

# RULE OF LAW IN THE RECENT CASE LAW OF THE CJEU AND THE ECtHR

ADVANCED TRAINING FOR COURT COORDINATORS: 2ND EDITION  
APPLICATION OF EU LAW, PRELIMINARY RULING PROCEDURE AND FUNDAMENTAL RIGHTS  
ORGANIZED BY  
ACADEMY OF EUROPEAN LAW (ERA)  
BUDAPEST, 23-24 2024

BY VIKTOR Z. KAZAI  
POST-DOCTORAL RESEARCHER AT UNIVERSITÉ LIBRE DE BRUXELLES



1

## SCOPE OF THE RULE OF LAW IN THE EUROPEAN LEGAL SPACE - COUNCIL OF EUROPE

- **Legal bases:**
  - Statute of the Council of Europe (1949)
  - Convention for the Protection of Human Rights and Fundamental Freedoms (1950)
  - ECtHR case law
- **Primary sources of interpretation and standard of evaluation**
  - Venice Commission reports (esp. Rule of Law Checklist, 2016)
  - ECtHR case law
- **Core areas of the rule of law**
  - Legality
  - Legal certainty
  - Prevention of abuse/misuse of powers
  - Equality before the law and non-discrimination
  - Access to justice
  - Fundamental rights enshrined (primarily) in the European Convention on Human Rights

2

## SCOPE OF THE RULE OF LAW IN THE EUROPEAN LEGAL SPACE – EUROPEAN UNION

---

### - Legal bases

- CJEU, Case 294/83 Parti écologiste 'Les Verts' v. European Parliament
- Treaty on European Union – Preamble + Article 2
- Commission Communication COM(2019) 163 - Further strengthening the Rule of Law within the Union
- Rule of Law Conditionality Regulation (2020), Article 2a
- Regulation laying down common provisions on eight EU Funds (2021), Article 9

### - Primary sources of interpretation and standard of evaluation

- Annual rule of law reports of the European Commission
- CJEU case law

### - Core areas of the rule of law

- Justice systems
- Anti-corruption framework
- Media pluralism
- Other institutional issues related to checks and balances (law-making, constitutional review, NHRIs, implementation of court judgments, civic space, elections, emergency measures)
- Fundamental rights enshrined in the EU Charter

3

## PROTECTION OF JUDICIAL INDEPENDENCE – COUNCIL OF EUROPE

---

### • Primary legal bases:

- European Convention on Human Rights
  - Article 6 (1) – Right to a fair trial
  - Article 8 - Right to respect for private and family life
  - Article 10 - Freedom of expression

### • Bringing cases to the ECtHR

- Individual applications (Article 34) by parties to a case or by judges/judicial associations
- Advisory opinion (Protocol No. 16) by highest courts in MSs

4

## CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

---

**Article 6 (1) – Right to a fair trial** - Appointment of ordinary judges and members of constitutional courts

- Irregularities of judicial appointment → violation of right to an “independent and impartial tribunal established by law”
- 3-step test: (i) manifest breach (ii) of a fundamental rule, and (iii) domestic review (if available)
- Needs to be judicial review of appointment procedure
- Most important: to avoid/minimize political influence
- Case law: [Guðmundur Andri Ástráðsson v. Iceland \[GC\], no. 26374/18 \(2020\)](#), [Dolińska - Ficek and Ozimek v. Poland, nos. 49868/19 and 57511/19 \(2021\)](#), [Reczkowicz v. Poland, no. 43447/19 \(2021\)](#), [Xero Flor w Polsce sp. z o.o. v. Poland, no. 4907/18 \(2021\)](#), [Juszczyszyn v. Poland, no. 35599/20 \(2022\)](#), [Tuleya v. Poland, nos. 21181/19 and 51751/20 \(2023\)](#), [Lorenzo Bragado and Others v. Spain, nos. 53193/21 and 5 others \(2023\)](#)

5

## CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

---

**Article 6 (1) – Right to a fair trial** - Adverse measures against judges: disciplinary measures and proceedings, (early) termination of mandate, lifting of immunity

- Judicial review of decision
- Justification of decisions
- Independence and impartiality of deciding body
- Case law: [Camelia Bogdan v. Romania, no. 36889/18 \(2020\)](#), [Eminağaoğlu v. Turkey, no. 76521/12 \(2021\)](#), [Żurek v. Poland, no. 39650/18 \(2022\)](#), [Grzęda v. Poland \[GC\], no. 43572/18 \(2022\)](#), [Catană v. the Republic of Moldova, no. 43237/13 \(2023\)](#), [Tuleya v. Poland, nos. 21181/19 and 51751/20 \(2023\)](#), [Pająk and Others v. Poland, nos. 25226/18 and 3 others \(2023\)](#)

6

## CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

---

**Article 8 – Right to respect for private and family life** - Adverse measures against judges: disciplinary measures and proceedings, (early) termination of mandate, lifting of immunity

