How to deal with rule of law-concerns in surrender procedures?

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1 Introduction

There are few, if any, scholars that have contributed more to the development of European criminal law than John Vervaele. Not only was he one of the first to recognize the significance of the process of European integration for the domain of criminal justice (and *vice versa*), but ever since, he has contributed to the further development of this area of law with numerous outstanding scientific publications, legal opinions, conferences and coaching of young academics, of which the authors of this contribution have been fortunate beneficiaries. In this contribution in honor of him, we discuss what we consider one of the major issues in European criminal law today, i.e. the backsliding of the rule of law in a number of Member States and its impact on the paradigm of mutual trust and the legal regimes based upon it in the Area of Freedom, Security and Justice (AFSJ). Our focus will be on the Polish judicial reforms and the European Arrest Warrant (EAW) regime. No doubt that John also scrutinizes these developments with great concern.

Despite an ever-increasing number of voices that call for a suspension of this regime with respect to Polish EAWs until the rule of law in Poland has been fully restored, the EU Court of Justice has maintained its course that EAW-proceedings can only be terminated in very exceptional cases. In this article, we argue that there is a good reason to adhere to this approach, and this for lack of a better alternative. We will begin the presentation of our argument with an overview of the evolution of the reforms of the judiciary in Poland (Section 2). It will be followed by observations on the approaches of the Court of Justice and national courts in the operation of the EAW regime (section 3). We will then proceed with our appreciation of the situation (section 4) and make some observations and suggestions for the future (section 5). In doing so, we limit ourselves to EAWs that have been issued for prosecution purposes by Polish authorities.

2 The judicial reforms in Poland

The judicial reforms in Poland started almost immediately after the electoral success and taking over of power by the Law and Justice Party (*Prawo i Sprawiedliwość*, PiS) in Autumn 2015, with the principal aim of overcoming the independence of the judiciary and submitting it to the Parliament's majority and in particular to the government's control. The following is a concise overview of the 8-years history of these reforms, which consists not only of a succession of legislative acts, but also of divergences among the governing bodies (especially between the Parliament/government/party circle and the President's circle), popular protests, resistance of individual judges and of the Supreme Court, as well as of pressure by EU different institutions and judgments of EU Court of Justice and the European Court of Human Rights.

From the perspective of the issuance and execution of EAWs, what is crucial is the situation of the ordinary criminal courts, including the Supreme Court. However, their position – and the overall rule of law situation in Poland – is also affected by the reforms concerning the other components of the justice system: the Constitutional Tribunal, the public prosecutor's office, as well as the Council of the Judiciary. These institutions were the initial target of the reforms.

The Constitutional Tribunal had played a key role as guarantor of the constitutionality of the laws. Despite some controversial decisions and a short history, it was a well-respected institution, composed of 15 judges, who, even though they were nominated by the Parliament and the President, used to be lawyers of high repute. Given its power to strike down unconstitutional laws, the Tribunal was the first subject of the attack on the judiciary. In just few years, the governing party peopled it with its own nominees, including some prominent politicians, and a president with close personal ties to PiS, nominations which legality is questioned.[1] It is now known for its inactivity in terms of control of newly adopted acts and the notorious decision to consider illegal the abortion in cases of serious and irreversible impairment of the fetus or its incurable life-threatening illness.[2]

Until 2010, the Minister of Justice held automatically also the position of the Prosecutor General of the Republic placing him or her at the helm of the hierarchical public prosecution office (*Prokuratura*). A reform introduced in that year separated these two functions, turning the Prosecutor General into an office not only distinct from the politically appointed minister, but in principle shielded from any political influence whatsoever. PiS was quick to go back on this reform. Already in January 2016 the Parliament adopted two laws restoring the personal

1. M. Szwed, 'The Polish Constitutional Tribunal Crisis from the Perspective of the European Convention on Human Rights. ECtHR 7 May 2021, No. 4907/18, Xero Flor w Polsce sp. z o.o. v Poland', *European Constitutional Law Review* 2022, pp. 132-154.
2. Polish Constitutional Tribunal, 22 October 2020, *Case K 1/20*.

union: as soon as the term of the only independent General Prosecutor, Andrzej Seremet, terminated, the role returned to the Minister of Justice, who has since the power to give direct orders to prosecutors.[3]

