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CORTE DI GIUSTIZIA DELL'UNIONE EUROPEA

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IDENTITÀ NAZIONALE DEGLI STATI MEMBRI, PRIMATO DEL DIRITTO DELL'UNIONE EUROPEA, STATO DI DIRITTO E INDIPENDENZA DEI GIUDICI NAZIONALI

Member States' National Identity, Primacy of European Union Law, Rule of Law And Independence of National Judges

CELEBRAZIONI DEL 70° ANNIVERSARIO DELLA CORTE DI GIUSTIZIA DELL'UNIONE EUROPEA

Celebrating the Court of Justice of the European Union's 70th Anniversary

ROMA, PALAZZO DELLA CONSULTA, 5 SETTEMBRE 2022

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Il presente volume raccoglie gli atti dell'incontro bilaterale tra la Corte costituzionale della Repubblica italiana e la Corte di giustizia dell'Unione europea, dedicato allo studio dei temi dell'identità nazionale degli Stati membri, del Primato del diritto dell'Unione europea, dello stato di diritto e dell'indipendenza dei giudici nazionali, secondo una visione interpretativa e sistematica. L'incontro si è svolto nell'ambito delle celebrazioni per il settantesimo anniversario della istituzione della Corte di giustizia dell'Unione europea.

This volume collects the proceedings of the bilateral meeting between the Constitutional Court of the Italian Republic and the Court of Justice of the European Union, dedicated to the issues of National identity of Member States, the Primacy of European Union Law, the Rule of law and the Independence of national judges, according to an interpretative and systematic view. The meeting took place as part of the celebrations for the 70th anniversary of the establishment of the Court of Justice of the European Union.

Testo a cura di – Edited by – Bruno CAROTTI

Consigliere della Corte costituzionale – Segreteria generale
Counsellor of the Constitutional Court – Secretary General

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RULE OF LAW AND INDEPENDENCE OF NATIONAL JUDGES

LARS BAY LARSEN

RULE OF LAW AND INDEPENDENCE OF NATIONAL JUDGES

Lars Bay LARSEN[1]

1. Premise

I would like to thank the Italian Constitutional Court and the other supreme Italian jurisdictions for the very warm welcome we have received here in Rome. It is no wonder that all roads lead to Rome with hospitality like this.

Thank you also, President Amato, for your introduction of this second working session.

It is an honor for me to try to introduce the somewhat delicate subject of rule of law and judicial independence as I see it from a point of EU Law and after almost 17 years as a judge at the CJEU and before those 3 years as a judge at the Danish Supreme Court. Obviously the views I express are personal and they may not all be shared by my colleagues.

My time is not without limits and my intention is, first, to very briefly introduce the basic legal framework in Union Law on rule of law and judicial independence. In particular, given that President Lenaerts has already largely covered this part this morning.

Then, I will turn to the main fields, where the principle of rule of law and the notion or principle of judicial independence has been interpreted and applied as illustrated by the case-law of the Court of Justice of the European Union.

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[1] Vice-president of the Court of Justice of the European Union. All opinions expressed herein are personal to the author.

Finally, I will talk on the effects and consequences, when these principles are not respected and judicial independence is not or no longer present, in particular due to a "systemic or generalized deficiency" in the judicial system of a Member State.

2. The Legal Framework – definition of the principle of judicial independence

In article 2 TEU we find a list of the fundamental values on which the European Union is founded: Respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.

It is further stated, that 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".

Now, why this article? In particular, when we already have a declaration in the preamble stating that the Member States confirm "their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law".

It is because article 2 TEU is clearly – and in spite of its general language – something more than just a simple declaration. To be attached to something is one thing, to be under a legal obligation is something different.

Obviously, becoming and being a Member State of the European Union is voluntary.

As the United Kingdom has sadly demonstrated, a Member State is free to leave (with or without an exit-agreement) in accordance with article 50 TEU as confirmed by the CJEU in our Wightman-judgment[2].

However, as long as you are a Member State, you are obliged to respect the fundamental values listed in article 2 TEU, including the rule of law.

The concept of the rule of law entails several elements, among which I will here highlight the judicial review of legislative and administrative action to ensure constitutionality of the legislation and legality of administrative acts.

Such controls presuppose judicial independence from the executive and legislative branches of government. Essentially the basic separation of the three state powers that Montesquieu advocated more than 250 years ago[3].

Surely, as I think Francesco Viganò argued, this can be done in a great many ways, and the Treaties does not point to or give preference to a single, specific shining path – we are also in this respect united in diversity. Nevertheless, the diversity is not without limits as all the Member States still have to respect the basic values.

