The CJEU Has Spoken Out, But the Show Must Go On

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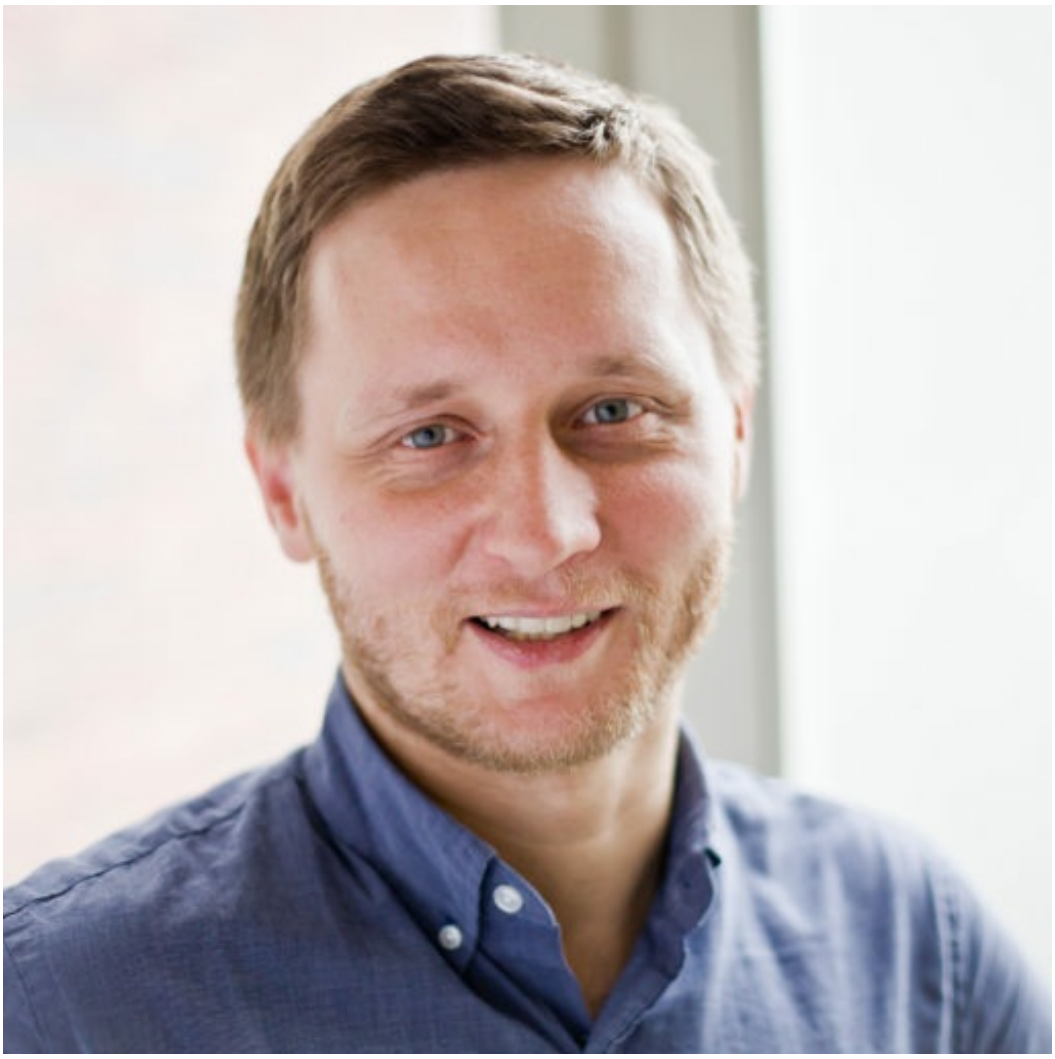
David Kosař Do 2 Aug 2018 Do 2 Aug 2018



The long-awaited *Celmer* judgment has pinned down quite a few scholars to their computers, despite the hot summer days. I am grateful to my co-bloggers at this symposium for their insights, on which I can heavily build. In my post, I will not repeat what has already been said. I will first focus more closely on the conceptualization of judicial independence by CJEU and then I will address some broader repercussions of the *Celmer* judgment.

In a nutshell, I argue that despite several conceptual problems in CJEU's understanding of judicial independence, it showed a healthy dose of judicial statesmanship in *Celmer*. As *neither* the preliminary reference procedure *nor* the fundamental right to the fair trial are good "vehicles" for addressing the Polish structural judicial reforms, there is a limit what the CJEU could do. The foundations of judicial independence are political and thus the real constitutional moment will be the combo of the next Polish parliamentary and presidential elections.

