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Safeguarding the rule of law within the EU: lessons from the Polish experience

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Abstract The rule-of-law procedure against Poland, opened in January 2016, has painfully tested the safeguards supposed to protect the EU's fundamental values. It is now obvious that the protective mechanisms need to be strengthened. For in their current form, tested in real life for the first time, they have not dissuaded the present Polish government, led by the nationalist Law and Justice party (Prawo i Sprawiedliwość, PiS), from seriously and continuously breaching the rules. All interested EU parties—that is, willing member states and institutions—should acknowledge this and start preparing modifications both to Article 7 of the Treaty on European Union, which includes a sanction mechanism, and to the European Commission's Rule of Law Framework, so that the EU's internal defences are strengthened for future needs.

Keywords Poland | Rule of law | Democracy | Sanctions

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Introduction

Poland¹ is the first country against which the European Commission has started proceedings under its Rule of Law Framework. It is also possible that Poland will eventually become the first member state of the EU ever to become subject to the measures described in Article 7 of the Treaty on European Union (TEU). Although no formal decision has yet been taken at the time of writing, the probability of triggering the TEU's 'nuclear option'—so called because the proceedings in question could theoretically lead to suspension of the voting rights of the member state—is, in the author's opinion, rather high.

Unfortunately, so is the likelihood of the European institutions failing to pursue the case to a positive resolution, either by consent or by force of sanctions. So far, a rather negative scenario has been unfolding, which has proved that the EU's internal safeguards for the rule of law are flawed. This is a situation that the EU, its institutions and member states, should not tolerate. The EU's internal protective mechanisms (the Rule of Law Framework and Article 7 of the TEU) need to be strengthened if they are to be of any value. The EU's inability to stop the Polish government's trampling of fundamental values needs to be discussed in detail in order to better understand the weak points of the above-mentioned safeguards and to help design substantial improvements.

The case against the Polish government

The case against the Polish government started in early 2016. The European Commission initiated its Rule of Law Framework proceedings on 13 January 2016. This was done in response to both the assault on Poland's Constitutional Tribunal by the ruling Law and Justice party (*Prawo i Sprawiedliwość*, PiS) and the new legislation relating to public service broadcasters, which gave the government political control over the public media (European Commission 2016c; *DW.com* 2016). While both areas are equally important, it is the Constitutional Tribunal issue that, understandably, raised the most fears. In December 2015, the PiS majority in parliament, acting under the pretext of seeking political pluralism in the composition of the Tribunal, passed a new law concerning its functioning and the nomination of its judges (European Commission 2016a). Before being effectively crippled, the Tribunal managed to rule on 9 March 2016 that the law of 22 December 2015 was unconstitutional (Poland, Trybunał Konstytucyjny 2016). However, this was to no avail. The PiS government simply refused to publish that ruling, claiming that it had no legal standing (Witek 2016). In the following months, the president and the vice-president of the Tribunal were replaced with lawyers close to PiS, and

¹ Although the country's name is used in this paper on many occasions, as it is in the body of the available literature, the author wishes to make one important clarification. The rule-of-law proceedings focus on the deeds of the Polish government, not on 'Poland', which is understood as the 1000-year-old country that is the homeland of the Polish nation and a total of 38 million people. As will be explained later in the text, this distinction is absolutely crucial from a communication point of view.

additional judges (also linked to PiS) were nominated, despite the fact that the previous (unpublished) ruling of the Tribunal had deemed such actions unconstitutional (Poland, Trybunał Konstytucyjny 2016).

The European Commission's initial assessment was that there was the possibility of a threat to the rule of law in Poland (European Commission 2016a). This was validated by the official opinion of the European Commission for Democracy through Law, better known as the Venice Commission, which is the advisory body of the Council of Europe (CoE) that deals with matters of constitutional law.² In its March 2016 opinion, the Venice Commission stated that PiS's actions endangered not only the rule of law, but also the functioning of Poland's democratic system. It warned that PiS undermined all three basic principles of the CoE: democracy, human rights and the rule of law (European Commission for Democracy Through Law 2016, 24). The Polish government effectively waved the Venice Commission's opinion aside, as it did the European Commission's initial findings (*Rp.pl* 2016).

As the situation in Poland deteriorated, the European Commission's Rule of Law Framework proceedings continued, albeit at a relatively slow pace. On 1 June 2016, almost half a year after the dialogue with the Polish government started, the Commission adopted its formal opinion, effectively concluding the first stage of the procedure (European Commission 2016a). The next stages took place in July and December 2016, and then in July 2017 the Commission issued formal recommendations to the Polish government (European Commission 2016b, 2017). The first two were related to concerns about the lack of an independent and legitimate constitutional review in Poland. In these recommendations, the Commission reiterated its view that the composition of Poland's Constitutional Tribunal was no longer in accordance with the Polish constitution (Timmermans 2017).

