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THE JUDGMENT OF THE CJEU IN *COMMISSION V. POLAND II* (C-192/18): THE RESURGENCE OF INFRINGEMENT PROCEDURES AS A TOOL TO ENFORCE THE RULE OF LAW?

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On the 5th November 2019, the Court of Justice of the EU (hereafter CJEU or "the Court") issued the much-awaited judgment in *Commission v. Poland II (Law on Ordinary Courts)*. For the second time in history, after the seminal judgment in *Commission v. Poland I (Law on the Supreme Court)*, the Court was called to verify whether a Member States failed to fulfil its obligations under Article 19(1) TEU for breach of the principle of judicial independence. Unsurprisingly, the defendant Member State – one again, the Republic of Poland – lost the case. Yet, the reasoning and implications of this judgment are of utmost importance for the future of the enforcement of the rule of law in the European Union.

The Commission contested the Polish law "*amending the Law on the system of ordinary courts and certain other laws*" (hereafter "*Amending Law*") of July 2017. Two main aspects were sources of concern. Firstly, the introduction of a difference the retirement ages between men (65 years) and women (60 years) for judges of Polish courts and public prosecutors. Secondly, the granting to the Minister of Justice of the power to extend – at his

discretion – the period of activity of judges who reached the retirement age. Accordingly, the Commission made two complaints.
As regards the first plea, the Commission claimed the breach of the principle of equal treatment of men and women in employment as enshrined in both Article 157 TFEU and Directive 2006/54/EC (Equal Treatment Directive). Not surprisingly, the Court sided with the Commission. Firstly, it declared that the pension paid scheme introduced by the Amending Law fulfilled the notion of "pay" under both Article 157 TFEU and the Directive. The decisive criterion to reach that conclusion was the fact that the pension was paid to the judges by reason of their employment.
Then, the Court found the difference in retirement ages to be directly discriminatory and thus in violation of both Article 157 TFEU and the Directive. Such a discrimination could not be justified on the basis of the Polish argument that the measure was aimed at removing discriminations against women. Indeed, a consolidated case law of the Court requires those measures to help women conducting their professional life on an equal footing with men (para. 80 and case-law cited). This was found not to be the case here, as the Polish retirement system was incapable to "*offset the disadvantages to which the careers of female public servants are exposed*" (para. 81).

Although addressing the Polish illiberal measures through the lens of the discrimination on grounds of sex is a "novelty" in the Commission v. Poland saga, the second one is much more relevant for the purposes of our analysis. The Commission claimed that the combination of the lowering of the retirement age and the new powers granted to the Minister of Justice undermines the principle of effective legal protection as stated in the second subparagraph of Article 19(1) TEU read in conjunction with Article 47 of the Charter. After having recalled the scope of application of Article 19(1) TEU as interpreted in *Associação Sindical* and the notion of judicial independence, the Court upheld the Commission's plea.
It should be reminded, in order to gain some perspective, that in *Associação Sindical* the Court held that Article 19(1) TEU requires the

Member States to fully guarantee the independence of their domestic courts, – an essential condition to ensure effective judicial protection – irrespective of whether they are implementing Union law in the case in question. That Article relates to "*the fields covered by Union law*", as its application is related to the possibility for a national judicial body to rule on questions concerning the application or interpretation of EU law.
The new interpretation given to Article 19(1) TEU was meant to stir things up in the context of the rule of law crisis (see Repetto's analysis on this blog). Indeed, few months after, the Commission started for the very first time an infringement procedure for violation of the principle of judicial independence as entrenched in Article 19(1) TEU. In ruling over that procedure in *Commission v. Poland I*, the Court dismissed the relevance of any factual element in establishing the applicability of Article 19(1) TEU. Thus, its application depends on a functional factor – namely, the participation of national courts in the "European judiciary" (Bonelli-Claes: 631).

Against this background, in *Commission v. Poland II* the Court found that, since Polish courts might be called to rule on questions related to EU law, Article 19(1) TEU applies to them (para. 104). Thus, the Court can examine whether the Amending Law satisfied the requirements of independence, which, according to a consolidated jurisprudence, have both an external aspect (absence of external pressures) and an internal one (impartiality). Judicial independence so defined requires, in particular, rules capable to both guarantee the irremovability of judges and avoid direct and indirect influences liable to affect their decisions.
In the present case, rather than the mere power of the Minister of Justice to extend the mandate of judges, it was the inadequacy of the substantive conditions and procedural rules channelling that power that was found to be problematic. Those rules must be as such not to give rise to doubts "*as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them*" (para. 119). This was found not to be the case here, for a twofold reason.
Firstly, the power to authorise judges to continue their duties were granted to the Minister of Justice under criteria which were "*too vague and*

unverifiable" and not even accompanied by a duty to state reasons, or a judicial remedy (para. 122). Secondly, there was no deadline for the Minister of Justice to answer a request of the extension of the mandate, thus putting the judge concerned in a situation of uncertainty (para. 123). Finally, the Court also looked at the combination of that measure with the general reform lowering the retirement age of judges and found a breach of the principle of irremovability. That combination was likely to be perceived as an attempt to enable the Minister of Justice to decide at his discretion over the removal of those judges who reached the normal retirement age (para. 127).

The outcome of the case is far from surprising and very much in line with what happened in *Commission v. Poland I*. However, it is a bit disappointing that the Court confined itself in solving the dispute in question, without taking the opportunity to address the broader issues left open in its previous case law.

