

ERA advanced training for Court Coordinators in European Law – Rule of law in the recent case-law of the ECJ and the ECHR

Hubert de Verdelhan – ECJ (référéndaire)

OCTOBER 2022



Co-funded by the European Union

- **Rule of Law** = a value common to the European Union and the Member States.
 - **EU** is a Union “**based on the rule of law**” (“Les Verts”)
 - **Article 2 TEU**
-

- Broad notion
 - Encompasses, but not limited to, **judicial independence** and **article 47** of the Charter of fundamental rights
-

Conceptual background – EU law

- Early phase: *Johnston* (C-222/84) and so on;
 - 2018 Revolution: *Associação Sindical dos Juízes Portugueses*
 - Judicial independence and rule of law as part of the ‘core’ values of the EU legal order – Article 19(1) TEU and Article 2 TEU (para. 32)
 - every Member State must ensure that the courts within its judicial system that may act in the “fields covered by EU law”, meet essential requirements (paras 36 and 37)
-

Conceptual background – EU law

- Material scope of Art. 19 TEU:
 - Broader and narrower than Article 47 Charter
 - Applies to “the fields covered by Union law” (not limited to “implementation of EU law”);
 - Only “structural” or “systemic” issues are covered.
-

Conceptual background – EU law

- **Different types of procedures:**
 - **Preliminary reference:** where rule of law question is ‘necessary’ for adjudicating (see *Miasto Lowicz* (C-558/18); *Prokurator Generalny* (C-508/19))
 - **Infringement procedures:** Commission suing MS for breaching EU law

- **Article 3 of the Statute of the COE:** “Every Member... must accept the principle of the rule of law...”
- **Preamble of the ECHR:** part of the common heritage of the Contracting States
- **ECourtHR:** “... inherent in all the Articles of the Convention” (see, for instance, *Broniowski v. Poland*, no.21443/96, § 147)

Conceptual background – ECHR law

- Guiding principle for interpretation of the Convention + Article 6§1
 - Broad notion
 - No overall definition
 - Encompasses, but is not limited to right to access to court, judicial review of acts of the executive, judicial independence, and so on
-

Components of the Rule of Law principle – judicial independence

- **Judicial independence in ECHR: Article 6§1**
 - **In EU law:**
 - Component of Article 19 TEU
 - Part of the ‘essence’ of the right to a fair trial under Article 47 of the Charter
 - **Two faces of judicial independence: *internal* and *external***
-

Components of the Rule of Law principle

- **External:** no 'pressure' from the exterior, esp. the executive
 - **Impact on organisation of the judiciary:**
 - Not left to the discretion of the executive
 - Need for a statutory framework ensuring the conditions of independence, especially:
 - Appointment of judges; Nomination/promotion;
 - Terms of office
 - Disciplinary sanctions; irremovability
-

Recent case-law: Appointment of judges

- ECJ judgements in *A.K. and others* (C-585/18, C-624/18 and C-625/18) and *Commission v. Poland* (C-791/19); ECHR judgements in *Reczkowicz v. Poland* (no. 43447/19), *Advance Pharma* (no. 1469/20), and *Juszczyszyn v. Pologne* (no. 35599/20)
 - **Issue:** procedure of appointment of judges to the Disciplinary chamber of the Polish Supreme Court;
 - Appointment by the President of the Republic, on a proposal from the KRS;
 - **Key findings:** important influence of the legislative and executive on the KRS giving rise to legitimate and serious doubt as to the independence of the KRS and, consequently, of the judges appointed by it;
 - Disciplinary chamber not an independent body;
 - Even more problematic that it is to rule on disciplinary proceedings against ordinary judges.