The third and most recent recommendation covers a relatively new, additional issue: legislative proposals in the area of court organisation that would limit the judicial independence of ordinary courts. In the European Commission's view, this further increases the systemic threat to the rule of law in Poland (European Commission 2017). As Commission First Vice-President Frans Timmermans put it, under the legislative measures proposed by PiS, judges would serve at the pleasure of the political leaders and be dependent upon them from their appointment to their pension (Timmermans 2017).

While adopting the third Rule of Law recommendation, the European Commission explicitly warned that it was finally ready to launch the sanctions procedure under the framework of Article 7 of the TEU (European Commission 2017). At the request of the Commission, the Estonian presidency of the Council of the EU decided to add a discussion on Poland to the agenda of the 25 September 2017 General Affairs Council (Maurice 2017).

² The CoE is an international organisation founded in 1949 that aims to uphold human rights, democracy and the rule of law in Europe, and promote European culture. It is not an institution of the EU.

One should note that it took the European Commission more than a year, numerous meetings (including two visits by Vice-President Timmermans to Poland), extensive exchanges in writing and consultations at different levels to come to this conclusion (European Commission 2016a). If the Commission finds that the Polish government has not followed the recommendations, it is theoretically bound to formally launch the proceedings described in Article 7 of the TEU. Alternatively, those proceedings can be triggered by the European Parliament or the member states.

From the very beginning, the Polish government has made it clear that it is not interested in taking the European Commission's actions seriously. This is despite the fact that, officially, the PiS government has declared its readiness to maintain a dialogue with 'Brussels', as the European institutions are often collectively referred to in Poland. In practice, however, Warsaw has disregarded the Commission's views and has paid only lip service to the Rule of Law Framework procedure itself. A particularly striking illustration of the PiS government's attitude is the following excerpt from the Minister of Justice's letter to Vice-President Timmermans: 'Poland is a sovereign and democratic country, so I would like you, for future reference, to be more restrained in instructing and exhorting the parliament and the government of a sovereign, democratic state. Even if you—as a representative of the left—are different from us ideologically' (*Newsweek* 2016).

The Polish government has not only persisted in wrongdoing, but has also methodically added insult to injury. The gradual destruction of the Polish Constitutional Tribunal's independence stretched over many months, during which PiS ignored all the opinions and advice given by various organisations (the European Commission, the Venice Commission, etc.), not to mention the protests from Poland's opposition parties, non-governmental organisations and representatives of academia. On 28 August 2017, the Polish government officially dismissed the Commission's Recommendations related to the new laws on ordinary courts, stating that the Commission had no competence whatsoever to judge the organisation of the Polish judiciary. As usual, the official letter to the Commission was full of assurances that the government in Warsaw was ready to engage in constructive dialogue (Wroński 2017).

It is worth mentioning that the barely hidden contempt for Brussels has not been limited to the area of constitutional affairs. In August 2017, for example, the Polish government declared that it was not going to respect the injunction of the Court of Justice of the European Union (CJEU), which had ordered Poland to immediately stop the controversial and possibly unlawful logging of the protected Puszcza Białowieska forest (Osiński 2017; *TVN24* 2017). This is the first ever instance of a member state openly ignoring a CJEU injunction.

The structural weakness of the EU's rule-of-law safeguards

There are two major reasons why the PiS government can afford such defiance. First, it is determined to proceed with making the deep changes to Poland's constitutional

order, regardless of the political cost. Second, the PiS government has based its strategy on a very simple assumption, that both the Commission's Rule of Law Framework and Article 7 of the TEU are only paper tigers.

As a matter of fact, Article 7 of the TEU allows a situation where another member state, that is, not the one subject to the procedure, may decide that it is not ready for a full confrontation and is able to block the deterrence mechanism in its final phase. Only the first part of the Article 7 mechanism—that is, a formal confirmation by the Council that there is a clear risk of a serious breach by a member state of the values referred to in Article 2—can be triggered by a four-fifths majority of the member states. The crucial part of the deterrent—that is, the acknowledgement of the existence of a serious and persistent breach of the values, leading to the suspension of the voting rights of the member state in question—requires unanimity in the European Council.

The PiS government apparently believes that unanimity among EU member states does not exist in practice, and that there is at least one country willing to vote against the deterrent. Also, Warsaw does not take seriously the threat that any friendly veto could be circumvented by debating the cases of two countries at the same time, thus effectively stripping them of the possibility of protecting each other. The PiS's thinking might be that any collateral damage would be limited to naming and shaming, something with which it could live. Since neither the European Commission nor the European Parliament has formally asked to use the Article 7 mechanism at the time of writing, this author's assumption has not yet been tested in reality.

