Judicial Independence Under Siege in Poland. The Last Landmark Ruling by the ECJ: repetita iuvant?

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Title: L'indipendenza giudiziaria sotto assedio in Polonia. L'ultima sentenza storica della Corte di giustizia europea: repetita iuvant?

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1.– With the judgment of 5 June 2023 in the case C-204/21 - *Commission v. Poland*, the European Court of Justice (hereinafter "ECJ") ruled on an action brought by the European Commission against Poland for failure to fulfil the obligations under Article 268 TFEU brought on 1 April 2021 with reference to the Polish reform of justice adopted in December 2019, also indicated as "Muzzle law".

The case represented a new chapter of the Poland / EU saga played on the field of independence of courts and the rule of law (on the previous "chapters" and rulings of the ECJ see *inter alios* G. Delledonne, *Ungheria e Polonia: punte avanzate del dibattito sulle democrazie illiberali all'interno dell'Unione Europea*, in ***DPCE Online***, S.l., 3, 2020, 3999 ff., E. Ceccherini, *L'indipendenza del potere giudiziario come elemento essenziale dello stato di diritto. La Corte di giustizia dell'Unione europea esprime un severo monito alla Polonia*, in ***DPCE Online***, 3, 2019, 2207 ff.). However, it will not be the last considering that in June 2023 the European Commission (hereinafter also as "EC") launched another infringement procedure against Poland based on the new Polish statute law on State Committee for the Examination of Russian influence on the internal security of Poland, in force since May 2023.

The ruling here commented follows two orders for *interim* measures issued by the ECJ on 14 July 2021 and 27th October 2023 by which the Court mandated Poland to suspend the effects of the so-called Polish "muzzle law" and sanctioned Polish authorities with a penalty payment amounting to one million of Euro per day up to fulfilment of the orders.

With this new decision, the Court of Justice confirmed that the verification of a Member State's compliance with the principle of the rule of law (which includes the effectiveness of judicial protection and the independence of the judiciary) falls within the jurisdiction of the ECJ. In this context, Member States are bound to comply with their obligations under

EU law and avoid any regression in guaranteeing the independence of the judiciary and, more generally, the rule of law (see A. Pin, *Rule of law, certezza del diritto e valore del precedente*, in *DPCE Online*, S.l., 2022, 2037-6677, R. Tarchi, A. Gatti (eds.), *Il rule of law in Europa*, in *Consulta Online*, 10, 2023, 87 ff.).

As regards the merits of the Polish measures, the Court reiterated *inter alia* that the disciplinary chamber set up at the Polish Supreme Court did not meet the requirements of impartiality and independence of the judiciary, both representing pillars of the principle of the rule of law (see M. Volpi, *Il governo autonomo della magistratura: una situazione complessa e dinamica* in *DPCE online*, 45, 4, 2021). In addition, Poland has further prejudiced the independence of the judiciary by adopting and maintaining in force provisions preventing national courts from verifying compliance with the requirements laid down by European Union law and issuing a request for a preliminary ruling to the ECJ.

The Polish provisions requiring national courts to declare their possible membership of associations or parties and publish that information have also been criticized by the Court of Luxemburg. To the Court, such provisions consisted in a breach of the data protection rules set out in EU Regulation 678/2016 and impaired the right to respect for private life of judges protected by the Charter of Fundamental Rights of the European Union.

While the outcome of the case is certainly not surprising (see among the early commentators L. Pech, *Doing Justice to Poland's Muzzel Law*, in *Verfassungsblog*, 11.06.2023 and C. Curti Gialdino, *La "legge bavaglio" polacca viola l'indipendenza, l'imparzialità e la vita privata dei giudici ed è incompatibile con principi fondamentali del diritto dell'Unione europea*, in *Federalismi*, 12.07.2023 and the consistent opinion of the Advocate General A.M. Collins except for one aspect noted *infra*) the ruling is still a matter of interest as: (i) it confirms the central role of ECJ as a gatekeeper of the rule of law; (ii) the ECJ also reaffirmed that the identitarian argument is recessive *vis-à-vis* the respect of the rule of law (iii) the Luxemburg judges remodulated the model of constitutional identity in the EU system which have to comply with obligation set forth under art. 2 TEU and the non-regression principle, as affirmed *inter alia* in the *Repubblika case* (C-896/19 – *Repubblika*) (v) the ruling seems to place the individual provisions of the Muzzle Act within the general context of Polish attempts to limit the guarantees of the Polish judiciary and finally (vi) the ruling broadened the set of rights and guarantees used as tools to defend the independence of judges, including the protection of personal data.

2. – The terms of the "dispute" between Warsaw and the EU are well known. However, it is worth focusing briefly on the context in which the ECJ's ruling has its roots.