Then there is a further concretization of the principle of judicial independence flowing from article 19, paragraph 1, second *sub*-para, TEU and from article 47 CEU (corresponding to art. 6 and 13 ECHR).

Article 19, paragraph 1, second *sub*-para TEU obliges Member States "to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law". The CJEU has confirmed that this part of this article has direct effect[4].

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[2] CJEU, judgment of 10 December 2018, *Andy Wightman and Others v Secretary of State for Exiting the European Union*, case C-621/18, EU:C:2018:851.

[3] C.L. MONTESQUIEU, *De l'Esprit des lois* [1748], Paris, 1961, Tome I, p. 163-174.

[4] CJEU, judgment of 2 March 2021, *A.B. and Others v Krajowa Rada Sądownictwa and Others*, case C-824/18, EU:C:2021:153, para 142 (*Appointment of judges to the Supreme Court – Actions*). See also CJEU, judgment of 22 April 2022, *RS*, case C-430/21, EU:C:2022:99, para 58 (*Effect of the decisions of a constitutional court*).

Article 47 CEU enshrines in Primary EU law two fundamental rights: the right to a legal remedy (corresponding to article 13 ECHR) and the right to a fair trial (corresponding to article 6 ECHR).

Finally, I will mention article 267 TFEU. As you will know, this article is the cornerstone on which the preliminary reference system, which counts for approximately 75 pct. of the case-load at the CJEU, is based.

The right to make preliminary references on the interpretation of EU-law and on the validity of EU-law is a right that belong to all national courts and tribunals in the Member States.

Normally it does not give rise to great doubts whether an order for reference arriving at the CJEU - be it from a court of first instance, an appeals court or a supreme or constitutional court - is made by a "court or tribunal of a Member State" in the sense of article 267 TFEU.

But occasionally the question arises, when an order for reference arrives from a particular body or board, which does not appear to be a classical court or tribunal, but perhaps a sort of hybrid that has some administrative features combined with some collegiate conflict solving elements.

Then the CJEU will consider a number of criteria and questions[5] before deciding whether the body is in fact to be considered as a court or tribunal in the sense of article 267 TFEU.

It is thus a concept of EU law, implying that the national "classification" of a body as a court or a tribunal is not decisive.

The criterion of independence is quite often a turning point, whenever such discussions on admissibility take place.

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[5] M. BROBERG and N. FENGER, *Preliminary References to the European Court of Justice*, Oxford, 2014[2], p. 61-72. See also CJEU, judgment of 21 January 2020, *Banco de Santander SA*, case C-274/14, EU:C:2020:17, para 51 and case-law quoted.

In this respect it does not suffice that the body is established by law. The law must also secure that the body is without organizational and functional links to the administration, whose decisions it is to oversee[6].

Judicial independence has both an external and an internal aspect. The body and its individual members must be protected against external intervention and pressure[7]. Internally the members should act impartially in order to provide a level playing field for the parties in the procedures before the body.

This necessitates rules on the composition of the body, on the qualifications and appointment of its members, their length of service, payment and dismissal as well as internal rules on issues such as voting, quorum and abstention in case of conflicts of interest[8].

In the case "*Juizes Portugueses*" the Portuguese Union of judges (unsuccessfully) challenged that a general cut of salaries due to the economic and financial crisis in Portugal had been extended to also affect the salaries of the members ("judges") of the Portuguese Court of Auditors. The key discussion in this case was not about admissibility, but on whether the independence of the judges concerned had been affected by the general cuts in salary.

In the CJEU'S judgment of 27 February 2018 the Court summed up the key elements of judicial independence and stressed that judicial independence is required by EU law not only for the judges and advocate generals at the Union Courts, but equally for national judges in the Member States, whenever they apply Union law[9].

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[6] ECJ, judgment of 30 May 2002, *Walter Schmid*, case C-516/99, EU:C:12002:213, paras 34-44 and ECJ, judgment of 31 May 2005, *Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others v GlaxoSmithKline plc and GlaxoSmithKline AEVE*, case C-53/03, EU:C:2005:333, paras 30 and 37.

[7] ECJ, judgment of 14 May 2008, *Jonathan Pilato v Jean-Claude Bourgault*, case C-109/07, EU:C:2008:274.

[8] ECJ, judgment of 19 September 2006, *Graham J. Wilson v Ordre des avocats du barreau de Luxembourg*, case C-506/04, EU:C:2006:587, paras 49-53.