Nevertheless, irrespective of the final decision concerning the Article 7 procedure, one thing already seemed clear in September 2017: the existing provisions of the rule-of-law procedure have proved ineffective in the case of Poland. The rule of law in Poland has clearly been breached; this is something that the opinion of the Venice Commission alone states clearly enough. Yet, the EU's structures have been unable to stop this breach. It is therefore evident that the existing framework offers no real protection from a determined member-state government as long as it is able to rely strategically on the political support of at least one other member state. The 26 against 2 scenario is all that is needed to give the rogue state effective impunity. One should also note that not only have the defences turned out to be impotent, but they are cumbersome and time-consuming as well, especially if compared to the efficiency of a determined illiberal power.

Of course, one may argue that the European system has been taken by surprise. To put it bluntly: at the time when the safeguard mechanism of Article 7 was created, no one could have expected that the basic constitutional rule of law might be so openly contested by an EU member state. Some scholars point out that both Article 7 and the Rule of Law Framework were introduced so that governments and institutions did not need to resort to ad hoc solutions, such as the bilateral sanctions that were imposed on

Austria in 2000,³ which backfired politically (Kelemen and Blauberg 2016, 317). But clearly they were not intended to address a crisis of such intensity and bad will on the part of a member-state government. As Kochenov and Pech put it, the abiding nature of the rule of law was considered irreversible; hence Articles 2 and 7 of the TEU were considered largely symbolic. Article 2 was supposed to be a token of remembrance of the underlying fundamentals of liberal democracy, while Article 7 was to play a symbolically dissuasive role (Kochenov and Pech 2016, 1062–74). The same belief that no member state would dare to set a collision course with the very basic fundamentals of the community laid at the heart of the European Commission’s Rule of Law Framework. Apparently, the Commission believed that any rule-of-law crises to be addressed by the Framework could only result from unintentional mistakes, poor interpretations and so on, on the part of the government in question. At the same time, the Commission seemed to believe that governments would act in good faith and that they would be willing, in the end, to adhere to the aforementioned basic tenants of liberal democracy. It is highly probable that no one in Brussels expected a situation where a member-state government’s deeply nested and fully embraced intention was to act against the essence of liberal democracy.

The European Commission now seems to have understood the limitations of the Rule of Law Framework and the Article 7 mechanisms. This is why it has initiated an alternative attempt to incline the Polish government to change its stance: on 26 July 2017, it announced that it was going to explore, in parallel to the Rule of Law Framework, the classic infringement procedure (European Commission 2017). By doing so, the Commission is walking on a thin rope. Any infringement procedure needs to be related to a specific provision of the EU’s *acquis communautaire* (directive, regulation etc.), while the EU’s fundamental values, such as the rule of law, are only vaguely mentioned in the treaties. There is no specific EU directive on constitutional courts or the independence of judges. Nonetheless, the Commission has tried to find legal ways to use the ordinary infringement procedure as a kind of back-up plan. In the particular case of Poland, it has found two possible infringements in the Law on Ordinary Courts: discrimination on the basis of gender due to the introduction of a different retirement age for male and female judges (65 and 60 years respectively), and the conferment of undue discretionary powers on the Minister of Justice. According to the Commission, the former provision might be in conflict with Article 157 of the Treaty on the Functioning of the European Union and Directive 2006/54 on gender equality in employment; the latter supposedly conflicts with Article 19 of the TEU in combination with Article 47 of the EU Charter of Fundamental Rights (European Commission 2017). The advantages of the classical infringement procedure are obvious: no member state can block the procedure and an independent court decides on the potential sanctions.

³ In February 2000, 14 countries of the EU imposed diplomatic sanctions on Austria, in response to the far-right Freedom Party (Freiheitliche Partei Österreichs, FPÖ) joining the government—the first ever instance of a far-right group taking power in the EU. The decision, taken by 14 member states, without any solid legal backing, had an adverse effect: the popularity of the Freedom Party in Austria and anti-EU sentiments soared. The sanctions were dropped in September 2000. See Hervey and Livingstone (2016).

Conclusion

In the short term, faced with persistent contempt from the Polish government, the European Commission has no choice but to clench its teeth, take the flak and continue its Rule of Law Framework proceedings. At some point it needs to decide whether to ask the Council to trigger the Article 7 mechanism. As already explained, the final outcome is easy to predict, but this should not stop the Commission from acting. Moreover, it has some chance of success in the parallel infringement procedure, at least theoretically. It remains to be seen if the Commission's arguments fly in the CJEU.

