1460 Days Later: Rule of Law in Poland R.I.P. (Part II)

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3. Problems left unaddressed by the Court of Justice's rulings to date

Notwithstanding the seminal and welcome rulings issued this year by the Court of Justice, a number of important and urgent issues have been left unaddressed. This is not to say, however, that the Court of Justice is necessarily at fault as e.g. the Court cannot approve interim measures if it does not receive an application from the Commission as it did in the case relating to the independence of Poland's Supreme Court and most recently in the case relating to the Disciplinary Chamber.

To begin with, the situation has not improved one iota as far as the (captured) Constitutional Tribunal (hereinafter: CT) is concerned. Despite a sharp decline in the number of cases submitted to it due to the widespread concerns about its lack of independence, the CT is fully operating and continuing to pretend to be a court. Last October, it even acted like a truly "European" court by declaring, for the first time, that a statute is not consistent with the TFEU (case P 1/18). This may be viewed positively at first sight but it should not be. Indeed, what we have here is a body masquerading as a court enforcing EU law (but only when it suits the ruling party) whereas according to the Commission itself, there is no longer any effective constitutional review in Poland following the failure of Polish authorities to take any steps with the view of restoring the independence of the CT. In addition to this damning diagnosis, one may refer to a series of letters to the (unlawfully appointed) "President" of the CT by a fellow judge. These letters offer multiple examples of obvious abuse of power such as an arbitrary allocation of cases to please the ruling party, an arbitrary make-up of judicial panels as well as an arbitrary (and unconstitutional) prohibition of dissenting opinions. To put it concisely, the time for an infringement action directly targeting the captured CT has come considering the damage it has done and its role when it comes to giving a veneer of legality to fellow sham bodies such as the Disciplinary Chamber (DC) and the National Council of the Judiciary (NCJ).

Speaking of the NCJ, people may be surprised (or not) to learn that it is continuing to function in a "business as usual" fashion notwithstanding the ruling of the Supreme Court of 5 December 2019 finding it to lack sufficient independence from legislative and executive authorities. In addition, some of its members have been busy spreading falsehoods about the content and binding nature of the ECJ preliminary ruling of 19 November 2019. Since its (unconstitutional) establishment on the back of the premature termination of the four-year term of office of its previous members, the neo-NCJ has recommended more than 650 individuals to be appointed as judges or

for promotion. Its enthusiastic participation in the (unconstitutional) attempted purge and simultaneous court-packing of the Supreme Court has been well documented, not least by the European Commission. Furthermore, it was revealed last August that some NCJ members secretly took part in a smear campaign targeting judges, including the First President of the Supreme Court (alleged members of what has been described as a "troll form" have of course denied the allegations). As of today, we are still waiting for meaningful investigations and sanctions but how can one hope for any given that "it is clear that the alleged smear campaign was organised from within the Ministry, with the involvement of high ranking officials in the Ministry and National Council of Justice", with the investigations undertaken by the NCJ and the prosecution service which is controlled by the Minister of Justice, the alleged main guilty party.

Similarly, the two captured chambers of Poland's Supreme Court – the DC and the Extraordinary Control and Public Affairs Chamber – continue to function and continue to pretend to be independent judicial bodies. To give a veneer of legality to their existence, they have involved the captured CT by requesting it confirm the constitutionality of their status and deliberately referring cases to extended panels within them (7 "judges" or the whole chamber) in order to make their "judgments" more difficult to overrule as other benches, composed of 3 judges, normally need to refer cases to even bigger formation should they wish to override it. The "judges" belonging to the Disciplinary Chamber also did not shy away from self-certifying themselves. In April 2019, they adopted a resolution proclaiming that their appointment is lawful and that the ENCJ-suspended NCJ was similarly established in a lawful manner as confirmed by the ruling of the (unlawfully composed) panel of the CT. They must not be aware of the *nemo judex in causa sua* principle among other basic legal principles.

