

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

ADVANCED TRAINING IN EU LAW FOR JUDGES AND PROSECUTORS
PRELIMINARY RULING PROCEDURE, CHARTER OF FUNDAMENTAL RIGHTS AND THE RULE OF LAW
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WHY BOTHER?

REFLECTIONS ON THE REAL-LIFE IMPORTANCE OF THE RULE OF LAW, ESP. JUDICIAL INDEPENDENCE

- Prevention of the arbitrary exercise of state power
- Protection of the fundamental rights of European citizens
- Guaranteeing economic prosperity and the European single market
- Protection of European integration and integrity of EU law



THE MEANING OF
THE RULE OF LAW

WHERE TO START?



SCOPE OF THE RULE OF LAW 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

SCOPE OF THE RULE OF LAW EUROPEAN UNION



Legal bases

- CJEU, Case 294/83 « Les Verts »
- TEU 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: checks and balances (law-making, constitutional review, NHRIs, implementation of court judgments, civic space, elections, emergency measures)
- Fundamental rights enshrined in the EU Charter

JUDICIAL INDEPENDENCE

THE CORNERSTONE OF
RULE OF LAW
JURISPRUDENCE



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



CASE LAW OF THE ECtHR



Article 6 (1) – Right to a fair trial - Appointment of judges

- 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)
- Judicial review must be available
- Most important aim: 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 \(2023\)](#)

CASE LAW OF THE ECtHR



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

- Judicial review of decision must be available
- Decisions must be justified
- Deciding body must be independent and impartial
- Case law: [Camelia Bogdan v. Romania, no. 36889/18 \(2020\)](#), [Eminağaoğlu v. Turkey, no. 76521/12 \(2021\)](#), [Žurek 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 \(2023\)](#), [Pajak and Others v. Poland, nos. 25226/18 and 3 others \(2023\)](#)

CASE LAW OF THE ECtHR



Article 8 – Right to respect for private and family life - Adverse measures (disciplinary measures, (early) termination of mandate, lifting of immunity) affecting judges' financial, social, mental status

- Evidence collection must be lawful
- Deciding body must be independent and impartial
- The formulation of law must be clear, its interpretation must be predictable
- 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 \(2023\)](#), [Aydın 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 \(2023\)](#)

CASE LAW OF THE ECtHR



Article 10 – Freedom of expression - Adverse measures (disciplinary measures, (early) termination of mandate, lifting of immunity) inflicted on judges for their (perceived) opinion

- 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 \(2021\)](#), [Žurek 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 \(2024\)](#)

TULEYA V. POLAND NOS. 21181/19 AND 51751/20 (2023), ECtHR

- Facts: lifting of judge's immunity + 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



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



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 \(Appoint of judges to the Supreme Court\) \(C-824/18\)](#)
- 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 \(Judicial secondments in Poland\) \(Joined Cases C-748/19 to C-754/19\)](#)

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 \(Appoint of judges to the Supreme Court\) \(C-824/18\)](#)
- 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, Repubblica \(Maltese judges\) \(C-896/19\)](#)
- 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 \(Continued holding of a judicial office\) \(C-718/21\)](#)

CASE LAW OF THE EUROPEAN COURT OF JUSTICE



National measures challenging the primacy of EU law

- Depriving lower courts of the right to disapply 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 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 judges. [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 \(Lifting of a judge's immunity and his or her suspension from duties\) \(C-615/20 and C-671/20\)](#)

CASE LAW OF THE EUROPEAN COURT OF JUSTICE



European arrest warrant cases

- A judicial authority must refuse the execution of an EAW in case of a real risk that the concerned individual's right to a fair trial would be violated due to lack of judicial independence. [Judgment in Case C-216/18 PPU Minister for Justice and Equality v LM \(Deficiencies in the system of justice\)](#)
- Exception to the principle of mutual recognition in case of fundamental rights violation
- 2 step test (based on Aranyosi case, C-404/15 and C-659/15 PPU)
 - 1) assessment of the existence of systemic or generalised deficiencies of judicial independence in the issuing MS based on objective, reliable, specific and properly updated material
 - 2) assessment of the real risk of the violation of the individuals' right to a fair trial in light of the circumstances of the specific case + information may be requested from issuing MS
- Elaboration of the 2nd step: 1) lawfulness of judicial panel, 2) context of the case [\(Judgment in Joined Cases C-562/22 PPU and C-563/21 PPU Openbaar Ministerie\)](#)

JUDGMENT OF 5 JUNE 2023 (GRAND CHAMBER), COMMISSION V POLAND (MUZZLE LAW) (C-204/21)

- Subject: “Muzzle law” (2019) new disciplinary offences to prevent judges from questioning the independence of any national court and delegation of this task to Extraordinary Chamber of SC.
- CJEU has competence to review MSs’ compliance with EU values. Regression is prevented. MSs shall not disregard EU law based on their national laws.
- The Disciplinary Chamber of the SC is not independent and impartial, so disciplinary proceedings threaten the independence of judges.
- Courts may be required to ascertain judicial independence.
- The conferral on a single national body (the Extraordinary Chamber) of the jurisdiction to ascertain judicial independence infringes EU law.
- Publication of information on judges’ membership in associations/parties interferes with their privacy and risks intimidation.



CONCLUDING REMARKS

- Threats to judicial independence are present and increasing in Europe.
- Attention to detail and political context!
- Good news: case law is developing fast.
- National judges/courts have an essential role in this process as
 - applicants / initiators
 - appliers of EU law and CoE law
- Judicial cooperation can be an effective counterbalance of rule of law backsliding.

LIBERTIES RULE OF LAW REPORT 2024

Continued demand for a depoliticised, better funded, and fairer justice system

Key findings

- Some Member States, such as Croatia and Sweden, took steps to depoliticise the judicial selection process. However, the **lack of sufficient safeguards against the politicisation of the selection of officials occupying high positions in the justice system** remains a key problem in several other countries, like Bulgaria, France, Germany, Greece, Hungary, and Slovakia.
- **Accountability mechanisms** applicable in Germany, Belgium, the Czech Republic, and Slovakia may **give room for the exercise of political pressure** by the executive branch over judges, especially in the case of the entry into power of extreme political parties.
- **Political actors** threatened the independence of the judiciary when they **openly criticised judicial decisions** or gave instructions in pending cases in Greece, Italy and Slovakia.
- The **political authorities' refusal to comply with court decisions** rendered in asylum and border protection cases reached a record level last year in Belgium and Greece.
- By 2023 the **politicisation of the judicial system** in Hungary and Poland had grown to such an extent that the implementation of **any reform** aimed at the restoration of its autonomy and integrity became **extremely difficult**.

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
- 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
- CJEU, Annual Reports:
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/>



THANK YOU VERY MUCH FOR YOUR ATTENTION!

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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.