The structure of the organization of the judiciary outlined in the Polish Constitution of 1997, which was already characterized by some critical issues in terms of the separation between the system of self-government and the executive power, such as the presence of the Minister of Justice in the self-governing body, began to undergo decisive deviations as of 2015 (S. Ceccanti, *Il costituzionalismo polacco dal 1791 ad oggi*, in *Federalismi.it*, 10,

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2006; C. Filippini, *Polonia*, Bologna, 2013, 48-53). Parliamentary elections that year marked an unprecedented victory of the right-wing coalition and the *Prawo i Sprawiedliwość* - PiS (Law and Justice). The party emerged from a period of initial self-exclusion from public life, followed by a brief period in government between 2005 and 2007, and a new loss of centrality, at least until the tragic crash of the presidential plane on April 10, 2010, which killed President Lech Kaczyński and senior public figures in his administration.

Since the beginning of the legislature launched by the electoral success of 2015, the PiS-led majority-backed government has adopted repeated interventions that have profoundly revolutionized the Constitutional Court (on the early constitutional crisis see *ex multis*, E. Cukani, *Condizionalità europea e giustizia illiberale: from outside to inside?*, Napoli, 2021, 189 ss.) and the entire judicial system, including the Supreme Court and the Attorney General's Office (See M. Mazza, *Le garanzie istituzionali della magistratura in Polonia: un presente difficile, un futuro incerto*, in *DPCE online*, 4, 2020, 4970 ff.).

The result of these reforms, according to many scholars and Polish judges, is a majoritarian shift in the Constitutional Tribunal and a general loss of judicial independence (see *ex multis* A. Śledzińska-Simon, *The rise and fall of judicial self-government in Poland: on judicial reform reversing democratic transition*, in *German Law Journal*, 19.7, 2018, 1839-1870, M. Miżejewski, *La crisi della democrazia in Polonia*, in *federalismi.it*, 22, 2018, M. Basilico, *Dopo la marcia delle mille toghe a Varsavia «per noi giudici polacchi un futuro ancora a rischio»*, in *Giustizia Insieme*, 17.02.2020, S. Troilo, *Controlimiti versus Stato di diritto? Gli esiti della giurisdizionalizzazione dello scontro fra Unione europea e Polonia sull'indipendenza della magistratura*, in *Consulta Online*, 1, 2022, 115 ss.; A. Angeli, A. Di Gregorio, J. Sawicki, *La controversa approvazione del "pacchetto giustizia" nella Polonia di "Diritto e Giustizia": ulteriori riflessioni sulla crisi del costituzionalismo polacco alla luce del contesto europeo*, in *DPCE Online*, 3, 2017, 788 ff.). Other prominent institutions in the political system have been affected by attempts to expand PiS's influence on public life. A case in point is the Polish law that intervened in the regulation of police and public order by expanding online surveillance powers and counterterrorism measures (Act of 15 January 2016 amending the Police Act and certain other acts on which see the Opinion no. 839 / 2016 of the Venice Commission). Even the press has been affected, for example by the Polish Act of 22 June 2016 on the National Media Council.

However, the impact on the judicial system was the most significant. In 2017, a comprehensive judicial system-wide reform package, accompanied by a chorus of criticism and concern from the European Union and observers, was adopted, affecting all areas of justice. Apart from the "capture" of the Constitutional court and the National Council of the Judiciary (see on this point G. Ragone, *La Polonia sotto accusa. Brevi note sulle circostanze che hanno indotto l'Unione europea ad avviare la c.d. opzione nucleare*, in *Osservatorio costituzionale*, 1, 2018, 4; see also M.A. Orlandi, *La 'democrazia illiberale'. Ungheria e Polonia a confronto*, in *Diritto pubblico comparato ed europeo*, 1, 2019, 167–216 for a comparison with the Hungarian case), the PiS-led government re-established the previous coincidence between the Ministry of Justice and the General Prosecutor's Office, which disappeared

in 2010 and was restored by the law of January 28, 2016 (see A. Di Gregorio, A. Angeli, J. Sawicki, *Il costituzionalismo "malato" di Ungheria e Polonia*, in A. Di Gregorio (ed.), *I sistemi costituzionali dell'Europa centro-orientale, baltica e balcanica*, Padova, 2019, 378).

Among the most notable changes, however, are measures concerning discipline and the Supreme Court. Two new chambers have been introduced in this body, one of them is the Disciplinary Chamber (*Izba Dyscyplinarna*), which is competent to decide on the imposition of disciplinary measures on judges, including on appeal, and the other one is competent for the extraordinary control of public affairs. A report by GRECO - Group of States against Corruption, a monitoring body of the Council of Europe, which noted the excessive involvement of the executive branch in the disciplinary process following the legislative changes, emphasized that the changes to the disciplinary process are significant and critical. (see *ad hoc* report on Poland, June 2018 available at https://rm.coe.int/ad-hoc-report-on-poland-rule-34-adopted-by-greco-at-its-79th-plenary-m/168079c83c).