The expansion of the Minister's role did not stop there. Not only has he been the proponent of most of the reforms, but through legislative amendments, he also acquired additional administrative powers as regards the everyday management of courts, e.g., concerning the nomination of presidents of courts (with significant disciplinary powers over the judges of their courts),[4] as well as of judges specifically designated for initiating disciplinary proceedings against fellow judges.[5]

The National Council of the Judiciary (*Krajowa Rada Sądownictwa*) is the body that is responsible for nominations of new judges and their appointments to higher levels of the judiciary. Its independence, guaranteed particularly by the fact that most of its members were elected by the judges themselves, was pivotal as it ensured that the nominations and career advancement of individual judges resulted from an apolitical process and were based on merit. In December 2017, the Parliament adopted a law that interrupted the term of the current Council of the Judiciary and transferred the power to elect new members to Parliament itself.[6] The nominations that were made by the newly appointed Council were questioned by representatives of the judges as constitutionally invalid. This criticism, and in particular refusals to cooperate with the judges appointed by the new Council, led to the adoption in December 2019 of the law prohibiting questioning the validity of appointments of the judges by members of the judiciary.[7] This, however, did not discourage members of the Supreme Court from formulating a resolution – issued together by the judges of all chambers of the court except the ones newly created under the reforms – indicating that the composition of a court in a concrete case is incorrect (and thus its decision can be invalidated), if one of the members was appointed by the new National Council of the Judiciary.[8]

The Supreme Court has been actually both a target of the reforms and the venue of a struggle for independence affecting the whole judiciary. It is also there that PiS encountered the strongest opposition. The Court was the target of the reforms, for

3. Article 13 of the Act of 28 January 2016 on the Public Prosecutor's Office, Dz. U. 2022 poz. 1247.
4. The Act of 12 July 2017 amending Acts – the Act on the Organisational Structure of Common Courts, and certain other Acts, Dz. U. 2017 poz. 1452, and the Act of 20 December 2019 amending acts – the Act on the Organisational Structure of Common Courts, the Act on the Supreme Court, and certain other Acts, Dz. U. 2020 poz. 190.
5. In Polish: *Rzecznik Dyscyplinarny Sędziów Sądów Powszechnych*.
6. The Act of 8 December 2017 on the amending Act on the National Council of the Judiciary and certain other Acts, Dz. U. 2018 poz. 3.
7. Act of 20 December 2019 amending Acts – the Act on the Organisational Structure of Common Courts, the Act on the Supreme Court, and certain other Acts, Dz. U. 2020 poz. 190.
8. The resolution of the formation of the combined Civil Chamber, Criminal Chamber, and Labour Law and Social Security Chamber of the Polish Supreme Court of 23 January 2020, *Case BSA I-4110-1/20*.

instance through a failed attempt to lower the retirement age of the judges (aimed at removing several prominent ones opposing the changes), which resulted in social protests and condemnation by the EU Court of Justice.[9] It has also been a venue of the battle for the newly appointed disciplinary chamber (known more recently as the Chamber of Professional Responsibility),[10] with competencies in disciplinary proceeding of judges (of every level), as well as of legal counsels and defense lawyers. This chamber has been notorious for a number of cases against well-known judges opposing the government policies, such as the proceedings against the Judge of the Supreme Court Włodzimierz Wróbel (who won the popular vote among the judges of that court to become its president, yet the President of the Republic refused to nominate him)[11] and Judge Paweł Juszczyszyn, whose suspension was recently condemned by the ECtHR for violating several articles of the Convention.[12] Under pressure from the EU Commission, the Chamber was recently renamed and reformed, however in a manner that does not seem to offer an improvement as far as its independence is concerned.

In a nutshell, the judges in Poland continue to execute their role, but are subject to pressure, which affect their independence, either because of administrative arrangements of the functioning of the court where they are employed, by the potential impact on their personal situation (e.g., the possibility to transfer a judge to a remote court) or by the threat of disciplinary proceedings. It is, however, not so difficult to find representatives of the judiciary who demonstrate their independence and ability to resist pressure in difficult cases, as well as to trigger proceedings in Luxembourg and Strasbourg questioning the reforms.

