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Laurent PECH
Sébastien PLATON

Systemic Threats to the Rule of Law in Poland: Between Action and Procrastination

"We cannot have one Europe that debates every decimal in every budgetary issue of every country and which decides to do nothing with EU Member States that behave like Poland or Hungary regarding issues linked to university and knowledge, refugees and fundamental values."

Emmanuel Macron, 27th April 2017 [1]

"We want to overhaul the legal system because this is what the Poles want. The attempts made to discredit the Polish government via allegations that the rule of law is not being respected, are lies."

Beata Szydlo, 8th September 2017 [2]

In his speech on the State of the Union on 13th September last the President of the European Commission, Jean-Claude Juncker, recalled that "[a]ccepting and respecting a final judgment is what it means to be part of a Union based on the rule of law ... To undermine [the judgments of the Court of Justice], or to undermine the independence of national courts, is to strip citizens of their fundamental rights. The rule of law is not an optional in the European Union. It is a must. Our Union is not a State but it must be a community of law."^[3] This implicit criticism of the Hungarian and Polish authorities follows the fierce, not to say, unacceptable response by the Hungarian government following the judgment rendered by the Court of Justice in the refugee relocation quota case,^[4] and the approval of a bill in Poland, which, without the veto of the Polish President last July, would have enabled the revocation and forced retirement of all of the judges of the Polish Supreme Court.^[5]

Although many voices have for quite some time called for the European Commission to trigger Article 7 TEU with regard to Hungary, or at least to subject it to the new framework to strengthen the rule of law adopted by the Commission in

2014, Poland is the only Member State which has been subject to this new framework since January 2016 following the adoption of measures regarding the Constitutional Court and the media. If we consider the Polish case alone, the Commission's initial concerns have unfortunately proven to be entirely justified. Indeed the Polish government and parliament – two institutions controlled by the "Law and Justice" Party (a party whose initials in Polish are PiS and whose name which George Orwell would without doubt have found particularly amusing) since the parliamentary elections of October 2015 -- have started a process to take control or to systematically eliminate all checks and balances or any potential source of opposition;^[6] and to do so while blatantly violating and repeatedly the Polish Constitution and rejecting, in the most discourteous manner, the concerns and objections expressed by the institutions of the EU, the Council of Europe, the United Nations about also those expressed by other governments and many non-governmental organisations.

The multiple, blatant and continuous violations of the principles at the heart of the rule of

[1] M. Verrier, Interview with Emmanuel Macron, *La Voix du Nord*, 27 April 2017.

[2] Quoted by M. Strzelecki, "Poland Starts Ad Campaign to Back Court Overhaul Disputed in EU", *Bloomberg*, 8 September 2017.

[3] Underlined in bold in the text: Speech on the State of the Union 2017, speech/17/3165, 13 September 2017.

[4] The Hungarian Foreign Affairs Ministers deemed it appropriate to speak of a « rape » of EU law by the Court of Justice: B Pivarnyik, "Hungary loses asylum-seeker quota lawsuit", *The Budapest Beacon*, 6 September 2017.

[5] The European Commission's Recommendation 2017/1520 adopted on 26 July 2017 offers an exhaustive analysis of this bill.

[6] For a complete analysis of the process of "rule of law backsliding" which occurred in Hungary prior to it happening in Poland, see L. Pech and K. Scheppele, "Illiberalism Within: Rule of law Backsliding in the EU" in *Cambridge Yearbook of European Legal Studies* (to be published this month).

law concept[7] by the Polish authorities have led the Commission to adopt a total of three recommendations based on the mechanism adopted in 2014. The European Parliament also expressed its concerns during four debates and via the adoption of two resolutions in 2016.[8] As for the Council, it twice accepted the Commission's request to discuss the situation of the rule of law in Poland; first on 16th May 2017 and a second time on 25th September 2017, an unprecedented move in the history of the Council.

The content of the 2014 Rule of Law Framework and the three Commission recommendations is briefly described below. A summary of the main objections expressed by the Polish government and a critical analysis of these is subsequently offered. In the light of the persistent refusal on the part of the Polish authorities not to even recognise the Union's right to review the situation or accept the existence of any rule of law problems in Poland, this article concludes with an analysis of the Commission's palpable reluctance to trigger the procedure provided in Article 7(1) TEU notwithstanding its repeated warnings that there is a systemic threat to the rule of law in Poland. This reluctance no longer seems defensible and the time has come for all the key EU actors to get a grip on the problem and act accordingly.

1. A BRIEF DESCRIPTION OF THE NEW RULE OF LAW FRAMEWORK[9]

The rule of law is one of the fundamental values upon which the European Union is based according to Article 2 TEU. Moreover, beyond this proclamation of the Union's common rules, the importance of the respect of the rule of law by the Member States is, strictly speaking, vital for European integration. The interconnected regulatory and judicial area of the European Union is indeed based on the principle of mutual trust and on the absolute need for mutual recognition of judicial decisions – principles which are difficult to protect if a Member State is no longer governed in compliance with the principle of the rule of law. Finally, the Union's legitimacy and credibility are undermined when its institutions cannot or are no longer willing to effectively uphold its values within its

territory whereas it is supposed to promote them in its relations with the wider world. Whilst the European Union is vigilant over the respect of democratic values of candidate countries, it remains however relatively powerless vis-à-vis any possible backsliding on the part of its Member States in this area – if we ignore the “nuclear” weapon of Article 7 TEU which may result in the suspension of the rights of any contravening States. [10] The EU's impotence became evident when Viktor Orbán came to power in Hungary with the benefit of a strong parliamentary majority. His party was able to modify the country's Constitution and adopt a new one in 2011, thereby causing a great deal of concern from the point of view of the respect of the Union's fundamental values. To remedy this powerlessness, the European Commission adopted a communication in March 2014 which resulted in the adoption of a “new European framework to strengthen the rule of law” across the Union. This mechanism aims to deal more effectively with any situation in which there is a “systemic threat to the rule of law” that might occur in any given Member State. This mechanism comprises three phases and can be summarised as follows:

