Slovenia, Constitutional Court, U-I-246/19-11, constitutional, 24 October 2019, ECLI:SI:USRS:2021:U.I.246.19; Constitutional Court, U-I-214/19-17, Up-1011/19-52, constitutional, 8 July 2021, ECLI:SI:USRS:2021:U.I.214.19

Member State

Slovenia

Topic

Accountability

Independence (interference by the legislative branch),

Rule of law (prevention of abuse of powers)

Deciding Court Original Language

Ustavno sodiš?e Republike Slovenije

Deciding Court English translation

Constitutional Court of the Republic of Slovenia

Registration N

U-I-246/19-11

U-I-214/19-17, Up-1011/19-16

Date Decision

Order U-I-246/19-11 of 24 October 2019 (judges)

Decision U-I-246/19-11 of 7 January 2021

Order U-I-214/19-17, Up-1011/19-16 of 12 November 2019 (state prosecutors)

Decision U-I-214/19-17, Up-1011/19-52 of 8 July 2021

ECLI (if available)

ECLI:SI:USRS:2019:U.I.246.19

ECLI:SI:USRS:2021:U.I.246.19

ECLI:SI:USRS:2019:U.I.214.19

ECLI:SI:USRS:2021:U.I.214.19

EU legal sources and CJEU jurisprudence

Associação Sindical dos Juízes Portugueses v Tribunal de Contas, C-64/16, 27 February 2018, para. 44.

Commission v Poland, C-619/18, 24 June 2019, para. 58, 77, 112.

Minister for Justice and Equality (Deficiencies in the System of Justice), C-216/18PPU, 25 July 2018, para. 48, 67

Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO')

2020 Rule of Law Report, The rule of law situation in the European Union, p. 9-10.

ECtHR Jurisprudence

Venice Commission Study no. 759/2014 of 25 March 2014: Amicus Curiae Brief in the case of Rywin v. Poland, paras. 6, 17, 31.

Kövesi v. Romania, 5 May 2020

Subject Matter

The Constitutional Court (the CC) interpreted the principle of separation of powers (Article 3 (2) of the Constitution), the principle of judicial independence (Article 125 of the Constitution), the principle of autonomy of state prosecutors (Article 135 (1) of the Constitution) and Article 93 of the Constitution (article governing parliamentary inquiries) in a case concerning a parliamentary inquiry established by the legislator in order to investigate, among other, the alleged involvement and abuse of powers of judges and prosecutors in allegedly politically motivated criminal proceedings against a right wing politic.

Legal issue(s)

The case primarily concerns independence and accountability of judges and prosecutors. The CC had to determine, whether the fact that the legislation does not provide a legal remedy against the Act of establishing the parliamentary inquiry when such inquiry jeopardizes the judicial independence or autonomy of the state prosecutors, violates the Constitution. The CC also determined whether the inquiry at hand was compliant with the constitution.

National Law Sources

Articles 2, 3 (2), 23, 93, 125, 134, 135 (1) of the Constitution

Articles 1, 2, 13 (4) of the Parliamentary Inquiries Act (the PIA)

Rules of Procedure concerning Parliamentary Inquiries

Constitutional Court, Decision U-I-244/99 of 15 June 2000

Constitutional Court, Decision U-I-42/12

Constitutional Court, Decision U-I-60/06, U-I-214/06 and U-I-228/06

Constitutional Court, Decision U-I-244/99

Facts of the case

The case concerns a parliamentary investigation commission, established by the opposition MPs, whose mandate is to investigate political liability of judges, prosecutors and other state officials for alleged abuse of their functions in prosecution against a high-profile right wing politic. Franc Kangler, current secretary of state at the Ministry of the Interior, ex-mayor of Maribor, Slovenia's second largest city, and former member of National Council (higher house of Slovene parliament) claims that he was subject to political and criminal prosecution, due to the fact 21 criminal proceedings were conducted against him. However, none finished with criminal conviction. It was established in one of the cases by the Supreme Court, that Mr Kangler's right to defence was

violated, since the courts rejected the evidence, which were adduced by Kangler in order to show, that he was in conflict with the investigating judge, who issued legal orders for secret measures, which led the police to incriminating evidence, and that he would have to be excluded. Moreover, it was a strange coincidence, that this very same investigating judge, who worked as an agent of SDV (State Security Service – political secret police in Yugoslavia) allowed all 7 prolongations of secret measures against Kangler. Further, he allegedly handed the court file to the prosecutor in violation of legislation. In addition, it was maintained that there was a high probability that someone has been secretly amending the case file there.

