What Does the Spring Bring for the Rule of Law in Europe?

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A few weeks before the European Parliament elections the Commission took new interest in safeguarding the rule of law in Europe. On April 3, 2019 it started a new infringement procedure about the Polish judicial reform, this time focusing on the new disciplinary regime for judges. On the same day it also launched a reflection process "to strengthen the rule of law in Europe," in the hope of "setting out possible avenues for reflection on future action".

It is in the spirit of much needed reflection and – even more – hope about more robust future action against violators of (allegedly) shared European values that the recent opinion of the Venice Commission on Hungary's administrative court reform is worth a closer look.

Two laws passed in December 2018 establish a separate system of administrative courts, with a new chief justice, parallel to the existing judiciary that is under the direction of the *Kúria* (Supreme Court). The new administrative court system is complete with its own self-governing body, although vast managerial and oversight functions (including final decisions about individual judicial appointments) are reserved for the minister of justice. The bill was harshly criticized by Hungarian civil society organizations, prominently by the Hungarian Helsinki Committee from the start. The Venice Commission's opinion is worth attention not only because of the faults it finds with the new Hungarian laws, but also for the manner in which these findings are presented and communicated to a wider European audience.

One Step at a Time – Or a Preventive Strike?

The Hungarian minister of justice requested the opinion of the Venice Commission on two bills establishing a new administrative court system in November 2018. Yet, before the Venice Commission got to have its say, the twin laws were adopted in December 2018, with the new courts expected to commence their work in January 2020.

On April 1, 2019 the Hungarian Parliament adopted the set of amendments to the new law establishing administrative courts. The amendments were tabled by MPs for the ruling FIDESz party on March 12, 2019 in response to the draft opinion of the Venice Commission. The final opinion was published almost a week later, on March 18, 2019. This is an odd sequence of events, even if the Hungarian government – according to its own admission as expressed in the reasons supporting the bill – is motivated by its eagerness to engage in a constructive constitutional dialogue with the Venice Commission.

Reading 1: A Long List of Faults

It is possible to read the Venice Commission's opinion as an extensive list of requests for technical revision to the two laws.

The Venice Commission did not see the point for creating a separate judicial council for the administrative judiciary, as it appears to run counter to Hungary's constitutional commitment to a single judiciary [§ 44]. This body – the National Administrative Judicial Council (NJAC) – seems especially superfluous, as it "does not seem capable of acting as an effective counterbalance to the Minister of Justice" [§ 44].

There are several pinpointed corrections requested, all aiming to counterbalance (i.e. limit) the minister's "substantial prerogatives" over the administrative courts [§. 39, with a list of powers]. The Venice Commission was particularly upset when it saw that recruitment is not driven by the judiciary's self-governing body, but by the minister of justice[§ 51]. They had concerns about the composition of the Personnel Council of the NJAC, noting that although formally its composition met European standards, and found the addition for further "judicial" members advisable [§ 53]. Additional concerns were raised about the potential threats against judges serving on the Personnel Council exerted through disciplinary proceedings [§ 54].

The opinion found "most problematic" the provisions on the powers of the minister to change the ranking of candidates prepared by the personnel council at his discretion, without any explanation or recourse [§ 56]. The Venice Commission was particularly upset as a similar discretionary override power was already taken away from the President of the National Judicial Council through a similar dialogue just a few years earlier [§ 57]. The Commission was concerned about the lack of criteria for ministerial override as well as the complete lack of a review mechanism of the minister's decision. As a further point of sharp criticism the Venice Commission noted the lack of guarantees against a potential arbitrary decision by the minister to annul an entire round of recruitment altogether [§ 60].

The Venice Commission had several further requests for changes to reduce political influence over the new administrative courts, pointing out the overwhelming political discretion over initial staffing decisions when the new courts are set up [§§ 74-77], the dangers arising from the lack of clear rules for the qualification criteria of the President of the Supreme Administrative Court (SAC) [§ 97] or the potential for political influence over the entire court system through the powers and constitutional position of the President of the SAC [§ 101].

The amendments adopted in response to these recommendations address some, but not all of these concerns.

Reading 2: Generous Guidance and Encouragement

The Venice Commission took the government's haste in tabling a set of amendments to the new laws as a sign of "willingness to take into account the criticisms and

suggestions of the Commission" [§ 24]. This awkward situation may explain that despite the sharp criticism, the tone of the opinion is more congratulatory than the substantive remarks would otherwise warrant.

Furthermore, the Hungarian government's creative take on European constitutional dialogue aside, the Venice Commission was admittedly not in an easy position: several European countries have separate administrative judiciaries, some are even under the direction of the minister of justice. Thus, it is hard to point to a preferred (or non-preferred) "European" solution as such. Also, the Venice Commission is increasingly uneasy about judicial self-government structures it used to support, as in practice judicial councils invariably appear to be too easy to manipulate politically or simply produce deadlocks. Ministerial management coupled with political responsibility sounds like a way out of stalemates, at least in principle. Accordingly, the diversity of European experiences is reflected in generous passages in the opinion about various models of administrative justice [§ 28] and judicial independence, admitting parliamentary accountability adds implicit democratic legitimacy to ministerial management powers [§ 51].

The Hungarian government can take ample comfort in these passages: this reads like validation for the project as a whole, despite technical objections on the nitty-gritty.