CJEU's conception(s) of judicial independence

In contrast to the suggestion by the referring Irish High Court, the *Celmer* judgment confirmed the applicability of the *Aranyosi two-prong test in full. As a result, the national court,* which has been seized by the EAW, must not only (1) evaluate in abstracto whether there are systemic and generalized threats to the independence of the requesting state's judiciary, but also (2) conduct a concrete review by determining whether that structural deficiency would negatively affect the rights of the particular individual after being sent back to the deficient requesting state.

The perils of the application of the second prong have already been discussed by my fellow co-bloggers (especially here and here). I will focus on the first prong of this test, which raises, perhaps counterintuitively, several conceptual concerns (see also here).

To sum up, the *Celmer* judgment, in conceptualizing judicial independence, heavily builds on the *ASJP* judgment. *Celmer* emphasises the crucial role of judicial independence (*Celmer*, §§ 48 & 53-54) and discusses its external and internal aspects (*Celmer*, §§ 63-67). The external aspects "presupposes that the court concerned exercises its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever" (*Celmer*, § 63), while the internal aspect "is linked to impartiality and seeks to ensure that an equal distance is maintained from the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings" (*Celmer*, § 65). These two aspects require guarantees against removal from office and adequate judicial salaries (*Celmer*, § 64) as well as clear rules on the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members (*Celmer*, § 66). Interestingly, the CJEU adds, without any reference to the prior case law, that judicial independence also requires safeguards against the (mis)use of disciplining judges as a system of political control of the content of judicial decisions (*Celmer*, § 67).

This part of the *Celmer* judgment reveals several vexing issues. First of all, it shows that the CJEU struggles in merging its earlier conceptualization of judicial independence (developed in the wholly different context under Article 267 TFEU as an implicit definitional criterion of "the court or tribunal" that can submit a preliminary reference, where the CJEU relaxed the independence standard to such an extent that AG Colomer lamented that even "a question referred for a preliminary ruling by Sancho Panza as governor of the island of Barataria would be accepted") with its more recent independence conceptualization developed in cases based on the substantive provisions of the EU directives (C-506/04 *Wilson*, C-175/11 *D. and A.*, C-222/13 *TDC* etc.) and the TFEU/Charter (*ASJF*). Unless the CJEU does manage to merge these two conceptualizations into one workable standard, it can be easily criticized for cherry-picking.

Second, the Grand Chamber ignores the ECtHR's case law on judicial independence, which is by far more developed. This is a pity, because it could have learned from it (as well as from its mistakes). Third, the CJEU mixes up judicial independence and judicial impartiality (to be fair, this a common problem of the Strasbourg case law as well). Fourth and relatedly, the CJEU does not distinguish between the threats to judicial independence coming from *outside* the judiciary (e.g. from the minister of justice) and the threats to judicial independence coming from *within* the judiciary (e.g. from court presidents who may or may not be the "transmission belts" of the executive). The former is in the Strasbourg

case law as well as in recent judicial independence literature referred to as external independence, while the latter as internal independence. The misleading use of the terms external and internal independence by the CJEU will likely cause a lot of troubles in future, as it is not clear how to operationalize the threats coming from court presidents (this point has been raised also by Stanisław Biernat) or disciplinary chambers (composed primarily by judges) – both being central issues in the upcoming infringement proceedings against Poland.

All of this brings chaos into the CJEU's concept(s) of judicial independence. In my opinion, the CJEU should unify its definition of judicial independence. Ideally, the CJEU would need more non-Polish judicial independence cases (like *ASJP*) to develop its judicial independence case law further before it applies them to the Polish scenario. If it does not get them, it should look elsewhere, either to the Strasbourg case law or to other sources. Developing the judicial independence principle from scratch and on the extremely sensitive cases is a dangerous path.

Be careful what you wish for

Some commentators *take for granted* that the *whole* Polish judiciary suffers from such structural deficiencies that independence of *all* Polish judges is compromised, and criticize the CJEU for holding so. However, drawing the red lines is not as easy as it seems at first glance, and the lack of solid and sufficiently nuanced CJEU's case law is not the only problem.

First, despite abundant literature on the topic, there is no generally accepted definition of judicial independence, even within EU. To name just a few examples, the right to a legal judge, so deeply embedded in the German legal culture, is alien to many Member States. Travelling among branches, cavalierly exercised by French *conseillers d'État*, would be considered unconstitutional in most CEE countries. The same applies to the secondment of German judges to the state ministries of justice. Judicial councils, so revered by the Council of Europe and the European Commission, not only do not exist in many Member States, but in some Member States (such as Germany) are even considered to be incompatible with the democratic principle (and, thus, according to some scholars, would violate the Eternity clause). In other countries, such as Spain, the judicial council is dominated by political appointees.

