

Recent jurisprudence of the CJEU and ECHR in the area of the rule of law

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„rule of law” - the concept

- In September 2015, the UN agreed a set of Sustainable Development Goals (SDGs) from 2015 to 2030. Goal 16.3 enshrines a commitment by all UN members to „promote the rule of law at the national and international levels, and to ensure equal access to justice for all”.
- Report on the Rule of Law of 2011: the Venice Commission („European Commission for Democracy through Law”) examined the concept of the rule of law.
- The terms „rule of law”, „Rechtsstaat” and „État de droit” or „prééminence du droit”
- The Venice Commission examined the definitions proposed by various authors from different systems of law and diverse legal cultures, all of which coalesced around the definition provided by Lord Bingham*, as follows: „All persons and authorities within the State, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts”.

* Tom Bingham: „The Rule of Law”, Penguin Books, 2011

„rule of law” - the concept

„Ingredients” or features (Tom Bingham):

- The law must be accessible and, as far as possible, clear and predictable;
- Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion;
- The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation;
- The law must afford adequate protection of fundamental human rights;
- Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve;
- Ministers and public offices at all levels must exercise the powers conferred on them reasonably, in good faith, for the purpose for which the powers were conferred and without exceeding the limits of such powers;
- Adjudicative procedures provided by the State should be fair;
- The rule of law requires compliance by the State with its obligations in international law, which, whether deriving from treaty or international custom and practice, governs the conduct of nations.

„rule of law” - the concept (EU law)

The ECJ:

„It must first be emphasized in this regard that the European Economic Community is a Community based on the rule of law” - Case 294/83 Parti Écologiste „Les Verts”

„rule of law” - the concept (EU law)

Rule of law - a value common to the European Union and the Member States

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.”

„rule of law” - the concept (EU law)

- **Judicial independence - component of the Rule of Law principle**
- **Article 47 of the Charter of fundamental rights**

„rule of law” - the concept (EU law)

Article 19 TEU

1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.

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

Material scope of Art. 19 TEU:

- Broader and narrower than Article 47 of the Charter
- Applies to „the fields covered by Union law” (not limited to „implementation of EU law”)
- Only „structural” or „systemic” issues are covered.

„rule of law” - the concept (EU law)

Types of procedures:

- **Preliminary reference: art. 267 TFEU**
- **Infringement procedures: art. 258 to 260 TFEU**

Judicial independence - component of the „rule of law” (EU law)

- **Article 19 TEU**
- **Part of the „essence” of the right to a fair trial under Article 47 of the Charter**
- **the two faces of judicial independence: *internal* and *external***

Judicial independence - component of the „rule of law” (EU law)

- **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:**
 - a) Appointment of judges, nomination/promotion;**
 - b) Terms of office;**
 - c) Disciplinary sanctions; irremovability.**

„rule of law” - the concept (EU law)

Article 7 TEU

- **(1.) (...) clear risk of a serious breach by a Member State of the values referred to in Article 2.**
- **(2.) (...) may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2.**

„rule of law” - the concept (EU law)

- Regulation (EU, Euratom) 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.**
- **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.**
- **Judgment of 16 February 2022 - dismisses the actions.**
- **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.**

„rule of law” - the concept (ECHR)

- Article 3 of the Statute of the Council of Europe: „Every Member... must accept the principle of the rule of law...”**
- Preamble of the ECHR: part of the common heritage of the Contracting States**
- European Court of HR: „ the rule of law, one of the fundamental principles of a democratic society, ... inherent in all the Articles of the Convention”**

(e.g.: Broniowski v. Poland, no.21443/96, § 147)

„rule of law” - the concept (ECHR)

- **Guiding principle for the interpretation of the Convention + Article 6§1**
- **Encompasses, but is not limited to:**
 - **right to access to court**
 - **judicial review of acts of the executive**
 - **judicial independence**

„rule of law” - the concept (ECHR)

Not only Article 6

Also

- Article 8 ECHR (right to respect for private and family life)**
- Article 10 ECHR (freedom of expression)**

Recent case-law: a) appointment of judges (EU)

ECJ judgements in *A.K. and others* (C-585/18, C-624/18 and C-625/18) and *Commission v. Poland* (C-791/19)

Context

- 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 (National Council of the Judiciary).

