

# Keeping the Past and the Present Apart

---

Anna Wójcik

2022-04-26T13:24:59

The mere fact that a judge was appointed for the first time under undemocratic conditions does not automatically determine that the court in which that judge adjudicates lacks the necessary independence under EU law. In a recent [judgment](#) in case C-132/20, The Court of Justice of the European Union has answered to this effect a question of Mr. Kamil Zaradkiewicz, appointed to Poland's Supreme Court in 2018 on recommendation of the new government-controlled National Council of Judiciary and thus lacking independence himself.<sup>1)</sup> In the course of the proceedings, Poland's [Commissioner for Human Rights argued](#) that Mr. Zaradkiewicz, sitting as a single judge in the Civil Chamber of the Supreme Court, acted in bad faith and wanted to abuse the preliminary ruling procedure to achieve an objective contrary to EU law: to render the CJEU A.K. judgment of 19 November 2019 (joined [Cases C-585/18, C-624/18 and 625/18](#)) ineffective (para 61). However, following AG Michal Bobek's [opinion](#), the CJEU considered not a particular judge, but the whole court and emphasized that it is undisputed that the Supreme Court meets the requirements of a referring court (C-132/20, para 68). See also: Pech, L., Platon, S., How Not to Deal with Poland's Fake Judges' Requests for a Preliminary Ruling A critical Analysis of AG Bobek's Proposal in Case C-132/20, [Verfassungsblog, 28 July 2021](#).

Importantly, the CJEU emphasized that the referring court did not submit any evidence that may rise legitimate and serious doubts, in the minds of individuals, over independence and impartiality of the particular judge (para 105). With this decision, the Court refused to be drawn into the inner-Polish dispute about decommunization, and reinforced its jurisprudence on judicial independence standards in the EU.

## The context of the rule of law crisis

The preliminary reference was issued on 18 December 2019 on the basis of a cassation appeal examined in the Supreme Court against a ruling of Court of Appeal in Wrocław in a case indexation of a bank loan agreement.

The [CJEU preliminary ruling of 19 November 2019](#) in joined [Cases C-585/18, C-624/18 and 625/18](#), A.K. *and others* that prompted Mr. Zaradkiewicz to pose the referral. In the A.K. judgment, the CJEU ruled that to assess if a judge constitutes an independent court established by law in the meaning of EU law, relevant circumstances must be taken into account – for instance, if the judge was appointed in a procedure involving bodies independent of political influence.

At the time of submitting the referral, the authorities in Poland tried to discourage judges from applying the A.K. judgment, by suspending of judge Paweł

Juszczyszyn<sup>2)</sup>As of 19 April 2022, judge Juszczyszyn has been suspended for 804 days already, despite the European Commission's President ultimatum to the Polish government that the illegally suspended judges are to be reinstated, or otherwise the national recovery plan would not be accepted. and drafting the [muzzle law](#)<sup>3)</sup>The Venice Commission considered that the amendments of December 2019 would 'diminish judicial independence and put Polish judges into the impossible situation of having to face disciplinary proceedings for decisions required by the ECHR, the law of the European Union, and other international instruments'. See **CDL-PI(2020)002-e Poland – Urgent Joint Opinion on the amendments to the Law on organisation on the Common Courts, the Law on the Supreme Court and other Laws**, issued pursuant to Article 14a of the Venice Commission's Rules of Procedure.. However, on 5 December 2019, the Supreme Court panel ruled that new National Council of Judiciary is not an impartial and independent body from the legislative and executive powers and that the Disciplinary Chamber in the Supreme Court is not a court within the meaning of EU law.<sup>4)</sup>On 23 January 2020, the Supreme Court's combined chambers (criminal, civil, labour) issued a resolution, that has a power of legal rule. It confirmed the lack of independence of the NCJ established in 2018 and declared that rulings issued after 23 January 2020 by the Supreme Court and common courts judges nominated in proceeding in which the neo-NCJ was involved, as well as all the Disciplinary Chamber of the Supreme Court's rulings are to be set aside. The Minister of Justice Zbigniew Ziobro declared the Supreme Court's resolution invalid, and in April 2020, the Constitutional Tribunal ruled that the Supreme Court's resolution illegal ([case U 2/2](#)).

## Questions to the CJEU

The referring court – a one-person panel of the Supreme Court's Civil Chamber – considered a cassation case that had been decided on appeal by three judges of Court of Appeal in Wroc#aw. Judge FO was first appointed as a judge in 1978 and promoted in 1984 by the Council of State of the People's Republic of Poland. In 1998, in the democratic Poland, he was promoted to the Court of Appeal on the recommendation of the NCJ. Two other judges in the case, HK and GP, were appointed to courts in 2012 and 2015.