It is probably too late to save Poland from several years of illiberal drift under the current PiS government, but this will hopefully only last for the duration of its time in office. However, it is not too late for the EU to reinforce its safeguards for any future use. The EU needs to have a truly effective system in place for protecting its founding values, principles and rules. If these are neglected, then the whole European project is worthless. The values of the rule of law, human rights and freedom of the press merit better protection. If the dissuading power is to be effective, it needs to be strengthened.

In the longer term, any meaningful change in the safeguard mechanisms would require a Treaty change, which is highly unlikely in the current political context. Having said that, the history of the EU tells us that nothing is set in stone: political circumstances may change, and a window of opportunity might eventually appear. The EU institutions and member states (those willing to protect the paramount importance of the rule of law) need to be ready with a concrete proposal when this happens.

This article suggests the following modification to Article 7 of the TEU: the decision-making mechanism described in the first paragraph (the Council determining a clear risk of a breach by a majority of four-fifths of its members, after obtaining the consent of the European Parliament) should apply to the second stage of the procedure (determination of the existence of a breach). This would still guarantee the democratic character of the decision to launch sanctions, but would make it more probable, should the EU ever face a comparable crisis. Needless to say, any modification to Article 7 would require the implementation of the full treaty-change procedure.

In parallel to some conceptual work related to a treaty change, the European Commission should act in two areas. First and foremost, the Commission should modify its Rule of Law Framework. Above all, strict deadlines need to be introduced. As it stands now, the Framework simply takes too long to be effective. In the case of Poland, it took the Commission more than a year and a half to move from phase one to phase three of the Framework. In that time the Polish government and its majority in parliament had steamrollered the country's Constitutional Tribunal, ordinary courts and part of the media. The construction of the Framework could remain the same; it is just the timing of the decisions that should change. Additionally, the Commission should consider inviting

the European Parliament, at least in a consultative role, to the Framework proceedings. Such an invitation would protect the Commission from easy-to-imagine accusations.⁴

Additionally, the European Commission should stop disregarding the communication angle of the current situation. So far, the picture shows great asymmetry. The government media in Poland (they no longer merit the name ‘public media’) portray the Commission and other EU institutions in a negative way. For example, in one of the many television debates related to the Commission’s proceedings, aired by the state-controlled TVP Info news channel, Vice-President Timmermans was called a ‘gendarme’ (*TVP Info* 2017). Some independent commentators claim that the state-controlled media have been purposely tasked with vilifying the EU, with the government’s blessing (Grochal 2017). In fact, the leader of PiS and the de facto extra-constitutional ruler of Poland, Jarosław Kaczyński, admitted in an interview that his party needed to control the media to influence public opinion (Cienski 2016). And in this particular case the Polish government is apparently trying to use propaganda to dilute public support for European institutions, which used to be relatively high in Poland.

And what has the European Commission’s response been to this propaganda onslaught? It has been timid, basically limited to some defensive declarations made at press conferences and to a few interviews with Vice-President Timmermans. To the best of the author’s knowledge, the Commission has not tried to reach the core public (in this case, Poles) directly with its own explanations and rationale. The Commission is wrong not to do so. In the author’s view, as long as it stays within the scope of its powers, the Commission is fully entitled to communicate its actions and their rationale directly to the relevant public, using all available and efficient means, including social media channels and so on. The independent, privately owned media in Poland do what they can, but the EU should not repeat its past mistakes and assume that mediation of its communications will do the job. In the dramatically different communication context of the twenty-first century, this is no longer the case (Niklewicz 2017, 61). By explaining its case directly to the Polish public, the Commission has a better chance of defusing a potential danger—a rally-around-the-flag phenomenon and a rise in nationalistic and anti-European sentiments, fuelled by the aforementioned government propaganda. Additionally, in its communications with the citizens, the Commission needs to stress that the proceedings target the government, not the country or the nation (Kelemen and Blauburger 2016, 319).

An old adage attributed to Prussian Field Marshal Helmut von Moltke the Elder says that ‘no plan survived contact with the enemy’ (Freedman 2013, 104). Although this rather militaristic parallel might seem exaggerated or inappropriate, its logic is correct. The mechanisms designed to protect the Union’s core values from being breached have failed: the EU should acknowledge this and move on. There are ways to fix the EU defences in the area of the rule of law. The EU institutions can still prove that they mean

⁴ Governments colliding with the European Commission tend to use the argument of ‘unelected bureaucrats imposing their will on democratically elected bodies’.

it when they say that they care about the essence of liberal democracy, the essence of this Union of Western democracies. That is what the rule of law is all about.

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