The Poland Act on The Supreme Court of 8 December 2017 (later amended in December 2019) also lowered the retirement age of Supreme Court judges by five years. This led to the replacement of approximately 40 percent of the members of the Court, with new judges being appointed by the President of the Republic on the proposal of the National Council of the Judiciary (see M. Ziółkowski, *Two faces of the polish supreme court after "Reforms" of the judiciary system in Poland: The question of judicial independence and appointments*, in *European Papers*, 1, 2020, 347-362; Č. Pištan, *Giustizia costituzionale e potere giudiziario. Il ruolo delle corti costituzionali nei processi di democratizzazione ed europeizzazione*, in A. Di Gregorio (ed.), *I sistemi costituzionali dell'Europa centro-orientale, baltica e balcanica*, Padova, 2019, 361 and the opinion no. 977/2020 of the Venice Commission). In effect, the law led to a judicial "revolution" from which the judges of the Supreme Court could only escape by requesting an extension from the President of the Republic, who could grant it or not at his discretion (see L. Pech, P. Wchowiec, D. Mazur, *Poland's rule of law breakdown: A five-year assessment of EU's (in)action*, in *Hague J. Rule of Law*, 2021).

The reforms did not spare ordinary magistrates either. Lower courts were also subject to the sudden lowering of the retirement age and the method of the selection of the judges to be retained in case of request, with the discretionary and unquestionable assessment of the Minister of Justice. Considering that the latter is formerly the Attorney General, a member of the self-governing body of the judiciary and the subject entitled to appoint the court presidents, one can appreciate the total omnipresence of the executive's action with respect to the Polish judiciary system (see M. Kalisz, *The time of trial. How do changes in justice system affect Polish judges*, Warsaw, 2019, M. Ziółkowski, *Two faces of the Polish supreme court after "Reforms" of the judiciary system in Poland*, cit., 348 ff.,).

3. – After the season of reforms initiated by the "Justice Package" and the regression of judicial guarantees, the EU institutions intervened using all the means provided by EU law. First, by the more "traditional" means of the infringement procedure under Article 258 TFEU (see S. Bartole, *La crisi*

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della giustizia polacca davanti alla Corte di giustizia: il caso Celmer, in *Quaderni costituzionali*, 4, 2018, 921-923). This led to a first wave of rulings by the ECJ, the substance of which was largely ignored by Polish institutions. Reference is made to the judgments on the independence of the Polish Supreme Court of June 2019 (C-619/18), the judgment on the independence of ordinary courts of November 2019 (case C-192/18), and the decisions on the amendments to the disciplinary procedure for Polish judges (C-791/19 R and C-791/19 R).

In addition, internal reactions within Poland should also be mentioned. These included spontaneous street mobilizations coordinated by the opposition, the January 2020 march of judges in Warsaw (M. Basilico, cit., *passim*), the stances of the press opposed to the illiberal turn and the protests in some universities. But another kind of "resistance" can also be appreciated in relation to judicial proceedings. An example of this is the case of *A.K. and Others*, decided with a judgment of the ECJ on the 19th of November 2019 (joined cases C-585/18, C-624/18 and C-625/18). The case originated from a request for preliminary rulings issued by the Polish Supreme Court, Labor and Welfare Section, in the context of judgments brought by Supreme Court and Supreme Administrative Court judges who were victims of early retirement and the denial of the subsequent request for extension. On that occasion, the Grand Chamber of the Court of Justice ruled that Article 47 of the Charter of Fundamental Rights of the European Union and Directive 2000/78 preclude the submission of disputes concerning the application of Union law to the exclusive jurisdiction of a non-independent and impartial body. In the Court's view, this is the case if the body is subject to external influences, by the legislative and executive branches and, in general, if it does not act in a position of neutrality with respect to opposing interests.

In accordance with the limitations that characterize the Luxembourg Court's review, the assessment of the independence of the Disciplinary Chamber of the Supreme Court of Poland with respect to the enucleated criteria is left to the referring court. Nevertheless the ECJ specified that, in the event of an alleged lack of independence, «the principle of the primacy of EU law must be interpreted as requiring the referring court to disapply the provision of national law which reserves jurisdiction to hear and rule on the cases in the main proceedings to the abovementioned chamber, so that those cases may be examined by a court which meets the abovementioned requirements of independence and impartiality and which, were it not for that provision, would have jurisdiction in the relevant field» (see paragraph 171 of the judgment and A. Di Gregorio, A. Angeli, J. Sawicki, *Il costituzionalismo "malato" in Ungheria e Polonia*, cit., 385 ss).

