1825 Days Later: The End of the Rule of Law in Poland (Part II)

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For Part I see here.

3. Defending Judicial Independence while Denying Reality to Save Mutual Trust: The Court of Justice's Mixed Contribution

Following its seminal 2018 ruling in the *Portuguese judges* case, the Court's infringement judgments and orders have helped limiting the amount of irreparable damage done to judicial independence. The same cannot be said of the Court's judgments in preliminary ruling cases as the Court, in this context, appears reluctant to take full account of the structural reality its own infringement judgments and orders have accurately depicted. One cannot however save mutual trust when judicial independence is *systemically* gone, which is what the Court is seemingly seeking to achieve. This approach may also seem unwise as it seriously increases the risk of inciting bottom-up resistance from national courts keen to prevent the authoritarian gangrene from spreading to their systems.

Joined Cases C-558/18 and C-563/18, Miasto #owicz and Prokurator Generalny

This judgment originates from two requests for a preliminary ruling submitted by two Polish judges. Possibly for the first time ever, these two requests were, in part, motivated by the referring judges' "fear of retribution if they do not adjudicate in favour of the State." And indeed, in yet another unprecedented and sinister development, the two judges "were called to account for their decisions to submit the present requests for a preliminary ruling by way of investigation procedures." And last November, Judge Tuleya, one of the two referring judges, was unlawfully suspended and his judicial immunity unlawfully waived by a panel of the "Disciplinary Chamber" (DC) which included a presumed member of the Ministry of Justice's "troll farm" denounced by PACE in January 2020. In one last brave move before he was denied access to the courtroom and his case files, Judge Tuleya was able to submit a preliminary request to the ECJ.

While the ECJ ultimately found both requests inadmissible, the Court's reasoning is particularly instructive, with the ruling itself containing the strongest warning to date that Polish authorities must cease to threaten or expose national judges to disciplinary proceedings for submitting references for a preliminary ruling. Indeed, "the mere prospect … of being the subject of disciplinary proceedings as a result of making such a reference or deciding to maintain that reference" violates EU law.

As noted in Part I of this post, this warning has remained unheeded. Furthermore, notwithstanding the welcome warning regarding the chilling effect of disciplinary proceedings, the Court's ruling in *#owicz* suffers from three main shortcomings:

1. It may be understood as abandoning national referring judges to their fates by deciding that "not everyjudge in every procedure is in the position to remedy potential violations of judicial independence with a reference to Luxembourg";
2. It fails to adequately make clear that disciplinary *investigations* also violate EU law when they aim to dissuade judges from applying EU law, which has led authoritarian-minded authorities to deliberately leave targeted judges in limbo by delaying the formal initiation of disciplinary *proceedings*;
3. It fails to draw the logical conclusion from the Court's own observation, to support its finding of inadmissibility, that the investigation proceedings concerning the referring judges have since been closed. But "in taking note of this, the Court contradicts its own insistence on the fact that the mere prospect of being disciplined is enough to deter judges from discharging their judicial duty in a truly independent manner".

Case C-791/19 R, Commission v. Poland

On 8 April 2020, the Court's Grand Chamber granted the Commission's request to order the suspension of the application of the national provisions relating to the powers of Poland's "Star Chamber" with regard to disciplinary cases concerning judges. As noted by one of the present authors, this order is both significant and unprecedented: "It is significant, because it makes clear that EU law prohibits Member States from setting up national disciplinary bodies which, themselves, fail to satisfy the guarantees inherent in effective judicial protection. It is unprecedented, to the extent that the ECJ has demanded the immediate suspension […] of the processing of all disciplinary cases regarding judges pending before a body which views itself as a court notwithstanding multiple judgments to the contrary by three chambers of Poland's Supreme Court."

It is also worth stressing that the ECJ ordered that Polish authorities refrain from referring any disciplinary cases pending before the DC before a panel whose composition does not meet the requirements of independence as defined by the Court, in particular, in its *AK* judgment. This *AK* judgment, however, has since been formally voided by the DC without, as noted in Part I, any reaction from the European Commission whatsoever.

As regards the Court's order of 8 April 2020, it suffers from one key weakness which derives from the Commission's failure to take into account the obvious potential for a bad faith and arbitrary use of the procedure to waive judicial immunity under the auspices of the DC acting hand in hand with Poland's National Prosecution Office. In this respect, one may helpfully recall that in 2016 the office of Public Prosecutor General was merged with that of the Minister of Justice on the basis of a law described by the Venice Commission as "unacceptable in a State governed by the rule of law". The ECJ could have prevented this entirely predictable abusive lifting of judicial immunity by tighter language regarding how the notion of disciplinary proceeding must be understood; by better emphasising that measures which may

lead to "any dismissal of those who have the task of adjudicating" form part of the disciplinary regime; and holding that the processing of *all* cases pending before the DC must be suspended as it appears, prima facie, to be a body *not* established by law.

