1095 Days Later: From Bad to Worse Regarding the Rule of Law in Poland (Part II)

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(Part I here)

4. One missed opportunity: The ECJ ruling of 25 July 2018 concerning the European Arrest Warrant

The knock-on effects of the deteriorating situation in Poland became notably visible when an Irish High Court judge decided to delay the extradition of a man to Poland over concerns about the rule of law there pending a preliminary reference request sent to the ECJ. This was followed by a vicious press campaign against the Irish judge, with Mr Marcin Warchoł, Poland's Deputy Justice Minister (and Poland's member of the Venice Commission, no less…) deeming it appropriate to question the professionalism and integrity of the Irish High Court judge by claiming that she did not know relevant rules or case law and that her analysis was *inter alia* ignorant, lacked common sense but also partial and biased. In addition, the Deputy Justice Minister did not see any problem with violating the principle of the presumption of innocence by publicly stating that the Irish High Court was "delaying the punishment of a serious drug mafia criminal". As regards Justice Donnelly's right to seek clarification from the ECJ, Mr Warchoł said: "such requests should be unbiased. It is regrettable your court is delaying this punishment completely on biased arguments".

In its judgment of 25 July 2018 (LM, C-216/18 PPU), the ECJ established a new two-step rule of law test based on one it developed regarding potential exceptions for surrender on the basis of the prohibition of inhuman or degrading treatment (Article 4 of the Charter). This new test stated that (i) when confronted with the claim that a European Arrest Warrant (hereinafter: EAW) request must not be granted due to systemic or generalised deficiencies liable to affect the independence of the judiciary in the issuing Member State, the executing judicial authority (Irish High Court in the present case), must, as a first step, "assess whether there is a real risk that the individual concerned will suffer a breach" of his fundamental right to an independent tribunal/to a fair trial "when it is called upon to decide on his surrender to the authorities of the issuing Member State"; and (ii) "that authority must, as a second step, assess specifically and precisely whether, in the particular circumstances of the case, there are substantial grounds for believing that, following his surrender to the issuing Member State, the requested person will run that risk".

This important ruling has been widely commented in particular by many eminent scholars on this blog. To put it briefly here, we view this ruling by the ECJ as a missed opportunity and certainly not as a breakthrough. Despite overwhelming and damning evidence of a growing systemic threat to the rule of law in Poland, the Court, rather than offering a systemic answer, opted for an individualised test requiring a case-by-case assessment. In doing so, we submit the ECJ ignored or refused to accept reality: 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*. One may view as particularly unworkable any requirement imposing on a national court acting as executing judicial authority the need to examine the extent to which systemic attacks on the rule of law are liable to have an impact at the level of the courts with jurisdiction over the requested person's case. We are sorry to say that we also find absurd to demand that such a national court request from the issuing judicial authority any infor-

mation that it considers necessary for assessing whether there is such a risk. This is akin to asking a potentially compromised court to confirm that it is not (or not yet) compromised in a context where judges can be subject to kangaroo disciplinary proceedings just for daring sending questions to the ECJ under Article 267 TFEU (see section 6 for more details).

In essence, the ECJ has created a test which we find impossible to apply in practice and disconnected from the reality of a judicial system which is in the process of being entirely captured by the executive. Anxious to preserve the principles of mutual trust and mutual recognition while simultaneously affirming the cardinal importance of the principles of the rule of law and judicial independence in the EU and in particular in Poland, the ECJ has devised a test which has the potential of undermining them all. The refusal to hold that the EAW mechanism cannot be suspended in respect of a Member State outside of a unanimous determination by the European Council, pursuant to Article 7(2) TEU, that this Member State has breached Article 2 TEU, is not merely dangerous, it is also flawed. Why? Because it reflects a failure to read a piece of EU secondary legislation in light of the EU primary law as it stands on the day of the ruling while justifying this failure on the back of an out-of-date, non-binding recital which merely does not take into account current Article 7(1) merely because it was not yet in force when the Framework Decision on the EAW was adopted! Last but not least, it means that even in a situation where judicial independence would have been totally annihilated, a case-by-case assessment would still be required unless – something which is simply politically unimaginable when you have more than one "rogue state" in the EU – unanimity in the European Council had been previously reached.