To complete our brief outline of the yet to be addressed issues by the ECJ (but a third infringement action is now pending before it), the overall operation of the new disciplinary system needs to be mentioned. While an alleged involvement in a smear campaign organised by the Ministry of Justice will not cause you any major inconvenience (disciplinary or otherwise), multiple judges have faced disciplinary charges for such "major crimes" as seeking to implement the Court of Justice ruling of 19 November 2019, being publicly critical about the so-called "judicial reforms" and "their effect on judicial independence", or, even more alarmingly, for the content of the "decisions they have taken when adjudicating cases". Yes, we are talking about a Member State of the EU in 2019 and not the Soviet Union. This is why, one may note in passing, that the analysis of Advocate General Tanchev in *Miasto #owicz and Others* (C-558/18 and C-563/18) may appear excessively formalistic and disconnected from the reality on the ground. As noted in a recent and worth reading report by two members of the Council of Europe's Parliamentary Assembly:

> A key issue of concern is the fact that after prosecutors and judges have been informed by the Disciplinary Inspectors that a disciplinary investigation has been started against them, these investigations *often continue indefinitely without formal disciplinary charges being brought* [our emphasis] before the relevant disciplinary chambers … The Chairperson of

> the National Council of the Judiciary informed us that, in the last year and a half, 1174 disciplinary investigations were started. Only in 71 instances had disciplinary cases been opened … Irrespective of the small number of actual disciplinary cases opened, the large number of investigations started by disciplinary officers directly accountable to the Minster of Justice, and the time it takes to close these investigations, if at all, clearly has a chilling effect on the judiciary and affects their independence.

This is now the reality of the state of the rule of law in Poland. It is to be hoped that the ECJ will *not* exclusively focus on whether formal disciplinary charges have been brought but instead take full account of the overall context and the impact of the multiple (kangaroo) disciplinary investigations leaving judges and prosecutors the ruling party has targeted in a "precarious limbo" as they are being investigated without "being able to defend themselves".

4. Going for broke: The "de facto Polexit" bill

Having initially reacted positively to the Court of Justice's ruling of 19 November 2019 – according to the Minister of Justice/Prosecutor General, the Court's ruling was a "great defeat for the extraordinary caste" – representatives of the ruling party and members of the bodies concerned by the Court's judgment (the DC and NCJ) quickly changed tack when they finally understood that the Court's reasoning had to lead the referring court to find both the DC and NCJ as lacking basic guarantees of independence.

Another important aspect of the Court of Justice's ruling, not widely noted, is that "the EU test for the 'appearances' of independence can now be applied by 'old' Supreme Court judges also to assess the independence of the Chamber for Extraordinary Control and Public Affairs, the second chamber set up in the same way, from scratch, by the ruling parliamentary majority".

This led the ruling party, following their usual *modus operandi*, to rush a new piece of legislation via some acquiescent MPs although the wording of the bill and the explanatory memorandum attached to it make it obvious that the bill was drafted in the Ministry of Justice. The purpose of this *modus operandi* is evident: to circumvent public consultation and prevent a meaningful parliamentary and public debate.

According to the initial version of the bill, it would be a disciplinary offence *inter alia* to disregard a provision of Polish law in a situation where its non-compliance with the Constitution (which has been violated on multiple occasions by members of the ruling party, not least the Polish President) has not been not confirmed by the (captured) CT. To put it bluntly, the ruling party "wants to force judges not to assess the conformity of the laws passed by the current authority on their own or through legal questions to the Supreme Court or the CJEU, with the Constitution or European law, under the threat of a penalty".

Other provisions of the bill are similarly alarming. For instance, the proposal aims to prohibit judges from discussing "political matters" or engaging in activities or

omissions which would allegedly undermine the functioning of the judiciary or more generally the functioning of Polish authorities and Poland's constitutional bodies. This was defended *inter alia* on the ground that French law would similarly restrict the freedoms of expression and of association of French judges. As demonstrated here, this is pure, and deliberately misleading nonsense.

Another worth noting provision, which is so typical of the institutional capture strategy pursued by Poland's ruling party, aims to secure the speedy replacement of the current First President of Poland's Supreme Court when her term of office expires next April. According to the contemplated new three-step procedure, the General Assembly of Supreme Court judges, whose task is to present candidates for this post to the President of the Republic, must consist of at least 84 out of 110 judges. If this quorum is not met, the second meeting must be held with a presence of 75 judges while the third must include not less than 32 of them. The bill also gives each judge of the Supreme Court a right to propose one candidate for the said position.