Key aspects

- 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: a) appointment of judges (EU)

ECJ judgment in A.B. and others (C-824/18)

Context

- Lack of judicial review against resolution of the KHS 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 aspects

- 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.

Recent case-law: a) appointment of judges (EU)

ECJ judgment in Repubblica (C-896/19)

Context

- 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 aspects

- „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: a) appointment of judges (EU)

ECJ judgement in Simpson (C-542/18 RX-II and C543/18 RX-II)

Context

- 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 aspects

- 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: a) appointment of judges (EU)

ECJ judgment in Getin Noble (C-132/20)

Context

- 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 aspects

- 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 as unconstitutional aspects were not related to lack of independence vis-à-vis the executive (contrary to current KRS).

Recent case-law: a) appointment of judges (EU)

ECJ judgment in Valančius (C-119/23)

Context

- Appointment of Judges of the General Court of the European Union;
- National procedure for proposing a candidate for the office of Judge of the General Court of the European Union;
- Proposal of a candidate named on the merit list other than the top-ranked candidate.

Key aspect

- A Member State may propose, from among the candidates named on a list drawn up by a national group of independent experts, a candidate other than the best-ranked candidate on that list, *provided that the candidate proposed satisfies the requirements laid down by the Treaties.*

Recent case-law: a) appointment of judges (ECtHR)

Violation of Article 6 § 1 of the Convention

- **Guðmundur Andri Ástráðsson v. Iceland (no. 26374/18)**
- **Lorenzo Bragado and Others v. Spain (application nos. 53193/21, 53193/21, 53707/21, 53848/21, 54582/21, 54703/21, and 54731/21)**
- **Advance Pharma (no. 1469/20)**
- **Juszczyszyn v. Poland (no. 35599/20)**

Recent case-law: b) term of office of judges (EU)

ECJ judgments in Commission v. Poland (C-619/18)

Context

- 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 aspects

- 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: c) disciplinary sanctions against judges (EU)

ECJ Judgments in Euro Box Promotion (C-357/19) and RS (C-430/21)

Context

- 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 aspects

- 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: c) disciplinary sanctions against judges (EU)

ECJ Judgment in *Inspekția Judiciară* (C-817/21)

Context

The director of a body (*Inspekția Judiciară*) competent to conduct investigations and bring disciplinary proceedings against judges and prosecutors has the power to adopt acts of a normative and individual nature relating to the organisation of that body, the selection of its staff members, their assessment, the conduct of their activities and the appointment of a deputy director.

Key aspects

The legislation should be designed in such a way that there can be no reasonable doubt, in the minds of individuals, that the powers and functions of that body (*Inspekția Judiciară*) will not be used as an instrument to exert pressure on, or political control over, the activity of those judges and prosecutors.

Recent case-law: c) disciplinary sanctions against judges (ECtHR)

ECHR judgment in *Juszczyszyn v. Poland* (no. 35599/20)

Context

- 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.

The Court

- 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: c) irremovability (EU)

- Judgment of the Court (Grand Chamber) of 6 October 2021 (request for a preliminary ruling from the Sąd Najwyższy – Poland) – Proceedings brought by W.Ż. (Case C-487/19)
- Judgment of the Court (Grand Chamber) of 16 November 2021 (seven requests for a preliminary ruling in the criminal proceedings against XA, YZ, DT, ZY, AX, BV, CU - (Joined Cases C-748/19 to C-754/19)

Recent case-law: Article 8 ECHR

ECHR judgment in *Aydin Sefa Akay v. Turkey* (no. 59/17)

Context

Judge serving at the United Nations International Residual Mechanism for Criminal Tribunals - diplomatic immunity conferred on him by the Mechanism's Statute

Key aspects

- Searches of applicant's person and home not „prescribed by law”;
- Applicant's place of residence in an analogous position to that of an office given he was working for the Mechanism remotely from his home country;
- Residence subject to a heightened protection similar to that afforded in the Court's Art 8 case-law to searches of a lawyer's office;
- Domestic courts' failure to examine that aspect of the applicant's immunity;
- Certain items seized later used in the criminal proceedings against him;
- No waiver of immunity from the UN Secretary General nor UN or applicant *ex post facto* consent

Recent case-law: Article 8 ECHR

ECHR judgment Tuleya v. Poland (applications nos. 21181/19 and 51751/20)

The case originated in the new disciplinary regime for judges in Poland. The applicant, Igor Tuleya, a well-known judge, complained about five sets of preliminary inquiries initiated against him in 2018 on suspicion of disciplinary misconduct.

