

# Though this be Madness, yet there's Method in't: Pitting the Polish Constitutional Tribunal against the Luxembourg Court

---

Stanisław Biernat

2018-10-26T17:48:15

At the beginning of October 2018, Poland's Prosecutor General submitted a request to the Constitutional Tribunal to examine the compliance of Article 267 TFEU with the Polish Constitution, so far as it allows the referral of preliminary questions regarding the organization of the national judiciary. The news about this incident went to the public two weeks later, just before elections to the local government. Formally, the request is an extension of the application submitted to the Constitutional Tribunal in August 2018 ([case K 7/18](#)) in response to the preliminary questions submitted to the CJEU by the Polish Supreme Court ([C-522/18](#) and [C-537/18](#)). The earlier application concerns the constitutionality of Article 267 TFEU, allowing – in view of the Prosecutor General – the national courts to refer preliminary questions bearing no relevance to the subject matter of the main case.

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”.

The motion to the Constitutional Court deserves urgent attention for a number of reasons. Undoubtedly, it is another manifestation of the deterioration of Poland's relations with the EU and the adoption of Poland's hard line in its relations with the EU. There is not much exaggeration in the statements of Polish commentators that this is the prelude to Poxit or "setting a bomb under Polish membership in the EU". Without going into the far-reaching intentions of the Prosecutor General, it can be stated that the expected judgment of the Constitutional Tribunal would allow the Polish authorities to disregard the preliminary ruling issued by the CJEU in response to questions referred by the Supreme Court in August 2018.

The relatively easy identification of motives underlying the application does not, however, exclude the need for analysis and evaluation of the contents of the application, i.e. the demand for a ruling on non-compliance of Article 267 TFEU, as well as the argumentation used as justification for this task.

Before that, however, it is worth making two remarks about the role of the main actors in this case: the applicant and the Constitutional Tribunal.

## Influence and Competence

The first remark concerns the very strong position of the Minister of Justice in Polish politics, who, in the discussed case, acts as the Prosecutor General. He manages the common courts through subordinate court presidents. Most members of the new National Council of the Judiciary are associated with him professionally or personally. This also applies to judges who are members of the newly created Supreme Court's Disciplinary Chamber, half of whom are former prosecutors. As the Prosecutor General, he can give instructions to all prosecutors who can take part in all court and administrative proceedings in Poland, and he can take over all cases run by subordinate prosecutors.

Recently, the Minister of Justice has also been directing the Polish policy towards the EU. At the beginning of October 2018, at the Council of the European Union, he vetoed the adoption of an annual report on the EU's Charter of Fundamental Rights. A further manifestation of Poland's collision course towards the EU is evidenced by the application in question.

The second remark concerns the role of the Constitutional Tribunal in the discussed case. Due to the competences of the Constitutional Tribunal, the proceedings in this case should be discontinued. Jurisdiction of the Polish Constitutional Tribunal includes the examination of the conformity of acts of parliaments and other normative acts, including international agreements, with the Constitution. However, as the analysis of the motion in question shows, the Prosecutor General does not challenge the normative contents of Article 267 TFEU. In fact, he challenges the manner in which the Polish courts exercise their competence to refer preliminary questions to the CJEU.

It should be noted, that challenging the constitutionality of Article 267 TFEU is another doubtful example of improper use of the Constitutional Tribunal to settle political disputes or legal controversies. This practice consists in the artificial formulation of *ad hoc* constitutional problems, so that they are formally suitable for recognition by the Constitutional Tribunal. The result of such operations is judgments containing sentences that are specially "sculpted" for immediate political need. It is significant that these artificially created cases were brought to the Constitutional Tribunal by groups of MPs from the ruling party (sic!) or by the Prosecutor General. Typical examples of such practices are cases concerning: procedure for selecting candidates for the position of the First President of the Supreme Court and the National Council of the Judiciary ([K 3/17](#), [K 5/17](#)), the application of the act of pardon by the President ([K 7/17](#), [K 8/17](#), [Kpt 1/17](#), [K 9/17](#)), evaluating the correctness of the election process with regard to a judge, the President and the Vice-President of the Constitutional Tribunal ([K 10/17](#)) and the possibility of invoking the conscience clause while providing services ([K 16/17](#)). In the light of previous practice it is likely that the case discussed here will join the infamous list of artificial creation of constitutional review and the Constitutional Tribunal will examine the motion of the Prosecutor General to the substance.

