



# Rule of law in the recent case law of the CJEU and ECtHR

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# THE ECTHR PROTECTION OF THE RULE OF LAW

## Specific applications submitted to the Court

complaints of violations of certain freedoms and rights enshrined in the ECHR

### **Article 6 (1) ECHR**

(right to a court)

- right to a fair and public hearing
- right to be heard within a reasonable time
- right to be heard by an impartial court
- right to be heard by an independent court
- right to be heard by a court ("tribunal") established by law
- right to enforce a judgment.

### **Article 8 ECHR**

(right to privacy)

### **Article 10 ECHR**

(freedom of expression).

# IMPACT ON THE PROTECTION OF THE RULE OF LAW:

## ▶ **RIGHT TO AN INDEPENDENT COURT (appearance of independence)**


- ▶ The manner in which the court's judges are appointed.
- ▶ The length of their term of office/removal or transfer without consent.
- ▶ The existence of mechanisms that protect them against external pressures.

## ▶ **RIGHT TO A COURT ESTABLISHED BY LAW**

- ▶ Validity of the process of appointing a given judge.
- ▶ The lawfulness of the composition of the bench in a case.
- ▶ Compliance with the rules on judicial jurisdiction.
- ▶ Prohibition of adjudication beyond the scope of the legal authority given to a given judicial officer.
- ▶ Impartiality:
  - ▶ Subjective impartiality: judge's approach towards a party to the proceedings
  - ▶ Objective impartiality: factors which may objectively influence the perception of a judge as impartial

# Article 8 ECHR

(protection of privacy and family life)



A judge is disciplined or dismissed from the position of president of the court for reasons related to private life.

The penalty or dismissal negatively affects their private life (reputation or good name is damaged).

# Article 10 ECHR

(freedom of expression)

JUDGES SHOULD EXERCISE THEIR FREEDOM OF EXPRESSION WITH A CERTAIN DEGREE OF RESTRAINT (PUBLIC CONFIDENCE).

JUDGES MAY NOT BE COMPLETELY DEPRIVED OF THE RIGHT TO EXPRESS THEIR OPINIONS AND VIEWS, IN PARTICULAR IN MATTERS RELATING TO:

- the protection of the rule of law
- the separation of powers
- the independence of the judiciary.

**Wille v. Liechtenstein**  
(violation art. 10 ECHR).

**Kudeshkina v. Russia**  
(violation of Article 10 ECHR)

# Removal of court president

(Baka v. Hungary: violation of Article 6 (1) and Article 10 ECHR)

- ▶ **Article 6 (1) ECHR**, covers labour disputes concerning public officials unless national law expressly excludes judicial recourse, and the exclusion is justified on objective grounds.
- ▶ **Article 10 ECHR**, the applicant's removal from the office of President of the Supreme Court was linked to his criticisms of the actions of Hungarian Government.

# Disciplinary liability of judges

## Ramos Nunes de Carvalho E Sa v. Portugal (violation of Article 6 (1) ECHR)

- Disciplinary proceedings should conform to the standards of a fair trial.
- Excessively limited jurisdiction of the Portuguese Supreme Court
- Failure to conduct a trial

## Paluda v. Slovakia (violation of Article 6 (1) ECHR)

- The applicant was deprived of access to a court
- The applicant had not been heard
- The council was chaired by who remained in dispute with the applicant.



## Right to a tribunal established by law

(Ástráðsson v. Iceland: violation of Article 6 (1) ECHR)

- ▶ A “flagrant” violation of domestic law is needed.
- ▶ It affects national rules of a “fundamental nature”.
- ▶ Risk that the “other organs of Government” may exercise undue pressure on the appointment process.
- ▶ Real effects of the legal violation (“look behind appearances”).



# The principle of the rule of law and the status of prosecutors (Kövesi v. Romania)



**Violation of Article 6**

(depriving of judicial recourse)



**Violation of article 10**

(dismissal linked to criticisms of the Government's legislative activities: "chilling effect")

# RULE OF LAW IN EU

- ✓ European Union is composed of States which have freely and voluntarily committed themselves to the common values referred to in Article 2 TEU.
- ✓ Article 49 TEU: “Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union”
- ✓ The European project relies on permanent respect of the rule of law in all Member States.
- ✓ Under the rule of law, all public powers always act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts.
- ✓ It is a prerequisite for the effective application of EU law and for mutual trust between Member States.
- ✓ The principle of the effective judicial protection of individuals’ rights under EU law is a general principle of EU law stemming from the constitutional traditions common to the Member States:
  - ▶ Enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 1950);
  - ▶ Reaffirmed by Article 47 of the Charter

# LEGAL BASIS

## ARTICLE 2 TEU

- The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

## ARTICLE 19(1) SECOND SUBPARAGRAPH TEU

- Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

## ARTICLE 47 CHARTER.

- Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
- Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

# CJEU & RULE OF LAW

## A) Infringement procedures (failure to fulfil an obligation under the Treaties by a Member State)

Articles 258 to 260 TFEU: actions lodged by MS or the Commission.

