Age is the limit? Background of the CJEU case C-619/18 Commission v Poland

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The ongoing saga of judicial independence in Poland

Next month the Court of Justice of the European Union will make a decision that is likely going to feature in the future textbooks on European Union law. In the case C-619/18 Commission v Poland, the Court will tackle the topic of judicial independence and the question of whether the standards of the rule of law were violated by the Polish government and parliament and thus address a critical element of European Union's legal system. In doing so, the CJEU will likely answer some long overdue questions regarding what the rule of law in the European Union is. More importantly, it will possibly counter an attempt at hostile takeover of Polish Supreme Court by the government. After 8 years of political debates on the rule of law in the European Union, 24th June 2019 could finally bring a landmark judgment on controversial reshaping of domestic institutions which has occurred in several EU member states.

The judgment will have major implications for Poland, where the ruling party Prawo i Sprawiedliwość (Law and Justice, PiS), which enjoys both a parliamentary majority and the support of the President, has altered the legal and institutional landscape in ways seen by scholars as an example of creeping authoritarianism.[1] The bulk of these measures have been intro-

[1] W. Sadurski, *Poland's Constitutional Breakdown*, Oxford University Press, forthcoming 2019.

duced by means of laws passed by the Polish parliament and signed into law by President Andrzej Duda. Until now PiS has been unable to alter the Polish constitution itself, for it lacks the parliamentary supermajority necessary to pass the threshold required for constitutional amendments to be adopted.

These measures have led the Polish government on a collision course with the European Union's institutions and resulted in the European Commission launching the art. 7 TEU procedure against Poland in December 2017. At the same time, Poland remains a country with high public support for the European Union and any ruling by the CJEU which would indicate that the government is imperilling Poland's position in the EU would likely be a political problem for the government.

After taking office in 2015, the PiS packed the Constitutional Tribunal and the National Council of Judiciary with loyal leadership and government-friendly judges and members. It then turned its eyes towards the Supreme Court of Poland. The first attempt at subjugating the Court has been carried out in 2017 and entailed removal of all sitting judges and a complete re-organisation. But the ruling party's plans triggered massive protests and continued pressure led to the President Duda vetoing the most egregious elements of the legislation (for a detailed account of legal reforms and EU reactions, see our analysis from 2018). This symposium deals with the second attempt at taking over the Supreme Court. Yet the upcoming judgment, important as it is, is but one element of an array of proceedings before the CJEU related to independence of Polish judiciary. Just recently the CJEU heard the case *Commission v. Poland* (C-192/18) which concerns the lowering of retirement age of judges of ordinary courts in Poland. Furthermore, various Polish courts have lodged requests for preliminary rulings on questions related to political influence on the judiciary and the use of disciplinary proceedings.[2] And just few days ago, the Supreme Court has requested for a preliminary ruling regarding the status of new Supreme Court judges appointed by the taken-over National Council of Judiciary, setting up an opportunity for the CJEU to look into the effect which the NCJ has on independence of the entire Polish judiciary. Keeping this context in mind is important, as no matter how ground-breaking the upcoming judgment is, there will be more in the coming months on CJEU and the status of Polish judiciary.

Why should Europeans from other countries care?

Why does the Polish Supreme Court matter? Apart from its rather obvious domestic importance as the highest instance of proceedings in civil, criminal, labour, military and social security matters, the Polish Supreme Court has the competence to elaborate binding interpretation of any law which falls under its jurisdiction. For example, the Supreme Court established that telecom operators are directly liable for mass adverts sent out via text messages and robocalls conducted by outsourced companies, thus curtailing the practice of telecoms evading punishment for spamming by subcontracting such services and deflecting liability on subcontractors.[3]

But above all, the Supreme Court of Poland is also a European Union court, one that applies European Union law and ensures that mutual recognition and trust within the European Union's legal sphere are respected. The legal system of the European Union is based on the notion that member state courts and authorities recognise rulings of courts in other member states without second-guessing whether these judgments are issued by an independent and impartial court. In that respect, the European Union legal system can be compared to a brick building where national courts of member states represent individual bricks. Take one brick out and a wall may fall apart when other national courts and authorities refuse to cooperate with a problematic court and call into question mutual recognition of decisions and rulings issued by courts in such country.

[2] Request for a preliminary ruling from the Sąd Okręgowy w Łodzi (Poland) lodged on 3 September 2018 — City of Łowicz v State Treasury — Governor of Łódź Province (Case C-558/18), Request for a preliminary ruling from the Sąd Okręgowy w Warszawie (Poland) lodged on 5 September 2018 — Criminal proceedings against VX, WW and XV (Case C-563/18)

[3] Resolution of the Supreme Court of Poland from 17th February 2016, III SZP 7/15

Another aspect of Supreme Court's importance is its role in elections, including elections to the European Parliament. Firstly, the Supreme Court rules on electoral protests and has the sole competence to declare elections and referendums valid. Matters related to elections are being currently dealt with by one of newly established chambers of the Supreme Court. Secondly, the Supreme Court delegates three of its members to the National Electoral Commission, which oversees the organisation and conduct of elections in Poland. One cannot forget that for all its transnational importance and pan-European character, the elections for the European Parliament are essentially 28 national elections cobbled together. Once again, the European Union law assumes that conduct of elections and handling of electoral protests in every member state are overseen by impartial and independent bodies. The wall/brick metaphor applies here as well. If there is no trust in the independence of Polish courts, electoral disputes could well be perceived as similar to the struggles over election results in countries outside the EU, such as Kenya or Ukraine during the Orange revolution.