Recent case-law: Appointment of judges

- **ECJ judgement in *A.B. and others* (C-824/18)**
 - **Issue:** lack of judicial review against resolution of the KRS proposing candidates for appointment as judges;
 - Adoption of a law declaring discontinuance of any pending challenges and precluding any remedy in such cases in the future;
 - **Key findings:** absence of legal remedy in the context of a process of appointment to judicial positions of a national supreme court not necessarily contrary to Article 19(1) TEU;
 - Different in where all the relevant factors characterising such a process give rise to systemic doubts as to the independence and impartiality of the judges appointed at the end of that process;
 - It appeared to be the case here as (1) possibilities for obtaining judicial remedies which previously existed are suddenly eliminated (2) the independence of a body such as the KRS from the legislature and executive is open to doubt.
-

- **ECJ judgement in *Repubblika* (C-896/19)**
 - **Issue:** In Malta, the Prime Minister has decisive power when it comes to appointment of judges;
 - Constitutional reform in 2016: creation of the Judicial Appointments Committee, responsible for assessing candidates for judicial office and providing an opinion to the Prime Minister;
 - **Key findings:** ‘no value regression’ rule: Member States cannot adopt reforms on the organisation of justice resulting in reduction of the protection of the rule of law and, notably, of judicial independence;
 - However, here, the reform was reinforcing the guarantee of judicial independence: the involvement of the Judicial Appointments Committee in the process for appointment of judges renders that process more objective.
-

Recent case-law: Appointment of judges

- **ECJ judgement in *Simpson* (C-542/18 RX-II and C-543/18 RX-II)**
 - **Issue:** procedure of appointment of a judge to the European Union Civil Service Tribunal;
 - General Court held that an irregularity in appointment rendered the composition of the panel of judges that adjudicated on two cases irregular=annulment of decision;
 - **Key findings:** Every court is obliged to check, of its own motion, whether access to an independent and impartial tribunal established by law was guaranteed;
 - Not every irregularity of appointment leads to a finding of irregularity of a judicial panel and annulment of its decisions: only if the irregularity is such as to raise doubt about independence;
 - Not the case here: “mild” procedural irregularity;
-

Recent case-law: Appointment of judges

- **ECJ judgement in *Getin Noble* (C-132/20)**
 - **Issue:** polish judges initially appointed by the executive when Poland was still a non-democratic, communist, state;
 - Reappointment done after a selection by a body (previous *KRS*), the composition of which was later declared unconstitutional, and/or following a procedure that was neither transparent nor public nor open to challenge;
 - Whether that called into question the independence of a panel;
 - **Key findings:** The *initial* appointment by the executive of an undemocratic regime is not sufficient, in itself, to give rise to doubts about the *current* independence of the judges in question;
 - Not every irregularity in the appointment is such as to cast doubt about the independence of a judge;
 - The involvement of the *previous* KRS not raising such doubt=unconstitutional aspects were not related to lack of independence vis-à-vis the executive (contrary to *current* KRS).

Recent case-law: term of office of judges

- **ECJ judgements in *Commission v. Poland (C-619/18)***
 - **Issue: New Law on the Polish Supreme Court, entails** lowering of the retirement age of Supreme Court judges;
 - Also applicable to judges in post;
 - But possibility of derogation, granted by discretionary decision of the Polish President;
 - **Key findings:** contrary to the principle of irremovability;
 - Doubts as to whether the objective pursued was legitimate (underlying policy was to 'fire' certain group of judges of the Supreme Court);
 - The combination of the early retirement + derogations discretionarily granted by executive raises serious doubts about independence from that executive.
-

Recent case-law: Disciplinary sanctions against judges

- **ECJ Judgement in *W.Ż.*(C-487/19)**
 - **Issue:** Transfer of a judge to another division, decided without his consent;
 - Appeal dismissed by a judge appointed pursuant to a resolution of the KHS;
 - **Key findings:** transfers without consent of a judge to another court or division are capable of undermining the principles of irremovability of judges and judicial independence: may constitute a way of exercising control over the content of judicial decisions;
 - So regime governing transfer must present guarantees, be based on transparent criteria, and be open to judicial review before an independent tribunal;
 - Not the case here.
-

