Luxemburg as the Last Resort

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A criminal proceeding has been suspended by a Hungarian justice of the Pest Central District Court to ask the European Court of Justice (ECJ) preliminary questions, *inter alia*, about his own judicial independence. Now, Hungary's Supreme Court has stepped in and ruled that the reference was illegal, essentially arguing that preliminary references are not the *fora* to discuss such claims. In fact, however, this preliminary reference reveals that all other means to effectively challenge the rule of law backsliding in Hungary have failed.

The Kúria's judgment and its likely effects

The Prosecutor General exercised his right to initiate a review of the order for the preliminary reference (press release in original language here). In its motion of 19 July 2019, the Prosecutor General argued that the first question is irrelevant, since the quality of translation did not come up in the case at hand, while the second and third questions are not about the interpretation of EU law, furthermore they are too remote from the case, as they do not influence its outcome. The Prosecutor General therefore requested the Supreme Court (in Hungarian: *Kúria*) to deem the reference unlawful.

On 10 September 2019, the *Kúria* delivered its judgment No. Bt.838/2019. In these types of procedures, the *Kúria* may determine that the challenged decision was illegal. When no substantive judgment was rendered in the original proceeding, this is all the *Kúria* can do, without attaching any legal consequences to such a determination, according to Article 669(3) of the Hungarian Criminal Procedural Code. Since no decision on guilt or punishment was taken when the request for a preliminary reference was issued in the case at hand, the *Kúria* could only determine illegality in a declaratory judgment.

In its judgment the *Kúria* agreed with the Prosecutor General without reservations and held that suspension of a criminal case and a request for preliminary ruling is illegal, if the subject matter of the request is not the interpretation or validity of EU law, but concerns questions irrelevant from the viewpoint of the outcome of the pending case. According to the *Kúria*, the objective of preliminary ruling procedures is the unified interpretation and application of EU law and not the theoretical assessment of a Member State's constitutional structure and legal system. In a clear reference to the referring judge's labor law disputes with the judiciary and the disturbed relation between the National Judicial Office and its supervisory organ, the National Judicial Council (the Hungarian judiciary's self-governing body), the press release also emphasized that procedural acts must not be abused either for real or perceived individual injuries, or for the realisation of institutional interests. As if responding to expected criticism, during the oral hearing (summary here), the *Kúria* stated that they only wish to protect the unity of the Hungarian case-law, and

the judgment does not jeopardise the inalienable right of Hungarian judges to turn to the ECJ in the form of preliminary references. The judgment has indeed no legal, but a chilling effect. It cannot prevent the procedure from unfolding, but it can prevent other judges from referring similar questions to the ECJ.

Futile procedures in case of doubts concerning judicial independence

Leaving aside the psychological effects of the ruling on the propensity of judges to refer cases to Luxembourg, one could ask whether the *Kúria's* – not so hidden – message is justified. It essentially claims that the case is only used and abused to offer a critique of Hungarian constitutional changes/capture, and that preliminary references are not the *fora* to discuss such claims.

Well, the case is certainly not what it seems to be. It is peculiar in many aspects. First it is unusual enough that a judge asks the Luxembourg court whether he – as a member of a captured judiciary – is independent enough to pass a judgment. Second, it is somewhat puzzling that the attorney of the defendant puts forward a request of suspension of the process. His main concern was – as stated during the court hearing in the original case – that the Hungarian judgment would not be acknowledged by foreign courts due to the irregularities in relation to procedural guarantees and violations of judicial independence. It is perplexing to hear this from an attorney because – however counterintuitive it may sound – his client would only benefit from non-recognition. Should the accused be found guilty and should the sentence not be recognised by a foreign court, the convict would only profit. If, however, he were exonerated by the Hungarian court, such a judgment would need to be recognised by any foreign court, due to the principle of *ne bis in idem*. So again, the convict would benefit.

Therefore, it is highly unlikely that the attorney was indeed motivated by concerns regarding mutual recognition, as he claimed. What is more likely is that he was worried that procedural issues and court capture in the *domestic* setting would violate his client's individual rights. But it is even more likely that the attorney and the national judge were concerned about the dire state of human rights and the rule of law in Hungary *in general*. If this is indeed the case, the preliminary reference in a criminal case is not the procedure to use. So let us see what other avenues would have been available and why they were not taken.

(i) One possibility within the domestic setting would be to file a claim before the Hungarian Constitutional Court. This institution however has been captured by the government, and is not in the position to rule on a delicate matter involving judicial independence or separation of powers (see for example here, here, or here).