Other controversial issues to be investigated were: alleged coordination between the investigation judge and the prosecutor, alleged interference of centres of power into the criminal proceedings on the first and the second instance, judging on the basis of subjective political convictions, namely that the first instance judge publicly reasoned his decision not to grant Mr Kangler an alternative way of serving the prison sentence by saying that he has to go to jail, otherwise, there would be a serious danger, that he returns to politics and that the final conviction has deterred him from politics.

In response to parliamentary inquiry (the PI), the Judicial Council (the JC) as well as the State Prosecutor General, the Supreme State Prosecution Office and the Supreme Court demanded a review of the constitutionality of the Act of Establishing a Parliamentary Inquiry. The CC issued two orders, whereby it temporarily prohibited the continuation of the work of the PI. The first, Order U-I-246/19-11 of 24 October 2019, which refers to judges, was based on the threat to independence of the judiciary (Article 125 of the Constitution) and separation of powers (Article 3(2) of the Constitution) whereas the second, Order U-I-214/19-17, Up-1011/19-16 of 12 November 2019, which concerns state prosecutors, was justified with protection of autonomy of state prosecutors (Article 135 of the Constitution).

Reasoning (role of the Charter or other EU, ECHR related legal basis)

The limits of the parliamentary inquiry from the perspective of judicial independence and the separation of powers

In this part of the Decision, the CC heavily relied on its case U-I-244/99 of 15 June 2000. It first found that in principle (according to Article 93 of the Constitution and Article 1 of the PIA), parliamentary inquiries may be established in relation to any question in the public interest that is covered by the scope of competence of the legislator, which is indeed very broad. Accordingly, it reiterated that the parliamentary inquiry can investigate the performance of the judiciary. However, the legislator has to comply with the principles of separation of powers and judicial independence. Judges have to be protected against external pressure liable to impact their decision-making. Namely, judges have to be protected against direct instructions as well as indirect influence that can affect their work. The CC then boldly concluded that as a result, the political accountability of judges for their adjudication is excluded.

The CC then outlined the limits of the parliamentary inquiry more concretely. The legislator may investigate questions concerning the judicial branch as a whole (paras. 71, 77) and the same events that are already an object of a criminal procedure (paras. 72, 77). However, the legislator is precluded from conducting a parliamentary inquiry that relates to a pending case and may in any way impact the decision-making in the concrete case (para. 73, 77). It is also forbidden for the legislator to conduct hearings of judges regarding the concrete judicial proceedings, even when they are already finished. This follows from Article 134 of the Constitution that grants immunity for opinions given at trial (paras. 74, 77). Further, parliamentarians having ex post debates during formal procedures (acting de iure imperii) on propriety and lawfulness of concrete decisions of judges was found contrary to judicial independence (paras. 73, 77). Furthermore, the ordering itself of a parliamentary inquiry that would investigate propriety and lawfulness of concrete decisions of judges, even if the decision cannot be legally challenged anymore, is unconstitutional. Such an inquiry can make an impression that judges will be investigated for decisions that will not conform to the interest of politics. The CC concluded that investigation into correctness of concrete judicial decisions in procedures, conducted by the executive or legislative branch would be incompatible with the constitutional system of separation of powers, even in the case of suspicions of deliberate abuse of judicial function in an already finished procedure (para. 119). However, the CC warned that these conclusions do not apply to criticism raised by the public (para. 79) and when the MPs do not act in a specific procedure where they would exercise the powers of parliament, but are merely debating (para. 117). It also held that when there is a suspicion that someone, who is politically accountable, has unacceptably impacted the judicial decision, an inquiry may be started, but has to focus on this person, not the judge, even though in such cases the investigation will by nature touch the judge as well (para. 120). In this way the CC narrowed down otherwise very bold conclusions that could limit the constitutional competence to conduct parliamentary inquiries more than the principle of separation of powers and judicial independence demand.