The Court:

- **violation of Article 6 § 1 (right to a fair trial):** The Disciplinary Chamber which had taken the decision to lift Mr Tuleya's immunity was not an „independent and impartial tribunal established by law” for the purposes of the Convention;
- **violation of Article 8 (right to respect for private life):** There had been no lawful basis for the measures against Mr Tuleya which had to have had a significant impact on his right to private life and could be characterised as a strategy aimed at intimidating (or even silencing) him for the views that he had expressed.
- **violation of Article 10 (freedom of expression):** The Court emphasised that Mr Tuleya's case had to be seen in context, notably that he was one of the most outspoken critics of judicial reform in Poland.

Recent case-law: Article 10 ECHR

- **ECHR judgment Tuleya v. Poland (applications nos. 21181/19 and 51751/20)**
- **ECHR judgment Danileț v. Romania (application no. 16915/21)**

Context

Disciplinary sanction imposed on a judge for posting two messages on his Facebook account

The Court

- **The domestic courts had failed to give due consideration to several important factors, in particular concerning the broader context in which the applicant's statements had been made, his participation in a debate on matters of public interest, the question whether the value judgments expressed had been sufficiently based in fact and, lastly, the potentially chilling effect of the sanction**
- **The Romanian courts had not given relevant and sufficient reasons to justify the alleged interference with the applicant's right to freedom of expression.**

Recent case-law: Article 10 ECHR

ECHR judgment Kövesi v. Romania (no. 3594/19)

Context

Premature termination of chief prosecutor's mandate following public criticism of legislative reforms

The Court

- Criticism in context of debate of public interest, not containing attacks against the judiciary
- Statements calling for high degree of protection
- Chilling effect of the measure defeating the very purpose of maintaining the independence of the judiciary
- Interference not accompanied by effective and adequate safeguards against abuse

Recent case-law: (EU)

Order of the General Court in cases Medel and Others v. Council (T-530/22, T-531/22, T-532/22, T-533/22) - 4 June 2024

- Rule of law: the actions brought by organisations of European judges against the Council decision approving the recovery and resilience plan for Poland are dismissed as inadmissible.
- The GC ruled that neither the applicants, nor the individuals they represented, were directly affected by the Council's decision and therefore lacked standing under article 263(4) TFEU.
- Appeal before the ECJ.
- ECtHR, Grand Chamber, in KlimaSeniorinnen v. Switzerland (no. 53600/20) imposes specific duties of standing for associations in climate cases.
- Does the recognition of associations to bring strategic actions in cases that hold a systemic importance for society (climate change, or the rule of law in the case of liberal democracies) have an impact in Union Law?

Pending cases (ECJ)

- **Joined Cases C-146/23 and C-374/23 XL Sąd Rejonowy w Białymstoku and SR, RB v Lietuvos Respublika:** Rule of law - Principle of judicial independence - Judges' remuneration

See the Opinion of Advocate General Collins delivered on 13 June 2024

- **Case C-272/24 HZ v. Tribunalul Galați:** Rule of law - Does the principle of judicial independence preclude national legislation that prohibits the payment of overtime worked by a judge owing to staff shortages at the court where he or she works, in a situation in which compensation solely by time off in lieu corresponding to the amount of overtime worked outside normal working hours, and on weekly rest days and public holidays, if applied, would have a negative effect on the annual leave provided for by law?

ECJ Judgment from 26 September 2024

ECJ Case C-792/22, SC Energotehnica SRL Sibiu

The Court

„The principle of primacy of EU law must be interpreted as precluding the legislation of a Member State under which the ordinary national courts may not, on pain of disciplinary proceedings incurred by their members, refuse to apply of their own motion decisions of the constitutional court of that Member State, where they consider, in the light of the interpretation given by the Court of Justice, that those decisions infringe the rights that individuals derive from Directive 89/391”.