The first phase is that of assessment. In this phase the Commission is supposed to bring together and examine all useful information and assess whether there is any clear evidence of a systemic threat in the relevant Member State. Although the Commission retains its role as the guardian of the Union's values, the 2014 Communication provides that the Commission can call upon the expertise of third parties if necessary. The expression “third parties” covers other EU bodies – particularly the Agency for Fundamental Rights – as well as the Council of Europe (Venice Commission) and even judicial networks such as the Network of the Presidents of the Supreme Judicial Courts of the European Union. In the event of a proven threat, an opinion regarding respect with the rule of law is to be addressed to the national government.

The second phase is that of recommendation. In the event of appropriate measures not being taken, the Commission may address a rule of law recommendation to the authorities of the country in question, with the Commission having the option to recommend any measure which may help solve the situation within a

[7] According to the Commission the six following principles can be deemed to constitute the consensual and minimum core of the concept of the rule of law in Europe : (1) legality, which supposes a responsible, democratic, pluralist procedure in enacting laws; (2) legal certainty; (3) prohibition of arbitrariness of the executive powers; (4) independent, impartial courts; (5) effective judicial review including respect for fundamental rights; (6) equality before the law. See Commission Communication, a New EU framework to strengthen the rule of law, COM (2014) 158, p. 4.

[8] European Parliament resolution of 13 April 2016 on the situation in Poland (2015/3031(RSP)) ; European Union resolution of 14 September 2016 on recent developments in Poland and their impact on fundamental rights that are part of the EU's charter of fundamental right (2016/2774(RSP)).

[9] For a detailed study, see D. Kochenov and L. Pech, "Upholding the Rule of law in the EU: On the Commission's 'Pre-Article 7 Procedure' as a Timid Step in the Right Direction", Robert Schuman Foundation, European Issue n° 356, 11 May 2015.

[10] See *infra* Section 5.

specific timeframe.

The third and final phase is that of follow-up. Should there be no satisfactory follow-up to its recommendation, the Commission may ask the Council (if there is a threat) or the European Council (in the event of systemic violation) to implement Article 7 TEU.

2. THE THREE RECOMMENDATIONS ADOPTED BY THE EUROPEAN COMMISSION

On 13th January 2016 the European Commission announced that it was going to assess the situation in Poland in line with the Rule of Law Framework. This decision was driven by two reasons: the refusal by the Polish authorities to submit to the decisions of the Constitutional Court and the bill regarding State radio/television. Because there was no real action by the authorities to assuage its concerns, the Commission issued an opinion on 1st June 2016 (not made public at the time), to which the Polish authorities were invited to respond. Failure to do so on the part of the authorities led the Commission to adopt and publish its first ever rule of law recommendation on 27th July 2016. The Commission's First Vice-President deemed that the threats to the rule of law continued to exist notwithstanding the dialogue which had been ongoing since January and he put forward five concrete measures to be introduced by the authorities within a three-month time-span. Amongst these, the most important was probably the total implementation by the Polish authorities of the decisions taken by the Constitutional Court which the government had refused to publish.

Rather than any desire for dialogue, the Polish government's response to the first recommendation betrayed hostility and a dismissive attitude.^[11] At the same time the government continued to tighten its grip over the Constitutional Court via a bill dated 22nd July 2016 which seriously limited the Court's independence and which was criticised by the Venice Commission for Democracy via the Law, a body of the Council of Europe, in an opinion dated 14th and 15th October 2016. If we strictly follow the logic of the 2014 Communication, which was designed as a "pre-Article

7" procedure, Poland's attitude should have led the Commission to propose the activation of Article 7 TEU. Instead of doing so, however, the Commission decided to address a second recommendation to Poland on 21st December 2016, a stage that the 2014 Communication on the Rule of Law Framework did not provide for explicitly. The Commission justified the adoption of this "additional" recommendation by the need to take into account major problems that remained without answer and by the emergence of new causes for concern since the first recommendation. They were mainly linked – still and always – to the lasting incapacity on the part of the Constitutional Court to fulfil its mission to review the constitutionality of acts adopted by the Parliament.

In this second recommendation the Commission added three new grievances against the Polish authorities: the adoption, since the first recommendation, of three new bills designed to interfere with the functioning of the Court; the appointment in irregular conditions of an interim president chosen by the PiS in replacement of the former president whose mandate had come to an end, and the setting aside of the normal procedure to nominate the president of the Court. The Commission correctly deduced from this that there was a serious threat to the legitimacy of the Constitutional Court and as a result, the effective nature of constitutional review in Poland, following which it gave Poland two months to remedy the situation whilst brandishing the threat of Article 7 and making clear that the adoption of this second recommendation would not prevent the direct triggering of the said article if there was a sudden deterioration of the situation.

Not only did the Polish government choose to ignore the said recommendation, it also ignored the specific request by the Commission not to appoint a permanent president of the Court. The behaviour of the Polish government, which clearly indicated that it did not want to have any dialogue with the Commission should have led it – even more strongly than after the first recommendation – to trigger Article 7(1) immediately. However the Commission decided instead to refer the problem to the governments of the Member States, which one might have interpreted – if one is optimistic – as a strategy to bolster its position before proposing

[11] See *infra* Section 3

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a triggering of Article 7 or – if one is pessimistic – as a further example of procrastination.

