1460 Days Later: Rule of Law in Poland R.I.P. (Part I)

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On 13 January 2016, exactly four years ago today, the Commission activated its rule of law framework for the very first time with respect to Poland (for our previous 2-part post assessing the situation as of 13 January 2019 see here).

During this time, Poland has become the first EU Member State:

- to be threatened with the payment of a penalty payment of at least €100,000 per day should it continue to ignore an interim order adopted by the ECJ in July 2017;
- to be subject to the exceptional procedure laid down in Article 7(1) TEU in December 2017;
- to have seen its newly "redesigned" National Council of the Judiciary suspended from the European Networks of Councils for the Judiciary for its lack of independence in August 2018;
- to have seen its self-described "judicial reforms" provisionally suspended by the Court of Justice via two interim orders in October and December 2018;
- to have been found by the Court of Justice to have failed to fulfil its Treaty obligations under the second subparagraph of Article 19(1) TEU not once but twice in June and November 2019;
- to have been referred to the Court of Justice by the Commission for making it possible to subject ordinary court judges to disciplinary investigations, procedures and sanctions on the basis of the content of their judicial decisions, including the exercise of their right under Article 267 TFEU to request preliminary rulings from the Court of Justice.

As if to outdo itself when it comes to annihilating judicial independence, Poland's ruling party has rushed an unprecedented piece of legislation last month. This bill "raises the question of whether Poland wants to remain in the EU" by forcing non-compliance with EU rule of law requirements and strengthening an arbitrary disciplinary regime which has already enabled a multitude of kangaroo disciplinary proceedings against any judge at any point in time for as long as needed from the point of view of the ruling party.

As recently and accurately observed, "no member state in the history of the EU has ever gone as far in subjugating its courts to executive control as the current Polish government. The Polish case has become a test whether it is possible to create a Soviet-style justice system in an EU member state; a system where the control of courts, prosecutors and judges lies with the executive and a single party".

This (two-part) post will highlight the main developments, primarily from the point of view of EU law, which took place in 2019. The most noteworthy one is the Court of Justice's two infringements rulings which have found Poland to have violated the principles of the irremovability of judges and judicial independence and the Court of Justice's first preliminary ruling regarding the so-called "Disciplinary Chamber" of Poland's Supreme Court. The latter ruling has proved particularly impactful as it has directly led a not-yet-captured chamber of Poland's Supreme Court to find the Disciplinary Chamber not to constitute a court within the meaning of EU and Polish Law. These two rulings have led in turn Polish authorities to put forward what may be described as a "de facto Polexit bill".

This means that the warning addressed to the new President of the European Commission last month by multiple NGOs and scholars remains more valid than ever: "The attacks on judicial independence we are witnessing in Poland are unprecedented in the history of the EU and legal chaos is bound to ensue and spread because Polish authorities are openly and purposefully ignoring their duties and obligations as a matter of

Polish as well as EU law. If not promptly addressed through interim measures, we have no doubt this will mark the beginning of the end of the EU's common and interconnected legal order."

It is time for European and national actors to WAKE UP and realise we may soon reach a tipping point, with the EU's interconnected legal ecosystem facing a medium-term risk of collapse due to the premeditated and ongoing "destruction of the independence of the judiciary" we are witnessing in Poland, a process which seems to be inspiring an increasing number of national governments with exhibit A being Orbán's Hungary.

1. Going M.I.A. in 2019: The Council

Before outlining the Court of Justice's decisive contribution in 2019, one may note the Council's failure to organise any Article 7(1) TEU hearing in respect of Poland since it held one in December 2018. One should not understand the lack of any Article 7(1) hearing as meaning that the Commission's Article 7(1) recommendations have been met. Indeed, not a *single* one of them has been *fully* implemented by Polish authorities. In fact, the situation is worse than ever, which is why the Commission had no choice but to conclude in February 2019 that due to "the cumulative effect of the recent changes affecting the judiciary", which "are limiting its independence" and "infringing upon the separation of powers", the executive and legislative powers can now "interfere throughout the entire structure and output of the justice system".

You have read this correctly: Poland's executive and legislative powers, de facto controlled by Poland's de facto Great Leader, can now *interfere* at will with the functioning and *outputs* of Polish courts (one may note in passing that the Commission's diagnosis confirms the ill-advised nature of the so-called Celmer test devised by the ECJ as we noted last year). This interference is now happening openly, through disciplinary charges or administrative measures, such as early dismissals from secondment or temporary suspension by captured presidents of courts, but also more indirectly by putting pressure on judges not to adjudicate in a certain way whenever the interests of the ruling party demand it.

What has the Council done to address the situation? Not much or rather, as little as possible. Two explanations may be advanced: the Romanian government, in charge of the rotating presidency of the Council, was too busy undermining the rule of law in Romania to organise a hearing while the otherwise very active Finnish Presidency did not want to be seen as interfering with Poland's parliamentary elections of October 2019, which is why it prioritised the organisation of the first Article 7(1) TEU hearing held in respect of Hungary in September 2019 followed by another one in December 2019.

In concrete terms, this means we only saw the Commission give a few updates on the rule of law situation in Poland during the past 12 months:

> *18 February 2019: The Commission provided the Council with an update on the latest developments regarding judicial reform in Poland. Member states considered that recent legislative changes concerning the Supreme Court law were a positive development and encouraged the Polish authorities to address the remaining issues raised by the Commission.9 April 2019: The Commission provided an update on the state of play in relation to Poland.18 July 2019: The Council took stock of the state of play as regards the rule of law in Poland in the light of recent developments, in particular the judgment of the European Court of Justice on Poland's Supreme Court law.16 September: The Commission updated ministers on the developments regarding the rule of law in Poland following the meeting of the General Affairs Council in July.10 December 2019: The Commission updated ministers on the latest developments, including the recent judgments of the European Court of Justice concerning Polish rules on the retirement age of judges and public prosecutors and the new Disciplinary Chamber of the Polish Supreme Court.*

Beyond the issue of the two rotating presidencies of the Council's own priorities, it would appear that an

additional pretext was used by some EU governments to justify their not untypical torpor: the alleged need to wait to see how Polish authorities would comply (or not) with the Court of Justice's forthcoming infringement and preliminary rulings considering the increasing number of pending cases before the Court, and which directly or indirectly raise most of the issues highlighted in the Commission's Article 7(1) reasoned proposal.

