Judges Depending on Judges

A Missing Brick in the CJEU Jurisprudence on Judicial Independence

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As commentators on this blog and elsewhere have rightly noted, since the beginning of 2018 the CJEU has finally been putting flesh on the bones of the EU principle of judicial independence. Most recently, the Court has been widely praised for its ruling against the Polish attempt of removing the, presumably, disloyal judges by a general measure of lowering their retirement age from 70 to 65. While the decision is indeed praiseworthy, it is nevertheless necessary to emphasize its notable doctrinal *lacuna* with potential negative practical implications – particularly in those EU member states with a weak democratic and rule of law tradition, a low degree of legal and political culture as well as with a small and tightly-knit legal elite.

In the most recent case against Poland (C-619/18), the CJEU explained what has already become part and parcel of its established case-law: that judicial independence features an external and an internal aspect. Accordingly, the external one "requires that the court concerned exercises its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions (C-619/18, para. 72). Whereas the internal dimension of judicial independence "is for its part linked to impartiality and seeks to ensure that an equal distance is maintained from the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law." (ibid., para. 73). To understand the doctrinal *lacuna*, perhaps even a flaw, in this reasoning, consider the following example.

A story yet untold

Once upon a time, almost thirty years ago, a country secured its independence and pledged to part with five decades of a totalitarian regime and to embark on a new path of the rule of law and democracy. Despite an overwhelming popular support for the "return to Europe", the political spectrum was much more divided and the old institutions proved to be sticky. In particular in the field of judiciary. This was, to be distinguished from its *bourgeois* counterparts, couched into a massive bureaucratic hierarchical structure, composed of hundreds of anonymous judges in service of justice as defined by the presidents of their respective courts, and as supervised by the president of the Supreme Court, who was simultaneously a member of the central committee of the Communist Party. This type of judiciary was, of course, not intended to be independent. The old Constitution, in the absence of separation of powers, did not require any such *bourgeois* oddity. The new Constitution did though, but in practice the old dependent judges were, as a rule, transformed into new independent judiciary with tenure, while being still presided over, more than symbolically, until 1993 by the same individual from the Central Committee.

As years, indeed decades, have passed, this judiciary has evolved, transformed and mutated, but the essence of the old bureaucratic hierarchical structure has remained in place, with the individuals who were still forming as judges in the 1980s, now enjoying the climax of their career at the Supreme Court. This judiciary is, thanks to the numerous constitutional and statutory safeguards which have been sufficiently

applied also in practice, externally independent. It has not been, as the CJEU rightly proscribes, subject to any hierarchical constraint or subordinated to any other body outside itself. Also, in terms of impartiality, that the CJEU constructs as an internal element of judicial independence, other than the usual public and political criticism, there have been no major events that would put this judicial principle into question.

However, there has been something that the CJEU case-law does not appear to catch. First, there has been some unusual traffic between the judiciary and the executive branch traditionally controlled by the post-communist left. Most recently, the former expert head of the judicial office for communication at the Supreme Court switched to the political position of state secretary in the Ministry of Justice, replacing the former political state secretary who returned to her former position of the now again expert head of the judicial office for communication at the same Supreme Court. This person is a wife of the vice-president of the Supreme Court, who has recently made "important" moves for denouncing his fellow Supreme Court judge to the commission for judicial ethics, which is chaired by the vice-president's former wife. That latter initially refused to recuse herself, but did so when the disobedient Supreme Court judge has been denounced to the judicial ethics commission yet again, this time around by the president of the Supreme Court himself. The rogue justice has namely publicly criticized the malpractice in judicial self-government, exposed evident pressures on the independence of individual judges, and gave evidence of tampering with the personal files of judges affecting their chances of promotion and interfering with their right to privacy at the working place. Last but not least, just recently the unmannered judge responded to the invitation of the Parliament's Judicial Committee and attended its session against the explicit instructions to the contrary by the president of the Supreme Court. After the failure of the initial intra-institutional attempts of silencing the naughty judge, who asserted his right to freedom of expression and indeed his institutional duty to criticize the malpractice of the leadership of the Supreme Court, he has now found himself under the pressure of a growing number of procedures conducted against him by the very same judicial leadership he had dared to publicly criticize.

The difficult fight against invisible internal dependence

This type of case, in which no external, be it political or executive, body needs to interfere with the judiciary since it has already been synchronized with those political expectations due to the institutional legacy of the past and the specific germination of the legal (including judicial) elite, does not raise the problem of external judicial independence. However, what is clearly at stake is internal judicial independence, but not within the meaning of impartiality of a judge or a court – the latter is in my opinion an independent legal principle, admittedly connected to, but still separate from the principle of judicial independence – rather within the meaning of an independence of a single judge, of a judge as an individual.

The independence of a judge as an individual is indeed the cornerstone of judicial independence. For it is obvious that the courts cannot function as collectively independent institutions of power, if and when they are composed of dependent judges. This dependence can be achieved by external interference, but the latter is typically blunt and widely visible, which makes it relatively easy to fight against and to prevent it. However, the dependence of judges can also be generated intra-systemically, when the judicial system is structured bureaucratically and controlled by a strong and politically connected ruling judicial class that uses informal collegial as well as formal means to control and, if necessary, also silence those judges who do not conform to the system. As this model requires no external political interference, or the latter is even hypocritically called upon to restore the collective institutional independence threatened by the individual disobedient judges, it is much more difficult to be detected, deciphered and countered. However, it poses an identical, but perhaps even a graver, threat to judicial independence of individual judges than the external, openly political interference by the other branches of power.

This *de facto* internal independence of an individual judge, including from their externally institutionally independent system of judiciary, literally from their peers, especially when they are not as virtuous as ideally required, is something that has eclipsed the recent CJEU case-law on judicial independence. Most likely, this has been the case, since the issue simply was not raised. However, this does not mean that the problem does not exist. I am afraid the example of Slovenia, that the very real fairy tale recounted above factually draws upon, can be extrapolated at least across Central and Eastern Europe, if not even more widely. At the very least, the CJEU should thus nuance its interpretation of internal judicial independence, which should not be just about impartiality, but about an actual internal independence of an individual judge.

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