That said, it has always been ludicrous to pretend that the waiving of judicial immunity by the DC does not amount to a violation of the ECJ order as this would allegedly amount to a procedure of a criminal nature. Suffice it to point out in this respect that the DC has continued to impose *disciplinary* sanctions when lifting the judicial immunity of judges who happened – pure coincidence no doubt – to be the most vocal defenders of judicial independence. It was good but still exasperating to see the Commission waking up about six months too late when it finally issued an additional letter of formal notice making clear that Poland is violating EU law by allowing the DC to decide matters such as cases for the lifting of immunity. Meanwhile, the number of victims of Poland's rule of law breakdown continues to increase.

Joined Cases C#354/20 PPU and C#412/20 PPU Openbaar Ministerie

On 17 December 2020, the Court's Grand Chamber held that the existence of evidence of systemic or generalised deficiencies concerning judicial independence in Poland (or indeed, even evidence of an *increase* in those deficiencies) cannot in itself suffice to justify a refusal to execute European arrest warrants (EAWs) issued by Polish courts. Instead, each national court (when acting as an executing judicial authority) must continue to assess in each case whether there is a specific risk of a breach of the right to a fair trial of the person concerned should he/she be surrendered.

Notwithstanding some minor improvements such as the new emphasis on the need to "exercise vigilance" in a situation where rule of law deficiencies have increased, this ruling mostly reiterates the flawed logic of the *Celmer* ruling. What's more, to save mutual trust, the ECJ omitted from its reasoning inconvenient facts such as the *legalisation* of the *systemic violation* of EU judicial independence requirements organised by the muzzle law, and the DC's decision of 23 September 2020 which formally voided its own ruling in *AK*.

As we wrote in January 2019, by requiring national courts to implement a two-pronged case-by-case assessment before refusing any surrender, the ECJ refused to accept that "in a situation of systemic attacks *targeting the whole judicial system*, there is, by definition, *already* a "real risk" of a breach of the fundamental rights to an independent tribunal and to a fair trial in *every single case*."

We must maintain our position. As the Irish Supreme Court diplomatically put it in a 2019 judgment, one may question whether "there is then room or need for further inquiry" once systemic deficiencies have been found. Indeed, the Court's reasoning means that even if Poland were to become a formal dictatorship and no unanimous agreement was found to sanction Poland under Article 7(2) and (3) TEU, national courts from other EU countries would still need to assess each EAW on a case-by-case basis. EU primary law does not warrant this (misguided) interpretation. Holding

that the EU law "requirement that courts be independent precludes the possibility that they may be subject to a hierarchical constraint or subordinated to any other body" is of no help when Polish courts are *already* subject to systemic interferences from the executive. The compliance of the *Celmer* two-step test with Article 6(1) ECHR requirements may also be questioned due inter alia to the disproportionate and unworkable burden it imposes on those subjects to EAWs.

The right to a fair trial can be said to be systematically violated following the adoption of the muzzle law in a situation where furthermore the ECJ order of 8 April 2020 is openly violated and the ECJ judgment of 19 November 2019 formally nullified. At the very least, the burden of proof should be on the Polish judicial issuing authority. The pragmatic concern of ensuring the proper working of the judicial cooperation system embodied by the preliminary mechanism cannot justify disregarding the *structural* violation of the principle of judicial independence, which the ECJ itself described as essential to guarantee the effective judicial protection of individual's rights under EU law. The ECJ ought instead to establish a *rebuttable* presumption that Polish courts are no longer independent. This would acknowledge reality without cutting off access to the ECJ and violating Article 6(1) ECH requirements.

One may further consider that Polish courts can no longer be considered "judicial authorities" notwithstanding the continuing bravery of so many individual judges. We cannot however leave the right to a fair trial at the mercy of individual judges' bravery in a situation where each Polish judge may be subject to arbitrary disciplinary sanctions for applying EU judicial independence requirements or refusing to obey ministerial instructions which compel them not to directly answer *Celmer*-related questions. In practice, the intention of these instructions is to prohibit Polish judges from directly emailing their EU counterparts and force them to correspond via the government. One may also mention additional instructions issued in 2020 (made public by *Rule of Law in Poland* on 11 January 2021) which require presidents of common courts to report to the Ministry of Justice any application of the ECJ *AK* judgment and connected rulings issued by Poland's Supreme Court. The underlying aim of this reporting system is obvious: to facilitate the initiation of disciplinary investigations should an ordinary court judge dare assessing the independence of the "judges" appointed on the back of Poland's so-called reforms from the standpoint of EU law and/or ECHR law. Justice cannot be done in such a situation regardless of whether the executive directly or does not directly interfere in a specific case.

4. The end of the road and the purge ahead

As observed by Adam Bodnar and Pawe# Filipek, EU institutions, including the ECJ, must always bear in mind that time is absolutely of the essence when it comes to preserving judicial independence in a situation where compliance with EU legal requirements relating to judicial independence has been made a disciplinary tort!

Beyond all else, a widespread judicial purge has already been announced by Poland's *de facto* leader last month and preliminary steps have also been taken to organise non-compliance with the recent seminal judgment of the European Court of Human Rights in the case of *Guðmundur Andri Ástráðsson v. Iceland*.

Enough report. Enough dialogue. The time to decisively act was yesterday but it is never too late to do the right thing and implacably enforce the rule of law.
