EU Rule of Law Dialogues: Risks – in Context

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On January 16, 2020 the European Parliament passed a resolution about the state of the Article 7(1) TEU hearings with Hungary and Poland, noting with concern that "the reports and statements by the Commission and international bodies, such as the UN, OSCE and the Council of Europe, indicate that *the situation in both Poland and Hungary has deteriorated since the triggering of Article 7(1) of the TEU*" (para. 3, emphasis added). The resolution is a plea for a structured and more meaningful process in which each EU institution would exercise its existing powers in a meaningful and cooperative manner. The resolution emphasizes that the Article 7(1) TEU preventive process is one of risk assessment and one that may have actual – including budgetary – consequences (see esp. para. 6).

The resolution may of course be read as a desperate attempt by the newly elected Parliament to still be included once the process reaches the Council (i.e. a thinly veiled assertion of its institutional prerogatives). In addition to inter-institutional tensions, it calls attention to how the Council is visibly left behind when events are moving fast on the ground [this is why the resolution "calls on the Council […] to ensure that hearings under Article 7(1) of the TEU also *address new developments* and assess risks of breaches"], while it also urges the Commission "to make *full use of the tools available* to address a clear risk of a serious breach by Poland and Hungary of the values on which the Union is founded, *in particular expedited infringement procedures and applications for interim measures* before the Court of Justice" (para. 3.)

Hungarian PM Orban responded robustly to the resolution: he called EPP MEPs who voted to support the resolution "traitors" and mused aloud about the possibility of Fidesz leaving the EPP. This line of thinking has been revealed in early January 2020 after Fidesz and PIS leadership met in Warsaw to discuss the future of Europe.

Thus, it is high time to reflect on the potential of closer Polish-Hungarian cooperation on the state of the rule of law in Europe. The EP's January 16, 2020 resolution provides helpful pointers for this exercise.

The State of the Rule of Law Dialogue

The resolution confirms that the EU's rule of law dialogue reached new lows in late 2019: the national governments at the center of the rule of law crisis took advantage – again – of EU actors' trepidation.

After the Commission's attempt to reinvent its rule of law playbook in the summer of 2019 (around the time of the EP elections), it was for Council to up its game

on Article 7(1) TEU. Despite the Finnish Presidency's commitment to reviving the process, by September 2019 it was hard to get enthusiastic about the hearing in the General Affairs Council (GAC). After all, all a GAC meeting has to offer to the general public is a bland brief summary on the atmosphere of a meeting in the official minutes. This was the case until a freedom of information request by Professor Laurent Pech opened the doors of the GAC to all who still care about the rule of law crisis. This unexpected transparency raised the stakes before the December 2019 GAC meeting for the Hungarian government: it was time to show off those skills at subverting the Article 7(1) TEU process to the general European public.

And so it happened, that a month before the December 2019 GAC hearing, on November 12, 2019 the Hungarian government tabled a 200-page long bill (T/8016) to amend 76 acts of parliament in a new effort to rein in the judiciary. In terms of its contents the bill, inter alia, meant to finally create those administrative courts that the Hungarian government has been longing for (this time without a Supreme Administrative Court or ministerial supervision). Observers may recall that in December 2018 the Hungarian Parliament had adopted a law to install a separate branch of administrative courts, nominally within the Hungarian judiciary, yet placed under the direction of a separate, newly established Supreme Administrative Court (*Közigazgatási Fels#bíróság*) alongside the existing Supreme Court (*Kúria)* (Act no. CXXX of 2018). After sharp criticism from the Venice Commission and also from various EU actors, in May 2019 the Government first suspended the implementation of the new law, and then dropped it completely in the fall of 2019. The November 2019 bill was a new iteration of this old idea. And for good measure the new bill expanded national security screening for the senior ranks of the judiciary.