Second, too stringent judicial independence standards might hit hard also other CEE countries. A similar ministry of justice model of court administration that PiS wants to reinstall in Poland operates in Czechia. Attempts to get rid of Chief Justices and lower court presidents are also widespread in the region. Political leaders in the CEE region ousted (or attempted to oust) not only András Baka, Andrzej *Rzepliński, and Małgorzata Gersdorf, but also* Chief Justices in Croatia, Czechia, and Slovakia.[1)]David Kosař and Katarína Šipulová, 'The Strasbourg Court Meets Abusive Constitutionalism: Baka v. Hungary and the Rule of Law', 10 *Hague Journal on the Rule of Law* 83 (2018). When it comes to lower court presidents, each Slovak minister of justice (since 1998) who stayed in the office for two or more years replaced more than 25% of all court presidents.[2)]Samuel Spáč and David Kosař, 'Court Presidents in Slovakia: From Transmission Belts to Transmission Belts?'

(unpublished manuscript, 2018). Three of them replaced more than 50% court presidents, which is much more than PiS (sic!). Similarly, as this blog reported, the Chief Prosecutor wields excessive powers over the judiciary not only in Poland, but also in Bulgaria. To be sure, I have no problems with erasing these pernicious practices. However, we must be ready to apply the same standard to all Member States instead of going just after Poland. Double standards would heavily undermine the legitimacy of all actions of the EU institutions and cause lasting deleterious effects.

To make things even more complicated, many measures criticized in Poland may actually work in other contexts. For instance, inclusion of lay judges to the disciplinary panels in Czechia is generally considered a positive measure, which increased public confidence in the Czech judiciary. A special disciplinary court, only loosely attached to the Supreme Court, has been operating for more than a decade in Slovakia, with mixed results, but who knows whether a different model would have worked better. Finally, CEE countries have also witnessed the abuse of judicial independence by judges who became the law onto itself.[3)]David Kosař, *Perils of Judicial Self-Government* (CUP 2016). It is all about the context. Tricky, right?

Therefore, the CJEU is not in an easy position. It has to navigate between the Scylla of being toothless and the Charybdis of "throwing the baby out with the bathwater". One lesson is that the CJEU will have to draw the red lines in the upcoming infringement procedure regarding the new retirement scheme (or more appropriately, the new retention scheme) for Polish judges, as well as the infringement procedure regarding the Polish Supreme Court, very carefully. Most likely, the cumulative effect of the measures adopted by the Polish government will play a central role in these cases. The second lesson is that we need as much empirical evidence of the abuse of the new mechanisms (such as revised disciplinary chambers) as possible. The third lesson is unfortunately the bad news – designing domestic judicial institutions by international/supranational courts is tricky and sometimes even futile.

After many years, I came to the conclusion that almost every model of court administration can be abused and the foundations of judicial independence are primarily political. In many Member States political leaders are capable to affect judicial independence, but they are not willing to do so, because they are constrained by the elites, which in turn results in a culture of judicial independence. French presidents do not sit on the *Conseil constitutionnel*, even though in theory they can. Likewise, the acting French president does not attend the meetings of the *Conseil d'État*, German and Austrian ministers of justice do not exploit their powers vis-à-vis the judiciary to pursue their political agenda, and no Taoiseach (prime minister) in Ireland attempted to pack the courts with his or her protégés, even though the executive firmly controls the appointment process. This culture of respect to judicial independence cannot be established in Poland by the CJEU judgments alone. The Polish people will have to speak out as well (on this see below).

Virtues of decentralization of judicial independence assessment

As several commentators already mentioned, the CJEU – by adopting a two-prong *Aranyosi* test – decentralized the assessment of the state of judicial independence in Poland. It provided guidance, but left the ultimate decision to national courts. While this "is not an unproblematic endeavour", it has three advantages.

First, the pace of changes to the court administration in Poland is so quick that the CJEU simply cannot react to these changes, at least not in the preliminary reference procedure. It would have to chase the moving target. It is thus much better to trust the national courts to assess the conditions at the moment when the extradition takes place (see the stress on the "properly updated" information in *Celmer*, § 61). Second, it diffuses pressure on Poland. It allows national courts to bring their own perspective and fine-tune the CJEU's judicial independence principles. Perhaps even more importantly, it nudges them to dig out deeper in the Polish judicial reforms and their repercussions. Instead of one big blow to PiS by CJEU (which so many commentators wished for), it opts for "death by a thousand blows".