[9] CJEU, judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*, case C-64/16, EU:C:2018:117, paras 42-46. The Court has recently applied the independence requirement to

It is also worth noting that the Court in this judgment noted the link between article 19 TEU on the value of the rule of law and the principle of sincere or loyal cooperation, expressed in article 4, paragraph 3, TEU. Thus stressing the responsibility of each Member State to secure the required judicial independence of its national courts whenever they are applying Union law[10].

In the judgment of 24 June 2019 concerning the independence of the Supreme Court of Poland, the CJEU essentially confirmed this case-law on the definition of the notion of judicial independence[11].

3. Interpretation and Application of the Principle of Judicial Independence in recent Jurisprudence of the CJEU

3.1 Modification of the period of judicial activity of judges

This makes a transition to the next part of my introduction, as I will now turn to the substance of the case concerning the Supreme Court of Poland.

The Commission was in this case contesting the "judicial reform" in Poland that combined a general lowering of the retirement age of Supreme Court judges from 70 to 65, leading to the removal of a significant number of judges, with a discretionary power of the Polish President to extend the employment period for selected judges for up to 2 or 3 years.

The Court in the judgment stated that the explanatory memorandum to the new Polish law contained information that raised "serious doubts as to whether the reform of the retirement age of serving judges of the [Polish Supreme Court] was made in pursuance of [potentially legitimate objectives of

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constitutional courts in judgment of 21 December 2021, *Euro Box Promotion and Others (Criminal Proceeding against PM and Others)*, joined cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034.

[10] CJEU, *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*, *cit.*, para 34.

[11] CJEU, judgment of 2 June 2019, *European Commission v. Republic of Poland*, case C-619/18, EU:C:2019:531, paras 72-74 *(Independence of the Supreme Court)*. See also the Rectification of 11 July 2019.

harmonizing legislation on retirement age], and not with the aim of side-lining a certain group of judges of that court"[12].

The Court further noted that the alleged purpose of harmonizing retirement age nationally had not been pursued with consequence, since the retirement age for most other groups on the labour market implied only the right, not the obligation to retire[13].

The CJEU found that this "judicial reform" implied that Poland had failed to respect its obligations under article 19, paragraph 1, second *sub*-para, TEU[14].

Later, the CJEU– on 5 November 2018, in case C-192/18 – applied a similar reasoning concerning the Polish law that reduced the mandatory retirement age from 70 to 65 for men and 60 for women and combined this with a possibility for the Minister for Justice to authorize for selected judges a continuation in judicial functions after they had reached retirement age[15]. The CJEU ruled that Poland was in breach of article 19, paragprah 1, TEU and article 47 CEU.

3.2 Appointment conditions and procedures

Several cases concerning *appointment conditions and procedures* have been brought before the CJEU the last couple of years.

In a preliminary ruling delivered on 19 November 2019[16] the CJEU raised doubts on the new appointment procedures for members of the Disciplinary Chamber of the Polish Supreme Court.

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[12] CJEU, *European Commission v. Republic of Poland*, *cit.*, para 82.

[13] CJEU, *European Commission v. Republic of Poland*, *cit.*, paras 84-85 and 89-90.

[14] CJEU, *European Commission v. Republic of Poland*, *cit.*, para 97.

[15] CJEU, judgment of 5 November 2019, *European Commission v. Republic of Poland*, case C-192/18, EU:C:2019:924.

[16] CJEU, judgment of 5 November 2019, *A.K. and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy*, cases C-585/18, C-624/18 and C-625/18, EU:C:2019.982 (*Independence of the Disciplinary Chamber of the Supreme Court*).

This was in particular due to the involvement of the new – and disputed[17] – National Judiciary Council (KRS) and the fact that sitting judges of the Supreme Court, who had not been appointed with the involvement of KRS, could not be appointed for the Disciplinary Chamber.

The national referring court (the Labour Chamber of the Polish Supreme Court) on 5 December 2019 ruled that the Disciplinary Chamber is not a court within the meaning of article 47 CEU, article 6 ECHR and article 45, paragraph 1, of the Polish constitution[18].

In *Repubblika*[19] it was the Constitutional Court of Malta that referred questions on the procedure laid down in the Maltese Constitution giving the Prime Minister discretion to appoint members of the judiciary.

In its judgment of 20 April 2021 the CJEU did not find that the Maltese law was contrary to EU law and emphasized in this respect a number of important constitutional and institutional measures that circumscribed the Prime Minister's discretion. However, the Court emphasized in its judgment the obligations to preserve the rule of law flowing from articles 2 and 19, paragraph 1, TEU[20].