3 The approach of the Court of Justice and responses by national courts

It is clear that the aforementioned developments also have a profound influence on the Area of Freedom, Security and Justice. There is an inherent tension between these developments and the narrative of mutual recognition of judicial decisions, wherein judicial independence, respect for the rule of law and judicial dialogues play a pivotal role. Nonetheless, surrenders to Poland continue to be the main rule. The Court of Justice, after all, consistently holds that if an executing judicial authority of an EU Member State has indications that there is a real risk of breach of the fundamental right to a fair trial, on account of systemic or generalised

9. ECJ, 19 November 2019, *Joined cases C-585/18, C-624/18 and C-625/18, A.K. v. Krajowa Rada Sądownictwa, and CP and DO v. Sąd Najwyższy*; ECJ, 24 June 2019, *Case C-619/18, European Commission v. Republic of Poland*.
10. Act of 8 December 2017 on the Supreme Court, Dz. U. 2018 poz. 5.
11. The communication on the proceedings and the Court Resolution available on the website of the Polish Supreme Court at: www.sn.pl (access: 2.11.2022).
12. ECHR, 6 October 2022, *Juszczyszyn v. Poland*, appl.no. 35599/20.

deficiencies that concern the independence of the issuing Member State's judiciary (the first step), that authority must also determine whether there are substantial grounds for believing that the person claimed will indeed run such a risk if he or she is surrendered to that State (the second step).[13]

Particularly the latter step proves an insurmountable obstacle in most cases. Though the ECJ requires national executing authorities to be 'vigilant'[14] and to closely monitor the situation in Poland, it also insists on this two-step approach wherein genuine concerns with respect to the general situation in Poland are not a sufficient reason to refrain from surrender. According to the view expressed by the Court, the threat for the person claimed always needs to be individualized, having regard to his or her personal situation, as well as to the nature of the offence for which the person is being prosecuted and to the factual context that forms the basis of the warrant.[15] In subsequent judgments, the Court insisted on this approach, despite signals from national courts that it may be very difficult, if not impossible to apply it in practice. Moreover, it has refused to deny the competent Polish authorities the status of 'judicial authority' under the EAW Framework Decision.[16] It also ruled that the two step approach must also be followed with respect to related fair trial guarantees, particularly the right to be tried by a tribunal previously established by law (Art. 47 CFR).[17]

It is worth noting – and we will come back on this further on – that the court also clarified in February 2022 that it is up to the person claimed to adduce specific evidence to suggest that the systemic deficiencies may have an influence on the case. Only when the executing judicial authority considers that 'the evidence put forward by the person concerned, although suggesting that those systemic and generalised deficiencies […] are liable to have, a tangible influence in that person's particular case, is not sufficient to demonstrate the existence, in such a case, of a real risk of breach of the fundamental right to a tribunal previously established by law, and thus to refuse to execute the European arrest warrant in question, [must] that authority, (…), request the issuing judicial authority to furnish as a matter of urgency all the supplementary information that it deems necessary.'[18]

This clarification has not been without significance. The possibility of entering into a dialogue with the Polish authorities is consequently no longer an option that exists prior or in parallel to the materials adduced by the person claimed, as it has

13. ECJ, 25 July 2018, *Case C-216/18 PPU*, ECLI:EU:C:2018:586, *Minister for Justice and Equality (Deficiencies in the system of justice)*.
14. ECJ, 17 December 2020, *Case C-354/20 PPU*, ECLI:EU:C:2020:1033, *Openbaar Ministerie (Indépendance de l'autorité judiciaire d'émission)*, 60.
15. ECJ, *Case C-216/18 PPU*, 75.
16. ECJ, 17 December 2020, *Case C-354/20 PPU*, ECLI:EU:C:2020:1033, *Openbaar Ministerie (Indépendance de l'autorité judiciaire d'émission)*.
17. ECJ, 22 February 2022, *Joined Cases C-562/21 PPU and C-563/21 PPU*, ECLI:EU:C:2022:100, *Openbaar Ministerie (Tribunal établi par la loi dans l'État membre d'émission)*.
18. *Ibid*., para. 84.

been interpreted by many national courts, but only follows in a subsequent stage.[19] Only in cases where the person claimed succeeds to raise a sufficient level of doubt, must the executing authorities approach their Polish counterparts in the frame of the judicial dialogue. Only then may the Polish authorities be asked to 'provide the executing judicial authority with any objective material on any changes concerning the conditions for protecting the guarantee of judicial independence in the issuing Member State, material which may rule out the existence of that risk for the individual concerned.'[20]