The truth is however that the Prosecutor General is dissatisfied with the preliminary questions referred by Polish courts and wants to eliminate them using the authority of the Constitutional Tribunal. The list of cases concerning the independence of the Polish judiciary is growing quickly in Luxembourg, i.e. C-522/18 (*D*), C-537/18 (*Krajowa Rada Sądowa*), C-558/18 (*Miasto Nowy Sącz*), C-563/18 (*Prokuratura Okręgowa w Płocku*), C-585/18 (*Krajowa Rada Sądowa i in.*), C-623/18 (*Prokuratura Rejonowa w Śubicach*), C-624/18 (*CP*), C-625/18 (*DO*).

It is therefore possible that the Constitutional Tribunal would consider the case admissible and issue a judgment declaring Article 267 TFEU unconstitutional, in scope challenged by the Prosecutor General. These are the expectations of many commentators. This clearly testifies to the fall of the authority of the constitutional court in Poland, the body that should safeguard the compatibility of the legal order with the Constitution.

It is obvious that the Tribunal should not engage in a substantive review of Article 267 TFEU also for other reasons. It should be recalled that the legal construction of the preliminary ruling (former Article 234 EC Treaty) has already been subject to constitutional review in a case regarding the Accession Treaty ([K 18/04](#)). The Prosecutor General's arguments to justify a re-examination of Article 267 TFEU are inconclusive. According to the settled case law of the Constitutional Tribunal, the case shall be discontinued if there are no new circumstances justifying constitutional review of a provision that the Tribunal has already examined.

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 not only to a violation of EU law, but also the infringement of the Polish Constitution. It would be incompatible with Article 9 of the Constitution, stating that the Republic of Poland shall respect international law binding upon it. In particular, it applies to international agreements transferring the competence of organs of State authority in relation to certain matters to an international organization or international institution (Article 90 of the Constitution).

## **Argumentative Cherry Picking**

The main argument of the Prosecutor General concerns the competence of the national courts to refer preliminary questions to the CJEU. According to the applicant, national courts exercise wide discretion to submit preliminary references in areas reserved for competences of the constitutional organs of the State. The Prosecutor General argues that issues relating to the system, form and organization of the judiciary, as well as judicial procedures, have not been transferred to the EU in the Accession Treaty. According to the Constitution, this competence still belongs to the organs of State authorities, particularly to the national parliament. The State benefits from institutional autonomy in this area.

In view of the Prosecutor General, after the accession of Poland to the EU, the competence of national courts has been extended as regards the scope of the preliminary questions that may be referred to the CJEU. In his opinion, many

questions do not relate to EU law. As an example, he mentioned the questions referred by the Supreme Court and other Polish courts in recent months. According to the applicant, it amounts to the extension of the Union's competences without observing the required constitutional procedures. In consequence, courts referring preliminary questions to the CJEU, concerning the system, form and organization of the judiciary, as well as judicial procedures, violate the Polish Constitution since the competences in question belong to the national law-making authority.

The reasoning given by the Prosecutor General deserves a critical assessment. His arguments are formulated in a general way, giving the impression that they relate to all EU Member States, although similar allegations were not raised in other countries.

It seems that the Prosecutor General ignores EU law or knowingly passes its important aspects in silence. In particular, this relates to the main argument of the alleged extension of the scope of application of Article 267 TFEU by the national courts referring preliminary rulings. He does not take into account that the admissibility of the questions referred for a preliminary ruling is not decided by the national courts but the CJEU before adjudicating on the substance. Claiming that the scope of Article 267 TFEU has changed on the grounds that Polish courts have made inquiries with widely-formulated questions is not justified. It happens of course that national courts refer questions going beyond the interpretation or validity of EU law. However, the last word belongs to the CJEU that may consider a given case inadmissible.

