



THE RULE OF LAW CRISIS DEEPENS IN POLAND AFTER *A.K. v. KRAJOWA RADA SĄDOWNICTWA AND CP, DO v. SĄD NAJWYŻSZY*

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ABSTRACT: The *Insight* analyses the recent judgment of the Court of Justice in joined cases C-585/18, C-624/18 and C-625/1, *A.K. v. Krajowa Rada Sądownictwa and CP, DO v. Sąd Najwyższy*, hereafter *A.K. and Others*. The ruling has had considerable impact on the crisis of the rule of law in Poland and the note evaluates its immediate effects.

KEYWORDS: rule of law – effective judicial protection – populism – Poland – reform of the judiciary – crisis.

I. BACKGROUND

Since gaining power in 2015, the Polish right-wing government has used the populist blueprint to radically reform the justice system.¹ Changes introduced at all levels of Polish courts aimed to gradually subordinate the judiciary to the political power of the day and they have significantly undermined the rule of law.² Despite the fact that many of these amendments were regarded as unconstitutional³ and some of them were found to contravene EU law,⁴ the government has persistently refused to re-evaluate

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¹ B. BUGARIČ, *Central Europe's Descent into Autocracy: A Constitutional Analysis of Authoritarian Populism*, in *International Journal of Constitutional Law*, 2019, p. 597.

² Palombella writes that "[t]he main thrust of the Rule of law refers instead to the existence of a varied organisation of legality, where parts of law exist that are not under purview of the leading power [...]". G. PALOMBELLA, *Illiberal, Democratic and Non-arbitrary? Epicentre and Circumstance of a Rule of Law Crisis*, in *The Hague Journal of the Rule of Law*, 2018, p. 5.

³ D. ADAMSKI, *The Social Contract of Democratic Backsliding in the "New EU" Countries*, in *Common Market Law Review*, 2019, p. 637.

⁴ See for example Court of Justice: judgment of 5 November 2019, case C-192/18 *Commission v. Poland*; judgment of 24 June 2019, case C-619/18 *Commission v. Poland*.

merits of its approach. The recent ruling of the Court of Justice in *A.K. and Others*,⁵ which considered issues pertaining to independence and impartiality of Polish courts after the introduction of the new legislation, has provided national judges with additional tools that can be used to safeguard the right to effective judicial protection for citizens. In giving effect to the interpretation of EU law, the Polish Supreme Court held that the National Council of the Judiciary, which is at the heart of the system of judicial appointments in Poland, was not independent of external influences. While the judgment aimed to defend the rule of law, the immediate reaction of the government and its continued refusal to rethink the reform of the judiciary have created chaos that at present seriously undermines the functioning of the judicial system and deepens the rule law crisis in the country.

II. THE NATIONAL CONTEXT

The cases that gave rise to preliminary references to the Court of Justice were brought before the Labour and Social Insurance Chamber of the Supreme Court of Poland. They were a continuation of the saga concerning the New Law on the Supreme Court of 8 December 2017, which in an earlier infringement case was found to contravene EU law.⁶ Therein, the Court of Justice held that provisions of the legislation suddenly lowering the retirement age of judges of the Supreme Court undermined their irremovability and independence.⁷ In response to an interim measure issued in the case, the Polish government amended the legislation, but its effects were never repealed *ex tunc*.⁸ While the judges were returned to active service, they sought in separate cases declarations that they had never taken retirement, which was necessary to safeguard their employment rights.⁹

III. THE REFERENCE IN PRELIMINARY RULING

The issue submitted to the Court of Justice in preliminary reference, concerned the right of the aggrieved judges to effective judicial protection enshrined in Art. 9, para. 1, of Directive 2000/78, which prohibits the discrimination on grounds of age and guarantees the right to an effective remedy, as well as Art. 47 of the Charter.¹⁰ The problem arose

⁵ Court of Justice, judgment of 19 November 2019, joined cases C-585/18, C-624/18 and C-625/18 *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*.

⁶ *Commission v. Poland*, case C-619/18, cit.

⁷ *Ibid.*

⁸ *A.K. and Others*, cit., paras 87-89, 96; Court of Justice, order of 17 December 2018, case C-619/18 R, *Commission v. Poland*.

⁹ *A.K. and Others*, cit., para. 96.