Third, it is a politically savvy move (or act of judicial statesmanship if you want it). While "PiS bashing" by the EU institution can be perceived as a form of top-down imperialism that the CEE population increasingly resent and that PiS could easily exploit politically, the "peer pressure" by Ireland and other EU Member States (especially if judges from both the "new" and "old" Member States join the choir) will cause troubles to PiS. It will be difficult for PiS to explain this to Polish voters (who may still care about their country's reputation abroad) and even more difficult to use it in the PiS political campaign. In other words, the "anti-EU card" plays well in CEE elections recently, whereas the "anti-Ireland card" has little appeal to the voters.

On constitutional moments

I respectfully do not share the view that the *Celmer* case had the potential to become a constitutional moment. First, I agree with Learned Hand that "the society so riven that the spirit of moderation is gone, no court can save".[4)] Learned Hand, *The Contribution of an Independent Judiciary to Civilization*, in The Spirit of Liberty 155, 164 (3d edition, enlarged 1960). For a *supranational* court, it is an even more daunting task. As Matej Avbelj suggested, such expectations would be too high. Second, constitutional moments require mass democratic mobilization that results in deep, broad, and decisive support for constitutional change. I have not seen this happening – neither in Poland nor on the EU-wide level. Third, it is too EU-centred a view. The stakes are much higher for Poland than for the EU. The message of Learned Hand is that no court can save an increasingly polarized political community that refuses to save itself. The key question for me is whether Poland indeed refuses to save itself. This brings me to my conclusion.

What is next?

The real constitutional moment thus will be the combo of the next Polish parliamentary and presidential elections. Unless something extraordinary happens, the former will take part in 2019 and the latter in 2020. Should the Polish people re-elect PiS and Andrzej Duda, Kaczyński's constitutional revolution will succeed as he practices a perverse variation on the theory of partisan entrenchment. Kaczyński's version is based on the premise that the

party that temporarily controls the presidency and the legislature can stock the courts with new judges (of ordinary courts) and justices (of the constitutional court) who have views on key constitutional issues roughly similar to those of the party leader. This shifts the position of the Constitutional Court as well as of the Supreme Court and changes the complexion of the lower courts, which, in turn, eventually affects constitutional doctrine. If enough new judges are appointed in a relatively short period of time (which is actually happening in Poland), changes will occur more quickly, producing a constitutional revolution. Put differently, if PiS and Andrzej Duda win again, reversing the recent interferences into the judiciary will be very difficult, if not impossible, in future. Should both PiS and Duda lose, a healing of the wounds may take place. [I do not dare to speculate about the remaining scenarios that would result in a very complicated "cohabitation".]

The million-dollar question is whether more CJEU's pressure hurts or helps PiS (and Duda). My guess is that it helps them, if they can credibly portray it as selective pressure. I have argued elsewhere that when facing with politically sensitive cases like *Celmer*, supranational and international courts should strive for a persuasive judgment that is firmly embedded in the pre-existing case law, instead of being overly creative and artificially stretching the treaty/directive provisions.[5)]David Kosař and Katarína Šipulová, 'The Strasbourg Court Meets Abusive Constitutionalism: Baka v. Hungary and the Rule of Law', 10 *Hague Journal on the Rule of Law* 83 (2018) In my opinion, the ECtHR failed to do so in *Baka*. The CJEU did well on this count in *Celmer*. I sincerely hope that the CJEU's judges will not evade their responsibility to adopt "the posture of statesmanship"[6)]Philip Selznick, *Leadership in Administration: A Sociological Interpretation* 134 (1957). in the upcoming infringement cases either. The show must go on!

References [+]

1. ↑ David Kosař and Katarína Šipulová, 'The Strasbourg Court Meets Abusive Constitutionalism: Baka v. Hungary and the Rule of Law', 10 *Hague Journal on the Rule of Law* 83 (2018).
2. ↑ Samuel Spáč and David Kosař, 'Court Presidents in Slovakia: From Transmission Belts to Transmission Belts?' (unpublished manuscript, 2018).
3. ↑ David Kosař, *Perils of Judicial Self-Government* (CUP 2016).
4. ↑ Learned Hand, *The Contribution of an Independent Judiciary to Civilization*, in The Spirit of Liberty 155, 164 (3d edition, enlarged 1960).
5. ↑ David Kosař and Katarína Šipulová, 'The Strasbourg Court Meets Abusive Constitutionalism: Baka v. Hungary and the Rule of Law', 10 *Hague Journal on the Rule of Law* 83 (2018
6. ↑ Philip Selznick, *Leadership in Administration: A Sociological Interpretation* 134 (1957).

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