On 16th May 2017 during a Council meeting, the national governments however simply insisted on the importance for the Commission and Poland to continue a dialogue even though this dialogue had then already taken the form of a monologue. In the absence of progress, the Commission issued a third recommendation on 26th July 2017. This third recommendation enabled the Commission to update its previous recommendations by adding four more grievances, i.e. the four bills whereby, after having subdued the Constitutional Court, the Polish government extended its grip over the rest of the judiciary: the bill on the Supreme Court, the bill on the National School of Judiciary and Public Prosecution, the bill on the Ordinary Courts Organisation and the bill on the National School of Judiciary. Taken together these bills allow the government to dismiss all of the judges in the Supreme Court, to replace the presidents of lesser courts and to control the entire system used to appoint judges. The unexpected veto by the Polish President on 24th July did not dissuade the ruling party, which has pledged to put forward the vetoed bills again^[12]. In the Commission's opinion the entry into force of the bills mentioned above would structurally damage the independence of the judiciary in Poland and would have a concrete and immediate impact on the independent functioning of the judiciary as a whole. Frans Timmermans declared that the triggering of Article 7 was imminent, but to date the Commission is yet to do so. Instead the Commission has opted for infringement actions against the bill on the Ordinary Courts Organisation, on the grounds that it would violate both the principle of non-discrimination between men and women (due to the different retirement age according to the gender of the judges) and the independence of the judiciary (due to the possibility for the government to replace the presidents of the ordinary courts). This path may allow for the eventual adoption, if necessary, of hard, financial sanctions on Poland without any Member State having a right to veto in this context. However, based on past experience and the low impact infringement actions have had on Hungary, optimism is not warranted when it comes to the likelihood of

bringing Poland back to the path of the rule of law on the sole basis of multiple infringement proceedings.

3. THE ARGUMENTS RAISED BY THE POLISH GOVERNMENT TO JUSTIFY THE NON-RESPECT OF THE COMMISSION'S RECOMMENDATIONS

3.1 The lack of any legal base

In response to the procedure triggered by the Commission the Polish authorities have regularly challenged the competence of the Commission to monitor respect for the rule of law in a Member State. This is what we should probably deduce from the assertion by several members of the executive, notably Foreign Minister Witold Waszczykowski^[13], and the Polish President Andrzej Duda^[14], who have suggested that the European Commission has gone beyond its remit. This argument whereby the Commission would be exceeding its powers, which seems to imply, in more specific legal terms, that the Commission is acting *ultra vires*, would have been probably the main basis for the eventual initiation of judicial proceedings, the threat of which was made by Jarosław Kaczyński, the leader of the PiS who is often presented as the country's *de facto* leader, before the Commission had even issued its first opinion (then unpublished) in May 2016.^[15] In light of the jurisdiction of the Court of Justice, however, such a legal action would have to probably take the form of an annulment action targeting one of the acts adopted by the Commission as part of the Rule of Law Framework procedure (for example a recommendation), which would then also allow the Polish government to raise, indirectly, the alleged unlawful nature of the 2014 Communication.

3.2 The exclusive competence of the Member States regarding the organisation of the judiciary

Beyond the issue of the Commission's power to monitor the rule of law situation in Poland, the argument of the Union's competence as a whole was also raised by the Polish authorities in different ways. Hence, in a press release published after the first recommendation on 27th July 2016, the Polish Foreign Minister deemed that the Commission had ignored the principles

¹². Which was done last month. Instead of an immediate purge of the Supreme Court, the draft bill would allow President Duda to achieve the same result but over a two to three year period, in a rather obvious breach of the Polish Constitution which is however hardly an obstacle anymore following the effective capture of the Constitutional Court by the ruling party...

See M. Broniatowski, "Poland's Duda acts to avoid head-on clash with Brussels", *Politico*, 25 September 2017; P. Pacula, "Polish president disappoints EU on judicial reform", *EUObserver*, 26 September 2017.

¹³. M. Karnitschnig, « Poland has a problem—with Frans Timmermans », *Politico*, 29 mai 2017.

¹⁴. « The European Commission has overstepped its bounds », *cité in J. Cienski*, « Polish president tells opposition, Brussels to back off », *Politico*, 21 déc. 2016.

¹⁵. J. Cienski and M. de La Baume, "Poland and Commission plan crisis talks", *Politico*, 30 May 2016.

of objectivism (sic), of the respect of sovereignty, subsidiarity and the respect of national identity, and had interfered in Poland's domestic affairs.[16] Invocation of the principles of subsidiarity (Article 5(3) TEU) and the respect of national identity (Article 4(2) TEU) refers rather less to a lack of competence on the part of the Union than to an excessive use of them. To be more precise, and with closer reference to the infringement procedure initiated by the Commission against Poland regarding the reform of the organisation of the judiciary, an advisor to the Foreign Minister deemed that the Commission had obviously breached the principle of conferral laid out in Article 5(1) and (2) TEU[17] – which is tantamount to saying that the EU has no competence in terms of how judicial power is organised.