The limits of the parliamentary inquiry from the perspective of autonomy of state prosecutors and the separation of powers

The CC first explained that according to its settled jurisprudence, the state prosecution forms a part of the executive branch. The principle of separation of powers prohibits parliamentary inquiries that interfere with the (exclusive) competences of the executive, since such inquiries cannot have more competences than the legislative branch itself. Further, the CC underlined the autonomous position of the state prosecution within the executive branch (Article 135 of the Constitution). It went on to explain this special position through describing the constitutional role of the state prosecutors. By invoking its previous case law, it held that the state prosecuting cannot be given political or professional instructions in concrete cases by the government or the ministry. It further opined that such pressure and influence could undermine the respect for the rule of law and human rights, as well as independent, impartial and fair trial. In support, it referred to Kövesi v. Romania, para. 208, where the ECtHR held that is that the independence of prosecutors is a key element for the maintenance of judicial independence. The CC finally referred to the Rule of Law Report, Opinion no. 13 (2018) of the Consultative Council of European Prosecutors and the

Council Regulation 2017/1939 concerning the EPPO to conclude that the independence and autonomy of the state prosecutors prohibit political interference in the work of state prosecutors in concrete cases.

After the general principles, described above were set, the CC determined the limits of the parliamentary inquiry from the perspective of independence and autonomy of state prosecutors. The reasoning mirrors the one adopted with respect to judges. The CC stressed that a parliamentary inquiry that would seek to establish accountability of a state prosecutor resulting, for starting or conducting prosecution against a state official or a person connected to him would be particularly unacceptable, as it would have a strong chilling effect on the work of prosecutors.

Remedies against the Act establishing a parliamentary inquiry

The CC distinguished two different aspects regarding legal remedies in the context of a parliamentary inquiry. First, it held there are sufficient remedies against individual measures, taken during a parliamentary inquiry. Second, it turned to the Act establishing a parliamentary inquiry. It found that this act cannot be considered neither a regulation (in the sense that is has general application, as for instance statutes) nor an individual decision (on rights, obligations or accusations against an individual). Hence, none of the remedies otherwise available was possible. As a result, bearing in mind that the Act of establishing a parliamentary inquiry itself may be contrary to the constitution, the CC found that an unconstitutional legal lacuna exists in the Slovene legal system. Hence, it found the PIA and Rules of Procedure concerning Parliamentary Inquiries to be contrary to the Constitution. It ordered the parliament to amend the legislation in one year. During this period, the CC decided that the Judicial Council (the JC) is competent to file a complaint regarding a parliamentary inquiry should it deem that it violates the principle of judicial independence to the CC in 30 days after the Act establishing a parliamentary inquiry is published in the official gazette. The CC found that such new competence of the CC fits well into the constitutional system, where the CC is called to solve conflicts between the three branches of power.

The same reasoning was mutatis mutandis used for the prosecutors. The CC decided that instead of the Judicial Council, the State Prosecutor General has the power to file a complaint to the CC.

Ruling on the concrete Act establishing a parliamentary inquiry

Even though the competence of the CC to rule on constitutionality of a parliamentary inquiry was only established in the case at hand, the CC did not feel barred from giving a decision right away. It held that this was necessary in order to clarify the permissible scope of the inquiry as quickly as possible, and that waiting for the JC to file a complaint would not add anything to the procedure

since the JC and both houses of Slovene parliament were already given the opportunity to express their views on the matter.