- Lawfulness of evidence collection
- Independence and impartiality of deciding body
- Clarity of the law and predictability of interpretation
- Respect of immunity
- Case law: [Eminağaoğlu v. Turkey, no. 76521/12 \(2021\)](#), [Juszczyszyn v. Poland, no. 35599/20 \(2022\)](#), [M.D. and Others v. Spain, no. 36584/17 \(2022\)](#), [Ovcharenko and Kolos v. Ukraine, nos. 27276/15 and 33692/15 \(2023\)](#), [Tuleya v. Poland, nos. 21181/19 and 51751/20 \(2023\)](#), [Aydin Sefa Akay v. Türkiye, no. 59/17 \(2024\)](#)

Gender-based discrimination regarding retirement age:

- Limitation of ministerial discretion
- Case law: [Pająk and Others v. Poland, nos. 25226/18 and 3 others \(2023\)](#)

7

## CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

---

**Article 10 – Freedom of expression** - Adverse measures against judges: disciplinary measures and proceedings, (early) termination of mandate, lifting of immunity

- Right to express criticism publicly, especially concerning measures affecting the judiciary
- Right to share information with colleagues and even with journalists
- Prohibition of application of adverse measures against judges based on their (perceived) political opinion
- Case law: [Miroslava Todorova v. Bulgaria, no. 40072/13 \(2021\)](#), [Eminağaoğlu v. Turkey, no. 76521/12 \(2021\)](#), [Żurek v. Poland, no. 39650/18 \(2022\)](#), [Kozan v. Turkey, no. 16695/19 \(2022\)](#), [Manole v. the Republic of Moldova, no. 26360/19 \(2023\)](#), [Tuleya v. Poland, nos. 21181/19 and 51751/20 \(2023\)](#), [Danileț v. Romania, no. 16915/21 \(2024\)](#)

8

## CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

---

### Tuleya v. Poland, nos. 21181/19 and 51751/20 (2023)

- Facts: lifting of judge's immunity from prosecution + suspension from judicial duties by Supreme Court's Disciplinary Chamber prompted by his criticisms publicly expressed in his professional capacity
- Violation of Article 6 - Inherently deficient judicial appointment procedure to Disciplinary Chamber by reformed NCJ which lacked independence from legislature and executive
- Violation of Article 8 - Unforeseeable interpretation of the domestic law by a body not constituting an "independent and impartial tribunal established by law"
- Violation of Article 10 - Interferences not "prescribed by law" and not pursuing any legitimate aims, lack of procedural safeguards, lack of independence of the deciding body, strategy aimed at intimidating the applicant

9

## PROTECTION OF JUDICIAL INDEPENDENCE – EUROPEAN UNION

---

- Primary legal bases
  - Treaty on European Union Articles 2 and 19(1)
  - Charter of Fundamental Rights of the European Union, Article 47 – Right to an effective remedy and to a fair trial
- Bringing case to the CJEU
  - Infringement procedure by the Commission (Article 258 TFEU) or by Member States (Article 259 TFEU)
  - Preliminary reference procedure (Article 267 TFEU) by national courts

10

## CASE LAW OF THE EUROPEAN COURT OF JUSTICE

---

### Adverse measures against judges

- The initiation of disciplinary proceedings as a result of the fact that judges submitted a reference to the Court for a preliminary ruling cannot be permitted. [Judgment of 26 March 2020, Miasto Łowicz \(Judicial disciplinary system\) Joined Cases C-558/18 and C-563/18](#)
- Disciplinary regime must comply with the requirements of impartiality and independence. Importance of political context! [Judgment of 2 March 2021, A.B. and Others v Krajowa Rada Sądownictwa and Others \(Appointment of judges to the Supreme Court\) \(C-824/18\)](#)
- Transfers of judges without their consent can undermine judicial independence. [Judgment of 6 October 2021, W.Ż. \(Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment\) \(C-487/19\)](#)
- Secondment of judges by the executive without clear criteria creates a risk of political control over judicial decision-making [Judgment of 16 November 2021, Criminal proceedings against WB and Others \(Judicial secondments in Poland\) \(Joined Cases C-748/19 to C-754/19\)](#)

11

## CASE LAW OF THE EUROPEAN COURT OF JUSTICE

---

### Appointment of judges

- The judicial review of appointment procedures must be guaranteed. [Judgment of 2 March 2021, A.B. and Others v Krajowa Rada Sądownictwa and Others \(Appointment of judges to the Supreme Court\) \(C-824/18\)](#)
- Appointment of members of the judiciary by the executive is permitted as long as an independent body is involved in the assessment of candidates. [Judgment of 20 April 2021, Repubblika \(Maltese judges\) \(C-896/19\)](#)
- A court chamber (such as Extraordinary Review and Public Affairs Chamber of the Polish Supreme Court) does not constitute a “court or tribunal” for the purposes of EU law if the appointment of its members was unlawful. [Judgment of 21 December 2023, Krajowa Rada Sądownictwa \(Continued holding of a judicial office\) \(C-718/21\)](#)