Although the Polish authorities have taken some limited steps of reform, these have mostly been "cosmetic" and have proved inadequate to put the country back on track with respect to the overall independence of the judiciary. Poland's inadequate response prompted the Union to take "unprecedented measures" under the preventive mechanisms for safeguarding the rule of law granted by the Treaties. This is the additional procedure provided for in Article 7 para. 1 TEU, which allows to react to risks of violation of the founding values of the Union in Article 2 TEU (on this aspect and the further developments see M. Aranci, *La reazione dell'Unione europea alla crisi polacca: la Commissione attiva l'art. 7 TUE*, in

federalismi.it, 18 luglio 2018, E. Cukani, *Il "Polish Gate" e il rafforzamento del diritto dell'UE*, in *DPCE Online*, 1, 2022, 11 ff., C. Sanna, *Dalla violazione dello Stato di diritto alla negazione del primato del diritto dell'Unione sul diritto interno: le derive della "questione polacca"*, in *Eurojus*, 31.12.2021).

The procedure is designed to ensure that the values of the EU are respected by the states that are already members of the Union. Indeed, while rigorous incoming conditionality mechanisms are foreseen for aspiring member states, allowing for a scrupulous examination of compliance with founding values, including the rule of law, it is more difficult to identify successive violations by member states that already participate (and vote) in the work of the European institutions. Also for these reasons, and taking into account the experience of Poland and Hungary, the EU has introduced the system of assessing compliance with the founding values, providing clarification of the content of the principle of the rule of law in the secondary legislation of the EU, and on the other hand by adopting Regulation 2020/2092 of 16 December 2020 (Regulation EU, Euratom 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 see on the Hungarian experience M.A. Orlandi, cit., *passim*). This Regulation introduces a general regime of conditionality for the protection of the EU budget, including, inter alia, respect for the rule of law, legal certainty, and effective judicial protection, including access to justice by independent and impartial courts and the separation of powers (see E. Cukani, Condizionalità europea e giustizia illiberale, cit., *passim* and S. Gianello, *Il Regolamento 2020/2092 alla prova "concreta" dei fatti: alcune indicazioni significative a partire dalla sua attivazione contro l'Ungheria*, in *DPCE online*, 2, 2022 661-701, V. Borger, *Constitutional identity, the rule of law, and the power of the purse: The ECJ approves the conditionality mechanism to protect the Union budget: Hungary and Poland v. Parliament and Council*, in *Common market law review*, 6, 2022, 1771–1802).

On the other hand, Polish institutions supported the attempt to undermine the principle of the supremacy of EU law over national legislation. This process peaked in the Constitutional Tribunal's decision K 3/2021 (Judgment K 3/21 of October 7, 2021 on which see M. Coli, *Sfida al primato del diritto dell'Unione europea o alla giurisprudenza della Corte di giustizia sulla "rule of law"? Riflessioni a margine della sentenza del Tribunale costituzionale polacco del 7 ottobre 2021*, in *Osservatorio sulle fonti*, 3, 2021, 1083 ff.). In a nutshell, by virtue of an illiberal interpretation of the Polish Constitution based on an emphasis on national identity, the Court asserted the supremacy of the Polish Constitution over the provisions of the TEU, declaring them incompatible with the constitutional framework of the country (see J. Sawicki, *The new illiberal interpretation of the constitution as a basis for declaring its incompatibility with the primary law of the European Union, as well as innovatively addressing the humanitarian crisis on the border with Belarus*, in *Nomos*, 3, 2021, 4 ff., O. Polański, *Constitutional tribunal judgment K 3/21 - a continued assault on the integrity of the EU legal order*, in *Public law*, 1, 2022, 344-347). According to scholars, the decision represented an attempt to pursue a true reversal of the principle of the primacy of Euro-Unitarian law rather than a claim based on the so-called counter-limits

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doctrine (E. Cukani, *The "Polish Gate*," cit., 6 ff. and S. Troilo, cit., 117 ff.). In fact, the Constitutional Tribunal denounces the beginning of an alleged "new phase" of the Union among the peoples of Europe, which would go beyond the competences attributed to Poland by the Treaties and would be in radical contrast with the Polish Constitution.

The decision raised criticism all over Europe and the arguments laid down by the TC were challenged in a public statement drafted by the former Polish TC judges in retirement (*Statement of Retired Judges of the Polish Constitutional Tribunal*, in *VerfassungBlog*, 2021/10/11 at https://verfassungsblog.de/statement-of-retired-judges-of-the-polish-constitutional tribunal). The statement denounces the incompliance of the decision with the Polish Constitution (*verbatim*: «it is not true that the judgment of the Constitutional Tribunal of October 7, 2021 will be able to produce legal effects other than exerting pressure on the judicial activity of Polish judges and threatening them with disciplinary proceedings») and disputes the existence of an antinomy between the application of EU law by the Polish courts and the Constitution in the terms indicated by the TC. In the view of the former TC judges, the true purpose of the decision is to exert a form of pressure on Polish judges by threatening them with the "sword of Damocles" of disciplinary proceedings.