Is CJEU moving to block the second attempt of the Supreme Court take-over?

The case C-619/18 Commission v Poland, also known as "Supreme Court judges' retirement age case", arose from a law adopted in 2017 which was an element of the second attempt to remove "thorny" judges of the Supreme Court. This time, the letter of the law was more subtle. It didn't outright remove the judges from office, it merely lowered the mandatory retirement age, which would in turn lead to retirement of a substantial number of justices, including the First President of Supreme Court, Prof. Małgorzata Gersdorf. The "removal by early retirement" tactic eerily resembled the one employed earlier in Hungary. To nuance things further, the President of Poland was given a fully discretionary power to keep the judges in the office, were they to request that of him. For the superficial observer, the reform may have seemed a harmless but complex technicality. In practice, it amounted to a sweeping alteration of the composition of the Supreme Court and would have paved the way to installing new leadership of the court (it is worth noticing that such sudden concern for prompt early retirement of judges was not extended to the government-friendly Constitutional Tribunal).

The law entered into force in April 2018. After the Commission exchanged letters of formal notice with Poland in July and August 2018, it elaborated a reasoned opinion, alleging that Poland had failed to fulfil its obligations under the combined provisions of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights. Throughout the dialogue with the Commission, Poland responded that the Commission's position is unfounded and requested closure of the procedure. Having exhausted its means for action, and apparently surmising that further political dialogue will lead nowhere, the Commission lodged an application with the CJEU on 2 October 2018, bringing an action under art. 258 TFEU against Poland for infringement of its obligations under the primary law.

Two major events followed. The CJEU accepted the Commission's request for interim measures on 17th December 2018 and ordered Poland to immediately adjust legislation in order to reverse the premature retirement of Supreme Court judges. This was a watershed moment, for if the Polish government was to ignore the order and brazenly defy the CJEU, it would have legally and politically declared an end to accepting the EU legal order. But the government backed down and the law in question was voided. For now, Prof. Małgorzata Gersdorf remains a sitting judge and the First President of the Supreme Court of Poland.

The second major event in this case was the opinion by Advocate General (AG) E. Tanchev, issued on 11th April 2019. P. Bogdanowicz provided an analysis of the opinion in an earlier Verfassungsblog article. Firstly, the AG rebuffed the arguments of the Polish government concerning inadmissibility of the case due to the fact the relevant laws have been revised following the Court's interim order. Secondly, he stated that yes, the Commission can bring an infringement action under art. 258 TFEU while there is an ongoing art. 7(1) TEU mechanism triggered with respect to particular

member state. Thirdly, the AG proposed that the Court should declare that Poland failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU to "provide remedies sufficient to ensure effective legal protection in the fields covered by Union law".

We have come a long way from cases about electricity bills and dairy products

Independence of the judiciary and standards of the rule of law have not been frequent matters for the CJEU. The Court was up to now confronted with relatively marginal questions related to the rule of law, e.g. of whether a quasi-judicial body fulfils the standards of independent judiciary. The picture changed in 2018, when a professional association of Portuguese judges brought a case before the CJEU, claiming that austerity measure that affected judges' pensions had an adverse effect on their capability as independent and impartial judiciary.[4] In doing so, the applicants provided the CJEU with an opportunity to elaborate on the standards of judicial independence, and fortuitously did so before the rulings in Polish cases. The Court then delivered a landmark ruling outlining the role of judicial independence as an element of the rule of law and declaring itself competent to evaluate the guarantee of independence of those national judges who apply and interpret EU law under Article 19(1) TEU. For more on this, see M. Ovádek here.

In the past, the CJEU occasionally surprised the legal world, passing landmark judgements in cases that had seemed mundane. A dispute about tariffs on urea formaldehyde became the staple case of any EU law textbook in form of the ruling in case *Van Gend en Loos*. In this case, however, all eyes are on the CJEU from the get-go, as possible consequences of the upcoming judgment, both legal and political, are tremendous. Obviously, the significance for Poland will be immense, but it is also a defining moment for European Union law and for the notion of the EU enforcing respect for its core values – democracy, the rule of law and human rights – vis a vis member states.

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[4] M. Bonelli, M. Claes, *Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical dos Juízes Portugueses.* 14(3) European Constitutional Law Review, p. 622-643, 2018.