As a result of all this, national courts still continue to surrender individuals to Poland, despite their serious and substantiated concerns over the situation in that Member State. Scarce exceptions to this are found in decisions by the German *Oberlandesgericht Karlsruhe*[21] and the District Court of Amsterdam.[22] Yet since the ECJ delivered its judgment of 22 February 2022, also the latter court has not refrained from surrender anymore. Though the Amsterdam court consistently emphasizes that there is a general, actual danger in Poland of a violation of the right to a fair trial, none of the claimed persons since succeeded in demonstrating that those structural or fundamental flaws may have an impact on their case. What seems to be expected of those persons is that they demonstrate to have caught the 'special interest of the Polish authorities,'[23] or circumstances from which 'future pressure in the prosecution and trial of the claimed person could be inferred.'[24] These criteria *de facto* require 'inside information' from within the confines of the Polish authorities. Only in true outlier cases,[25] will the person claimed be able to demonstrate such forms of pressure. As a consequence, the reluctant attitude of the Polish authorities to enter into dialogues with executing judicial authorities has lost much of its relevance, as no person claimed passes this *probatio diabolica*.

4 Appreciation of the current approach and some suggestions

One of the key points of discussion in the current debate is why the ECJ insists on the performance of the two-step approach and requires that an assessment of the general situation always precedes the specific facts of the case at hand. The ECtHR, after all, does not, at the least not in such a principled way.[26] The ECJ clearly wishes to prevent that the mechanism of Art. 7 TEU is effectively bypassed by the

19. As evidenced by for instance Amsterdam District Court, 6 April 2022, ECLI:NL:RBAMS:2022:1793, 5.8, and ECLI:NL:RBAMS:2022:1839, 5.9.
20. ECJ, *Case C-216/18 PPU*, 77.
21. References in T. Wahl, 'Refusal of European Arrest Warrants due to fair trial infringements', *EUCRIM* 2020, pp. 321, 324.
22. District Court Amsterdam, 10 February 2021, ECLI:NL:RBAMS:2021:420.
23. *Cf.* District Court Amsterdam, 25 May 2022, ECLI:NL:RBAMS:2022:3049.
24. *Cf.* District Court Amsterdam, 25 May 2021, ECLI:NL:RBAMS:2021:2665.
25. Such as District Court Amsterdam, 10 February 2021, ECLI:NL:RBAMS:2021:420.
26. *Cf.*, with respect to Art. 3 ECHR, ECtHR 29 April 2022, *Khasanov and Rakhmanov v. Russia*, appl.nos. 28492/15 and 49975/15, 95-101.

executing courts. That argument, however, does not explain why the court then insists on this general first step, nor will it be very convincing in situations – not established yet – where the overall human rights situation in a particular state has become so serious that an individualized assessment seems to have become superfluous.

There are roughly two interpretations of the ECJ's approach. It may be that the requirement of a general assessment follows from the fact that only in situations where there are signals that the issuing state is no longer capable of redressing fundamental rights violations itself, as guaranteed by Art. 19 TEU and 47 CFR, a refusal by the executing state is imminent. At the same time, however, the ECJ does not seem to have attached much weight to similar arguments before.[27] Another – more likely – explanation is that the two-step approach is connected to the specific fair trial guarantees that are at play in relation to the independence of the judiciary. In this reading, the court stresses that the judicial reforms in Poland do not affect the judicial office as such, but the conditions under which that office can be exercised. Interpreted that way, Polish courts and judges remain indeed precisely that – 'courts' and 'judges' –, yet the conditions under which they operate hinder their role as guardians of the right to a fair trial and the rule of law.

The second interpretation has the merit of not disqualifying Polish judges that oppose the reforms. Indeed, the problems find their origin within the legislative branch of state, not, at the least not yet, in the judicial branch. Denying Polish judges the status of 'judge' would also cut their ties with the Luxembourg court under the preliminary reference procedure and have an impact that goes far beyond the frame of the European Arrest Warrant.[28] Moreover, allowing national executing courts to make this assessment themselves has the inherent risk of diverging approaches by the various national courts. To that extent, it is remarkable and perhaps telling that only a handful of courts has asked for this guidance by the ECJ. We submit, therefore, that the ECJ is right in its current approach, by lack of a better alternative that will also prevents impunity in situations where a judicial authority refrains from surrender.

