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Observations

on the proposed Amendment of the Law on the System of Ordinary Courts, the Act on the Supreme Court and certain other acts (Sejm form no. 69)

from the perspective of German and European constitutional law

Hearing at the Polish Senate

14 January 2020
11 h

Senat RP
Warsaw

- CHECK AGAINST DELIVERY -

Mr. Chairman, honourable Senators,

thank you very much for the invitation, and for the possibility to make some observations on the suggested legislation.

Let me stress that I do not intend to interfere in inner-polish matters. If there is a democratic majority for the suggested legislation in Poland, there is a majority for the suggested legislation.

All I want to point out is that with this legislation, Poland will distance itself from core European standards of law.[1] Here is the test: Is it possible to become an EU member without independent judiciary? Answer: No. In turn, this means for actual Member States that going down this road may lead to a point where the membership of Poland in the European Union will not be possible anymore.

Again, this is a perfectly legitimate choice. As Brexit proves, membership in the EU is not mandatory, contrary to the infamous equating of European Union and Soviet Union. The EU is totally free-will based. If there is a democratic decision and majority in Poland to get out of the EU, we other Europeans have to respect that.

I would still deeply regret such a development, though.

I have been co-teaching here in Warsaw at the Law faculty for the last 20 years each and every year. Since 2000, I have been closely following the pre-accession efforts, then accession, Poland becoming and being a trusted Member State.

When I assisted to the hearing at the Polish Constitutional Tribunal on the European Arrest Warrant here in Warsaw in 2005, I saw European constitutional law standards in action.

Then, I followed the dismantling of the Constitutional tribunal and of the independence of the judiciary with disbelief and sadness.

I am sad because I strongly believe that Poland's place is inside the European Union, not outside. But this will not be possible without independent courts and without respecting the European community of law.

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I want to make two points on the distance that the suggested law will establish between Poland and EU rule of law standards **from a German law perspective**.

The first is on the interference of politics in the selection and promotion of judges. The second is on the relationship of the German constitution and EU law.

On both points, there seem to be misunderstandings and misrepresentations of German law in the current Polish debate.

Let me be very clear: It is simply wrong to claim that the suggested legislation is close to German law.

I.

First, on politics and the judiciary.

After World War II, it was a conscious decision in Germany not to leave recruitment and promotion in the hands of the judiciary that was to a large extent the same judiciary that had actively or tacitly helped the Nazi regime.

In order to establish trust in the rule of law and the independence of the judiciary after the dictatorship, parliamentarians or officials accountable to parliament were given a role in appointing and promoting judges.

But – and this seems to be one of the points misrepresented in the Polish debate – appointment and promotion are first and foremost based on qualification and merit. Only the best and brightest can become judges.

It is impossible to appoint a judge simply because he or she has the party affiliation of the respective majority. The democratic element in the German system is not an entitlement for the ruling majority to put “their” people in the courts. It is quite the opposite: Democracy in the German constitution means safeguarding pluralism.

This is particularly clear in the appointment rules for the constitutional court: To become a judge there, you need a majority of two thirds of parliament.[2] Those judges then are the ultimate guardians of the independence of the entire judiciary, as guaranteed by the constitution.

And this works.

II.

Another misunderstanding concerns the relationship of German constitutional law and the European legal order.

No, the German constitution does not allow to simply trash the promises given to all other Member States when signing the founding treaties.

The German constitution imposes a constitutional aim to pursue a United Europe [3] and a constitutional duty of “friendliness towards European integration”.[4] The German constitutional court ruled that the ECJ is functionally a domestic court, making it a breach of the German constitution, a violation of the right to the lawful judge, if any

German court ignores the EU law obligation to submit a preliminary reference to the European Court of Justice.[5]

It is true, though, that the German Constitutional Court also indicated constitutional limits of Germany's participation in European integration. The German Constitutional Court has repeatedly stressed that it would not accept an infringement on German constitutional identity and the EU acting ultra vires, outside its powers and competencies.[6]

But these are highly hypothetical scenarios.[7] Imagine an EU ruled by a majority of states that abolish the rule of law in their countries and in EU law – that scenario would require defending the German rule of law against EU law.