¹⁰ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment.

because the New Law on the Supreme Court granted the exclusive jurisdiction in the cases to the newly created Disciplinary Chamber and serious doubts existed about its independence and impartiality.¹¹ The Court of Justice ruled that these elements are the essence of the right to effective judicial protection and a national court that is not capable of guaranteeing them must be precluded from applying EU law.¹² It further clarified the standard as requiring that no legitimate doubts exist, in the minds of the subjects of the law, as to the imperviousness of that court to external factors, in particular the influence from the legislature, the executive and with respect to the interests before it.¹³ The final decision whether the Disciplinary Chamber was in fact independent and impartial was left to the Polish Supreme Court.¹⁴ Nonetheless, the Court of Justice concurred that certain characteristics of the Chamber, such as the scope of its jurisdiction, composition and circumstances surrounding its creation, when evaluated in a holistic manner, could give rise to concerns.¹⁵

Moreover, prompted by the question referred by the national court, the Court of Justice addressed issues relating to the National Council of the Judiciary, which plays a key role in all judicial appointments in Poland, and was involved in the selection of members of the new Disciplinary Chamber.¹⁶ The law on the National Council of the Judiciary was amended in December 2017, which sparked vivid debates about the constitutionality of the change.¹⁷ The Court of Justice reasoned that in the light of the functions performed by the organ, the degree of its independence was relevant for ascertaining whether judges it selects are capable of guaranteeing the right to effective judicial protection.¹⁸ The Court further suggested that a number of factors regarding the election procedure of the members of the National Council of the Judiciary could cast doubts on its imperviousness to the influence of the legislature and the executive.¹⁹ The ruling specifically pointed to the reduction of the term in office of the previous members, the increased role of the legislature in elections, the potential for irregularities in the appointment process and no possibility for judicial review.²⁰

¹¹ *A.K. and Others*, cit., paras 40, 114, 115.

¹² *Ibid.*, paras 120, 166, 171.

¹³ *Ibid.*, para. 171.

¹⁴ *Ibid.*, paras 132, 153.

¹⁵ *Ibid.*, paras 146-152.

¹⁶ *A.K. and Others*, cit., paras 136-145.

¹⁷ See for example W. SADURSKI, *Poland's Constitutional Breakdown*, Oxford: Oxford University Press, 2019; D. ADAMSKI, *The Social Contract of Democratic Backsliding*, cit., p. 653-655.

¹⁸ *A.K. and Others*, cit., para. 139.

¹⁹ *Ibid.*, paras 143-145.

²⁰ *Ibid.*

IV. THE AFTERMATH OF THE COURT OF JUSTICE'S JUDGMENT

These remarks have had profound and immediate effects in Poland, putting to question independence of over 500 judges at all levels of the judiciary, who took office since the appointment of the New Council of the Judiciary in 2018.²¹ It was not long before consequences of the ruling materialised in practice. While the decision of the Polish Supreme Court was pending, a judge of a regional court questioned the validity of a judgment challenged before him, and pursuant to the ruling of the Court of Justice sought to verify independence of the court that delivered the original verdict. The government retaliated by demoting the judge to his previous position in a district court, where he was subsequently suspended. Moreover, disciplinary actions were brought against him, as well as other judges who were supportive of the same position.²² The government's reaction, intended to contain the effects of the Court of Justice's judgment, added weight to the concerns about the guarantees of judicial independence in the Polish justice system and led to country-wide protests.²³

V. THE RESPONSE OF THE NATIONAL COURT AND ITS IMPLICATIONS

In the face of the escalating crisis, the Polish Supreme Court delivered a prompt response. It held in an unequivocal judgment of 5 December 2019 that the National Council of the Judiciary did not guarantee standards for effective judicial protection outlined by the Court of Justice, as it was neither impartial, nor independent from the legislature and the executive.²⁴ In the context of the case, the Supreme Court ruled that the Disciplinary Chamber was not a court within the meaning of EU law and Polish law. Therefore, the body was precluded from exercising the jurisdiction conferred upon it by the New Law on the Supreme Court. Furthermore, the Supreme Court reminded organs of the Polish state about their duty to give effect to the principle of primacy of EU law. It stressed that all courts must ensure EU standards of judicial impartiality and independence in cases brought before them.

The line of reasoning of the Supreme Court has had broad implications. In an effort to preserve a degree of legal certainty, courts at all levels have started to take measures that preclude judges whose independence can be questioned from hearing cases, as the validity of their judgments can be challenged. Moreover, some courts have postponed issuing of opinions for judicial appointments until the legislator gives effect to

²¹ This media report contains a list of 543 judges who were elected by the current National Council of the Judiciary: *Oko.press, Ujawniamy Listę 543 Sędziów Nominowanych przez neo-KRS. Ich Wyroki Mogą Być Podważane w Przyszłości*, oko.press.