Hence, the Polish Constitution is used by the TC as a tool to force the resistance of European institution to the attempts to undermine the independence of Polish courts in the name of an alleged national constitutional identity to be made to prevail. The emphasis on the identitarian argument in the TEU, however, conveniently omits to consider that the independence of national courts and individual judges constitutes a common value of the European Union that must also be considered in the interpretation and application of the principle of the primacy of EU law (see S. Sciarra, *National identity and constitutional courts. the common value of independence*, in Vv. Aa., *National identity of member states, primacy of European Union law, rule of law and independence of national judges*, 2022, 6 ff., available at https://cortecostituzionale.it/jsp/consulta/convegni/5_sett_2022/Giornata-Studio-Cc-Cgeu-Def.pdf). Indeed, the courts of the member states, by making themselves guarantors of the application of Union law, also act in the interest of the European Union, which must be able to rely on an independent judicial body.

Conversely, national identity cannot be treated as an "exemption clause" to be invoked by way of cultural exemption in the face of provisions unpalatable to national legal systems (however it is true that the concept national identity has had a controversial and evanescent nature and its boundaries have been hard to draw as noted by F. Fabbrini, A. Sajó. *The dangers of constitutional identity*, in *European Law Journal*, 25.4, 2019, 457–473 also in respect to the decisions of the German *Bundesverfassungsgericht* and the Italian Constitutional Court in which the national constitutional identity has been often invoked).

This point has been clearly addressed by Advocate General Emiliou's opinion of March 8, 2022 (see the Advocate general opinion in *Boriss Cilevičs and Others v. Latvijas Republikas Saeima*, C- 391/20, paragraph 86). According to the A.G., while it is not up to the EU to determine the elements

that are part of the core of national identity, «the discretion of the Member States cannot be unlimited. Otherwise, Article 4(2) TEU would take the form of an all-too-easy total exemption clause from the rules and principles of the Union treaties, which could be activated at any time by any member state. An obligation for the Union to "respect" the national identity of member states cannot amount to a right of the member state to ignore Union law at will». The ECJ also purported the point with respect to individual rights and freedoms, affirming that «It is true that Member States enjoy broad discretion in their choice of the measures capable of achieving the objectives of their policy of protecting the official language, since such a policy constitutes a manifestation of national identity for the purposes of Article 4(2) TEU (see, to that effect, judgment of 16 April 2013, Las, C-202/11, EU:C:2013:239, paragraph 26). However, the fact remains that that discretion cannot justify a serious undermining of the rights which individuals derive from the provisions of the Treaties enshrining their fundamental freedoms» (see *Boriss Cilevičs and Others v. Latvijas Republikas Saeima*, C- 391/20, paragraph 83).

4. –The challenge to the Court's jurisdiction raised by the Polish authorities is the first aspect addressed by the ECJ in this case. The Polish authorities recalled the decision of the Polish Constitutional Court of 14 July 2021 and argued that, in the light of the Polish case law of the *Trybunał Konstytucyjny*, the ECJ would exceed its powers in case the complaints raised by the Commission were upheld.

Contrary to the Polish Government's argument, the Court recalls its previous judgments, according to which the competence of national authorities to determine their own constitutional arrangements cannot constitutes an obstacle to compliance with the obligations laid down in Articles 2 and 19 TEU. In other words, the Court responds to *Trybunał Konstytucyjny* by reiterating that the principle of the primacy of Union law over national law requires even a constitutional court to accept the interpretation of Union law provided by the ECJ (see S. Giudice, *Nuova condanna per la Polonia, la legge che «imbavaglia» i giudici è incompatibile con il diritto dell'Unione*, in *http://www.sidiblog.org/2023/07/11/nuova-condanna-per-la-polonia-la-legge-che-imbavaglia-i-giudici-e-incompatibile-con-il-diritto-dellunione/*).

Therefore, with respect to the national identity doctrine, the case in comment confirms what the Court had previously stated: «there is no ground for maintaining that the requirements arising, as conditions for both accession to and participation in the European Union, from respect for values and principles such as the rule of law, effective judicial protection and judicial independence, enshrined in Article 2 and the second subparagraph of Article 19(1) TEU, are capable of affecting the national identity of a Member State, within the meaning of Article 4(2) TEU». Consequently, the reference to Article 4(2) TEU «cannot exempt Member States from the obligation to comply with the requirements arising from those provisions» (see paragraph 72 of the case C-204/21 and in general terms on the identity principle see G. Di Federico, *L'identità nazionale degli Stati membri nel diritto dell'Unione europea. Natura e portata dell'art. 4, par. 2 TUE*, Napoli, 2017).

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While it has been argued by the Advocate General Emiliou in the opinion recalled before that «the Court has not elaborated on the concept of 'national identity' or on the nature and scope of the 'national identity clause' set out in Article 4(2) TEU'» as «it remains unclear whether and to what extent 'Article 4(2) TEU may be interpreted as introducing a horizontal or general clause that Member States may invoke in order validly to claim derogations from the EU rules'», the present decision seems to indicate that the ECJ intends to thoroughly clarify the scope and extent of national identity in order to "dismantle" any argument used by the Polish authorities to avoid the application of the primacy principle.

