Null and Void

The CJEU Judgment on Poland's Chamber of Extraordinary Control and Public Affairs

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The judgment of the Court of Justice of the European Union (CJEU) in the Case C-225/22 from September 4 confirmed that the Chamber of Extraordinary Control and Public Affairs of the Supreme Court in Poland is illegitimate. The ruling not only exposes the collapse of judicial legitimacy at the highest level, but also shows how chaos in the Polish judiciary disrupts the lives of ordinary citizens, with proceedings suspended because higher courts' judgments are void. For Waldemar Żurek, the new Minister of Justice, it offers a powerful argument to accelerate efforts to restore the rule of law before the political window closes.

A landmark decision by the CJEU

The underlying issue of the case is the legal status of the Chamber of Extraordinary Control and Public Affairs of the Supreme Court in Poland. The Court of Appeal in Krakow was presented with a case referred back to that same court: a legal dispute between two publishers of crossword magazines about industrial property rights and unfair competition, dating back to 2004. Within these proceedings, it questioned whether the Chamber qualified as an independent and impartial tribunal. It thus stayed its proceedings and made a request for a preliminary ruling to the CJEU regarding the interpretation of Article 2, Article4(3), Article 6(3), and the second subparagraph of Article 19(1) TEU, Article 267 TFEU, Article 47 of the Charter of Fundamental Rights of the European Union and the principle of primacy of EU law.

The Court of Appeal posed four questions striking at the heart of the rule of law: First, is it permitted for a national court to disregard a decision of a constitutional court, based on the examination of whether the judicial body is an independent and impartial court, due to how judges were appointed? Second, is a national court prohibited from assessing the lawfulness of the appointment of a judge? Third, is an ordinary court bound by a judgment of a court of final instance if its sitting members were appointed to the office in flagrant breach of national law? And finally, is a judgment given by such a court of final instance a judgment in a legal sense within the meaning of EU law or should the ordinary court disapply the application of provisions of national law, to the extent necessary to ensure that individuals are afforded effective legal protection?

On the first three questions, the CJEU held that by adopting and maintaining rules that bar national courts – under threat of disciplinary action – from verifying their own independence and impartiality, Poland failed to comply with the principle of EU law's primacy. It is for the national ordinary court to ascertain whether the judges were appointed under conditions ruled compatible with the requirements of an independent and impartial tribunal established by law. A national court must disregard the rulings of a higher national court if it considers that they are not consistent with EU law, and, if necessary, refuse to apply the national rule requiring it to comply with the decisions of that higher court.

The most important answer, however, was given to the final question. The CJEU decided that "in a situation where it is found, based on a decision of the Court, that a judicial body of last instance does not satisfy the requirements of independence, impartiality and previous establishment by law, for that provision, a decision taken by such a body, by which the case concerned is referred back to a lower court for re-examination, must be regarded as null and void, where such a consequence is essential in view of the procedural situation at issue to ensure the primacy of EU law." This ruling

(re-)confirms that the panel of judges of the Chamber of Extraordinary Control and Public Affairs does not satisfy the requirements of independence, impartiality and previous establishment by law. No consideration based on the principle of legal certainty or linked to the alleged finality of the judgment prevents an ordinary court from declaring the Chamber's decisions to be null and void. Indeed, it is even required to do so.

The legal crisis at the heart of the case

The recent judgment is a direct consequence of the long-unsolved problem of unlawful judicial appointments, confirming its stubborn persistence. The pressure international institutions have exercised for years did not persuade the outgoing PiS-led government to give up the masterplan of bending the Polish judiciary to political will. Till the very end of their time in office, the PiS-made frankenstate was stitching together "perfectly legal and reasonable constitutional components" with flawed legislation and unlawful appointments. The constitutional crisis that stared with first ignoring and then hijacking the Constitutional Tribunal opened the pathway to eroding further elements of the system. Inevitably, the malaise spread to the Supreme Court and the National Council of the Judiciary.

The saga of the Polish Supreme Court is long and eventful. It dates back to the transition (or rather demolition) of the Polish judiciary, initiated by the Law and Justice government in 2015. On numerous occasions, Poland clashed with the European Commission and other intergovernmental bodies, like the Venice Commission, or international courts like the European Court of Human Rights (ECHR). The CJEU imposed a memorable, record-high daily penalty of one million euros following an infringement procedure regarding the Disciplinary Chamber of the Supreme Court (which today no longer exists) that threatened the independence of judges by imposing inadequate and arbitrary disciplinary measures (better known by the nickname of a "muzzle law").

This, however, was not the only issue with the "reformed" Supreme Court. According to the CJEU judgment in Case C-718/21 from 2023, the adjudicating panel of the Extraordinary Review and Public Affairs Chamber did not constitute an independent and impartial tribunal established by law, owing to the circumstances surrounding the appointment of its judges. Back in 2021, the final judgment of the ECHR in the case of Dolińska-Ficek and Ozimek v. Poland already established that the two adjudicating panels of the Extraordinary Review Chamber were neither established by law nor independent because the National Council of the Judiciary (KRS), responsible for nominating judges, was unable to put forward independent and impartial candidates for judicial posts at the Supreme Court. This finally brings us to the original sin: the 2017 overhaul of the KRS, since become known as neo-KRS. The change in the composition of the KRS cast doubt on its independence from political influence.

Cleaning the "Augean Stables"

Mere change of government brought about by the 2023 parliamentary election was not sufficient to successfully remedy the malaise of the Polish judicial system. Despite the efforts of Adam Bodnar, the former Justice Minister, reasonable doubts persist not only as to the imperviousness of some judges and the direct or indirect political influence on their decisionmaking. The legitimacy of the system collapsed under the weight of legislative inflation – new laws and their hasty amendments overriding the Constitution – and the appointment of "fake judges" through flawed procedures. Today's chaos in the Polish judiciary, swelling for almost 10 years, made it resemble the Augean stables.

As attempts to repair the rule of law by playing by the rules have failed, a more invasive approach will be needed. Exactly one year ago, Prime Minister Tusk announced setting the course for "militant democracy". Undoubtedly, there is no point in delaying remedial measures any longer. The result of the 2025 presidential election is not favourable for the ruling coalition. Karol Nawrocki's style will most probably be rather confrontational than cooperative, especially on rule of law matters. Meanwhile, the fierce campaign for the 2027 parliamentary elections is picking up. Public

opinion polls indicate a continuing stalemate between the PO and PiS duopoly.

Keeping all that in mind and not losing sight of the goal, Justice Minister Żurek must hurry to reverse the PiS reforms, as the window of opportunity may close in two years. In this spirit, he described the newest CJEU ruling as "extremely important". Indeed, next to the verdict of an international court confirming the lacking legitimacy of the Supreme Court Chamber of Extraordinary Control and Public Affairs, it demonstrates how the chaos in the Polish judiciary affects ordinary citizens: suspending the proceedings before the court due to the invalidity of judgments of a higher court. Determined not only to move on with rule of law repair, but also compelled to win public support for this operation, Żurek could use this very practical example to explain his intentions. "We must finally sort this out", he pledged. How exactly? This remains to be seen.

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