The respect of national constitutional identity is laid down in Art 4 TEU [8] and the European Court of Justice has accepted this.[9] Of course, you can't claim national constitutional identity to do away with the rule of law domestically.

Note also that the German court has emphasized that the identity control and the ultra vires-control require the German Constitutional Court to submit the issue to the ECJ first.[10]

This is about a conversation between the courts [11] and an effort to find common ground.[12] This is what constitutional pluralism is all about,[13] to briefly bring in a theoretical debate that I also saw distorted in the Polish discussion.

Just some weeks ago, the German Constitutional Court has accepted to use EU fundamental rights as negative rights against German public authority.[14]

Outside the identity issue, the German Constitutional Court accepts the primacy of EU law on the entire, I repeat, the entire German legal order, I quote: „the precedence of application of Union law before national law also applies to conflicting national constitutional law".[15] That was stated in the OMT case, in the context of the Euro crisis, in 2016.

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Let me conclude. Here's the lesson from the German post-dictatorship experience:

Don't destroy trust in the judiciary. Don't put your people in the courts because they are your people, as this will destroy trust.

And trust is also the keyword in the EU law context. As I said in the beginning: This is not about lecturing you that our system is better than yours. It is the free decision of this country how to set up the judiciary.

But the suggested reform comes with a hefty price tag: the cost of pushing the reform through would not only be a legal battle in front of the European Court of Justice and the European Court of Human Rights.

It would be the loss of trust of all the players interacting with the Polish legal system. Each and every cross-border activity would be contaminated: “How can we still trust anything emanating from the Polish legal order if there is no independent judiciary?”

This would not only affect European arrest warrants, but basically everything related to the EU common market and has the potential to effectively disrupt Poland’s access to the common market.

As I said, ultimately, the consequence would be to drop out of the European Union. I would deeply regret losing Poland as an EU Member State. But this is what is at stake.

Thank you very much.

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References:

[1] The independence of the judiciary is a core element of EU law, as the European Court of Justice emphasized recently in the Portuguese judges-case: Art. 19 TEU secures the autonomy of the judiciary, conzeptualized as protection against any external impairment of judicial decision making, ECJ Judgment of 28 February 2018, *Portuguese Judges*, C-64/16, EU:C:2018:117, para. 44:

> "The concept of independence presupposes, in particular, that the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions [...]".

[2] See Art. 94 para. 1 of the German Constitution (Basic Law of 1949, *Grundgesetz*) and §§ 6 and 7 of the Act on the Federal Constitutional Court.

[3] The constitutional aim (*Staatsziel*) to pursue a United Europe is laid down in the Preamble of the German Constitution:

> "[…] Inspired by the determination to promote world peace as an equal partner in a united Europe, the German people, in the exercise of their constituent power, have adopted this Basic Law […]”

It can also be found in Art. 23 para. 1 of the German Constitution:

> “With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law and to the principle of subsidiarity and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law […]“.

[4] In the words of the German Constitutional Court (BVerfGE 123, 267 (346 para. 225) – Lisbon Treaty):

> “The constitutional mandate to realise a united Europe, which follows from Article 23 para. 1 of the Basic Law and its Preamble) means in particular for the German constitutional bodies that it is not

left to their political discretion whether or not they participate in European integration. The Basic Law calls for European integration and an international peaceful order. Therefore, not only the principle of openness towards international law, but also the principle of openness towards European law (*Europarechtsfreundlichkeit*) applies“.

[5] This is about the German constitution's guarantee of access to justice (Art. 101 para. 1 German constitution). In the words of the German Constitutional Court in BVerfGE 147, 364 (378 para. 37) – see also BVerfGE 73, 339 (366 et seq.) – Solange II; BVerfGE 82, 159 (192); BVerfGE 126, 286 (315) – Honeywell; BVerfGE 128, 157 (186); BVerfGE 129, 78 (105); BVerfGE 129, 186 (para. 59); BVerfGE 135, 155 (230, para. 177):

"The ECJ is the lawful judge within the meaning of Art. 101 para. 1 second sentence of the German Constitution […]".