The CC found that investigating political accountability of judges is contrary to Article 125 of the Constitution, since judges are not politically accountable. It held that the inquiry aims to investigate correctness of the concrete judicial decisions. The CC reiterated that the other two branches of power are precluded from debating on lawfulness and propriety of concrete judicial decisions and that this would entail political control over the content of judicial decisions, which is forbidden under the Constitution. Here, the CC seems to have put special emphasis on the case law of the CJEU, since it explicitly held that the reader should pay special attention to footnote 22, where the CC quoted the following passage from Commission v Poland, C-619/18, 24 June 2019, para. 77; Minister for Justice and Equality (Deficiencies in the System of Justice), C-216/18PPU, 25 July 2018, para. 48, 67:

“[I]t is apparent from the Court’s case-law that the requirement of independence means that the rules governing the disciplinary regime and, accordingly, any dismissal of those who have the task of adjudicating in a dispute must provide the necessary guarantees in order to prevent any risk of that disciplinary regime being used as a system of political control of the content of judicial decisions. Thus, rules which define, in particular, both conduct amounting to disciplinary offences and the penalties actually applicable, which provide for the involvement of an independent body in accordance with a procedure which fully safeguards the rights enshrined in Articles 47 and 48 of the Charter, in particular the rights of the defence, and which lay down the possibility of bringing legal proceedings challenging the disciplinary bodies’ decisions constitute a set of guarantees that are essential for safeguarding the independence of the judiciary.”

With regards to the prosecutors, the CC found that the concrete parliamentary inquiry, even the act of ordering itself, would be contrary to Article 135 and 3 (2) of the Constitution. It held that such an inquiry was found to be particularly unacceptable in para. 81 of this decision.

Relation of the case to the EU Charter

The CC did not invoke the Charter, except in para. 68, where it listed the international instruments that protect judicial independence. However, the CC heavily relied on caselaw of the CJEU, where the Charter played the a very central role.

Use of Judicial Interaction technique(s)

Consistent interpretation – interpretation of the constitution in the light of ECtHR jurisprudence, CJEU case law and soft law instruments.

Comparative reasoning with foreign legislation or foreign caselaw – see below.

Horizontal Judicial Interaction patterns (Internal – with other national courts, and external – with foreign courts)

When the CC held that judges have to be protected against direct instructions as well as indirect influence that can affect their work, it referred to Order of German Federal Constitutional Court no. 2 BvR 2576/11 of 17 January 2013, para. 8; Constitutional Court of Bavaria (Munich) no. Vf. 70-VI/14 of 17 November 2014, para. 66.

Vertical Judicial Interaction patterns (Internal – with other superior national courts, and external – with European supranational courts)

When the CC set out the general principles that govern the case at hand, it relied on Commission v Poland, C-619/18, 24 June 2019, para. 58, and Minister for Justice and Equality (Deficiencies in the System of Justice), C-216/18PPU, 25 July 2018, para. 48, and quoted the position of the CJEU that the requirement that courts be independent, which is inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded.

It also quoted CJEU's cases Commission v Poland, C-619/18, 24 June 2019, para. 58, 77, 112 and Minister for Justice and Equality (Deficiencies in the System of Justice), C-216/18PPU, 25 July 2018, para. 48, 67.

These references show that the CC regards the CJEU jurisprudence regarding the judicial independence as a fundamental common European standard. Bearing in mind the fact, that the CC did not invoke otherwise relevant and rich domestic jurisprudence, this suggests that it considered that the CJEU jurisprudence possess a special legitimizing force. This can arguably also explain the boldness of some conclusions of the CC in the case at hand, where the CC invoked the CJEU case law (see for example when the CC held that the judges are not politically accountable and when it concluded that investigation into correctness of concrete judicial decisions in procedures, conducted by the executive or legislative branch would be incompatible with the constitutional system of separation of powers, even in the case of suspicions of deliberate abuse of judicial function in a final procedure (para. 78, 117, 119)).

The prosecutor general and the Supreme Prosecutors' Office had invoked Article 2 TEU, second subparagraph of Article 19 (1) TEU and Article 47 of the Charter. However, the CC did not explicitly mention these provisions. Instead, as an additional argument, along with referring to the commentary of the constitution and Opinion no. 13 of the Consultative Council of European Prosecutors (2018), paras. 15, 31, 32, it invoked Council Regulation 2017/1939 on EPPO, namely Article 6, which stipulates that the EPPO shall be independent and that the Member States of the European Union and the institutions, bodies, offices and agencies of the Union shall respect the independence of the EPPO and shall not seek to influence it in the exercise of its tasks, and the 2020 Rule of Law Report, p. 9-10. With these references, the CC supported its finding that the

independence and autonomy of the state prosecutors prohibit political interference in the work of state prosecutors in concrete cases.