The referring court asked if the judges' independence may be called into question in the light of the circumstances surrounding their appointment, as judge FO was first appointed and later promoted by undemocratic bodies that did not guarantee impartiality, and two other judges were appointed with the involvement of the

NCJ<sup>5)</sup>They were first appointed as judges in democratic Poland and later promoted to the Court of Appeals in 2012 and 2015, respectively, in a procedure in which the NCJ was involved, selected on the basis of the 2011 Act on the NCJ. while Poland's Constitutional Tribunal in a [judgment of 20 June 2017 in the K 5/17 case](#) found that between 2000 and 2018 the NCJ did not act transparently and its composition was unconstitutional.

The referring court asked the CJEU if according to EU law,<sup>6)</sup> Article 2, Article 4(3), Article 6(1) and (3) and the second subparagraph of Article 19(1) [TEU] in conjunction with the first and second paragraphs of Article 47 of the [Charter] and the third paragraph of Article 267 TFEU, Article 38 of the Charter and Article 7(1) and (2) of [Directive 93/13]. a court can be independent and impartial if it consists of a person who was for the first time appointed as judge “by a political executive of a state with a totalitarian, non-democratic, communist system of power” (para 49), when criteria for the judge’s appointment were not transparent, the judge could be removed from office at any time, and neither judicial self-government nor state bodies formed in democratic elections were involved in the appointment procedure, and when a judge was later promoted in democratic state based on length of service and work assessment, and was not asked to pledge allegiance to the democratic state (para 49).

In response, the CJEU referred to the EU accession criteria and Article 49 TEU and raised that since Poland’s accession to the EU its judicial system was in principle considered compatible with EU law (para 104). Moreover, the CJEU noted that the referring court did not provide specific evidence why the circumstances of the initial appointment of a judge, who was kept in office after that regime ended, would warrant legitimate and serious doubts, in the minds of individuals, as to the independence and impartiality of that judge (para 105). The CJEU also ruled that it was unclear how these circumstances would enable to exercise undue influence on the judge today (para 106).

Another question was linked to Poland’s Constitutional Tribunal’s finding in 2017 that parts of the 2011 bill on the NCJ was unconstitutional. The referring court asked if such ruling may affect an individual’s perception of a court’s independence, if it consists of judges appointed in the process involving the NCJ created on provisions that the CT later found unconstitutional.

The CJEU underscored that in the cited judgment the Polish CT did not rule on the NCJ’s independence and that the provisions ruled unconstitutional concerned the individual nature of the members of the NCJ’s term of office and the distribution rules based on which the NCJ members were chosen within the Polish courts (para 125). According to the CJEU, finding such provisions unconstitutional “is not capable, by itself, of calling into question the independence of that body or, consequently, of giving rise to doubts, in the minds of individuals, as to the independence of the judges concerned with regard to external factors” (para 126).

The CJEU compared the provisions to those of the Act on the NCJ from 2017, which the [CJEU](#) and the [ECtHR](#) found to be reinforcing the legislative and the executive’s influence in the new NCJ selection process and thus casting doubts as to the NCJ independence and, consequently, on the independence of judges appointed in the procedure in which the NCJ was involved.

The CJEU did not discuss the fact that the Constitutional Tribunal’s panel that handed 2017 ruling on the 2011 NCJ bill included rapporteur Mr. Mariusz

Muszyński, whose inclusion in the panel the ECtHR found in [Xero Flor v Poland](#) to be in breach of ECHR.

## Mnemonic governance and the drift away from European law standards

The 'mnemonic constitutionalism' theory argues that governments use various forms of historical memory governance to justify their current political choices.<sup>7)</sup> See Belavusau, U., & Gliszczynska-Grabias, A. (2020). Mnemonic Constitutionalism in Central and Eastern Europe. *European Papers*, 5(3), 1231-1246. The referral in itself is exemplary of the attempts by proponents of judicial changes in Poland after 2015 to legitimize these changes by means of the decommunization argument.

Before submitting the preliminary reference questions, Mr. Zaradkiewicz compiled a non-exhaustive [list](#) of 747 judges first appointed in undemocratic Poland, curiously omitting the name of Julia Przytycka, the Constitutional Tribunal's president. In May 2020, he briefly acted as the first president of the Supreme Court and ordered to [remove](#) six portraits of the Supreme Court's first presidents during the communist era.

'Decommunization' means a process of undoing the communist regime and its remnants in politics, economy, and society, that started in Poland in the 1990s. The process was fraught with political disagreements, and certain important decommunization mechanisms, such as lustration, were adopted much later than in other former communist states in the region. Dissatisfied with this, PiS party has made the need to finalize decommunization a centerpiece of its historical policy, next to preserving a master narrative about the Second World War that emphasizes Poles' honorable deeds and sidelines the negative ones.