5. – The first issue examined by the Court concerned the powers conferred on the Disciplinary Chamber of the Supreme Court following the adoption of the "Muzzle Law" (the Commission's fourth complaint). The Chamber was entitled to take a number of disciplinary measures against Polish judges, which could have an impact on their professional and private lives (e.g., initiation of criminal investigations against judges, reduction of judges' remuneration, as well as retirement).

As already confirmed in case C-791/19, Article 19 TEU requires that the sanctioning powers available to the Disciplinary body are not used to exercise undue pressure or political control over the judges of the Member States. By attributing these powers to a body whose independence and impartiality the ECJ has already declared incompatible with EU law, Poland has failed to fulfil its obligations under Article 19(1)(2) TEU. According to the Luxembourg judges, the Polish legal system lacks sufficient guarantees to avoid the risk of political control and pressure on judges by the Chamber, thus undermining « the trust which justice in a democratic society governed by the rule of law must inspire in those individuals» (see paragraph 102 and C. Curti Gialdino, *La "legge bavaglio" polacca viola l'indipendenza, l'imparzialità e la vita privata dei giudici*, cit., xviii).

6. – The second substantive issue considered by the ECJ is focused on the provisions of the "Muzzle Law", which provide for the facts suitable for establishing a disciplinary offence for judges (third complaint of the EC). According to the Commission, the Polish national provisions violate the second subparagraph of Article 19(1) TEU and Article 47 of the Charter of Human Rights. In fact, they classify as a disciplinary offense the examination of compliance with the requirements laid down in EU law based on the notion of an independent and impartial judicial body, although Polish judges are obliged act accordingly in view of the jurisprudence of the ECJ. The Court upheld the complaint, finding that Poland had failed to comply with its obligations. First, the ECJ reiterated the limits of the Member States' discretion in this matter, noting that «although the establishment of the disciplinary regime applicable to judges falls within the competence of the Member States, the fact remains that, when exercising that power, each Member State is required to comply with EU law».

Second, the Court found that the definitions of the disciplinary offenses to be considered after the approval of the "Muzzle Law" are so broad and imprecise that they may lead to the initiation of disciplinary proceedings in situations where Polish judges are merely considering whether the

requirements of Article 19(1) TEU and 47 of the EU Charter of Human Rights are respected. These may include the assessment of the impartiality of the court on which they sit or of other judges or courts of Poland.

Thirdly, according to the ECJ, the Polish legislation does not ensure that the liability of judges is limited to exceptional cases. Moreover, such legislation does not prevent the use of disciplinary proceedings as a means of political control over judges. Finally, the Court found a violation of Article 267 TFEU, as the Polish law will allow the initiation of disciplinary proceedings if a Polish judge submits a request for a preliminary ruling to the Court of Justice. The Court's response to this complaint is consistent with the jurisprudence of the ECJ and case C.791/2019. However, in addition to the ECJ's "*repetita iuvant*" approach, it is worth emphasizing that the Court recognized a pattern in the Polish authorities' conduct: the European judge affirmed that the "Muzzle Law" constituted a deliberate attempt to «neutralize pending preliminary references relating to the right to an independent tribunal established by law» (L. Pech, *Doing Justice to Poland's Muzzel Law*, cit., 3). Not surprisingly indeed, this happened after the *A.K.* case law (joined cases C-585/18, C-624/18 and C-625/18), by which the ECJ acknowledged that Polish judges are entitled to question the independence of their national courts and judicial bodies.

7. – The Court then dealt with the first complaint of the EC. According to the Commission, by prohibiting national bodies from verifying compliance with the requirements arising from EU law with regard to the guarantees of independence, impartiality and pre-establishment by law, Polish authorities contravened the provisions of the second subparagraph of Article 19(1) TEU in conjunction with Article 47 of the Charter, the principle of the primacy of EU law and Article 267 TFEU.

The Court preliminary found the complaint partially inadmissible in the part related to the violation of Article 267 TFEU as, *in nuce*, it did not comply with the requirements of the statements which must be «sufficiently clear and precise to enable the defendant to prepare his or her defense and the Court to rule on the application procedure and, therefore» (see paragraph 188).

The other parts of the complaints, however, have been deemed as admissible and upheld in the merits by the Court. The ECJ observed that if a Polish judge were to give effect to the duties arising from these provisions of Union law, he or she would be in a situation of conflict with domestic law and would risk being subject to the disciplinary measures mentioned above (see S. Giudici, cit., 4 ff.). In the Court's view, the provisions examined also violate the principle of primacy because they result in an obstacle to the disapplication of Polish law in contrast with EU provisions with direct effects, including Article 47 of the European Charter (see judgment of 29 July 2019, *Torubarov*, C-556/1 and the case comment by E. Frasca, *Rule of law concerns regarding systems of judicial review in asylum cases: on the binding effect of judicial decision and the fundamental right to an effective remedy*, in *Cahiers de L'Edem*, September 2019).

