Editorial

Sovereign Within the Union? The Polish Constitutional Tribunal and the Struggle for European Values

On 6 October 2021, the Polish Constitutional Tribunal (CT) delivered its much-awaited ruling in case K 3/21. The Tribunal declared the unconstitutionality of arts 1, 2 and 19 TEU inasmuch as they require that national judges discard the Polish legislation on the organisation of the judiciary; in particular, those provisions which, in the view of the CJEU, place the Polish magistrature under strict control of the political power.

Although, at the time of writing, the reasons for the ruling have not been stated, the operative part of the decision unveils a line of argument based on the premise that the EU does not possess the power to determine the limits of its own competence and, therefore, cannot acquire substantial autonomy from the will of its founders. On the grounds of this assumption, the consequence was seemingly drawn that the two foundational interpretive doctrines of the CJEU concerning the relations between EU law and national law, namely primacy and perhaps also direct effect, do not apply in Poland.

The supporters of the ruling did not shy away from highlighting the analogies between it and other recent decisions of other MS Constitutional Courts. In particular, the PSPP decision of the BVerfG (judgement of 5 May 2020 2 BvR 859/15) was expressly evoked as a "moral" precedent for the K 3/21 ruling.

This *tu quoque* argument is unfounded, as the two rulings reveal a number of dissimilarities (even though perhaps not all those identified by A Thiele, 'Wer Karlsruhe mit Warschau gleichsetzt, irrt sich gewaltig' (10 October 2021) Verfassungsblog verfassungsblog.de). In particular, while proclaiming that the conferment of competences in well-determined areas to the Union could not transfer the ultimate power to determine the scope of these competences, the BVerfG carefully conceived of such a power as limited to single acts of the Union. By so doing, the BVerfG was able to reconcile the irreconcilable: establishing and maintaining a strict surveillance on *ultra vires* acts of the Union but not precluding the participation of the German federation in the process of integration.

Conversely, the search for a systemic conflict seems to be the dominant motive in case K 3/21. In order to shield the legislative measures undermining the independence of the judges, and to prevent judges from invoking EU law to set them aside (see case C-791/19 *European Commission v Republic of Poland* ECLI:EU:C:2021:596), the CT did not hesitate to declare unconstitutional the overall principle of the primacy of EU law. In

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consequence thereof, Polish legislation conflicting with EU law cannot be discarded by Polish judges and, in practice, the effects of EU law can be made dependent on domestic legislation. The ruling also struck the principle of the "ever closer Union": a clause which expresses the special nature of the Union and the very essence of the integration project. No doubt, the ruling has heralded the irredeemable rupture between Poland and the Union: a rupture which the most enthusiastic supporter of the PSPP ruling could hardly have imagined.

The difference is conspicuously relevant in an ethical and political perspective. One can wonder, however, whether it is also relevant in a legal perspective.

Modern legal orders are based on the postulate that there must be a supreme authority having the ultimate power to settle conflicting legal claims. In this perspective, it is irrelevant whether the last word pronounced by these supreme authorities accords with standards of morality, justice or even political wisdom, or whether the final settlement of a conflict is right or wrong. In a legal system where there is a supreme authority to have the final say, the only thing that counts is that this last say is the law.

If the authority of the final say depended on its contents, it would be necessary to identify a further procedure to determine the erroneousness of this determination: and the ultimate arbiter would be downgraded to the penultimate. Nor would the issue of the legality of that supreme authority itself be relevant. An authority would not be supreme if its legality could be questioned by another authority (see the ruling by the ECtHR, *Xero Flor w Polsce sp. z o.o. v Poland* App n. 4907/18 [7 May 2021] paras 255-275; a good example of the game of mirrors produced by conflicting claims among judges contesting their respective legality is provided by case C-132/20 *Getin Noble Bank*, pending before the CJEU).

The power to say the last word has been traditionally conceived of as part of the overall power to do or undo the law and the hallmark of legal sovereignty: *(s)ous cette même puissance de donner et casser la loi, sont compris tous les autres droits et marques de souveraineté* (J Bodin, 'Les Six Livres de la République', I X 163). For centuries, that power was exercised by the political organs: the prince and, later, the Parliaments. In our complex legal orders, and in particular on issues concerning relations between legal systems, that power seems to have passed on to the ultimate custodian of constitutional legality.

This happened, albeit surreptitiously, also in Europe, where "(t)ucked away in the fairyland Duchy of Luxembourg and blessed, until recently, with benign neglect by the powers that be and the mass media, the Court of Justice of the European Communities has fashioned a constitutional framework for a federal-type structure in Europe" (E Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) AJIL 1).

In the struggle for the final say, in this race towards the infinity, the national Constitutional Courts deployed all the theoretical armoury supporting the idea of statehood as the

political organisation of natural communities and of national legal orders as the expression of their self-determination and, ultimately, of their essential identity. The obvious conclusion of this reasoning is that the EU cannot break free from the constitutional restraints imposed on it by its MS through the treaties; that this claim would violate not only the constitutional prohibition to transfer outside the State undetermined competence, but also the principle of democracy whereby only the people can legitimate the exercise of political power; that the people is conceived, now and forever, of as a community sharing a common cultural heritage and a common destiny; that, therefore, there is no European people which could legitimate the decisions of the EU; and, finally, that political decisions of the EU must be blessed by the peoples of the MS through their own procedures of democratic legitimacy. This broad claim is a worm which gnaws at the flesh of the process of integration and that could ultimately corrode its very soul.

