. Although

Mr. Junker has reassured the general public that relations with Poland continue to be "friendly and good", and even if, in the words of Mr. Timmermans, "[T]he framework has a preventive nature, and the start of a detailed, factual and legal assessment in no way implies any automatic move to decisions at later stages", polls indicate that soon after the activation of the procedure PiS is believed to have gained consensus growing from 37,6% (electoral results) to 42% (source: TNS Polska).

As is apparent Art. 7 TEU is *in concreto* of little or no avail: it demands that the violation of the rule of law and democracy be of particular gravity – the notion of which, however, remains far from clear – and duration. Furthermore, the majorities prescribed therein are very difficult, if not impossible, to reach. As a matter of fact, Mr. Orbán already declared that "The European Union should not think about introducing any sanctions against Poland, because that would require full unanimity and Hungary will never support any sanction against Poland" (which, by the way, suggests that in the future we could witness strategic anti-democratic alliances).

Above and beyond their merits, the ambitious proposals put forward to overcome the existing impasse deriving from the formulation of Art. 7 TEU (cf. Lucia Serena Rossi, Floris De Witte and Jan-Werner Müller) would require a modification of the treaties and, thus, again, unanimity. Notwithstanding, it is true, as stressed by the European Commission in its Communication of 2014, that: "the confidence of all EU citizens and national authorities in the functioning of the rule of law is particularly vital for the further development of the EU into an area of freedom, security and justice without internal frontiers. This confidence will only be built and maintained if the rule of law is observed in all Member States" (pt. 1). But; it should be added, it will also be built and maintained if it is applied in a way which is, and is perceived to be fair, by States and individuals. Proceduralization comes at a (relatively high) price: coherence and predictability. The first steps taken against Poland are rather clunky.

At present, the procedure seems to be on hold, at least until the Venice Commission issues its opinions, presumably in March. It is hoped that in the meantime, the Polish situation will be managed wisely, which, it is respectfully submitted, implies sounder legal arguments, adequate comparative analysis and (the elaboration of) credible benchmarks as to what represents a systemic threat to the rule of law. Otherwise, the very credibility – and thus the effectiveness – of

the new instrument will be gravely jeopardized.