8. – The next point on which the ECJ focused its attention is the second complaint of the EC. The Commission, on the premise that questions related

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to the independence of a court or judge are «horizontal issues», holds that Poland has failed to fulfil its obligations under EU law by conferring on the Extraordinary Review and Public Affairs Chamber the exclusive jurisdiction to rule on matters relating to the recusal of judges and the designation of the courts (see paragraph 233).

Again, the ECJ found that the complaint was partially inadmissible as per the EC doubts on the composition of the Extraordinary Review and Public Affairs Chamber (hereinafter also indicated as "ERPAC"), as they were not mentioned during the pre-litigation stage nor the application but only at the stage of reply. Thus, these arguments should be considered inadmissible as "new".

Nevertheless, the remaining part of the second complaint is upheld by the European judge despite the opposite opinion of the Advocate General Collins on the point (see points 106 ff. of the A.G.'s conclusions). In the view of the court, having Poland assigned to the ERPAC the exclusive jurisdiction on the evaluation of the lack of independence of a judicial body, the Member State has failed to comply with Article 19(1) TEU and 47 of the Charter. The Court here makes a more far-reaching assessment than the one carried out by the Advocate General in his conclusions.

In the view of the A.G., Article 267 TFEU gives national courts the «widest discretion to refer matters to the Court where they consider that a case pending before them raises questions that involve the interpretation of provisions of EU law necessary to resolve the case before them» (paragraph 106). In addition, as to the A.G., the Polish provisions do not exclude the possibility for national courts to submit a request for preliminary ruling to the Court of Justice.

Instead, the Court first finds a breach of Articles 19(1) TEU and 47 of the Charter as the national provisions are deemed to be able to prevent all courts from verifying compliance with the guarantees required by EU law and limit the jurisdiction of the extraordinary chamber. In the view of the Court, it may happen that the need to verify compliance with the above-mentioned EU provisions is raised before any national court, while the introduction of the Polish prohibitions and disciplinary offences, are suitable to weakening the effectiveness of the review concerning the observance of the right to effective judicial protection, which EU law poses on all the national judges.

In addition, the Polish legislation is found to be incompatible with the principle of primacy as by preventing courts other than the ERPAC from ensuring the observance of the right to effective judicial protection (i.e. Art. 47 of the Charter), they inhibit the other national judges by disapplying, where appropriate, the Polish provisions which are contrary to EU law.

9. – The last complaint addressed by the Court – the fifth of the EC – is the one presenting the most novel aspects with respect to the previous rulings of the ECJ. The Commission critically examine certain provisions of the Muzzle law in the light of the EU Regulation 2016/67 (General Data Protection Regulation – GDPR) and Charter of Fundamental Rights of the European Union). The Polish provisions in question are those that require Polish judges to submit a written declaration of their membership in associations, non-profit foundations or a political party, including the

positions held. In addition, the Polish provisions require the publication of these data in a public information bulletin (*Biuletyn Informacji Publicznej*).

In the EC's view, this constitutes the processing of personal data as it relates to information concerning the private life of judges. This rule is evaluated in light of the right to respect for private and family life and the protection of personal data envisaged by Article 6 and 7 of the Charter and the provisions of the GDPR, which are deemed as applicable (despite the objections raised by Poland) as «national provisions consisting (…) in making the declaration and placing online of the information at issue compulsory involve operations consisting of the collection, recording and dissemination of that information, namely a set of operations which constitutes 'processing' of personal data, within the meaning of Article 4(2) of the GDPR» (see paragraph 324 or the ruling).

Poland had attempted to justify the measure on the basis that it was intended to ensure the neutrality and impartiality of judges, which was an objective of general and substantial interest under Articles 6(3) and 9(2) of the Charter. On this basis, the Polish authorities considered that this objective could also legitimize the restriction of the rights under Articles 7-8 of the Charter.

On the contrary, the Court found that the measure was not only inadequate and inappropriate to achieve the objective, but also lacking in proportionality, since «the result of the weighing up of the interference resulting from the placing online of the personal data concerned and the alleged objective of general interest is not balanced». In addition, the Court stated that any judge is required to recuse himself or herself from deciding a case in which a circumstance relating to his or her membership or association may give rise to doubts as to the impartiality of his or her office.

After dismantling Poland's weak justifications, the Court added the existence of serious risks in the dissemination of the personal data of Polish judges. In fact, this could lead to the exposure of the judges concerned «to risks of undue stigmatization, by unjustifiably affecting the perception of those judges by individuals and the public in general, as well as the risk that the progress of their careers would be unduly hampered» (paragraph 377).

Consequently, in the Court's view, in the absence of any adequate justification for the measure, the Polish provisions resulted in a serious interference with the fundamental rights of judges, including the right to private life and to the protection of personal data protected by Articles 7 and 8(1) of the Charter.

10. – In conclusion, the unsurprising outcome of the decision, which is in clear continuity with the previous rulings against Poland, does not prevent the Court from adding new elements of interest to the debate.