12

## CASE LAW OF THE EUROPEAN COURT OF JUSTICE

---

### National measures challenging the primacy of EU law

- Depriving lower courts of the right to disapply on their own motion a national provision which is contrary to EU law is not permitted. [Judgment of 18 May 2021, Asociația 'Forumul Judecătorilor din România' and Others, C-83/19 and Others](#)
- National courts must be empowered to disapply a decision of a constitutional court that is contrary to EU law, without national judges incurring disciplinary liability. [Judgment of 21 December 2021, Criminal proceedings against PM and Others \(Euro Box Promotion and Others\) \(Romanian judges II\) \(Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19\)](#)
- National courts must have jurisdiction to examine the conformity with EU law of national legislation which has been held to be constitutional by the constitutional court. [Judgment of 22 February 2022, RS \(Effect of constitutional court rulings\) \(Romanian judges III\) \(Case C-430/21\)](#)
- National supreme courts must refrain from declaring a request for a preliminary ruling submitted by a lower court unlawful. Disciplinary proceedings must not be initiated against a judge because (s)he made a reference for a preliminary ruling to the CJEU. [Judgment of 23 November 2021, IS \(Illegality of the order for reference\) \(C-564/19\)](#)
- National courts must refrain from applying an act (such as a disciplinary resolution) in order to ensure the primacy of EU law. [Judgment of 13 July 2023 \(Grand Chamber\), YP and Others \(Lifting of a judge's immunity and his or her suspension from duties\) \(C-615/20 and C-671/20\)](#)

13

## CASE LAW OF THE EUROPEAN COURT OF JUSTICE

---

### [Judgment of 5 June 2023 \(Grand Chamber\), Commission v Poland \(Independence and private life of judges\) \(C-204/21\)](#)

- Subject: series of laws (muzzle law) adopted in 2019 introducing disciplinary offences and sanctions for judges to prevent them from questioning the independence of any national court and delegating this task to the Disciplinary Chamber and the Extraordinary Chamber of the Supreme Court.
- CJEU has competence to review MSs' compliance with EU values, inc. rule of law and judicial independence. Regression is prevented. MSs may not disregard EU law based on their national laws or case law.
- The Disciplinary Chamber of the SC does not satisfy the requirement of independence and impartiality, so disciplinary proceedings threaten the independence of judges.
- Courts may be required to ascertain their independence and the independence of other judges and courts.
- The conferral on a single national body (namely the Extraordinary Review and Public Affairs Chamber of the Supreme Court) of the jurisdiction to verify compliance with essential requirements relating to effective judicial protection infringes EU law.

14

## CONCLUDING REMARKS

---

- Rule of law jurisprudence is developing.
- National judges courts has an essential role in this process.
  - Applicants / initiators
  - Appliers of EU law and CoE law
- Judicial dialogue and cooperation can be an effective counterbalance of rule of law backsliding.
- DARE TO ACT!

15

## USEFUL SOURCES

---

### Collections of judgments

- CJEU, Selection of Major Judgments – Year 2023:  
[https://curia.europa.eu/jcms/upload/docs/application/pdf/2024-04/selection\\_grands\\_arrets\\_2023\\_en.pdf](https://curia.europa.eu/jcms/upload/docs/application/pdf/2024-04/selection_grands_arrets_2023_en.pdf)
- CJEU, Selection of Major Judgments – Year 2022:  
[https://curia.europa.eu/jcms/upload/docs/application/pdf/2023-04/en-selection\\_des\\_grands\\_arrets\\_2022.pdf](https://curia.europa.eu/jcms/upload/docs/application/pdf/2023-04/en-selection_des_grands_arrets_2022.pdf)
- CJEU, Annual Reports:  
[https://curia.europa.eu/jcms/jcms/Jo2\\_7015/en/](https://curia.europa.eu/jcms/jcms/Jo2_7015/en/)

- ECHR Knowledge Sharing platform:  
<https://ks.echr.coe.int/>

- ECHR case law guides per article:  
<https://ks.echr.coe.int/web/echr-ks/all-case-law-guides>

### Blog pages

- EU Law Live: <https://eulawlive.com/>
- Strasbourg Observers:  
<https://strasbourgobservers.com/>
- Verfassungsblog: <https://verfassungsblog.de/>

16

---

THANK YOU VERY MUCH FOR YOUR ATTENTION!

Viktor Z. Kazai  
Email: viktor.zoltan.kazai@ulb.be

17

## POINTS OF DISCUSSION

---

- Examples of the violation of judicial independence in your own jurisdiction
- Any potential infringement of judicial independence that could be brought to CJEU/ECtHR
- Impact of the jurisprudence of CJEU/ECtHR in the national context.
- The legitimate means for judges to defend their independence.

18