3.3 Compliance of the “reforms” with “European standards”

As regards the substance of the Commission's recommendations, the Polish authorities have tried to assert that the reforms initiated in Poland comply with European standards, as they result from the European Convention on Human Rights, as well as the soft Law of international organisations,[18] and went as far to cite the Venice Commission in this respect.[19] To this they sometimes add an argument of comparative law, for example when the Polish government justifies the decision to appoint the members of the State Judicial Council by the Parliament, referring to Spain and Germany as examples.[20] Using the criticism levelled at the government based on the principles at the heart of the right to a fair trial to the benefit of the government, this advisor also deemed that the reform was necessary to respond to the European Court of Human Rights' rulings against Poland for unreasonably lengthy proceedings and to put an end to nepotism and corruption which, in his opinion, have been poisoning the Polish legal system since the end of the Communist period.[21]

3.4 The political nature of the criticism

Many PiS members have criticised the Commission's actions against Poland as being politically motivated

and that they ignore the “facts”. This accusation was notably made by Jarosław Kaczyński,[22] and Prime Minister Beata Szydło.[23] Sometimes Frans Timmermans is blamed personally, whether this is in interviews with press agencies[24] or in press releases.[25] The Hungarian Prime Minister made his own contribution maintaining that this supposedly political attack would be motivated by the EU's dislike for the intergovernmental notion of the EU that he would share and defend with the Polish government.[26]

4. DISCUSSION OF THE POLISH GOVERNMENT'S ARGUMENTS

4.1 The lack of any legal base

The argument that the Commission has no legal basis is hardly convincing if we recognise that the procedure adopted by the Commission in March 2014 is a “pre-a) Article 7 procedure”.[27] It can now be said that the power of the Commission to supervise the respect of the values of Article 2 TEU by the States on the one hand, and that of adopting an organised procedure to this end on the other, are both quite logically the result of the fact that the Commission is one of the institutions with the power to trigger the procedure provided in Article 7 TEU.

Article 7 TEU specifies that the proposed acknowledgement of a risk of serious infringement of the values in Article 2 TEU, whoever the author of this proposal may be, has to be reasoned. It would be difficult to understand how the Commission, should it be the author of such a proposal, could properly substantiate without the power to monitor respect for the values laid down in Article 2 by the States. Such a reading is in line with the Commission's policy based on Article 49 TEU. The Commission drafts “supervisory” documents to this effect on a regular basis assessing the progress made by the EU candidate countries in relation to the values included in Article 2, without Article 49 having to make any explicit provision for this power.

Since the Commission has the power to trigger Article 7 TEU it is logical also to recognise that it has the power

16. See MFA statement on the Polish government's response to Commission Recommendation of 27.07.2016.

17. Quoted in « Polish government adviser: Commission position is 'grotesque' », *Entretien avec Euractiv*, 3 août 2017.

18. See MFA statement following the European Commission's Recommendation of 26 July 2017 regarding the rule of law in Poland.

19. See MFA statement on Poland's response to European Commission's complementary Recommendation of 21 December 2016.

20. C. Davies, « Polish judges urged to 'fight every inch' for their independence », *The Guardian*, 26 février 2017.

21. « Polish government adviser: Commission position is 'grotesque' », *Entretien avec Euractiv*, 3 août 2017.

22. « Poland's Kaczyński says EU's call to halt court reforms 'political' », *Reuters*, 19 July 2017.

23. A. Rettman et E. Zalan, « Hungary and Poland defy EU authority », *EUObserver*, 22 septembre 2017.

24. « EU's Timmermans says Poland not budging on rule of law, signals more steps », *Reuters*, 31 août 2017.

25. See for example : MFA statement on Poland's response to European Commission's complementary Recommendation of 21 December 2016.

26. « We're saying: 'Less Brussels, more member states'. (...) Our standpoint is the reason why someone has taken aim at Poland and launched political attacks », cité in A. Rettman et E. Zalan, “Hungary and Poland defy EU authority”, *EUObserver*, 22 septembre 2017.

27. V. Reding, *A New Rule of Law Initiative*, conférence de presse, Parlement européen, 11 mars 2014.

to clearly define the practical means for the exercise of its power to activate Article 7. Such a power may also be said to be inherent to any administrative authority that enjoys discretionary power. In France administrative law, this takes the form of administrative instructions (circulaires) issued by relevant bodies. The Commission's power to issue communications is the EU law manifestation of this inherent power. Viewed in this light, the pre-Article 7 procedure introduced by the Commission may also be said to promote legal certainty in that it provides early notice to the Member States as to why the Commission might eventually decide to trigger the Article 7 procedure.

4.2 The exclusive competence of the Member States regarding the organisation of the judiciary

The argument whereby the EU lacks competence regarding the judicial system is not without basis. It cannot be denied, on reading the Treaties, that the EU has no general, direct competence in this area. In 2014 already, when the Commission adopted the Communication on the Rule of Law Framework, the Council's Legal Service deemed that the Framework put forward by the Commission "was not compatible with the principle of conferral which regulates the definition of the Union's competences".[28] However, the European Union's system of competences is complex, flexible, teleological and dynamic. In absence of competence in terms of the legal system the Union's action can be founded on a competence in terms of guaranteeing the rule of law. In particular this can be justified by the fact that the rule of law is both a value, a goal and one of the Union's functional necessities. [29]

The proclamation of the rule of law as a Union value can be found in Article 2 TEU, a provision which is specifically dedicated to the values on which the Union is based. It is re-iterated in the preamble of the EU's Charter of Fundamental Rights (2nd Recital) and it features in Article 21(1) TEU on the Union's action in the international arena, as one of the "principles which guided its creation, its development and its enlargement." The Member States' obligation to respect the EU's values is asserted both in Article 49 TEU,

which makes it a condition for membership, as well as in Article 7 TEU which makes it a possible reason for suspending a Member State's rights.