The Hungarian Parliament adopted the bill on December 10, 2019, ie on the very day the GAC hearing was meant to happen. Not all went to plan. Before it could become law, the President of the Republic returned the bill to Parliament to enable a few quick fixes that the Hungarian Parliament dutifully adopted on December 17, 2019. Note that this time around the Ministry of Justice did not turn to the Venice Commission for an opinion in the spirit of European constitutional dialogue. This may be because the whole point of the timing of the bill (a month before the GAC meeting) was to ensure that it would thwart any meaningful exchange in and outside the GAC on the state of the rule of law in Hungary on the political scene. Which self-respecting European government would dare to ask pointed questions about the reasons behind hyper-technical legal changes on numerous issues in the shadow of a new, 200-page-long judiciary bill that is pending before a national parliament?

There was little time to ponder this question, however, as on December 12-13, 2019 all attention shifted to the new Polish bill on the judiciary, adopted in response to the CJEU's November 19, 2019 judgment. In that judgment, reached upon a preliminary reference from Polish courts, the CJEU held that it was for the national courts to assess the independence of the Disciplinary Chamber of the Polish Supreme Court. Trusting national courts with an assessment of local conditions under EU law is of course not new for the CJEU. But in this case it turned out to be a fateful assignment, as the Polish government decided to attach new disciplinary

consequences to any such attempt in the new bill. The bill was condemned by the deans of 13 Polish law faculties. In addition, the bill was referred to the Venice Commission by the speaker of the Polish Senate.

One is kept wondering what difference would it have made if the Commission had brought this case itself, and with some expediency? And if the CJEU were to decide on the issues raised without tossing the ball back to the national courts?

Rescue Attempts from the CoE? The Venice Commission and the ECtHR

The Parliament's new resolution emphasizes that the Article 7(1) TEU is a process that is based on assessing risks, looking for a clear risk of a serious breach of the EU's founding values. The Parliament recalls that this process requires all EU institutions to use their powers to the best of their abilities. Based on its own plans and communications it is apparent that the Commission believes infringement action to be a tool in its toolkit to safeguard the rule of law. And while formally Article 7(1) TEU has nothing to do with a case on preliminary references before the CJEU, the consequences of a judgment in a matter that is at the heart of the crisis (politically tainted disciplinary measures against Polish judges) – somewhat predictably – fall within the series of events routinely described as the EU's rule of law crisis.

A decade into the events, risk assessment under Article 7(1) TEU can drawn on a impressive body of evidence, collected and interpreted by constitutional actors inside and outside the EU. Two more pieces were added to this puzzle in less than a week, in a manner that appears to take into account the facts before these CoE institutions as well as the broader context of the cases before them.

Consider the Venice Commission's urgent opinion on the latest Polish bill. E.g. para. 31:

> "Several provisions of the Amendments eliminate the competence of the Polish courts to examine whether another court decision was issued by a person appointed as a judge in compliance with the Constitution, European law and other international legal standards. These amendments are *seemingly* designed to have a nullifying effect on the CJEU ruling of 19 November 2019 and the Supreme Court judgment of 5 December 2019, and on other pending proceedings where the competence of the newly appointed judges has been challenged." (emphasis added)

This is then followed by the following observation in para. 37:

> "*the above provisions, taken together, aim at nullifying the effects of the CJEU ruling*. This is a serious challenge to the principle of the primacy of EU law. In the preliminary ruling of 19 November 2019, the CJEU clearly held that it was a duty of the referring court to examine the question of independence of the Disciplinary Chamber, in particular by looking at the composition of the selecting body (the NCJ). Polish courts dealing with the

consequences of the CJEU judgment of 19 November 2019 or confronted with an issue of judicial independence in a different context, will be put in an impossible position of choosing between following the requirements of the EU law as interpreted by the CJEU, or using legal avenues provided by the TFEU, and abiding by the new law." (emphasis added)

In brief, the Venice Commission was willing to consider the recent Polish bill in its broader context and considered the impact of this regulation on Polish courts as well as on the European legal order. The language is certainly tentative at times. What matters for the purposes of risk analysis (ie the exercise in Article 7(1) TEU) is that that these particular provisions are read in a broader context where legal tools of this kind are routinely used to undermine the rule of law in the very member state.