²² International Commission of Jurists, *Poland: End Unjustified Disciplinary Proceedings against Judges*, www.icj.org.

²³ BBC News, *Poland: Thousands Rally to Support Country's Judges*, www.bbc.co.uk.

²⁴ Supreme Court of Poland, judgment of 5 December 2019, A.K., PO 7/18.

the judgment of the Court of Justice. The First President of the Supreme Court wrote to the judges of the Disciplinary Chamber, which has continued to operate, that their activity is a serious threat to the stability of the legal system and requested that they refrain from rendering any judgments.²⁵ These developments have not inspired a reasonable response from the government.

VI. THE RESPONSE OF THE GOVERNMENT

In a legislative proposal presented on 12 December 2019, the government outlined its plans to address the current crisis with broadening the range of disciplinary offences and increasing sanctions against recalcitrant judges.²⁶ The amendments prevent ordinary courts, as well as the Supreme Court from questioning independence of another court or a judge, making the judgment of the Court of Justice in *A.K. and Others* virtually ineffective.²⁷ Despite the negative opinions of all expert groups that scrutinised the legislative proposal, nation-wide protests and an intervention from the European Commission,²⁸ the proposal passed through the Sejm, the lower house of the Polish Parliament in a record time, in a manner that disregarded good working practices and without respect for due process. However, it is expected that the pace of work on the legislation is going slow down in the Senat, where the opposition has a slim majority.

The government has justified its actions on grounds of strengthening the principle of irremovability of judges and improving efficiency in the functioning of the systems.²⁹ However, in the light of the recent judgments of the Court of Justice and the Supreme Court of Poland the new legislation achieves these objectives at the expense of judicial independence, further lowering standards of judicial protection for Polish citizens and contravening EU law. Moreover, the legislation curtails the role of courts in judicial appointments and results in even greater politicisation of the process. The measures proposed by the Polish government are another step in the backsliding of the rule of law, defined by Pech and Scheppele as “the process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic State and entrenching the long-term rule of the dominant party”.³⁰

²⁵ Oświadczenie Pierwszego Prezesa Sądu Najwyższego, www.sn.pl.

²⁶ Druk Nr 69/ IX Kadencja Sejmu.

²⁷ *Ibid.*

²⁸ Full version of the letter from the Commission regarding further reforms of the Polish judiciary: www.polsatnews.pl.

²⁹ *Ibid.*

³⁰ L. PECH, K.L. SCHEPPELE, *Illiberalism Within: Rule of Law Backsliding in the EU*, in *Cambridge Yearbook of European Legal Studies*, 2017, p. 3.

VII. OUTLOOK FOR THE FUTURE

The recent judgment of the Polish Supreme Court upheld to the fullest extent the EU standards for independence and impartiality of the judiciary, as outlined in the Court of Justice's judgment of 19 November 2019. Moreover, it has empowered courts at all levels of the Polish judicial system to defend the right to effective judicial protection. However, the judgment has also triggered a response from the Polish government, which is underpinned by the populist idea that legal norms should not unduly limit political power³¹ and aims to introduce severe sanctions against judges who follow the lead of the Supreme Court.

The solutions that have been proposed by the government are not capable of effectively addressing problems highlighted by the Court of Justice in *A.K. and Others* and contravene EU law. They were met with strong opposition from the legal community and the civil society. In the light of the recent events, representatives of non-governmental organisations and academics requested the Commission to issue an application for interim measures in the currently pending infringement proceedings against Poland (C-791/19, *Commission v. Poland*), which concerns the disciplinary regime in the Polish judiciary.³² In the past, such measures have proven effective in persuading the Polish government to implement necessary changes in the legislation that ensure compliance with EU law.³³ Given the systemic threats to the EU posed by the persisting rule of law crisis in Poland,³⁴ it is important that the Commission pursues concrete actions against the current developments.

³¹ P. BLOKKER, *Populism as a Constitutional Project*, in *International Journal of Constitutional Law*, 2019, p. 539.

³² See www.amnesty.org.

³³ D. ADAMSKI, *The Social Contract of Democratic Backsliding*, cit., p. 653-655.

³⁴ A. VON BOGDANDY, M. IOANNIDIS, *Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done*, in *Common Market Law Review*, 2014, p. 59.