The promotion of the rule of law is also one of the European Union's goals that results from Article 3(1) TEU ("The Union aims to promote peace, its values and the well-being of its peoples") and which is also an obligation for its institutions in virtue of Article 13(1) TEU ("The Union has an institutional framework that aims to promote its values"). And in virtue of the loyal cooperation principle set out in Article 4(3) TEU, "the Member States facilitate the completion by the Union of its task and refrain from any measure that might jeopardise the attainment of the Union's objectives."

Finally the respect of the rule of law by the Member States is one of the Union's functional requirements for several reasons. On the one hand the legitimacy of the decision-making process of the European Union depends on this, taking into account the role given to the Member States in this area via the intermediary of the European Council and the Council of the European Union where they sit. On the other hand, the European legal area is one that is transnational, in which the acts of a Member State's public power can impact other Member States (judgments, European arrest warrant, certain administrative decisions etc.) The keystone of this kind of area, as noted by the Court of Justice,[30] is mutual trust that the States grant each other, notably in terms of the respect of fundamental rights. This trust is obviously shaken if the democratic standards are no longer respected, even if it is by just one of the Member States. Ultimately the respect of the EU's values is a functional necessity to the Union from a "vertical" point of view, i.e. in the relations between the EU's institutions and its Member States. In particular, as part of the preliminary ruling procedure, as noted by Frans Timmermans,[31] it is the Court of Justice that finds itself in direct relation with the national courts, on whose independence it has to be able to count and which comprises one of the conditions for a State body to be considered as a "jurisdiction" in the sense of the said procedure.[32]

4.3 The compatibility of the Polish "reforms" with "European standards"

28. Legal Service of the Council of the European Union, Opinion no 10296/14, 14 May 2014, para 28.

29. On this issue see C. Hillion, "Overseeing the rule of law in the European Union. Legal mandate and means", Swedish Institute for European Policy Studies, European Policy Analysis, 2016-1.

30. CJUE, avis 2/13 du 18 déc. 2014 relatif à l'adhésion de l'Union européenne à la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales.

31. See in particular his declaration during the debate over the situation of the rule of law and democracy in Poland on 14th December 2016 at the European Parliament: "The separation of powers is essential for the functioning of our internal market, because the Court of Justice in Luxembourg has to be sure that, in its direct relationship with courts at the national level, there is no interference of the other branches of power. Judicial independence is of the essence for the whole system to be able to function, including the functioning of the internal market".

32. On this issue see and on the possibility of the Court of Justice being able to reject preliminary issues on the part of a national court that is not independent: D. Sarmiento, "The Polish Dilemma", Blog Despite our Differences, 17 July 2017.

The compatibility of the “reforms” undertaken by the Polish government with European standards is, to say the least, doubtful. Some measures, such as the refusal to publish the decisions of the Constitutional Court or the draft bill that aimed to dismiss all of the judges in the Supreme Court clearly cannot be defended, and to suggest that they are supposedly compliant “European standards” in defence of this type of behaviour, which would only be valid in an authoritarian regime, would pass as a bad joke if the context was not as serious.

The European Commission’s analysis is incidentally supported by other international institutions. In an opinion delivered on 14th and 15th October 2016 the Venice Commission deemed that although the bill of 22nd July 2016 regarding the Constitutional Court had been improved “the effect of these improvements is very limited, since many other measures in the bill that has been adopted will significantly delay or prevent the Court’s work and make its work ineffective, thereby compromising its independence, as there will be excessive legislative and executive supervision over the way it functions.”[33] In the same opinion it added that “without any constitutional basis, by refusing to publish its decisions, the Prime Minister’s chancellery has given itself the power to control the validity of the decisions taken by the Constitutional Court.”[34]

The European Network of Councils for the Judiciary of the Member States of the European Union, a body which brings together the national independent institutions in charge of protecting the independence of judges, deemed in an opinion dated 30th January 2017 that the initial drafts of the bill focusing on the reform of the judicial system in Poland had not been the subject of any significant consultation with the Polish Council of Judges; that this reform implied the interruption of the mandate of the members of the said Council, contrary to its independence; that the appointment of the members of this Council by Parliament was not in line with the Network’s standards and that the new organisation provided for by the Council gave an excessively important role to political power in the selection and appointment of the judges.[35] This analysis was repeated more recently in a press release dated 17th July 2017,[36] which adds that this bill,

if taken together with the second bill approved by Parliament, and which gives the Justice Minister the power to dismiss and replace the president of the court within a six month time span after its entry into force, will necessarily lead to the erosion of the independence of Polish justice and would necessarily impact the rule of law. The Network’s administrative council also clearly criticises the draft bill dated 12th July as it would result in the disbanding of the Supreme Court and the forced retirement of its members. Finally we should point out that the “Declaration of Paris” adopted on 9th June 2017 by the General Assembly of the Network, in which it is stressed that the “judicial reforms in force and drafted in Poland continue to be a source of serious concern, in that they may change significantly the separation of powers, which is vital for the maintenance of the rule of law.”[37] This declaration that came from a consensus of many independent national institutions responsible for the guarantee of the independence of magistrates, mechanically weakens (and this is a euphemism) the argument of comparative law which the Polish authorities often use, a practice that again recalls the “Hungarian precedent” in which the party in office did not hesitate to justify its authoritarian reforms on the basis of a selective, if not false analysis of foreign examples.