[C-192/18](#), [C-619/18](#) : violation of the principle of effective judicial protection and the right to an effective remedy, as guaranteed by Article 19(1) TEU and Article 47 Charter

INTERIM MEASURES: serious damage to the EU legal order, individuals' rights deriving from EU law, and the values set out in Article 2 TEU, on which the EU is based (Order of 17 December 2018, Commission v. Poland, [C619/18 R](#)).

### Judgment of 24 June 2019:

- ▶ First, by providing that the measure consisting in lowering the retirement age of the judges of the Supreme Court of Poland is to apply to judges in post who were appointed to that court before 3 April 2018 and,
- ▶ Secondly, by granting the President of the Republic the discretion to extend the period of judicial activity of judges of that court beyond the newly fixed retirement age,

The Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU;

### Judgment of 5 November 2019:

- ▶ In establishing a different retirement age for men and women who are judges in the ordinary Polish courts and the Supreme Court or are public prosecutors in Poland, the Republic of Poland has failed to fulfil its obligations under Article 157 TFEU and Articles 5(a) and 9(1)(f) of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation;
- ▶ In granting the Minister for Justice (Poland) the right to decide whether or not to authorise judges of the ordinary Polish courts to continue to carry out their duties beyond the new retirement age of those judges, the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU;

# PRELIMINARY RULING MECHANISM

Article 267 TFEU: validity or interpretation of EU law

B) Requests for preliminary rulings submitted by national judges

Not only courts of national law but also courts of EU law ("European Judges").

Play a key role in guaranteeing effective protection of the rights that EU law confers and in protecting the rule of law within the EU legal order.

Entitled – or even required – to seek guidance from the Court of Justice

Culture of mutual trust between the Court of Justice and national courts, in both directions

Only national courts that are genuinely independent are able to engage in a dialogue with the CJ



# PIVOTAL JUDGMENT OF 27 FEBRUARY 2018, ASSOCIAÇÃO SINDICAL DOS JUÍZES PORTUGUESES, C-64/16.

¿Can a national court or tribunal rely directly on EU law to protect its independence, when is – or might be – threatened by the government?

- ▶ Unbreakable link that exists between the right to an effective legal protection (Article 19 TEU), the fundamental right to an effective remedy (Article 47 Charter), and the rule of law (Article 2 TEU).
- ▶ All ‘courts or tribunals’ in the Member States within the meaning of Article 267 TFEU must meet the requirements of effective judicial protection, by an independent and impartial tribunal previously established by law (Article 47, second subparagraph, Charter) which is an essential component of the rule of law (Article 2 TEU).
- ▶ Article 19(1), second subparagraph, TEU: Member States should ensure ‘effective legal protection’.
- ▶ That provision applies *ratione materiae* to the ‘fields covered by EU law’, irrespective of whether the Member States are implementing EU law within the meaning of Article 51(1) of the Charter.
- ▶ It is not limited to national measures implementing EU law but applies horizontally to all proceedings before national courts in which EU law might apply.

# ARTICLE 7 TEU

- ▶ Clear risk of a serious breach of the Union's values (Article 7(1) TEU).
- ▶ Existence of a serious and persistent breach of the Union's values (Article 7(2) TEU).

**Rule of Law Framework:** established by the Commission in 2014 to prevent the emergence of a systemic threat to the rule of law that would require the use of the Article 7 mechanisms.

It provides for a process of dialogue with the Member State concerned, structured with opinions and recommendations from the Commission:

**POLAND: DECEMBER 2017**

**HUNGARY: SEPTEMBER 2018**



# RULE FOR LAW CONDITIONALITY REGULATION

Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.

Conditionality Mechanism: receipt of financing from the Union budget subject to the respect by the Member States for the principle of the rule of law.

Allows the Council, on a proposal from the Commission, to:

- ▶ Adopt protective measures such as the suspension of payments to be made from the Union budget.
- ▶ Suspend of the approval of one or more programmes to be paid from that budget.

Hungary and Poland each brought an action before the Court of Justice for the annulment of that regulation (C-156/21 Hungary v Parliament and Council, and C-157/21 Poland v Parliament and Council) alleging:

- ▶ Absence of an appropriate legal basis in the TEU and TFEU
- ▶ Circumvention of the procedure laid down in Article 7 TEU
- ▶ European Union having exceeded its powers
- ▶ Breach of the principle of legal certainty.

Judgment of 16 February 2022 dismisses the action

Guidelines 2 March 2022 from the Commission on the application of the Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget

# MUTUAL RECOGNITION OF JUDICIAL DECISIONS

Aranyosi and Căldăraru C-404/15 & C-659/15, Judgment of 5 April 2016 (conditions of detention in the issuing Member State)

- ▶ Limitations on mutual recognition and mutual trust ‘in exceptional circumstances’
- ▶ Surrender of the requested person can be refused (risk of being subjected to inhuman or degrading treatment, Article 4 of the Charter).