Be that as it may, we now have several concrete examples of national courts struggling when it comes to implementing the ECJ's "Celmer test". Wouter van Ballegooij and Petra Bárd spoke of Herculean hurdles in a post published last July. Recent examples have proved them right.

Just to give a single example, a Dutch court recently held that 11 surrender cases must be stayed and more questions sent to the relevant Polish issuing judicial authorities, as the initial answers provided by Polish courts did not adequately answer its concerns regarding the independence of the judiciary. This is not however the first time we saw a non-Polish court sending a second set of questions to Polish courts. Indeed, last September, we saw senior Polish judges openly disagreeing "with each other in letters sent to the High Court in Dublin about the independence of the Polish judiciary", with the one judge finding no problem with a court president appointed on the basis of an arguably unconstitutional law which was referenced as a source of concern by the Commission in its Article 7(1) TEU proposal…

We remain deeply sceptical of the ECJ's test as it is difficult to see how a national court, no matter how many and well thought questions it is able to produce and send under the preliminary reference procedure to the ECJ, may ever be able to gather sufficient evidence to meet the ECJ's threshold laid down in the second prong of its EAW rule of law test, i.e., to *specifically* and *precisely* prove, in the particular circumstances of each relevant case that there are *substantial* grounds for believing that, following the surrender to the issuing Member State, the requested person will run a real risk of a breach of his fundamental right to an independent tribunal. For instance, the Irish High Court found that the ECJ test cannot be met even in a situation where a Deputy Justice Minister is recorded to have publicly described the subject of the EAW as a dangerous criminal (presumption of innocence, anyone?). More generally speaking, how on earth can one receive a fair trial in a system without effective constitutional review; without an independent National Council for the Judiciary (the Polish KRS was suspended from the European Networks of Councils for the Judiciary for its lack of independence); but with a supreme court which now arguably includes unlawfully appointed judges, and where each judge in Poland potentially faces the threat at any point in time of kangaroo disciplinary proceedings (see below section 6).

In a recent and potentially significant development, the Irish High Court has asked Ireland's highest judicial body to clarify whether systemic and gener-

alised deficiencies in the independence of the relevant national judiciary are "sufficient, *on their own* [our emphasis] and in the absence of evidence of deficiencies in other safeguards for a fair trial, to establish substantial grounds that there is a real risk of a breach of the essence of the requested person's right to a fair trial". This is a question, however, which can only be authoritatively answered by the ECJ and one would therefore expect the Irish Supreme Court to refer this point to Luxembourg, providing the ECJ the needed impetus to fine-tune its test.

5. Several pending preliminary reference cases

Following the activation of Article 7(1) TEU, a number of Polish courts, including the Supreme Court and the Supreme Administrative Court, have submitted numerous references to the ECJ on the basis of the preliminary ruling procedure laid down in Article 267 TFEU.

In August 2018, the Supreme Court sent several questions regarding the forced retirement of its judges and the power to suspend domestic law regarding the independence of the judiciary. The ECJ has since agreed to expedite the case in light of the importance of the issues raised, the "serious uncertainties" the disputed national provisions have created with respect to "functioning of the referring court as highest national court" as well as Article 267 TFEU, "the keystone of the EU judicial system" and one which could not function without independent national courts according to the ECJ (see order adopted on 26 September 2018 in Case C-522/18).

Broadly similar questions than the ones submitted in Case C-522/18 have been subsequently referred by the Polish Supreme Court last October in Case C-668/18 and similarly, the ECJ has agreed to expedite the procedure in this case on 11 December 2018 for the same reasons given previously in the order issued in Case C-522/18.

Other preliminary reference proceedings initiated by the Supreme Court concern the disciplinary regime put in place on the back of the so-called "judicial reforms", and in particular the new disciplinary chamber, with the question of whether it may be considered a "court" within the meaning of EU law one of the issues raised. It is worth recalling in this respect that in its fourth rule of law recommendation of 20 December 2017, the Commission underlined that Poland's new disciplinary regime raises a number of concerns in particular related to the autonomy of the new disciplinary chamber in the Supreme Court; the removal of a set of procedural guarantees in disciplinary proceedings conducted against ordinary courts and Supreme Court judges; and the influence of President of the Republic and the Minister of Justice on the disciplinary officers.