Yet regardless of our adherence to the course taken by the ECJ, by no means can the existing situation be qualified as satisfactory. We are currently in a stalemate that cannot be tackled under the EAW regime alone. Clearly, due to the judicial reforms, the paradigm of mutual trust is also under serious pressure, both in its claim that all EU states are bound to recognize the equivalence of the legal orders of other EU States under the EAW-regime, as well as in its manifestation as a legal rule of non-inquiry, as implemented by Art. 1(2) Framework decision EAW, save for exceptional circumstances.[29] It is precisely the emphasis that the ECJ puts on

27. *Cf.* ECJ 25 July 2018, *Case C-220/18 PPU*, ECLI:EU:C:2018:589, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, 117, and ECJ, *Joined Cases C-562/21 PPU and C-563/21 PPU*, 99.
28. ECJ, *Case C-354/20 PPU*, 38-44.
29. Opinion of the Court 2/13 of 18 December 2014, ECLI:EU:C:2014:2454, 192.

the mandatory first step that makes it difficult for any executing authority to rely on the 'self-cleaning capacity' of the Polish legal system, which is essential for that rule of non-inquiry to function properly. The exception, after all, has become the general rule, as the Amsterdam District Court consistently emphasizes in its recent case law.

At the same time, persons claimed will often find themselves in an impossible procedural position in the executing state; they will have to demonstrate how the reforms may likely impact their case. That burden of proof not only relates to a situation that has not occurred yet, but also to interventions in the administration of justice that by their very definition take place in covert. That the ECJ has now limited the possibility for a dialogue with the Polish authorities until these persons have succeeded in raising enough doubts as to their right to a fair trial must in our view be qualified as unfortunate. This is all the more so, now that the ECJ itself has only dealt with specific elements of the judicial reforms in infringement procedures this far and not with the judicial reforms in Poland in general. Consequently, the impact of the judicial reforms on Art. 19 TEU and Art. 47 CFR cannot be fully determined on that basis either. Until more effective mechanisms are found, the present situation will continue to be part of legal reality.

There is room, however, for national courts to ease the burden that now rests upon the person claimed. The ECJ held, after all, that executing authorities need not only look at statements made by public authorities, but may also rely on any other information which it considers relevant, such as that relating to the personal situation of the person concerned, the nature of the offence for which that person is prosecuted and the factual context in which the European arrest warrant concerned is issued.[30] We believe that this consideration also sends a signal to national authorities – which have to be 'vigilant', after all – of not becoming too strict in the application of the ECJ's case law. Instead of requiring proof or indications that the authorities have already shown a particular interest in certain cases, it should be sufficient for applicants to demonstrate – for instance with credible evidence of previously expressed beliefs, opinions or lifestyle – that it can reasonably be expected that they may catch the interest of the Polish authorities.

The fact that she or he may have committed a criminal offence will in general not be enough to meet this threshold. Nonetheless, it cannot be excluded that executing courts may also have to be vigilant in that respect, in view of the evolution of criminal policies in Poland. This could be the case, for instance, because of proposed reforms of substantive criminal law, already voted in favor for once by the lower chamber of the Parliament, but rejected by the upper house, according to which the Penal Code would include lifelong imprisonment for certain offences without the possibility of parole. The point in all these cases is that persons claimed are at risk of being treated unfairly, mostly because of personal

30. ECJ, *Case C-216/18 PPU*, 75.

traits, but sometimes also for other reasons. Under those circumstances, it cannot be reasonably excluded that the independence of judges comes under pressure and that this consequently materializes the individual risk for the person claimed.

It is likely that such substantiated arguments will rarely suffice in and of themselves for the conclusion that EAW procedures must be terminated. Yet such individualized accounts of what a realistic future scenario in the criminal proceedings against the person claimed could be, call, under the present circumstances, for an answer by the Polish authorities. Their task then is to 'provide the executing judicial authority with any objective material on any changes concerning the conditions for protecting the guarantee of judicial independence in the issuing Member State, material which may rule out the existence of that risk for the individual concerned.'[31] Should the latter fail to answer the questions asked in its entirety or to convincingly answer them, then that circumstance should play a major role in the decision whether or not to terminate the EAW-procedure. We believe that such an approach is already possible on the basis of the current case law and that it will put the ball back where it belongs, namely in the court of the Polish executive and legislative authorities.

31. ECJ, *Minister for Justice and Equality (Deficiencies in the system of justice)*, 77.