4.4 The political nature of the criticism

Frans Timmermans has denied the political nature of the criticism that he addressed via the Commission to Poland. Hence in a letter addressed to the Polish people on 7th December 2016 in the *Publicystyka*,[38] he maintains that the issue of the rule of law is not a political one and that the Commission fully respects the right of the Polish government to implement its political programme. However, the government purposely aimed to confuse legislative mandate and the right to flout the Polish Constitution, as well as its international obligations. Ensuring the respect of the standards of the rule of law by the Member States is a vital function of the European Union and the legal analysis developed by the Commission in its three recommendations is, in our opinion, as sound as it is convincing. However if we absolutely want to find any political tint in the Commission’s action, it has to be said that the

33. Venice Commission, Opinion^o 860/2016 on the law governing the Constitutional Court, paras 122-123.

34. *Ibid.*, para 126.

35. Opinion of the ENCJ Executive Board, 30 January 2017.

36. Statement by the Executive Board of the ENCJ on Poland, 17 juill. 2017.

37. The Paris Declaration on resilient justice, 9 June 2017.

38. R. Heath, « Timmermans Takes Poland complaints to the people », *Politico*, 8 December 2016.

difference in treatment between Hungary and Poland is not the most coherent, and can be explained by a strategic and political choice. It remains nonetheless that the European Commission was right to enable its framework on the rule of law as far as the situation in Poland is concerned. All of its recommendations to remedy the systemic threat that weighs over the rule of law in Poland can also be deemed perfectly in line with the reality of this threat. It does seem to us that it is more than high time for the Commission to move on to the next stage in view of the rhetoric and action taken by the Polish authorities since January 2016.

5. THE NEXT STAGE: ARTICLE 7 TEU?

It has taken nearly 18 months of evident disrespect of its recommendations, outrageous comments made against it and the approval of a legislative package authorising a "judicial purge", not to mention a multitude of other laws that have enabled the restraint of the public media, the civil service, the police force and even the army[39], for the European Commission to resign itself to making an open threat to trigger the procedure provided for in Article 7(1) TEU. According to this provision, the Council may address recommendations to the country in question if a 4/5 majority of the governments of the Member States agree on the existence of a "clear risk of serious violation" of the common values laid down in Article 2 TEU, which include the rule of law.

Why this reluctance, whilst the rhetoric of the Polish leaders continues to be particularly worrying[40] and multiple, continuous, deliberated infringements of the rule of law have occurred since January 2016, not to mention the blatant non-respect of the three recommendations adopted by the European Commission?[41] Several reasons are regularly offered to justify not triggering Article 7, which is known informally as 'the nuclear weapon or option', a rather unfortunate label since it seems to encourage its inactivation, whilst it comprises two distinct phases: a so-called preventive procedure (Article 7 (1) TEU) and a so-called corrective procedure (Article 7(2) TEU).

The first reason commonly used to justify not using Article 7 is that the latter would have a counter-

productive effect. The "Austrian precedent" is often mentioned in virtue of this. For Frans Timmermans, Article 7 "is a measure of last resort, not to be ruled out of course, but I dare to hope that we would never allow a situation to escalate to the point that we would have to use it. I believe that the example of Austria, from the time when Jörg Haider's party took office, weakened the Union's ability to respond in situations like this. It was a political response that was totally counterproductive and since then the Member States have been reluctant to express their disagreement with other Member States on this basis." [42]

However, we can contest this analysis. In brief, the decision to suspend diplomatic relations with Austria following the introduction of a government coalition with the far-right party then led by Jörg Haider, was not taken by the Union but by the Member States acting outside of the European legal framework. Moreover, this initiative was taken without any measure or action to suggest that there was a "clear danger of a serious infringement" of the common fundamental values. In no way can the situation in Austria in 2000 be compared to the present situation in Poland. Indeed, we have a long list of evident, repeated violations of the rule of law, and from a political point of view, we should not forget the repeated, mass demonstrations by many Poles, whether this was last July in protest against the bid to undertake a judicial purge or in December when the party in office tried to limit media access to parliament. Not only does placing emphasis on an eventual nationalist backlash add an unplanned condition to Article 7 (the latter does not make any mention that its launch has to be conditioned by opinion polls or the danger of seeing the government in office play the card of a "country under siege"), it shows that the EU is more concerned about the response of those who flout our common values than the fate of those who are the victims of this and who are asking for the EU's intervention and protection. This kind of logic is absurd because it aims to appease those who have no respect for the rule of law while those fighting for the respect of this principle are abandoned on the wayside.

Another argument we have become accustomed to hearing regularly is that the "Hungarian veto" would

39. The private media sector, the educational sector and all of the courts will undoubtedly be the next targets of those in power: V. Gera, "Media ownership, courts on agenda for Poland's lawmakers", AP, 12 September 2017. We might also note that in virtue of a "reform" of the school curriculum, history manuals will no longer speak of the Holocaust as part of the lessons on the Second World War: "Poland education reform to slash thousands of teachers' jobs", DW, 2 September 2017.

40. We should note for example the recent declarations of Jarosław Kaczyński for whom the courts "are the bastion of the post-communists in Poland", the Supreme Court an institution that "protects those who served under the old regime" as part of a judicial system "controlled by leftists" and "subordinate to foreign forces", quoted in M. Broniatowski, "Polish government moves to take control of top court", Politico, 13 July 2017.

41. We should note for example that the constitutional judges illegally appointed by the Polish authorities have now taken control of the Constitutional Court and are taking part in violating the recommendations made by the European Commission in a way we might have thought unthinkable in a country belonging to the EU. One may note for example the "forced" holidays of the Court's Vice-President due to his refusal to submit to the ruling party; the mysterious disappearance of judgments from the Court's database whose publication and execution had been recommended by the Commission; the exclusion of judges appointed in 2010 on the basis of an appeal as ridiculous as it is abusive initiated by the Prosecutor General himself on behalf of those in power; the rule prohibiting Polish constitutional court judges from raising the issue of the unlawful appointment of some of them in their dissenting opinions; etc.