Bearing in mind that at least 43 nominees of the (unlawfully operating) neo-NCJ are members of the Supreme Court, the new procedure virtually guarantees that the post will fall to one of (the ruling party's) chosen ones. And should the said procedure fail, which is unlikely but better safe than sorry as the saying goes, the President of the Republic will be given an exclusive right to appoint an interim First President. In other words, it is only a matter of time before the ruling party captures the Supreme Court as a whole as it has already captured the CT and the NCJ, but also the Supreme Administrative Court. Indeed, and *for the first time* since the beginning of the rule of law crisis, the bill also targets the Supreme Administrative Court with the Polish President being given once again the exorbitant power to decide the new rules of procedure of that court.

The bill contains so many outrageous provisions and laughable claims – for instance the bill claims to be mindful of the need to protect the principle of irremovability of judges by which one should of course understand the irremovability of individuals whose appointments are legally tainted due to the unlawful character of the NCJ – it is difficult to be concise. Space constraints precluding further details here, we will refer readers to Professor Marcisz's analysis:

> The provisions in the bill are all designed as an assault on judicial independence. They aim at crushing the opposition against previous illegal reforms among the judiciary. No need to discuss their details: *res ipsa loquitur.* The bill is blatantly unconstitutional but without a functioning Constitutional Court it does not matter much. It is also contrary to EU law. Not only does it infringe the judicial independence … but also the principle of primacy of EU law.

It was good therefore to see Vice-President Jourová making clear her multiple concerns in a letter to the Polish authorities on 19 December 2019. However, if there is anything the last four years should have taught the Commission is that Polish authorities are never acting in good faith and will not shy away from deliberately and repeatedly violating the principle of loyal cooperation in order to create *faits accomplis*. The Commission should face up to this unfortunate reality and stop

wasting time by repeatedly trying to “engage in a constructive dialogue” with a repeated offender.

What is needed from the Commission is strong leadership via *concrete* deeds. In this respect, European Commission Vice President V#ra Jourová and the European Commissioner for Justice Didier Reynders must be commended for their leadership. The Commission’s decision “to ask the Court of Justice to impose interim measures on Poland, ordering it to suspend the functioning of the Disciplinary Chamber of the Supreme Court” on the back of the pending infringement case 791/19 was an absolutely essential step to take at this point in time. As accurately noted by the Commission, Polish authorities’ refusal to comply with the ECJ ruling of 19 November 2019 and the subsequent ruling of the Supreme Court of 5 December 2019 has created “a risk of irreparable damage for Polish judges and increasing the chilling effect on the Polish judiciary”.

In addition, the Commission should stand ready to launch a fourth infringement action modelled on the infringement action initiated against the attempted purge of the Supreme Court as soon as the pending bill is adopted (and to shorten pre-litigation stage as much as possible so as not to let Polish authorities capture the Supreme Court in the meantime). As for national governments who care about the rule of law, they should systematically join pending proceedings and should the Commission fail to act promptly, they should stand ready to put their money where their mouth is and initiate rule of law infringement actions on the basis of Article 259 TFEU.

5. A fictional country or an EU Member State in 2020?

Imagine a country where national authorities (non-exhaustive list below):

- Refuse to “publish and implement fully” rulings of the national constitutional court in obvious violation of the national constitution;
- Refuse to comply with a Commission’s recommendation not to appoint an acting president of the national constitutional court in obvious breach of the national constitution;
- Refuse to comply with an interim order of the ECJ in the landmark “Bia#owie#a forest” case;
- Refuse to comply with an interim order of the national supreme administrative court which halted pseudo NCJ’s recommendation to the Supreme Court and requested the Court of Justice for interim measure;
- Refuse to comply with a final ruling of the national supreme administrative court by hiding behind a patently unlawful decision of the captured office of the supposedly independent data protection authority;
- Refuse to comply with a final ruling of the national supreme court applying a preliminary ruling of the European Court of Justice;