Reading 3: What the Venice Commission Did Not (Wish to) See

The measures proposed by the Venice Commission to counter-balance the overwhelming management powers of the minister of justice could come from a good practice handbook on constitutional design and the rule of law. These can be grouped in four large clusters:

- improving parliamentary accountability,
- enhancing the elements of judicial self-government,
- encouraging clarity in statutory drafting (requesting more detailed rules),
- demanding review or appeal mechanisms against decisions affecting the fates of individual judges.

These are certainly sensible recommendations in abstract terms. However, at most points the Venice Commission did not consider how these would resonate in the prevailing Hungarian political context.

Parliamentary accountability mechanisms have a modest impact in a unicameral parliament where the government comfortably controls a 2/3 majority of the votes. There are hints in the opinion that its authors were well-aware of the manner in which political influence is carried in this system (e.g. passages on the powers of the president of SAC). Still this awareness did not trigger a less trusting take on the ministerial management model as a whole.

The Venice Commission's insistence on detailed legal rules as a means to prevent the arbitrary exercise of powers is of course understandable. Clear and accessible legal rules are undoubtedly essential for the rule of law. As is the demand for access to judicial review against decisions of public authorities affecting one's own fate. The Hungarian government certainly did its part: the review mechanism proposed against the minister's decision re-ranking a particular applicant is a formal complaint sent to the minister who is then meant to forward the complaint to the disciplinary courts of the judiciary for a decision on the merits. It is hard to say whether anyone should have expected much better of the masters of legal formalism in light of the track record of the past decade.

Legal technicalities aside, the opinion is particularly encouraging about the government's commitment to staff the new administrative courts in part with qualified civil servants: "having administrative judges from more diverse professional backgrounds is a positive point" [§ 34]. While this may sound promising in principle, in the local context the reading is less promising. The new administrative judges will not be hired from an abstract, professional, politically neutral bureaucracy. Since the spring of 2010 the Hungarian civil service underwent a strategic personnel reshuffle: the civil servants of the previous regimes were swept aside and replaced by new hires. The civil servants who will compete with judicial positions on the new administrative courts will arrive from this apparatus. And in their new positions they will continue to remain under the management of a cabinet minister, with admittedly little counter-balance from within the judiciary.

What is Next? Getting Serious About Interlocked Fates

First Vice-President Timmermans said in a LIBE hearing on March 21, 2019 that the European Commission is studying the Hungarian administrative court reform and the Venice Commission's take on it very closely. This is a potential new sideshow to the Article 7(1) TEU process that is pending before Council.

Regrettably, the Romanian presidency did not prioritize safeguarding the rule of law among its core objectives. The Article 7(1) TEU processes against Hungary and Poland were before the General Affairs Council in December 2018 and February 2019, with the next round scheduled for April 2019.

The LIBE hearing of March 21, 2019 was the result of several failed attempts by the European Parliament to seek an audience before the GAC to present the parliamentary resolution against Hungary. Instead, the Council requested a summary from the Commission. The unofficial legal position of the Council's Legal Service is that the Council's own rules of procedure leave no room for involving the Parliament in the Council's work. At the LIBE hearing Vice-President Timmermans made it clear that the Commission will not get involved in the power struggle between the Parliament and the Council, at the same time he expressed disapproval about using the Council's rules of procedure to undercut procedures prescribed in the Treaties (e.g. in Article 7).

This exchange in LIBE happened less than two weeks before the Commission decided to open a debate on strengthening the rule of law on April 3, 2019.

The stakes of safeguarding the rule of law were explained by several EU institutions in recent months via recalling that the Union legal order interlocks the fates of national constitutional orders in a unique manner.

In September 2018 the Parliament stressed that "any clear risk of a serious breach by a Member State of the values referred to in Article 2 TEU does not concern solely the individual Member State where the risk materialises but has an impact on the other Member States, on mutual trust between them and on the very nature of the Union and its citizens' fundamental rights under Union law." The interlocked fates theme was echoed by the CJEU in December 2018 in its order in the case of the Polish Supreme Court: the interim injunction was meant to protect the interests of "both the European Union and the Member State" in a case that involved "fundamental questions of EU law" [§ 25]. The Commission's new infringement action concerning the Polish judiciary invokes a similar sentiment: "The functioning of the preliminary reference mechanism – *which is the backbone of the Union's legal order* – requires national courts to be free to refer to the European Court of Justice any question for a preliminary ruling that they consider necessary, at whatever stage of the proceedings." (emphasis added)

In the Europe of interlocked constitutional fates the apparent consolidation of illiberal constitutional regimes in the EU legal order gives a certain urgency to safeguarding the rule of law.

This would require exceeding the familiar tropes and pathways of European dialogues about the rule of law as practiced for much of the last decade.

By now it has to be clear that the offenders use these opportunities for dialogue – such as the one the Hungarian government had with the Venice Commission – skillfully and strategically, to further their own illiberal agendas. The preemptive amendment tabled by the Hungarian government should not prevent the Venice Commission from assessing the amendments that were passed – and also seeing which recommendations were not complied with. And of course, there is no reason why the European Commission would need to wait and see how this dialogue unfolds between the Hungarian government and the Venice Commission.

European constitutional actors chaperoning the rule of law have markedly different mandates: the Venice Commission's opinion does not and should not replace the European Commission's own assessment, even if the latter takes into account the conclusions of the former. Inter-institutional dialogue cannot result in leveling down in the name of professional courtesy. Especially not at a step when the Venice Commission's legal analysis needs to be complemented by an assessment that reflects on the threats and risks these legal measures entail in their broader political, social and economic context.