Can an Unlawful Judge be the First President of the Supreme Court?

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Yesterday, the President of Poland appointed Małgorzata Manowska as the First President of the Supreme Court. Manowska cannot be considered an independent judge in light of the judgment of the ECJ in *A.K. v Sąd Najwyższy* and the subsequent rulings of the Polish Supreme Court. Moreover, she was endorsed as a candidate for the First President by other 'members' of the Supreme Court whose independence is in doubt rather than the majority of the General Assembly of the Supreme Court as required by the Polish Constitution. In our view, the new 'members' of the Supreme Court should not have participated in the election of the new First President at all. The ECJ and the Supreme Court ruled out the possibility that these members, due to their questionable independence stemming from the irregular appointment, exercise judicial functions. The Polish Supreme Court, with Manowska as its First President, may from now on have difficulty providing the appearance of independence as required from all national courts dealing with EU law.

Can a judge be only a little bit lawful?

Recently, the Polish Supreme Court implemented the judgment of the ECJ in *A.K. v Sąd Najwyższy* (see, here; for commentaries, see here and here). It confirmed that reasonable citizens may have legitimate doubts as to the actual independence of the new members of the Supreme Court appointed in 2018 and later (for English versions see, here and here). These new members were appointed at the request of the new National Council of Judiciary, itself appointed with a breach of multiple constitutional provisions by the parliamentary majority from among persons having close links to the Minister of Justice. As a result, the new members of the Supreme Court – including Manowska – were considered incapable of providing effective judicial protection, hearing individual cases and rendering judicial decisions. Importantly, these rulings were issued by panels of the Polish Supreme Court whose independence was beyond any doubt. Subsequently, one of the rulings was questioned by the captured Constitutional Tribunal. According to the majority of constitutional law experts, however, the Constitutional Tribunal trespassed the boundary of its jurisdiction and attempted to render the ECJ judgment inapplicable.

Leaving the 'judgment' of the captured Constitutional Tribunal aside, what was indeed not directly settled in the ECJ and Supreme Court rulings was whether the new 'members' of the Supreme Court can perform certain activities reserved for judges but not pertaining to judicial decision-making in the strict sense, such as the election of the new First President of the Supreme Court.

In the said rulings, the Polish Supreme Court made a distinction between the *application* of the EU right to effective judicial protection in individual cases and the judicial review of the general *validity* of judicial appointments by the Polish President. The Supreme Court confined itself to holding that its new 'members' cannot provide effective judicial protection in individual cases so they should abstain from adjudication. But the question remained if these retain the judicial status in the formal sense. By making the distinction between effective judicial protection and the formal judicial status, the Supreme Court aimed to avoid long-lasting constitutional controversies as to whether a formal judicial appointment – which is a prerogative of the President of Poland – is as such amenable to judicial review. The Supreme Court eschewed tackling this issue by distinguishing differ-

ent spheres of judicial activity including the decision-making sphere and the institutional sphere. In the decision-making sphere, which directly pertains to effective judicial protection, judges exercise the proper judicial authority by settling legal disputes and rendering judicial decisions vis-à-vis the parties to judicial proceedings. In the institutional sphere, judges interact mainly with each other while, for instance, electing bodies of judicial self-government or, importantly, candidates for the First President of the Supreme Court to be presented to the President of Poland. The ECJ and Supreme Court rulings directly related only to the decision-making sphere, leaving the institutional sphere aside. As a result, both courts remained silent on whether the 'judges' whose independence was in doubt could still obtain judicial salaries, enjoy judicial immunity and exercise non-adjudicatory judicial functions, including whether they could elect candidates for the First President of the Supreme Court.

Another problem was that the new legislation governing the Supreme Court, introduced in 2018, significantly increased the influence of the President of Poland over the election of the First President of the Supreme Court. Previously, the President of Poland could appoint the First President from among at least *two* candidates presented by the General Assembly of the Supreme Court. Under the law of 2018, the General Assembly was to present *five* candidates. This way, the President might be sure that at least one of the five candidates would represent the 'new' members of the Supreme Court.

