

## Poland and the Crisis of Rule of Law: “Alea Jacta Est”?

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October 19th 2018. The Vice-President of the Court of Justice ordered the Republic of Poland to immediately suspend provisions of the recent Polish law on the Supreme Court that lowered the retirement age for Supreme Court judges to 65 years, which would have the effect of removing nearly one-third of the Court’s judges.

One month has passed. Nothing happened.

Quite the opposite: on 9<sup>th</sup> November 2018 the new Polish National Council of Judiciary issued a resolution that concretely blocks the interim measure of October 19<sup>th</sup>; to be more precise, the resolution contains a threat of disciplinary responsibility for the reinstated Supreme Court Judges, if they perform official duties. Obviously this resolution may have a considerable negative impact on the way the order of the Vice-President of the CJEU is being carried out.

In this context, it must be underlined that, on 17th September 2018, the European Network of Councils for the Judiciary (ENCJ), after considering that an essential condition of ENCJ membership is “that institutions are independent of the executive and legislature and ensure the final responsibility for the support of the judiciary in the independent delivery of justice” decided to suspend the membership of the Polish National Judicial Council, the KRS, in the ENCJ.

Regardless of the reassuring words of the Polish political authorities when reacting in Brussels or to others European Members, the present example is an unequivocal indication of their subjacent real intentions, in fact, not even very disguised: the submission of the judiciary is a definitive ambition for the Government, in breach of the article 2 of the Treaty on European Union.

Precisely to materialize this goal on a long term basis, in respect to the so-called “undue” influence of the EUCJ, at the beginning of October 2018, Poland’s Prosecutor General – at the same time, Minister of Justice - submitted a request to the national Constitutional Tribunal to examine the compliance of Article 267 of the Treaty on the Functioning of the European Union with the Polish Constitution, so far as it allows the referral of preliminary questions regarding the organization of the national judiciary. In

the application dated October 4, 2018, the Prosecutor General demands that the Constitutional Tribunal declare the unconstitutionality of Article 267 TFEU “so far as it permits the national court to submit preliminary references on the interpretation of the Treaties or on the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union in matters relating to the system, form and organization of the judiciary as well as proceedings before judicial authorities of the EU Member State”.

It seems unblemished that the admissibility of the application submitted by the Prosecutor General and reviewing the constitutionality of one of the most fundamental provisions of the Treaty would amount to a flagrant violation of EU law; one might wonder if the Polish Government is really committed in being a member of European Union regarding the obedience to the paramount requisite of submitting to basic rules of the European Treaties.

The independence of the courts, the security of tenure of judges and their accountability to disciplinary authorities are elements of the system and organization of the national judiciary falling undoubtedly within the scope of EU law especially the article 2 TEU, article 19 TEU and article 47 of the Charter of the Fundamental Rights of the European Union.

The latest jurisprudence of the Court of Justice is emphasizing the exact same assumption. The case “C-64/16 - Associação Sindical dos Juízes Portugueses” could not be more explicit: “The guarantee of independence (...) is required not only at EU level (...) but also at the level of the Member States as regards national courts. The independence of national courts and tribunals is, in particular, essential to the proper working of the judicial cooperation system (...). The concept of independence presupposes, in particular, that the body concerned exercises its judicial 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, and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions.”

The Prosecutor General omits this relevant case law entirely. Therefore, his argument concerning the inadmissibility of preliminary references concerning system, form and organization of the judiciary as well as proceedings before judicial authorities, inevitably, falls apart.

Having in mind the present composition of the Constitutional Tribunal in the aftermath of the institutional crisis initiated in 2015, it is certainly predictable that the

future judgment will accept the arguments presented by the Prosecutor General. Meanwhile the resolution of the Polish National Judicial Council, the KRS, affronts the EUCJ interim ruling and allows the Government to gain time to avoid any enforcement of this decision while waiting for the more definitive solution provided by a dependent Constitutional Tribunal.

The International Association of Judges, on its meetings in Santiago de Chile (2017) and in Marrakesh (2018), and the European Association of Judges, on its 2018 General Assembly in Berlin, adopted robust resolutions in which the grave concern about the inobservance of Rule of Law in Poland was formally stated.

This is the current scenario in Polish judiciary that should be, realistically, weighed by the European authorities.

It is difficult – if not impossible - to imagine that the EU could tolerate the described situation. The only choice for the European Commission should be to move forward and to request the enforcement of the judgement of the European Court through Article 260 TFEU imposing a lump sum or penalty payment appropriate in these particularly grave circumstances.

There is still time – although shortening - for Polish Government to rethink their policy towards the EU in general and to the judicial system in particular.

On the other hand for EU authorities the path for the near future must be firm and unequivocal; otherwise the credibility of the European Union, as a whole, and its concrete commitment to the Rule of Law will be definitely compromised.