To summarise where we are, in addition to Case C-522/18 and Case C-668/18 mentioned above, an additional seven preliminary ruling requests are now pending before the ECJ (it is not easy to keep track):

- Cases C-558/18 and C-563/18 (these two cases have been joined with the expedited procedure requests submitted by the referring courts however rejected by the ECJ on 1 October 2018);
- Cases C-585/18, C-624/18, C-625/18 (these three requests have been joined and expedited procedure granted by the ECJ on 26 November 2018);
- Case C-623/18 (lodged on 3 October 2018);
- Case C-824/18 (lodged on 28 December 2018).

To the best of our knowledge, kangaroo disciplinary proceedings have since been initiated against the judges at the origin of Case C-588/18; Case C-563/18; and Case C-623/18 (see section 6 below).

The tactical retreat operated by Polish authorities following the ECJ interim order regarding their attempted purge the Supreme Court also means that it is unclear whether the questions submitted in Case C-522/18 and Case C-668/18 still ought to be answered by the ECJ. According to what was recently reported in the Polish media, the Polish government has requested that the two cases be dismissed in light of the latest amendments to the Law on the Supreme Court. The Supreme Court must now explain to the ECJ before the end of the month why a preliminary ruling from the ECJ is still necessary to enable it to give a judgment in these two cases.

In any event, it is worth noting that in addition to the issue of the Supreme Court's new disciplinary chamber, some of these pending cases raise the issue of the composition and appointment procedure of the ENCJ-suspended KRS, by asking the ECJ that it interprets whether Article 19(1) TEU and Article 47 CFR preclude a body such as the KRS which the Commission has recently described as follows in a document submitted to the Council before the third hearing organised under Article 7(1) TEU last December:

> *The new election regime of the judges-members of the National Council does not comply with European standards requiring that judges-members of Councils for the Judiciary are elected by their peers. No changes have been introduced in that respect. No remedy is foreseen to address the premature termination of the four-year mandates of the former judges-members of the National Council for the Judiciary. The conditions under which the Sejm elected the new judges-members, and the first meeting of the National Council for the Judiciary illustrate its politicisation and lack of legitimacy.*

If you are not yet alarmed by the above and the sheer number of preliminary ruling requests originating from Polish courts raising the issue of attacks on their independence in the past few months, the section below should hopefully convince you that it time to raise the alarm and for national governments, parliaments and courts from other EU countries to step up to the plate.

6. Latest insidious developments

In a nutshell, Polish authorities are now seeking to finalise their capture of the judicial branch and prevent any further involvement of the ECJ via the systemic – formal or otherwise – bullying and intimidation of any judge refusing to toe the party line and the support of the captured Constitutional Tribunal. With respect to the former, to quote the European Commission again (document dated 11 December 2018, on file with the authors),

> *disciplinary officers appointed by the Minister of Justice continue to initiate preliminary disciplinary investigations against judges who participated in public debates or provided public statements about the ongoing reforms. Preliminary disciplinary investigations concern also judges who referred requests for preliminary ruling to the Court of Justice. In addition, disciplinary officers appointed by the Minister of Justice exercised their power to take over investigations carried out by disciplinary officers appointed at request of the judiciary, including in cases where the judges concerned were found by the latter not to have committed any disciplinary offence*

The goal here is quite obvious: due to the increasing number of referrals to the ECJ, the ruling majority and bodies captured by it are seeking to send a (chilling) message to all Polish judges by retaliating against those who dare to involve the ECJ. Such state-sponsored bullying of judges making use of Article 267 is proving to be a blueprint attractive to other 'quasi-authoritarian' Member States/ 'rogue state' and already seems to have spread to Bulgaria.

A particularly absurd example is the situation of the judge who is now subject to kangaroo disciplinary proceedings for asking the ECJ (Case C-558/18) about the compatibility of Poland's new system of disciplinary system with EU law. Unbelievably, this judge was then summoned by the disciplinary officer under the control of the Minister of Justice for potential abuse of the Article 267 procedure…

> *Pursuant to … You are hereby invited to submit within 14 days from the date of delivery of this letter, a written statement regarding the possible judicial excess [our emphasis] which resulted in the District Court in Łódź's request for a preliminary ruling against [our emphasis] the requirements laid down in Article 267 [TFEU] (translated excerpt from the summons sent on 29 November 2018 to Judge Ewa Maciejewska by the deputy disciplinary commissioner)*

As noted by the Polish Association of Judges Themis, "by instituting disciplinary proceedings against [two] judges, the Deputy Commissioner, almost certainly unintentionally, confirmed the argument contained in Judge Igor Tuleya's question requesting a preliminary ruling [Case C-563/18] that the new disciplinary procedure has been politicized to such an extent that it can serve the purpose of exerting unacceptable pressure on judges". (An additional recent example of disciplinary proceedings targeting the judge at the origin of Case C-623/18 is here).