[6] See for identity control and ultra vires-control BVerfGE 135, 317 (399 et seq., para. 161 et seq.) – ESM; BVerfGE 140, 317 (337 et seq., para. 43 et seq.) – European Arrest Warrant; BVerfGE 142, 123 (195, para. 137 et seq., 198 and para. 137 et seq., 143) – OMT; BVerfGE 146, 216 (252 et seq., para. 51 et seq.) – PSPP preliminary reference; BVerfG, Judgment of the Second Senate of 30 July 2019 – 2 BvR 1685/14, para. 119 et seq. – Banking union.

[7] The German Constitutional Court also emphasizes that there is no contradiction between the concept of identity- and ultra vires-review and the German constitution's commitment to a United Europe. In the words of the Court (BVerfGE 140, 317 (338 et seq., para. 45 et seq.), see also BVerfG 146, 216 (255 et seq., para. 58 – PSPP)):

"Therefore, if the Federal Constitutional Court, in exceptional cases and under narrowly defined conditions, declares an act of an institution or an agency of the European Union to be inapplicable in Germany, this does not contradict the Basic Law's openness to European law (Preamble, Art. 23 sec. 1 sentence 1 GG). This approach does not entail a substantial risk for the uniform application of Union law. On the one hand, violations of the principles of Art. 1 GG in particular, which are at issue here, will only occur rarely – for the reason alone that Art. 6 TEU, the Charter of Fundamental Rights and the case-law of the Court of Justice of the European Union generally ensure an effective protection of fundamental rights vis-à-vis acts of institutions, bodies and agencies of the European Union".

See also BVerfGE 126, 286 (303, para. 59) – Honeywell:

“According to the legal system of the Federal Republic of Germany, the primacy of application of Union law is to be recognised and it is to be guaranteed that the control powers which are constitutionally reserved for the Federal Constitutional Court are only exercised in a manner that is reserved and open towards European law”.

And BVerfGE 142, 123 (203, para. 154) – OMT:

“Both the ultra vires and the identity review – each constituting independent instruments of review – must be exercised with restraint and in a manner open to European integration”.

The commitment of the German constitution order to respecting the European legal order has been confirmed most recently with regard to the protection of fundamental rights, BVerfG, Judgment of the First Senate of 6 November 2019 – 1 BvR 16/13, para. 61 – European Fundamental Rights.

[8] Art. 4 para. 2 of the Treaty on European Union (TEU):

“The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State”.

[9] See ECJ Judgment of 22 December 2010, *Sayn-Wittgenstein*, C-208/09, EU:C:2010:806, para. 92; ECJ Judgment of 12 June 2014, *Digibet*, C-156/13, EU:C:2014:1756, para. 34; ECJ Judgment of 2 June 2016, *Bogendorf von Wolffersdorff*, C-438/14, EU:C:2016:401, para. 73 et seq.; ECJ Judgment of 5 June 2018, *Coman*, C-673/16, EU:C:2018:385, para. 43.

[10] BVerfGE 126, 286 (304, para. 60) – Honeywell; BVerfGE 140, 317 (339, para. 46) – European Arrest Warrant.

[11] Cf. the recent decision to accept EU Fundamental Rights as yardstick for fundamental rights scrutiny by the German Constitutional Court BVerfG, Judgment of the First Senate of 6 November 2019 – 1 BvR 276/17, para. 68 – European Fundamental Rights.

[12] See in that context the conceptualization by the President of the German Constitutional Court, Andreas Voßkuhle, Der europäische Verfassungsgerichtsverbund, NVwZ 2010, 1; Andreas Voßkuhle, Multilevel cooperation of the European Constitutional Courts: Der Europäische Verfassungsgerichtsverbund, EuConst 2010, 175.

[13] See for more detail Franz C. Mayer, Verfassung im Nationalstaat: Von der Gesamtordnung zur europäischen Teilordnung?, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer [VVDStRL] 75 (2016), 7-63.

[14] BVerfG, Judgment of the First Senate of 6 November 2019 – 1 BvR 276/17, para. 59 – European Fundamental Rights.

[15] See the OMT-decision of June 2016, BVerfGE 142, 123 (186, para. 118) – OMT. The full quote:

> "In principle, the precedence of application of Union law before national law also applies to conflicting national constitutional law and as a rule, in case of conflict, leads to the national law being inapplicable in the specific case".