Nonetheless, according to the case law of the Constitutional Tribunal from before its capture, following the vote on individual candidates *all the five* with the highest numbers of votes should be *once again confirmed* by a resolution endorsed by at least the majority of the General Assembly of the Supreme Court. Alternatively, the majority of the General Assembly could adopt five separate resolutions endorsing each of the five candidates (Case K 44/16). Only this way, could the persons presented to the President of Poland be reasonably considered *the candidates of the General Assembly of the Supreme Court*, as required by the Constitution, rather than the candidates endorsed by just a few judges of the Supreme Court. The judges of the Supreme Court appointed before 2018 demanded that the General Assembly followed this case law. They also demanded that the new 'members' whose independence was in doubt were excluded from electing the candidates. Alas, the new law on the Supreme Court gave to the President of Poland the power to appoint the chairman of the Assembly in case the office of the First President was already vacant. The two chairmen appointed by the President of Poland single-handedly rejected all inconvenient requests and proceeded with the election of five candidates without seeking a final confirmation by the majority of the General Assembly. Only one of the five candidates thus elected, Włodzimierz Wróbel, obtained the majority of votes of the General Assembly (i.e. 50 votes of the judges) but the President of Poland chose Manowska who obtained a minority of votes (i.e. 25 votes).

In our view, the judges of the Supreme Court appointed before 2018 were right to demand the exclusion of the new members from the General Assembly. If a judge cannot guarantee the sufficient appearance of independence in the decision-making sphere, neither can she be considered independent while exercising other judicial tasks and prerogatives. It cannot be reasonably claimed that the rulings of the ECJ and the Supreme Court relate only to the decision-making sphere and have no bearing upon the institutional sphere, including the election of the First President of the Supreme Court.

The President of a Court affects the Court's Appearance of Independence

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The president of a court may have a significant impact on its decision-making by, among other things, manually reassigning politically controversial cases to specific judges. While the Supreme Court's First President cannot directly influence the content of judicial decision and she does not assign cases to judges (the

Presidents of Chambers have this competence), she has an impact on organisational and technical aspects of judicial decision making. Moreover, she appoints and dismisses heads of judicial divisions within the chambers. She may apply to the Supreme Court to make so-called interpretive resolutions which are subsequently binding on the Supreme Court's judges. She may also petition the Constitutional Tribunal to rule on the constitutionality of any legislation in abstract, i.e. without a connection to pending cases. She may also apply to the Minister of Justice to second to the Supreme Court judges from lower courts due to temporary shortages of staff. Finally, in some circumstances she may order a judge from one chamber to decide a specific case in another chamber.

The ECJ emphasised in its case law a link between decision-making independence and organisational independence. The decision-making independence of an institution may be influenced through material and technical conditions in which the institution operates, including through the supporting staff (see, Case C-614/10, *Commission v Austria*, § 58-61). This is why any links between the head of an independent institution, who supervises the organisation of work at this institution, and political authorities may raise a reasonable suspicion of partiality (*ibid.,* § 52, see also Case C-518/07, *Commission v Germany*, § 36 and 43). Such links therefore weaken the institution's appearance of independence.

The problem is that Manowska has been appointed to the Supreme Court at the request of the unconstitutional National Council of Judiciary. The constitutionality of her appointment is also in doubt. Moreover, she has been considered as not providing the sufficient appearance of independence in light of the ECJ judgment in *A.K. v Sąd Najwyższy*. Despite all the allegations by top legal experts regarding the unconstitutionality of the procedures for judicial appointments and the election of the new First President of the Supreme Court, she accepted both the 'appointment' to the Supreme Court and the office of its First President. Last but not least, she pointed out that resolution of the Supreme Court that had followed the ECJ' judgement would be reconsidered and annulled in the nearest future. In other words, she has chosen a different path regarding the independence and impartiality than 'old' judges of the Supreme Court and the ECJ.

Good night and good luck

The independence of national courts in the EU is required by Article 19(1) TEU (see here, §§ 167-169) and Article 47 of the EU Charter of Fundamental Rights. Also, Article 45(1) of the Polish Constitution and other constitutional provisions require the independence and even separation of the judicial branch from the political branches. These provisions, as well as the rulings of the ECJ and the Polish Supreme Court, were disregarded by the chairmen of the General Assembly of the Supreme Court and the President of Poland. The attempts during the General Assembly of the Supreme Court judges appointed before 2018 to preserve the appearance of independence of the Supreme Court deserve the greatest recognition. The standards of judicial independence set by the Supreme Court in its rulings implementing the ECJ judgment in *A.K. v Sąd Najwyższy* may one day serve as a point of departure for the discussion about restoring the social confidence in the rule of law in Poland. The Supreme Court foresaw the events described in this post already one year ago. The Supreme Court warned the ECJ, national and European actors that "when the new Frist President of the Supreme Court is elected [from among the new members of the court – M.K., M.Z.] (...) she will not have any interest in ensuring the effectiveness of the ECJ's judgements. Then, the Supreme Court will only be able to say: «Good night and good luck» to the EU".

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