While these disciplinary proceedings have yet to conclude (to keep up to date: see this website), their "chilling effect" is obvious and so is the intent of the Polish government: to bully if not scare judges into submission since there is no one left to defend them, the ruling party having *de facto* captured the Supreme Court's new disciplinary chamber...

Not to be undone by these scandalous proceedings and this frontal attack against Article 267 TFEU, "the keystone of the EU judicial system" according to the ECJ itself, the Prosecutor General/Minister of Justice has submitted last October a request to the pseudo Constitutional Tribunal. In a nutshell, the PG/MoJ is asking it to assess whether Article 267 TFEU is in line with the Polish constitution (you know, the document Polish authorities are complying with only when convenient), the key claim being that "issues relating to the system, form and organization of the judiciary, as well as judicial procedures, have not been transferred to the EU in the Accession Treaty". Should the "Constitutional Tribunal" happily oblige (and refuse to refer the case to the ECJ prior to issuing judgment), this would be a direct challenge to the primacy of EU law, its uniform application, and the rule of law as a foundational value of the EU as we have never seen before. Should such a ruling materialise, we would then expect the Commission to immediately initiate yet another infringement action building on Case C-416/17.

Last but not least, a new developing frontline must be paid attention to. The new KRS – well known and widely mocked for its recent interpretation of the judicial ethics code according to which judges cannot wear "Constitution" t-shirts – has also brought its own case to the so-called "Constitutional Tribunal". On its own motion, the (captured) Polish National Council of the Judiciary has requested that the (captured) Constitutional Tribunal finds its composition compatible with the Polish Constitution. Although it is up to the body which refers the case to the "Constitutional Tribunal" to show that a disputed law is unconstitutional, it clearly seems that the new KRS is not bothered with what it must view as only legal niceties and is essentially urging the "Constitutional Tribunal" to rubber-stamp its politicisation. Be that at it may, we are looking at the staggering possibility that a captured body will come to the rescue of another captured body so as offer the ENCJ-suspended KRS some ammunition in case of any adverse ruling from the ECJ or its eventual exclusion from the ENCJ.

7. Diagnosis and way forward

To put it concisely, the situation of a systemic threat to the rule of law in Poland, which led the Commission to finally and rightly activate Article 7(1) TEU more than a year ago, 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 means that the ongoing Article 7(1) TEU procedure must continue. It is however time for the Commission to accept that stand-alone dialogue, still presented as its "preferred channel for resolving the systemic threat to the rule of law in Poland", will lead nowhere when dealing with would-be autocrats acting in bad faith. The Commission should therefore launch accelerated infringement proceedings regarding every single issue mentioned in its Article 7(1) reasoned proposal not yet covered by any of the pending infringement or preliminary reference actions.

Should the Commission fail to do so, it is time for national governments which take the rule of law seriously and are keen to protect the EU's internal market, to rediscover Article 259 TFEU and bring their own infringement actions against Poland. They should also seek to systemically intervene in every single ECJ action where the systemic threat to the rule of law in Poland is the key issue.

As for the Council, our key recommendation would be for it to ensure full transparency of Article 7 proceedings by systematically publishing any connected document it produces or receives from the EU Commission and national governments.

National courts have also a role to play. We would want to see as many of them refer as many preliminary requests as possible to the ECJ should they be faced with cases which, directly or indirectly, raise issues relating to the rule of law situation in Poland, if only to prevent a situation where the ECJ is unable to issue rulings because the Commission has withdrawn its infringement actions and/or the Polish authorities have been able to "kill off" all requests via formal and informal means.

Last but not least, the ENCJ ought to face reality and accept that the KRS cannot be saved and ought to therefore exclude it considering the disgraceful actions and behaviour of its members since it was suspended last September.

Enough is enough.

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