First, it is necessary to positively emphasize the presence of different passages in the decision in which the Court considers the Polish measures in the whole context of Polish legal life and in the light of the previous stages of the legal contrast with the EU. This can be seen, for example, in the paragraph in which the Court seems to make use of the Commission's argument that the Polish provisions have a wider and more general scope that should not be underestimated: «as regards the more general context in which the amending law and the contested national provisions were adopted,

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it should also be recalled that, as the Commission maintains and as is apparent from guidance in several recent judgments of the Court, the attempts by the Polish authorities to discourage or prevent national courts from referring questions concerning interpretation to the Court of Justice for a preliminary ruling regarding the second subparagraph of Article 19(1) TEU and Article 47 of the Charter in relation to the recent legislative reforms that have affected the judiciary in Poland have recently increased (see, inter alia, judgment of 2 March 2021, A. B and Others (Appointment of judges to the Supreme Court – Actions), C-824/18, EU:C:2021:153, paragraphs 99 to106 and the case-law cited)».

Another element of interest is the broad protection reserved for the private sphere of judges, which is undermined by attempts to delegitimize their impartiality with respect to the publication of private information online (see C. Curti Gialdino, *La "legge bavaglio" polacca viola l'indipendenza, l'imparzialità e la vita privata dei giudici*, cit., xxiii). While in general the distinction between the public and private sphere of judges is a critical matter (see for instance E. Bruti Liberati, *La libertà di espressione dei giudici in Europa*, in *Questione Giustizia*, 16.3.2023), the Court in this case is particularly mindful of the importance of both the impartiality and the trust in the impartiality of judges in a democratic society governed by the rule of law (see e.g. paragraphs 58 and 211). In this context, it may be appreciated how the EC and the Court enriched the EU "tool case" against the stigmatization of judges by Poland with the unusual reference to the GDPR.

On a critical perspective, on the other hand, it has been agreeably noted that the Commission insofar failed to address the problem at its sources, i.e. the total lack of independence of the NCJ (Polish National Council of the Judiciary), already regarded as problematic by the ECJ but still able to «nominate wave after wave of "judges"» (see L. Pech, cit., 1), thus leaving intact the ongoing process of reshaping the Polish judiciary with the judges who are most in line with the current majority political forces.

Despite the numerous judgements of the ECJ issued insofar, the endurance of the problems of the Polish judicial system has been recently underlined by the latest European Commission in the Annual Report on the rule of law in July 2023. According to the EC in Poland «serious concerns related to the National Council for the Judiciary remain to be addressed, as there are legitimate doubts as to its independence» and « serious doubts remain as to whether a number of Supreme Court judges appointed in 2018 and 2019, including its First President, comply with the requirements of a tribunal established by law» (see 2023 Rule of Law Report available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52023DC0800).

Notwithstanding the above, the EC also appreciated that «In Poland some progress has been made to ensure the functional independence of the prosecution service from the Government, but the functions of the Minister of Justice and the Prosecutor General have still not been separated», continuing to stress the main factor that put in jeopardy the separation between the executive and the judicial branch.

It is worth underlining that sooner or later Poland will be forced to face the great financial pressure resulting from these proceedings in view of the daily fines imposed with the previous orders of the Court's Vice

president, and the failure to receive the funds of the Next Generation EU due to the violations of the rule of law principle and the EU system of conditionality (see C. Curti Gialdino, *La "legge bavaglio" polacca viola l'indipendenza, l'imparzialità e la vita privata dei giudici*, cit., xxvi and C. Fasone, *Le sentenze della Corte di giustizia sul Regolamento UE sulla condizionalità relativa alla rule of law: gli elementi di novità e le (numerose) questioni aperte*, in *Democrazia e Sicurezza*, 2, 2022, 57-94).

In the light of the above, the decision seems to confirm how the Polish case is part of a more general trend taking place in some jurisdictions in the Eastern European area that, for several years now, have positioned themselves «in a gray area, where the principles of constitutionalism seem to be decisively tested, thus undermining the ubi consistam of European supranational integration» (E. Ceccherini, *L'indipendenza del potere giudiziario come elemento essenziale dello stato di* diritto, cit., 2207).

If it is true that the 1789 Declaration of the Rights of Man and of the Citizen stated that «Every society in which the guarantee of rights is not secured, nor the separation of powers established, has no constitution», one can appreciate the depth of the violation of key principles of constitutionalism resulting from the complete erosion of the guarantees of the Polish judiciary and its autonomy from other powers. On the other hand, this is certainly not a total new design: after all, the line «The First Thing We Do, Let's Kill All Lawyers» in Shakespeare's Henry VI, Part 2, Act IV, was meant to refer to professionals of the law in general, including judges, and not just attorneys. In other words, as stated in Justice Stevens' interpretation of the line, «Shakespeare insightfully realized that disposing of lawyers is a step in the direction of a totalitarian form of government». (See *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 371 n. 24 (1985), Stevens, J., dissenting).

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