In addition, the general qualification of organization of the judiciary and judicial procedures as matters falling within the exclusive competence of State authorities is incorrect. The organizational and procedural autonomy of the Member States is not absolute and does not keep cases from the influence of EU law. This is especially evident in relation to judicial procedures. It is enough to point out the cooperation of the EU Member States in criminal and civil matters. Moreover, while applying judicial procedures, national courts are bound by the principle of equivalence and effectiveness in cases with EU law elements (e.g. *Arcor*, [C-422/04](#))

It is significant that arguing about the system and organization of the national judiciary, the Prosecutor General does not mention in one word the independence of the courts, the irremovability of judges and their accountability to disciplinary authorities. These are undoubtedly elements of the system and organization of the national judiciary falling within the scope of EU law (Article 2 TEU, Article 19 TEU, Article 47 of the CFR), which was emphasized in the latest jurisprudence of the Court of Justice (e.g. *Associação Sindical dos Juizes Portugueses*, [C-64/16](#); *Achmea*, [C-284/16](#); *LM*, [C-216/18 PPU](#)). The Prosecutor General omits this 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, does not hold water.

Triggering the proceedings before the Constitutional Tribunal concerning Article 267 TFEU should be critically assessed in view of EU law. National courts, including constitutional courts, have no competence to provide final interpretation of Article

267 TFEU in an autonomous manner and independent from interpretation given by the CJEU. Such an interpretation by the Constitutional Tribunal would be inevitable if it were to adjudicate on the compliance of Article 267 TFEU with the Polish Constitution. However, such a solution would be unacceptable under EU law. It is the CJEU that has the power to make a definitive and binding interpretation of the Treaty. Allowing the national courts to set aside provisions of the Treaty would be incompatible with the principle of uniform application of EU law in all Member States.

## Apocalypse Tomorrow?

It is worth considering the consequences of the future judgment of the Constitutional Tribunal in case it accepts the arguments presented by the Prosecutor General.

Firstly, state authorities could refuse to recognize the judgements issued by the CJEU in response to the preliminary questions referred by Polish courts since August 2018. In consequence, judgments concerning the system, form and organization of the judiciary would not have any legal effect in Poland to the extent that they are incompatible with the Constitution. They would not impose the need to change Polish law, nor can they be taken into account when issuing judgments by national courts.

Secondly, in the future, Polish authorities could decide with a large margin of discretion which judgments of the CJEU fall within the scope of the matters covered by the judgment issued by the Constitutional Tribunal and draw the consequences outlined above. As a result, Article 267 TFEU would be treated by the Polish authorities as binding only in a limited, not clearly defined scope.

Thirdly, Polish courts referring preliminary questions relating to the judiciary, would have to take into account that their actions would be treated as violations of the Constitution. Undoubtedly, this would not be an obstacle in view of EU law to refer new cases to the CJEU (e.g. *Melki and Abdeli*, [C-188/10](#); *A v. B*, [C-112/13](#); *Križan*, [C-416/10](#)), but judgments issued in response to preliminary references could not be recognized in Poland. In turn, judges who refer preliminary questions and subsequently issue respective judgments could face disciplinary proceedings alleging the breach of the Constitution.

Fourthly, the discussed future judgment of the Constitutional Tribunal would result in a new situation of Poland as a Member State. One of the most important provisions of primary EU law, having a great contribution in the development of this area of law, would be applied in this Member State in a narrower scope than in others. This would amount to the departure from the principle of uniform application of EU law in all Member States. As a result, Poland would find itself in a situation of a Member State permanently violating not only Article 267 TFEU, but also the principle of loyal cooperation expressed in Article 4 paragraph 3 TEU. The inevitable consequence of such state of affairs would be a proceeding based on Article 258 TFEU, followed by the judgment issued by the CJEU declaring that Poland has breached its obligations arising from the Treaties.

It is difficult to imagine that the situation described above could be tolerated by the EU. It may lead to a serious breach of the values specified in Article 2 TEU and the initiation of the proceedings referred to in Article 7 TEU.

The vision presented above may seem apocalyptic. Unfortunately, it is an entirely probable scenario if the Polish Constitutional Tribunal were to issue a judgment declaring the incompatibility of Article 267 TFEU with the Constitution in the scope contested by the Prosecutor General. He is aware of the consequences of his application, although probably not in all details. Nevertheless, the Prosecutor General is guided by political motives. Perhaps the situation will change in the light of one recent event: the interim order of the CJEU (*Commission v. Poland*, [C-619/18](#)). This should force the state authorities to think about their future policy towards the EU in general.