42. "The European Union and the Rule of Law", keynote speech, Tilburg University, 31 August 2015.

make any possible use of Article 7 superfluous. In the opinion of Donald Tusk, the President of the European Council, triggering Article 7 would simply be a “waste of time”.[43] This analysis mutes the existence of two distinct procedures within Article 7 and the fact that the first was not available at the time of the so-called “Austrian precedent”: in virtue of subsection 1 of this article, unanimity is not required within the Council when it comes to establishing a clear danger of serious infringement of the rule of law by a Member State and/or sending to the latter recommendations to remedy this risk. It is true that the possible adoption of sanctions in the hypothesis of a “serious and persistent violation” of the values targeted in Article 2 TEU requires the prior adoption of an observation of this nature by the European Council acting unanimously. It is true that the Hungarian government has publicly committed – and this on many occasions – not to vote in support of a determination of this nature. We might quote from a recent speech by the Hungarian Prime Minister, “We must make it perfectly clear that a campaign of inquisition against Poland will never succeed, because Hungary will resort to all the legal mechanisms offered by the European Union in order to show its solidarity with the Polish people.”[44] In our opinion Article 7 should be interpreted in virtue of the so-called useful effect principle.[45] It follows that the “Hungarian veto” in virtue of article 7(2) would therefore no longer be applicable if Hungary was subject to one of the two procedures provided in Article 7, which can no longer be ruled out following the vote by the European Parliament on a new resolution on the situation in Hungary on 17th May 2017 and in virtue of which Parliament asked one of its committees to “launch the procedure and to draft a specific report, in view of putting a reasoned proposal to the vote in plenary, inviting the Council to act in line with Article 7, subsection 1.”[46] In other words if Article 7 were to be triggered both against Poland and Hungary, whether this is for “preventive” (subsection 1) or “corrective”(subsection 2) reasons, the governments of both of these countries would logically lose their right to be involved in any procedure related to Article 7 and as a result, their respective vetoes.

Another argument of a political nature is often highlighted to justify the caution, not to say, procrastination on

the part of the Commission. Frans Timmermans suggested in March 2017 that triggering Article 7 would be “counter-productive” and would not help at all given the “general context” and that he preferred, as a consequence, to avoid being “a one-day-hero” so that he could continue to supervise the situation in Poland.[47] We have to admit that we find this logic rather difficult to understand. Nothing prevents the Commission from continuing its supervision of action taken by the Polish authorities outside of the Rule of Law Framework once it is all too clear that this new mechanism has failed, and from launching multiple infringement proceedings as the Commission has done over the last few months and for which the Commission ought to be commended. The usefulness of continuing to adopt Recommendations and to see these blatantly ignored, with the Commission’s authority being further undermined, might seem questionable, even if we agree that the multiple Recommendations have had a beneficial effect, which was most likely unexpected at first: we now have a solid body of evidence on which to rely should the Commission (finally) agree to trigger Article 7. Rather than the reasons publicly mentioned, Timmermans’ reluctance seems to be based on something that he would prefer to not emphasise: the fear of seeing the Council either deny the existence of a “clear danger of serious breach” of the rule of law in Poland, or see the latter addressing modest recommendations; irrelevant ones; or ones in contradiction with its own recommendations, and which would not resolve the issues previously identified by the Commission. Fears like this seem to explain why the Commission has resolved to asking the Council on two occasions to discuss the situation in Poland, which was done in May and September 2017, but without any change in tone being noted or even attempts being made by the Polish authorities to comply with the Commission’s multiple recommendations.

It is easy to understand the Commission’s lack of confidence in the light of the actions or rather the lack of action and courage of most governments in the Member States regarding this issue. We should recall for example that the Council, instead of providing its full support to the Commission when the latter adopted the Rule of Law Framework in 2014 (in response as

43. M. Strzelecki, ‘Defiant Poland Scoffs at EU Rebuke Over Eroding Rule of Law’, Bloomberg, 27 oct. 2016.

44. Viktor Orbán, speech of 22 July 2017.

45. A standard principle of interpretation in EU law and on the basis of which priority must be given to the interpretation of the relevant provision of EU which maximises its effectiveness and usefulness in a situation where several interpretations of this provision and its effects are possible.

46. Resolution 2017/2656/ (RSP).

47. Quoted in A. Eriksson, ‘Poland unlikely to face EU discipline on rule of law’, EUObserver, 23 March 2017.

it happens to a Council request), deemed it more useful to adopt its own mechanism known as “the annual dialogue on the rule of law”, a mechanism that is as superfluous as it is useless, in that it comprises discussing a particular issue via an oral intervention by each Member State that is as brief as it is insipid. It has to be said that the “culture” of the Council, an intergovernmental body that is thoroughly diplomatic in the way it functions, is instinctively reluctant to open discussion of contentious subjects that might lead to the “naming and shaming” of a particular government, whatever the behaviour of the latter and no matter how shocking it might be. As stated by an anonymous representative of the Union when speaking of a possible use of Article 7 against Poland, “no one likes to target a Member State. Everyone has their own sins and it would create a dangerous precedent – what should you do when you might be next on the list?”[48] This logic reflects however both a deep lack of knowledge of what is going on in Hungary and Poland – the process of “constitutional capture” cannot be confused with serious but non-systemic and intentional violations of the rule of law, the former aiming to introduce an autocratic regime – and a strange reasoning that seems to justify inaction on the basis of the hypothesis that another Member State might also one day transform itself into an autocratic regime.