(ii) There are also European avenues to discuss the state of the rule of law. Article 7 TEU procedures are the obvious path to challenge pressure by the executive on the judiciary in a Member State. But such a procedure has only been triggered twice in EU history, and none of the processes came to an end. Given the immense harm

that can be done until such a procedure determines state responsibility (if such a decision is ever rendered), Article 7 TEU cannot be seen as an efficient tool.

(iii) An infringement procedure is the next option, which can be invoked if a Member State has failed to fulfil an obligation under the Treaties. There is established case law on the importance of judicial independence for the whole European project, underpinned by specific Treaty provisions, such as Article 2 TEU on the founding values the EU, Article 4 Section (3) TEU on the principle of sincere cooperation, and importantly Article 19 Section (1) on the obligation to provide national remedies for effective legal protection in the fields covered by EU law. In the Case C-64/16 *Associação Sindical dos Juízes Portugueses* the ECJ held that every Member State has to ensure that national courts must meet the requirements of effective judicial protection, which is only possible if judicial independence is maintained. In C-619/18 *Commission v. Poland* on the forced early retirement of judges, the ECJ held that the effective judicial protection of individuals as laid down in Article 19(1) TEU is a general principle of EU law and that an absence of an implemented EU law is irrelevant for it to be invoked, in view of the fact that this provision refers to the "fields covered by Union law". After having clarified matters on applicability and scope of EU law, the ECJ held that judicial independence requires that national rules must be designed in such a way that judges are protected from temptations to give in to external intervention or pressure, whether such influences are direct or indirect. Despite the case law and the strong black letter law on judicial independence, neither the Commission, nor another Member State have made the first steps to expose the capture of the Hungarian court system.[1)]To be precise, the ECJ ruled in Case C-268/12 *Commission v. Hungary* on the forced early retirement of Hungarian judges back in 2012, but at that time the case was (mis)construed as an age discrimination case, and the remedies did not contribute to undoing the harm and could not prevent judicial capture. The case law has changed considerably since then, and several other changes in the Hungarian laws on the judiciary could have been attacked, nevertheless no infringement proceedings have been started.

(iv) Finally, there is the preliminary ruling procedure as a tool to discuss systemic rule of law backsliding. Polish judges make attempts to use this type of procedure (here is a summary of all Polish preliminary references tackling rule of law backsliding, by courtesy of Laurent Pech) and the first AG Opinion is promising. But these cases are originating from disputes where the judges are themselves parties to the cases, challenging the rules applicable to them.

In cases involving mutual recognition of criminal judgments, the ECJ allows for a general suspension of mutual recognition only when a Member State has been sanctioned in line with Article 7 TEU, which has never happened in EU history yet. Or, according to the case-law, mutual recognition can be suspended in individual cases, where a two-prong-test is satisfied: after having determined that there were general deficiencies in an issuing country with regard to human rights or the rule of law, the defendant has to prove that in the case at hand s/he is individually concerned by the generic problems (joined Cases C#404/15 and C#659/15 PPU, *Aranyosi and C#ld#raru*, later reaffirmed in Case C-216/18 PPU *Minister for Justice and Equality v LM*). As we have argued earlier on this blog, the second prong of

the test places Herculean hurdles on the suspect or the convict, as it is close to impossible to show the individual concern.

A case of desperation

The preliminary reference in the Hungarian case should never have been submitted, and certainly not in that form. The fact that it was, shows that all domestic channels which were supposed to operate as checks on the government were weakened and/or institutions were packed by government-friendly persons. At the same time external mechanisms to sanction rule of law backsliding were also un- or underused. The EU remained silent during the long years when a poisonous climate within Hungarian courts escalated and the judiciary was being captured. This is so despite the fact that "the EU's toolbox of measures to support and correct for rule of law rot is already sufficiently comprehensive and sophisticated in nature to, at the very least, contain rule of law backsliding if the full set of current instruments is used promptly, forcefully and in a coordinated manner". But it isn't. As Dimitry Kochenov put it, the EU is "failing the main promise the new Member States hoped the EU would keep, i.e. to protect the new democracies from their own failures and deadly temptations", and is "co-responsible for the ongoing rule of law failures, [when it] supports autocracies financially, institutionally and politically". And by failing to act and use exiting instruments to their full potential, let me also add: "legally".

References

- 1. To be precise, the ECJ ruled in Case C-268/12 Commission v. Hungary on the forced early retirement of Hungarian judges back in 2012, but at that time the case was (mis)construed as an age discrimination case, and the remedies did not contribute to undoing the harm and could not prevent judicial capture. The case law has changed considerably since then, and several other changes in the Hungarian laws on the judiciary could have been attacked, nevertheless no infringement proceedings have been started.