- Encourage and deliberately organise non-compliance with rulings of both the ECJ and the national supreme court via public statements, disciplinary proceedings and legislative means;
- Appoint individuals to the constitutional court at 1.30am(!), a few hours before the Constitutional Court's hearing in a case regarding this very issue, to create a *fait accompli* in open violation of the constitution (as subsequently confirmed by the not-yet-captured Constitutional Court);
- Give themselves the power to adopt the new rules of procedure of the national supreme court so as to force the supreme court to allocate cases to individuals appointed to the supreme court on the basis of a recommendation by a body subsequently found to lack independence from the executive and legislative;
- Dismiss court presidents and vice-presidents "without any specific criteria, without justification and without judicial review";
- Forcibly retire the president of a supreme court notwithstanding the constitutional provision providing for a fixed term of six years;
- Make threats of disciplinary action against a Supreme Court judge for complying with an ECJ order;
- Equate national judges with Nazi-era collaborators;
- Claim to pursue the objective to remove judges from the communist era while at the same time appointing a former communist-era prosecutor to the constitutional court having previously unconstitutionally appointing an acting president (now the president) of the constitutional court who started her career during the communist era;
- Defend the new statutory retirement age of 65 for judges while at the same time appointing two individuals who are both 67 to the constitutional tribunal;
- Sanction judges for the content of their rulings;
- Sanction judges for applying EU law as interpreted by the ECJ while prosecutors are simultaneously instructed to immediately report any judges doing so;
- Investigate prosecutors who participated to a congress of regional prosecutors during which interferences with their independence were denounced;
- Investigate judges who dare sending requests for a preliminary ruling to the ECJ;
- Threaten to not comply with ECJ ruling depending on its content;
- Question the independence and impartiality of ECJ judges;
- Accuse an EU Advocate General of defending the national judiciary's "pathology";
- Establish a body masquerading as a court which in turn is used to publicly accuse the ECJ of disregarding due process principles;
- Force a legislative change to void pending cases challenging the legality of new appointments made to the supreme court "in the early hours of Friday morning" even though the change "had not even been on the agenda" of the Parliament the previous day;
- Issue official instruction to ignore the national supreme court's ruling;
- Accuse former constitutional court judges to have deliberately violated the national constitution;

- Provide misleading information to the Council of the EU regarding disciplinary proceedings against national judges exercising their right to refer preliminary ruling question to the ECJ;
- Provide misleading justification to the ECJ according to the ECJ itself regarding the real objective underlying a national legislation lowering the retirement age of judges of the supreme court;
- Promote a "vision" where judges are expected to be always "on the side of the state" with the conduct of judges being described as "dangerous" when they "turn against the legislative and executive authorities";
- Conspire to organise a smear campaign via the provision of confidential and/ or personal information by a secret unit with the Ministry of Justice to an anonymous Twitter account with respect to judges critical of the ruling party's attacks on the rule of law all the while the government is claiming that national authorities "have never undermined the legitimacy of the Supreme Court, ordinary courts or judges – individually or collectively";
- Tell foreign lawyers to stop criticising ruling party's attacks on judicial independence – sorry, the ruling party's "judicial reforms" – while publicly attacking in the most disrespectful manner the sitting chief justice of the country's supreme court.

This country is not a fictional one. This country is now Poland under the Soviet-style moniker of the mislabelled "Law and Justice" party.

As accurately observed on 16 October 2019 by the First President of Poland's Supreme Court: "The end result is that the rule of law in Poland is not simply at risk: it is being erased."

Writing a year ago, we warned that the situation in Poland "has deteriorated further to the point of threatening the functioning of the whole EU legal order and therefore, the future of the EU's internal market itself." This is no longer a mere threat but a clear and present danger. Poland should now be considered, to borrow an expression from the financial world, as a country in default from a rule of law point of view. EU institutions and EU Member States will soon have to decide on the nature of their losses: Sacrifice their good relations with Polish national authorities or sacrifice the EU legal order.

Stalling for time would be irresponsible. On current trajectory, it is only a matter of time before Poland's rule of law default eventually triggers a knock-on process of legal disintegration.

Part I can be found here.