It is highly likely that we would not be facing the establishment of an autocratic regime and a slow motion coup in Poland if a certain number of major players did not continue to deny the reality of the situation in Hungary and the domino effect had by European inertia with regard to the Hungarian regime that some have qualified as a “gangster regime”[49] lying in a “grey area between democracy and dictatorship”[50] The European Parliament pointed out that Hungary was “a test of the Union’s ability and political will to respond to threats and violations of its own fundamental values by a Member State,” (prior to various shameful episodes that marked 2017[51]) and that the Union’s passivity in terms of Hungary might have contributed to the development of similar phenomenon in other Member States which raises “serious questions about the Union’s ability to guarantee the continued respect of the political criteria of Copenhagen after the accession

of a Member State to the Union.”[52] Notwithstanding the explicit request on the part of the European Parliament to activate the Rule of Law Framework to “trigger immediately an in-depth monitoring process of the situation in terms of democracy, rule of law and fundamental rights in Hungary”,[53] this does not mean unfortunately that MEPs are above reproach.[54]

In conclusion we can only admit our scepticism regarding the reasons that are regularly put forward to justify why Article 7(1) TEU has not been triggered in the case of Poland. The latter should have been triggered last November[55] when it became clear that the Polish authorities were waiting for the departure of the President of the Constitutional Court in order to take over control of it via the (unconstitutional) appointment of “judges” who supported those in office and to violate, in their own manner, the country’s Constitution. It is more than high time for European leaders to assume their responsibilities[56] and to bring to an end the comfortable “externalisation” of the “Polish question” to the Commission. Frans Timmermans regularly recalls that the responsibility to prevent systemic dangers or threats that weigh over the rule of law in the Union is up to us all and therefore it is also up to the governments of the Member States. This should however not lead the Commission to defer its responsibility onto the Council since the role of guardian of the Treaties is within its remit and it is up to the Commission finally to end the period of “dialogue” that never happened and move on to the next stage.

Of course this does not mean that the activation of Article 7 should be considered a miracle solution. It is however possible to believe that there is currently a 4/5 majority at the Council and that an unprecedented moral condemnation of the Polish government by its peers would have a more dissuasive effect than the adoption of non-legally binding recommendations.

Not only is the threat that weighs over the Union in the shape of hybrid, semi-authoritarian regimes real, but it is of an existential nature for the European legal order. According to the Court of Justice “a legal

48. G Baczyńska, ‘EU heads towards tougher action on Poland after Merkel joins fray’, Reuters, 4 September 2017.

49. Bálint Magyar, ‘The EU’s Mafia State’, Project Syndicate, 21 June 2017.

50. István Hegedus, co-founder of the party Fidesz, cited in M. Fletcher, ‘Is Hungary the EU’s first rogue state? Viktor Orban and the long march from freedom’, New Statesman, 1 August 2017.

51. Let us quote for example the national consultation entitled « Let’s stop Brussels », the vote on the so-called Lex CEU bill and the so-called Lex ONG bill as well as the xenophobic, paranoid consultation on going at present regarding the « Soros Plan », whereby George Soros, an American businessman and philanthropist who was born in Hungary with the complicity of « Brussels » is said to be trying to organise an annual mass immigration from Africa and the Middle East towards Europe.

52. Resolution 16 December 2015 on the situation in Hungary: followed by the European Parliament’s resolution 10 June 2015 (2015/2935(RSP)), para 5.

53. Ibid, para 8.

54. For further analysis of the party politics dynamics within the European Parliament, see L. Pech and K. Scheppele, ‘Illiberalism Within’, cited above note 6.

55. L. Pech, « Systemic Threat to the Rule of Law in Poland: What should the Commission do next ? », *Verfassungblog*, 31 oct. 2016.

56. J. Rankin, « Angela Merkel: we cannot hold our tongues on risk to rule of law in Poland », *The Guardian*, 29 août 2017.

construction like this is based on the fundamental premise that each Member State shares with all of the other Member States and acknowledges that they share with him a series of common values on which the Union is founded, as it is set out in Article 2 TEU. This premise implies and justifies the existence of mutual trust between the Member States in the recognition of these values and therefore in the respect of the Union's law which implements them.”[57] Let us stop hiding behind the supposed virtues of any discursive process and confront our problems head on. For the “new autocrats”,[58] a process of dialogue is only useful in that it offers them a window to perfect their control over the country in question in relative calm, since the authorities of the Union always place their bets on the good faith of the national authorities and on the respect of the principle of loyal cooperation. It would however be naïve to believe in the good faith of the Hungarian and Polish authorities. We should

laud the legal activism undertaken by the Commission in the Polish case since last July, which finally seems to reflect growing awareness both of the threat and the uselessness of dialoguing with a government that ignores both your authority and the existence of any problem, in spite of all the evidence available. And if Article 7 does not remedy the situation it would then be time to seriously envisage the best way of making possible the adoption of financial sanctions, directly or indirectly, against those who violate the rule of law in a systemic and shameless manner. Last week, Frans Timmermans intervened during a debate organised by the European Parliament on the rule of law situation in Poland. Without explicitly mentioning Article 7 TEU, he recalled that there was still a systemic threat to the rule of law in Poland and deplored the fact that the Commission had still not been able to have a constructive dialogue with the Polish authorities.

57. *Opinion 2/13, para 168.*
58. *A Puddington, Breaking Down Democracy: Goals, Strategies, and Methods of Modern Authoritarians, Freedom House, juin 2017.*

Laurent Pech

Professor in European Law at the University of
Middlesex, London

Sébastien Platon

Professor in Public Law, University of Bordeaux

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Publishing Director : Pascale JOANNIN

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