Recent case-law: Disciplinary sanctions against judges

- **ECJ Judgement in *WB* (C-748/19 to C-754/19)**
 - **Issue:** Polish legislation providing the possibility for the Minister for Justice to second judges to higher courts on the basis of unknown criteria;
 - Power to terminate such a secondment, at any time, without justification;
 - **Key findings:** MS may use a system of secondment of judges;
 - But rules governing secondment must provide guarantees of independence and impartiality to prevent any risk of a secondment being used as a means of exerting political control over the content of judicial decisions
 - Criteria ought to be known in advance;
 - Possibility to terminate secondment at any time, without justification, could be perceived as subordination to the ministry, incompatible with irremovability of judges;

Recent case-law: Disciplinary sanctions against judges

- **ECHR judgement in *Juszczyszyn v. Pologne* (no. 35599/20)**
 - **Issue:** judge suspended because he ordered an inquiry into the nomination of judges to the KHS;
 - Appeal rejected by the disciplinary chamber of the Supreme Court, composed of judges appointed pursuant to a resolution of the KRS;
 - **Key findings:** violation of Article 6§1, 8 and 18: no sufficient guarantees against arbitrary sanction and transfer of judges by the executive;
 - In particular, no remedy possible before an independent tribunal: ECHR confirms that the disciplinary chamber of the Polish Supreme Court cannot be regarded as such;
 - Generally speaking, a judge being suspended for adopting a legal decision should only happen in very exceptional circumstances.
-

Recent case-law: Disciplinary sanctions against judges

- **ECJ Judgements in *Euro Box Promotion* (C-357/19) and *RS* (C-430/21)**
 - **Issue:** Rule according to which ordinary judges are bound by ruling of the Romanian Constitutional Court. If they do not follow=disciplinary sanctions;
 - Also where the constitutional Court has ruled on the compatibility of a national law/decision with EU law;
 - **Key findings:** ordinary courts being bound by decisions of the constitutional court is not, in itself, contrary to EU law;
 - But cannot exclude the jurisdiction of ordinary judges to assess the compatibility of national law with EU law;
 - Would be contrary to primacy + Article 267 TFEU;
 - Disciplinary sanctions may not be inflicted to a judge for applying EU law and/or making a preliminary reference, even if that means disregarding a decision of constitutional court.

Recent case-law: the 'conditionality judgements'

- **ECJ judgements in *Hungary v. Parliament and Council (C-156/21)* and *Poland v. Parliament and Council (C-157/21)***
 - **Issue:** Annulment actions against Regulation 2020/2092, making payment of EU funds to Member States conditional on respect of the rule of law
 - Main claim: lack of competence: no legal basis; circumvention of the procedure provided in Article 7 TEU in case of risk of serious breach of fundamental values by a Member State;
 - **Key findings:** Regulation could be adopted on the basis of Article 322(1)(a) TFEU (implementation of Union budget), read in light of Article 2 TEU
 - Compliance with values set in Article 2 TEU 'is a condition for the enjoyment of all the rights deriving from the application of the treaties...' (C-156/21, point 126);
 - The value of the rule of law can be protected by other means than the procedure laid down in Article 7 TEU : conditionality procedure has a different purpose.

Pending cases

- **Cases *D.K. (C-647/21)*, *M.C. and MF. (C-648/21)***
 - **Issue:** polish judges relinquished of the cases that were attributed to them, presumably because of the position they took on independence issues;
- **Case *Inspekția Judiciară (C-817/21)***
 - **Issue:** broad investigative powers of romanian judicial inspection in disciplinary proceedings against judges;
- **Case *Asociația “Forumul Judecătorilor din România” (C-216/21)***
 - **Issue:** whether nomination of judges to a court can depend on an assessment of their work by a commission composed of judges from that court.



Thank you for your attention!

Questions?