Strategic use of judicial interaction technique (purpose aimed by the national court)

It seems that the CC invoked the jurisprudence of the CJEU as an argument of power, a tool to legitimize its reasoning, since it failed to dig deeper into the invoked CJEU cases.

Other

Reaction regarding the establishment of parliamentary inquiry commission

The establishment of parliamentary inquiry commission attracted widespread media coverage and numerous responses by politicians and publicly known lawyers. It was labelled illegitimate by the president of the Supreme Court and considered an abuse of parliamentary investigation for political purposes by many other lawyers, since it would allow the politicians to interfere with the work of the judiciary and the state prosecutors. On the one hand it was regarded as fitting well into the political agenda of discretisation of the courts and contributing to strengthening of the controversial perception that many voters hold that the judges and state prosecutors are proponents of the left (post-communist) political option. On the other hand, the parliamentary inquiry was considered a legitimate tool to investigate the abuses of judicial powers, that were inadequately dealt by the judicial branch.

Potential broader implications of the case

By holding that having ex post debates during formal procedures (acting de iure imperii) on propriety and lawfulness of concrete decisions of judges was contrary to judicial independence (paras. 73, 77), the CC implicitly touched upon another “hot topic” of relations between the legislative and the judicial branch: the nomination of judges. Under the Slovene Constitution, judges are elected by the national assembly (lower house of the Slovene parliament) (the NA) on the proposal of the JC. However, Article 21 (3) of the Judicial Service Act gives the NA the power to elect or turn down the candidate for the Supreme Court, proposed by the JC, even if he was already a sitting judge. Traditionally, the NA acted as a rubber-stamping institution and always elected the proposed candidate. In the last 5 years, this constitutional custom was eroded, especially in the context of nomination of SC judges.

In the case U-I-225/16-15 (see the corresponding template in the CJC database), the NA turned down a SC judge candidate, who sat on the panel that upheld the conviction of Mr Kangler, mentioned in this template. The parliamentary committee debated the very same issues, that were later included in the parliamentary inquiry, and unanimously decided to halt the promotion. The question therefore arises whether, according to the position of the CC in this case, such debates

are now forbidden for the parliamentarians? If yes, what should they debate on? Statistical data concerning judicial performance do not necessarily show the exact picture. What is then the role of the NA in the process of promotion of judges? Is it merely a rubber-stamping institution? This position could allegedly be defended with regards to the SC judges, since electing SC judges is not a constitutional competence and can thus be regarded as been appropriated by the NA (see U-I-225/16-15, where two CC judges made this argument). However, the bold conclusion of the CC can even be applicable for Constitutional court candidates that are judges. Here the NA has a constitutional competence to elect CC judges. Is debating concrete cases of these candidates contrary to judicial independence and if so, what should they debate on then? Isn't the judicial work best portrayed through their decisions in concrete cases? Does judicial independence construed in such broad way, serve to whom it primarily serves - the people? For now, we can only say that such rule is a lex imperfecta and will probably not bar the parliamentarians from debating on concrete cases.

(Link to) full text

Order and Decision of the CC regarding judges:
https://www.us-rs.si/odlocitev/?q=U-I-246%2F19&caseId=&df=&dt=&af=&at=&pri=1&vd=&vo=&vv=&vs=&ui=&va=&page=1&sort=&order=&id=1

Order and Decision of the CC regarding State prosecutors:
https://www.us-rs.si/odlocitev/?q=U-I-246%2F19&caseId=&df=&dt=&af=&at=&pri=1&vd=&vo=&vv=&vs=&ui=&va=&page=1&sort=&order=&id=1

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History of the case: (please note the chronological order of the summarised/referred national judgments.)

1. Order U-I-246/19-11 of 24 October 2019 (judges)

2. Order U-I-214/19-17, Up-1011/19-16 of 12 November 2019 (state prosecutors)

3. Decision U-I-246/19-11 of 7 January 2021 (judges)

4. Decision U-I-214/19-17, Up-1011/19-16 of 8 July 2021 (state prosecutors)