This broad claim is grounded on pre-legal ideological views of statehood and community which, as such, can be neither validated nor confuted. But its consequences can be well conceptualised and assessed within a legal perspective and, specifically, within the perspective of the European process of integration. Brought to its ultimate consequences, that claim, *i.e.* to remain fully sovereign within the Union, would not only be inconsistent with the process of European integration; it would also diverge from the principles that inspired the great constitutionalist movement starting in the second half of 20th Century: open statehood and *Völker- und Europarechtsfreundlichkeit*. This consideration may have played a role in the decision of the MS Constitutional Court to stop at the cliff's edge and to prevent the claim of absolute sovereignty from producing a systemic inconsistency with the Union's legal order. Yet, this is precisely what is seemingly happening now with the K 3/21.

However, and paradoxically, this ruling does not necessarily prelude to Poland's decision of to withdraw from the European Union. By combining the self-referential legitimacy endorsed by the CT with the unfortunate withdrawal clause of art. 50 TEU, Poland could well retain its claim to be sovereign within the Union without having to comply with its fundamental principles and values.

Two events followed this ruling.

On 27 October 2021, in case C-204/21 R *European Commission v Republic of Poland* (ECLI:EU:C:2021:878), the vice-president of the CJEU fined Poland for its failure to abide by the *interim measures* ordered on 14 July 2021 (ECLI:EU:C:2021:593). The fine, of unprecedented magnitude, was set at one million euros per day.

This decision probably opens a new phase during which the Commission and the CJEU will use monetary leverage to persuade Poland to desist from its course of action and to resume compliance with the European obligations.

However, monetary sanctions can hardly persuade a State to change its overall political course, also due to the multiple instruments at its disposal to minimise or even

nullify their effect. More likely, the two institutions will be bogged down in a prolonged war of position, with sudden escalations and partial retreats. Notoriously, the most efficient instrument of coercion, namely the conditionality clause included in Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, was rendered virtually inoperative by the European Council declaration included in the Conclusions of the meeting of 10-11 December 2020; a decision fiercely criticised in this journal (see the Editorial, 'Neither Representation nor Values? Or, "Europe's Moment" – Part II' (2020) European Papers www.europeanpapers.eu 1101).

The second event, related to the first, is the deafening silence kept by the European Council in its meeting of 21-22 October 2021. Of course, this is not necessarily due to a lack of interest. Behind the scenes, the members of the European Council are likely using diplomatic means to persuade the Polish authorities to reach a compromise. Of course, again, one may think that, instead of compromising on values, the MS should rather back the action of the supranational Institutions, which are on the frontline in the struggle for European values. But how could they react against a violation of the Treaty values apart from by fighting the symbolic battle for the art. 7 TEU procedure?

To answer this question, a short reference should be made to the relation between the Union's values and the obligations which reflect them. While art. 7 TEU provides for a special procedure to assess a systemic breach of the values of the Union, by no means does it prevent the functioning of ordinary remedies against a failure to comply with these specific obligations. Some of these rules are exclusively part of the body of European law. Others are also established by international law.

The correspondence of the content of an obligation of international law with the values protected by art. 2 TEU does not, *per se*, prevent MS from invoking that obligation in their reciprocal relations. More likely, the two obligations – European and international – will coexist and develop along parallel trajectories. It follows that the MS, acting in their capacity of sovereign States, are entitled to invoke *vis-à-vis* another MS a breach of international law obligations corresponding to obligations equally incumbent upon them in force of art. 2 TEU. In particular, MS, acting individually or even collectively, can bring interstate claims before the ECtHR or lodge communications before the Human Rights Committee set up by the International Covenant on Civil and Political Rights of 1966, or avail themselves of other means of redress provided for by international law.

Nor is this option precluded by art. 344 TFEU, which prevents the MS from submitting disputes concerning the interpretation or application of EU law to means of settlement other than those provided for by the Treaties. It is only after the accession of the EU that the ECHR will be part of EU law and, therefore, that MS will be prevented from bringing a claim before the ECtHR against other MS for alleged breach of the Convention (see Opinion 2/13 *Accession of the European Union to the ECHR* ECLI:EU:C:2014:2454 paras 201-214). But, even then, this preclusion will only apply within the scope *ratione*

materiae of EU law. It is common knowledge that art. 2 TEU also requires the MS to respect the values of the Union outside that scope.

An action brought by the MS against Poland in their capacity of sovereign States would produce a number of beneficial effects. It would remedy the weakness of the institutional procedures designed to ensure the implementation of the values of the Union. It would contribute to saving the soul of the Union and the fundamental rights of its citizens. It would make virtuous use of sovereignty: as a historical nemesis for the very ideology of sovereignty.

E.C.