As we shall now see, Polish authorities have only publicly accepted to comply with the Court's two infringement rulings to date primarily because these rulings did not prevent them from progressively capturing the Supreme Court from within. As soon as the Court of Justice provided an interpretation of EU law which led a not-yet-captured chamber of Poland's Supreme Court to find unlawful two of the sham bodies established or captured by the ruling party (i.e. the "Disciplinary Chamber" of the Supreme Court and the ENCJ-suspended National Council of the Judiciary), a new bill was put forward to organise and legalise non-compliance with the judicial independence requirements established in EU law, in obvious breach of both the Polish Constitution and the EU Treaties.

2. The Court of Justice's entrée en piste

As of today, two infringement rulings – Case C-192/18 and Case C-619/18 – and one preliminary ruling – joined Cases C-585/18, C-624/18 and C-625/18 – have been issued by the Court of Justice. In addition, one infringement case regarding Poland's new disciplinary regime for judges (C-791/19) and, to the best of our knowledge, eighteen requests for a preliminary ruling raising judicial independence issues, are now pending before the Court.

The two infringement rulings previously mentioned went against Poland, which was not in the slightest surprising considering the obvious arbitrary nature of the changes pushed by Polish authorities regarding the retirement regime of Polish Supreme Court judges, Polish ordinary court judges and public prosecutors. These infringement rulings having been analysed elsewhere (see e.g. here and here), let us just emphasise how they show the lack of good faith of Polish authorities when it comes to the real reasons underlying their so-called "reforms". Indeed, while members of Poland's ruling party have been keen to constantly emphasise the need to "decommunise" the judiciary (even claiming that younger judges educated post 1989 would allegedly follow the behavioural patterns of their older, allegedly "communist", colleagues), the justifications put forward before the Court to justify the retirement "reforms" were of a different nature. For instance, the lowering of the retirement age of Supreme Court judges to 65 was allegedly needed to standardise their regime "with the general retirement age applicable to all workers in Poland" while in the case of female ordinary court judges, Polish authorities explained the lowering of their retirement age to 60 (from 67) "on account of their particular social role connected with motherhood and child raising".

With respect to the Supreme Court, the Court observed, in a highly unusual fashion but commensurate to the Polish government's bad faith, that the "explanatory memorandum to the draft New Law on the Supreme Court contains information that is such as to *raise serious doubts* [our emphasis] as to whether the reform of the retirement age of serving judges of the *Sąd Najwyższy* (Supreme Court) was made in pursuance of such objectives, *and not with the aim of side-lining a certain group of judges of that court* [our emphasis]". The Court therefore had no choice but to conclude that Polish authorities did not pursue a legitimate objective when they sought to lower the retirement age of the Supreme Court judges in post prior to the adoption of the law in dispute. Similarly, the Court of Justice found the new Polish rules relating to the retirement age of judges of ordinary courts and public prosecutors, adopted in July 2017, to be in violation inter alia of the principle of irremovability of judges, which is inherent in judicial independence.

In another seminal (preliminary) ruling (analysed e.g. here and here), the Court of Justice meticulously explained how the referring chamber of Poland's Supreme Court can ascertain whether the so-called Disciplinary Chamber (hereinafter: DC) – which is also

one of the problems highlighted by the Commission in its Article 7(1) reasoned proposal – is sufficiently independent to constitute a court within the meaning of EU law. In the same preliminary ruling, the Court also explains how to ascertain the independence (or lack thereof) of the new National Council of the Judiciary (hereinafter: NCJ) – another body which has been highlighted as problematic by the Commission and many other organisations. Overall, the ECJ's interpretation makes it implicitly obvious that neither the DC nor the NCJ satisfy the basic requirements of independence established by EU law, as previously made explicitly clear by Advocate General Tanchev.

Unsurprisingly, therefore, the referring court (the Labour and Social Security Chamber of the Supreme Court) subsequently found on 5 December 2019, on the basis of a meticulous and compellingly argued judgment, that the neo-NCJ does not offer a sufficient guarantee of independence from the legislative and executive authorities before ruling that the "Disciplinary Chamber" does not constitute a "court" within the meaning of EU law and therefore not a court within the meaning of Polish law as well.

With respect to the neo-NCJ, one may recall that it has been suspended from the ENCJ since August 2018 and that it was not merely established in breach of the Polish Constitution but also most likely unlawfully constituted on the basis of the 2017 (unconstitutional) law which changed the appointment procedure for the judicial members of the NCJ while also providing "for the early termination of the mandate of all judicial members on the Council". To put it simply, it is likely that the judicial members of the NCJ were not supported by the required number of judges provided by the new (unconstitutional) law and/or only supported by each other or judges seconded to the Ministry of Justice. This is likely the reason why national authorities have openly ignored (you read that correctly) a final ruling from the Supreme Administrative Court ordering the *Sejm* to disclose the names of the judges supporting the NCJ candidates.

This blatant but far from unique violation of the most basic understanding of the rule of law by Polish authorities was rightly deplored by the Supreme Court in its judgment of 5 December 2019 which applied the ECJ preliminary ruling of 19 November 2019.

(Part II forthcoming)

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