A [memory law](#) from 2018 that declared incorrectly attributing the Second World War Nazi crimes to the Polish state or nation a crime has been the most internationally discussed legal instrument of PiS historical policy. The 2016 decommunization bill limiting thousands of individuals's rights by lowering the amounts of retirement pensions and other benefits linked to employment in the undemocratic state's institutions received much less attention.<sup>8)</sup> Since January 2018, the bill's provisions are subject to the Constitutional Tribunal's scrutiny; the case is pending. Frustrated with prolonged waiting for the CT's judgment, several common courts in Poland have ruled in favour of persons whose benefits were reduced. On the bill, see Wójcik, A. (2019). Reckoning with the communist past in Poland thirty years after the regime change in the light of the European Convention on Human Rights. *Polish Yearbook of International Law*, (39), 135-157. PiS also enacted a soft law compelling local governments to [change street names](#) as part of decommunization and compelled new groups of state office holders to submit lustration declarations.

Judges and prosecutors born before 1972 must submit lustration declarations since 2007, when PiS amendments to the 1997 lustration Act entered into force. According to government statistics from 2017, an average lower court judge was [44 years old](#),

too young to be covered by lustration law. This may be one of the factors behind why only 13 per cent of Poles [considered](#) that „decommunization” best describes the changes into judiciary in recent years.

This is the domestic backdrop before which the CJEU had to decide. The Luxembourg Court, however, refused to get involved in Poland's internal decommunization of judiciary debate. From the standpoint of EU law, the Court argued, what matters is judicial compliance with the EU accession criteria and individualized assessment, based on sound evidence, of today's pressures on specific judges that could raise legitimate doubts in individuals over the court's impartiality and independence. The CJEU drew a thick line between the present of Polish EU membership and the past before Poland joined the EU, and chose to look at the future.

*The author is grateful to the Volkswagen Foundation for supporting this study within their research grant allocated for the consortium project 'MEMOCRACY' (2021-2024).*

## References

- In the course of the proceedings, Poland's Commissioner for Human Rights argued that Mr. Zaradkiewicz, sitting as a single judge in the Civil Chamber of the Supreme Court, acted in bad faith and wanted to abuse the preliminary ruling procedure to achieve an objective contrary to EU law: to render the CJEU A.K. judgment of 19 November 2019 (joined Cases C-585/18, C-624/18 and 625/18) ineffective (para 61). However, following AG Michal Bobek's opinion, the CJEU considered not a particular judge, but the whole court and emphasized that it is undisputed that the Supreme Court meets the requirements of a referring court (C-132/20, para 68). See also: Pech, L., Platon, S., How Not to Deal with Poland's Fake Judges' Requests for a Preliminary Ruling A critical Analysis of AG Bobek's Proposal in Case C-132/20, *Verfassungsblog*, 28 July 2021.
- As of 19 April 2022, judge Juszczyszyn has been suspended for 804 days already, despite the European Commission's President ultimatum to the Polish government that the illegally suspended judges are to be reinstated, or otherwise the national recovery plan would not be accepted.
- The Venice Commission considered that the amendments of December 2019 would 'diminish judicial independence and put Polish judges into the impossible situation of having to face disciplinary proceedings for decisions required by the ECHR, the law of the European Union, and other international instruments'. See CDL-PI(2020)002-e Poland – Urgent Joint Opinion on the amendments to the Law on organisation on the Common Courts, the Law on the Supreme Court and other Laws, issued pursuant to Article 14a of the Venice Commission's Rules of Procedure.
- On 23 January 2020, the Supreme Court's combined chambers (criminal, civil, labour) issued a resolution, that has a power of legal rule. It confirmed the lack of independence of the NCJ established in 2018 and declared that rulings issued after 23 January 2020 by the Supreme Court and common courts judges nominated in proceeding in which the neo-NCJ was involved, as well as all the

Disciplinary Chamber of the Supreme Court's rulings are to be set aside. The Minister of Justice Zbigniew Ziobro declared the Supreme Court's resolution invalid, and in April 2020, the Constitutional Tribunal ruled that the Supreme Court's resolution illegal (case U 2/2).

- They were first appointed as judges in democratic Poland and later promoted to the Court of Appeals in 2012 and 2015, respectively, in a procedure in which the NCJ was involved, selected on the basis of the 2011 Act on the NCJ.
- Article 2, Article 4(3), Article 6(1) and (3) and the second subparagraph of Article 19(1) [TEU] in conjunction with the first and second paragraphs of Article 47 of the [Charter] and the third paragraph of Article 267 TFEU, Article 38 of the Charter and Article 7(1) and (2) of [Directive 93/13].
- See Belavusau, U., & Gliszczynska-Grabias, A. (2020). Mnemonic Constitutionalism in Central and Eastern Europe. *European Papers*, 5(3), 1231-1246.
- Since January 2018, the bill's provisions are subject to the Constitutional Tribunal's scrutiny; the case is pending. Frustrated with prolonged waiting for the CT's judgment, several common courts in Poland have ruled in favour of persons whose benefits were reduced. On the bill, see Wójcik, A. (2019). Reckoning with the communist past in Poland thirty years after the regime change in the light of the European Convention on Human Rights. *Polish Yearbook of International Law*, (39), 135-157.