**¿Analogy to the risk of breach of the fundamental right to an independent tribunal, as guaranteed by Article 19 TEU and Article 47 of the Charter?**

**LM C-216/18 PPU, Judgment of 25 July 2018:**

“Real risk” of breach of the fundamental right to a fair trial guaranteed by the second paragraph of Article 47 Charter on account of systemic or generalised deficiencies so far as concerns the independence of the issuing Member State’s judiciary, allows the executing judicial authority to refuse the surrender.

Independence of the judiciary:

- ▶ Forms part of the ‘essence’ of the fundamental right to a fair trial.
- ▶ Is also pivotal in the EAW mechanism between ‘judicial authorities’ founded on the premiss that they all meet the requirements of effective judicial protection.
- ▶ Mutual trust is not blind trust: requires Member States to consider that all the other Member States comply with EU law and, in particular, with fundamental rights.

# JURISDICTION OF THE CJ

## NATIONAL PROVISIONS RELATING TO THE ORGANISATION OF NATIONAL COURTS & DISCIPLINARY MEASURES APPLICABLE TO JUDGES:

¿exclusive competence of the Member States? ¿outside the scope of EU law?

- ▶ Organization of justice falls within the competence of Member States.
- ▶ MS are required to comply with their obligations deriving from EU law: must ensure effective judicial review in the fields covered by EU law (second subparagraph of Article 19 (1) TEU)

“Courts, to be called upon to rule on questions relating to the application or interpretation of EU law, must meet the requirements of effective judicial protection”

# JUDICIAL INDEPENDENCE

## The concept of independence is inherent in the task of adjudication:

- ▶ The body concerned exercises its judicial functions wholly autonomously
- ▶ Without being subject to any hierarchical constraint or subordinated to any other body
- ▶ Without taking orders or instructions from any source
- ▶ Protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions.

## Those guarantees of independence and impartiality require rules, particularly:

- ▶ The composition of the body and the appointment
- ▶ Length of service/removal from office
- ▶ Grounds for abstention, rejection and dismissal

“Such as to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it”

# ESSENTIAL SET OF GUARANTEES FOR SAFEGUARDING THE INDEPENDENCE OF THE JUDICIARY

- ▶ Rules defining conducts amounting to disciplinary offences and penalties
- ▶ Involvement of an independent disciplinary body.
- ▶ Procedure which fully safeguards the rights enshrined in Articles 47 and 48 of the Charter, in particular the rights of the defence.
- ▶ Possibility of bringing legal proceedings challenging the disciplinary bodies' decisions.

## PRINCIPLE OF IRREMOVABILITY, UNLESS:

- ▶ It is justified by a legitimate objective
- ▶ It is proportionate in the light of that objective
- ▶ It not raise reasonable doubt in the minds of individuals as to the imperviousness of the courts concerned to external factors and their neutrality

## C- 192/18 & C-619/18. THE COMBINATION OF THE MEASURE AND MECHANISM UNDERMINES THE PRINCIPLE OF IRREMOVABILITY:

- ▶ The measure lowering the retirement age of judges.
- ▶ Minister for Justice has the right to authorise judges to continue actively to carry out judicial duties beyond the retirement age, as lowered:
  - ▶ on the basis of too vague and unverifiable criteria
  - ▶ the Minister's decision is not required to state reasons
  - ▶ Such a decision can not be challenged in court proceedings



# INADMISSIBILITY OF THE REQUEST

## 1. Determining whether a body making a reference is a 'court or tribunal' for the purposes of Article 267 TFEU.

- ▶ This mechanism may be activated only by a body responsible for applying EU law which satisfies, *inter alia*, that criterion of independence.
- ▶ The Court takes account of a number of factors (established by law, permanent, compulsory jurisdiction, *inter partes* procedure, applies rules of law, independent).

## C- 274/14: the request for a preliminary ruling from the TEAC is inadmissible, since that body cannot be described as a 'court or tribunal' for the purposes of Article 267 TFEU:

- ▶ The applicable national legislation does not ensure that the President and the other members of the TEAC are protected against direct or indirect external pressures that are liable to cast doubt on their independence.
- ▶ There are no particular safeguards in respect of their removal or the termination of their appointment.

# INADMISSIBILITY OF THE REQUEST

## 2. Inexistence of connecting factor between EU Law and the questions referred.

C-558/18 & C-563/18: concern about objectivity and impartiality of disciplinary proceedings concerning judges are no longer guaranteed and the independence of the referring courts is thereby affected.

- ▶ Article 267 TFEU: the question referred for a preliminary ruling must be 'necessary' to enable the referring court to 'give judgment' in the case before it.
- ▶ There must be a connecting factor between that dispute and the provisions of EU law whose interpretation is sought, by virtue of which that interpretation is objectively required for the decision to be taken by the referring court.
- ▶ The second subparagraph of Article 19(1) TEU to which the questions referred relate, is not required to be applied in those examined disputes.
- ▶ The requests for a preliminary ruling must be declared *inadmissible*.

DIFFERENCE: in an action for failure to fulfil obligations, the Court must ascertain whether the national measure or practice challenged by the Commission or another Member State, contravenes EU law in general, without there being any need for there to be a relevant dispute before the national courts



THANK YOU VERY MUCH