Firstly, the Court did not seize the opportunity to sheer light over the relationship between Article 19(1) TEU and Article 47 of the Charter, as Advocate General Tanchev suggested in his Opinion. In *Associação Sindical*, the Court relied also on Article 47 of the Charter to stress that access to an "independent" tribunal is a key component of effective judicial protection. However, it then restrained itself in applying the Charter directly, while considering it as a source of inspiration.

While acknowledging the existence of a "*constitutional passerelle*" between the two provisions, Advocate General Tanchev warned against a direct use of Article 47 of the Charter in situations outside the notion of implementation of EU law under Article 51(1) of the Charter, as that would amount to an extension of the Union's competences and thus a violation of Article 6(1) TEU and Article 51(2) of the Charter (paras. 99-100 of the Opinion). The following judgment in *A.K. and Others* may be seen as an implicit acceptance of that reasoning. In the context of a situation brought in the scope of EU Law by Directive 2000/78, the Court held that an analysis of Article 19(1) TEU was not necessary because the national measure at issue was already in breach of the principle of judicial independence arising from Article 47 of the Charter. Hence, we could

infer, by *a contrario* reasoning, that in situations falling outside the scope of application of the Charter, only Article 19(1) TEU is applicable (if the situation concerns "*fields covered by Union law*"). However, an explicit clarification from the Court would be much welcome in this respect.
Secondly, it remains to be seen whether the application of Article 19(1) TEU is restricted to cases where there are generalised deficiencies as regards the rule of law (also discussed here and here). Interestingly, Advocate General Tanchev proposed to confine the material scope of Article 19(1) TEU in relation to problems that threaten judicial independence in a systemic way. Conversely, individual breaches of judicial independence should be dealt with under Article 47 of the Charter, where applicable according to Article 51(1) of the Charter. This would avoid having the EU overstepping the competences of the Member States or those of the ECtHR in addressing fundamental rights violations (paras. 114-116 of the Opinion).
Thirdly, the Court did not further clarify the meaning of Article 19(1) TEU apart from judicial independence. It thus left open whether other components may be identified in the future as part of the requirement of effective legal protection under that Article.

Whereas the judgment did not raise new points of law in comparison with *Commission v. Poland I*, the fact that the Court, for the second time in less than five months, found Poland to be in breach of Article 19(1) TEU is of particular importance. Indeed, it confirms both the new role that the Court is carving out for itself in the enforcement of the rule of law (see my previous analysis on this blog) and the boost that infringement procedures have received as an instrument for enforcing EU values.
One of the most problematic kinds of measures put in place by the Polish and Hungarian governments was the attempt to dismantle the guarantees of independence attached to judges. However, initially the Commission did not treat the first cases with the severity they required. In *Commission v Hungary* – where a measure lowering the compulsory retirement of judges was at issue – the Commission limited itself to claim only a breach of the principle of non-discrimination on grounds on age. Thus, it failed to tackle directly the problems related to the violation of judicial

independence and rule of law (Bugaric□: 20).
That case illustrated the traditional shortcomings of the infringement procedure in the enforcement of European values – that is, the fact that they address only direct breaches of EU law. Indeed, for a long-time, they were considered as an ill-suited instrument in the realm of values, where much of the violations took place in areas outside EU competences (Gormley).

Against this background, the action of the Commission and the judgments in *Commission v Poland I and II* are much welcomed. The direct objective of the action was indeed achieved as the contested laws are no longer in place. Besides, they had a very symbolic impact.
These elements have supported the legitimacy of the Commission's initiative. At present, a third infringement procedure has been launched against Poland for breach of Article 19(1) TEU by reason of the introduction of a disciplinary regime for judges of the ordinary courts.
In the past neglected as a measure for values enforcement, infringement procedures are now displaying a renovated role in upholding the rule of law against illiberal reforms.
Such a role is increased by the fact that they are mutually exclusive as regards procedure under Article 7 TEU. The two mechanisms – one legal and the other political – may be invoked in parallel and for the same national measure, as confirmed by Advocate General Tanchev in a previous Opinion. Indeed, the fact that the procedure provided under Article 7(1) TEU had been triggered against both Hungary and Poland did not prevent the Commission from starting infringement procedures for the same legislative changes.
In light of the above, infringement procedures display a double advantage. Firstly, they can be used to bring cases concerning specific points of EU law connected with broad rule of law concerns, as the Commission has started to do against Hungary (pending cases C-718/17 and C-66/18). Secondly, thanks to the revolution operated by the Court, they can also be used to address breaches of the principle of judicial independence directly. As they are independent of both political support and cooperation with national courts, they have an advantage in

comparison with both Article 7 TEU and the preliminary ruling system. Yet, it seems that an interpretative effort from the CJEU is still required before the Commission decides to take a courageous infringement action such as in the case of Article 19 TEU. Hence, it is doubtful whether future enforcement of EU values may depend only from actions under Articles 258-260 TFEU without a prior clarification from the Court as regards the substantive criteria shaping the principle of effective judicial protection, as well as the rule of law.

What also remains to be seen is whether the infringement procedure as a measure to safeguard judicial independence will be relied on also by individual Member States in actions under Article 259 TFEU. Some scholars had already argued in favour of this possibility in the past (Kochenov). Nowadays, the enlarged scope of Article 19(1) TEU may give fresh impetus to that suggestion. Even though it is still hard to believe that a single or a small group of "virtuous" countries will act against a Member States violating the rule of law, it is interesting to reflect upon the possibility of direct actions under Article 259, as one day it might give rise to an interesting line of case law.