A Polish Marbury v. Madison?

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Last week the Warsaw Court of Appeal officially asked the Polish Supreme Court whether a civil court is entitled to assess the validity of appointing Julia Przylebska as the new President of the Constitutional Tribunal (CT). If the question is answered in the affirmative, it could be the first step towards extending the remit of civil courts to constitutional issues.

The Court of Appeal's case is at the heart of the Polish constitutional crisis. The case was initiated by the former President of the Polish CT, Andrzej Rzeplinski, who asked a civil court to issue an injunction banning three so-called "anti-judges" (those with whom PiS – the party of government – packed the CT in 2015) from sitting on the Polish CT. Rzeplinski's choice of a civil procedure to solve a constitutional issue was heavily criticized: it was unprecedented in Poland, which follows the continental legal tradition of treating public and private cases entirely separately. The criticism became even stronger after the court of first instance dismissed the case as ineligible for a civil procedure. The government's acolytes presented Rzeplinski's court defeat as evidence of his poor legal expertise.

Undeterred, Rzeplinski filed an appeal before stepping down from his presidential position and leaving the CT in December. His successor, Julia Przylebska, allowed the three anti-judges to decide constitutional cases; she also withdrew Rzeplinski's appeal, which could undermine those anti-judges right to sit on the court.

Instead of dropping the appeal, the Court of Appeal put new life in it. As I informed the readers of this blog, Przylebska's appointment as President of the CT was legally flawed. The Court of Appeal duly took issue with the appointment, challenging Przylebska's capacity to act as President of the CT and her right to withdraw the appeal. As a consequence, instead of dismissing the case, the Court of Appeal referred a prejudicial question to the Supreme Court.

The gist of the question is whether a civil court has the right to assess the validity of the appointment of the new president of the CT. If it does, the Court of Appeal would like to know whether several procedural flaws in the appointment of the president make her ineligible to act as CT's president before the civil court. The question contains an indirect criticism of PiS's interference in the CT: the procedural flaws mentioned by the Court of Appeal include the absence of the three judges elected by the previous parliament in the panel appointing the new president and the fact that the appointment meeting was presided over by the commissionaire nominated by President Duda instead of being presided over by Vice-president Biernat.

If the Supreme Court answers the prejudicial question in the affirmative, it will have effects on several levels. A "yes-yes" answer ("yes" for the court's right to assess the procedure of the president appointment and "yes" for the claim that president was not appointed properly) will be significant on both legal and political levels. The first "yes" will be a clear signal that civil courts may enter the realm of public law and that constitutional procedures are not immune from their scrutiny. The second "yes" will be a huge PR problem for Przylebska – her legitimacy to act as a president of the CT will be undermined, as will PiS's decisions concerning the CT.

To be clear, even a yes-yes answer will not change the CT's predicament significantly. Even if confirmed by the Supreme Court, the civil court's right to assess the CT President appointment is relatively restricted: it only concerns the President's capacity to act in civil law cases. As such, it will have no direct effect on her capacity to act within her public law competencies, e.g. the competencies to form CT panels to sit in particular cases.

Nonetheless, an affirmative answer may create forward momentum: if civil courts can assess the President's competencies in this case, perhaps they will be able to do so in others. This may impact labour law cases initiated by CT back-office employees who were fired by Przylebska in revenge for their support for Rzeplinski, or a case by vice-president Biernat, on whom Przylebska forcibly imposed leave of three months. Perhaps the civil court's right to assess Przylebska's capacity to act as president of the CT will cover assessments for damages connected with its future verdicts. One could easily imagine a case in which an aggrieved Polish citizen sues the government for damages caused by a CT verdict reached by a Przylebska-appointed panel (particularly if the panel included one of the anti-judges).

Whatever its outcome,the Polish Supreme Court's verdict will not be a Polish *Marbury v. Madison*, as it will not give the civil courts the right of constitutional review. It may, however, blur the line between private and public cases in Polish law and thereby pave the way for another milestone court decision similar to Marbury. Without a doubt, both the question asked by the Court of Appeal and the Supreme Court's answer to it can be perceived as the judiciary's way of saying no to PiS's commandeering of the Polish Constitutional Tribunal.

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