As a second example, take a recent judgment of the Grande Chamber of the ECtHR in *Magyar Kétfarkú Kutya Párt v. Hungary* (January, 20, 2019). The case involved a challenge against a fine that was imposed on the Hungarian Party of the Dog with Two Tails for encouraging voters to use an app to share anonymously with each other photos of invalid ballots cast in a 2016 referendum in Hungary. The question in the referendum posed by the Hungarian government: "Do you want the European Union to be entitled to order the mandatory settlement of non-Hungarian citizens in Hungary without Parliament's consent?" The government's preferred response was "no." Despite 3.362.224 voting "no" (ie. over 98 % of the respondents), the referendum was invalid as participation did not reach a 50 % threshold. The Party of the Dog with Two Tails encouraged its voters to cast invalid ballots in the referendum. It was fined for endangering the fairness of the election for exercising its rights against their purpose.

Hungarian courts did not believe that this case involved freedom of expression. The Grand Chamber of the ECtHR found that it did, and concluded that using an unforseeable limitation on freedom of expression violates Article 10(2) of the Convention. Importantly, the ECtHR found that this was about the integrity of democratic institutions and the rule of law:

- 100. When those legal provisions form the basis for restricting the exercise of freedom of expression, this is an additional element to be taken into account when considering the foreseeability requirements which the law must fulfil. In this connection the Court reiterates that free speech is essential in ensuring "the free expression of the opinion of the people in the choice of the legislature". …
- 101. In the Court's opinion, this kind of supervision naturally extends to the assessment of whether the legal basis relied on by the authorities in restricting the freedom of expression of a political party was foreseeable in its effects to an extent ruling out any arbitrariness in its application. *A rigorous supervision here not only serves to protect democratic political parties from arbitrary interferences by the authorities, but also protects democracy itself*, *since any restriction on freedom of expression in this context without sufficiently foreseeable regulations can harm* open political debate, the legitimacy of the voting process and its results and, ultimately, *the confidence of citizens in the integrity of democratic institutions and their commitment to the rule of law* (emphasis added).

The ECtHR did what we had seen from the Venice Commission: placed the facts of the case before it (i.e. a political prank by a joke party) into its broader context of regular restrictions of political dissent and the rights of political parties in a member state that is eager to use the law to build an illiberal democracy. The above statement may not make that much of a difference for the outcome of this case, but it reminds all about the foundations of the European human rights regime and the interconnections between these founding elements. These are the very same foundations that the risk assessment exercise of Article 7(1) TEU aims to protect.

What is Next?

As of January 2020 the Hungarian government, and PM Orban personally has been attacking courts, human rights defenders and the legal profession. His radio interview of January 17, 2020 responding to the European Parliament's resolution attacked not only the "traitors" of the EPP that supported the resolution, and George Soros, but the Hungarian court that awarded damages for racial segregation in a local school. As a by-the-by it also targeted those who assisted detainees in seeking compensation under the 2016 Hungarian law on compensation for inhuman detention conditions, a law adopted to implement an ECtHR pilot judgment against Hungary. The radio interview followed similar speeches along similar lines. A week earlier PM Orban said that the judgment awarding compensation for desegregation "hurts society's 'sense of justice' as the people of Gyöngyöspata see that the town's Roma community gets a 'significant sum without having to work for it in any way'."

Attacks of this kind against courts and the legal profession are already familiar in the Polish political discourse. This is a new development in Hungary, though few will be surprised in light of more intense recent cooperation between the political elites of these already friendly countries.

The real question is what various EU actors wish to do in the face of such a blatant attack against the rule of law — beyond continuing the Article 7(1) TEU dialogue as if nothing has happened. The Parliament's resolution is asking for more: it is asking for actual risk assessment that is context savvy, instead of focusing of past events and it is asking for responses from the EU that reflect the stakes, including budgetary conditions and consequences. Hardly a slow start for a new year!

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