3.3 Disciplinary and control procedures

If we now turn our attention to the area of disciplinary and control procedures, we once again have to mention a case of Polish origin, *Commission v Poland*, which was decided by our court on 15 July 2021[21].

The CJEU found that Poland had failed to fulfill its obligations under art. 19, paragraph 1, TEU by inter alia failing to guarantee the independence and

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[17] CJEU, judgment *A.B. and Others v Krajowa Rada Sądownictwa and Others*, *cit.*

[18] This subject was recently reconsidered by the CJEU in the judgment of 29 March 2022, *BN and Others v Getin Noble Bank S.A.*, case C-132/20, EU:C:2022:235.

[19] CJEU, judgment of 20 April 2021, *Repubblika v. Il-Prim Ministru*, case C-896/19, EU:C:2021:311.

[20] CJEU, *Repubblika v. Il-Prim Ministru*, *cit.*, paras 63-65.

[21] CJEU, judgment of 15 July 2021, *European Commission v Republic of Poland*, case C-791/19, EU:C:2021:596 (*Disciplinary regime for judges*).

impartiality of the Disciplinary Chamber and by allowing the content of judicial decisions to be classified as a disciplinary offence. The Court also found that Poland had violated article 267 TFEU by making it possible to trigger disciplinary procedures against Polish judges, who have used their right under article 267 TFEU to make a preliminary reference to the CJEU.

Romania is equally represented in our case-law under this sub-heading[22]. In the judgment, "Romanian Judges Forum", which was delivered on 18 May 2021, the CJEU once again stressed the need for disciplinary chambers to be set up in such a way and in accordance with rules such as to safeguard the impartiality and independence of the chamber and its individual members.

It is, said the CJEU, "essential that the body competent to conduct investigations and bring disciplinary proceedings should act objectively and impartially in performance of its duties and, to that end, be free from any external influence"[23].

As is normal in a preliminary ruling case it is then for the referring court to apply the EU-law as interpreted by the Court on the national law and the facts at hand in the national file.

3.4 Liability of judges

The Court in the "Romanian Judges Forum" case also drew a very sharp line between state financial liability for judicial errors, which is certainly in conformity with articles 2 and 19 TEU, and personal liability of individual judges for damages caused by the judicial errors they may have made, which on the other hand is not acceptable[24].

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[22] CJEU, judgment of 18 May 2021, *Asociaţia 'Forumul Judecătorilor din România' and Others v Inspecţia Judiciară and Others*, joined cases C-83/19, C-127/19, C-195/19, C-291/19 and C-397/19, EU:C:2021:393 (*Romanian Judges Forum*).

[23] CJEU, *Asociaţia 'Forumul Judecătorilor din România' and Others v Inspecţia Judiciară and Others*, *cit.*, para 199.

[24] JEU, *Asociaţia 'Forumul Judecătorilor din România' and Others v Inspecţia Judiciară and Others*, *cit.*, para 241.

3.5 Transfer of judges

The rules of Primary EU law on judicial independence, in particular art. 19, paragraph 1, TEU may equally play a role and set limits, when it comes to the transfer of judges against their will. The CJEU on 6 October 2021 rendered a judgment in the *W.Z.* case[25], which falls under this heading and confirms this. However, the factual and procedural setting of this case is so complex and intertwined with other preliminary references that for reasons of time I refrain from presenting it properly.

4. Possible general effects and consequences when the principles of rule of law and of judicial independence are not respected in a Member State

I have already mentioned the (in)admissibility of preliminary references made by bodies who in the end often end up not qualifying as a "court or tribunal" in the sense of article 267 TFEU, which of course is often a consequence of lack of judicial independence. Although it is normally a consequence of an individual character, as it normally concerns a single body.

I will now instead talk a little on the possible more general consequences, when these principles are not respected and judicial independence is not or no longer present, in particular due to a "systemic or generalized deficiency", in the judicial system of a Member State.

The issue has already been brought before the CJEU on several occasions.

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[25] CJEU, judgment of 6 October 2021, *W.Z.*, case C-487/19, EU:C:2021:798 (*Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment*).

5. The Framework Decision on the European Arrest Warrant

This happened for the first time in a judgment in the Minister for Justice and Equality case of 12 March 2018[26] on a preliminary reference from an Irish court confronted with a European Arrest Warrant concerning the surrender of a Polish citizen to Poland. The referring court was - with reference to inter alia reports from the Venice Commission - concerned with the possible general deficiencies in the Polish judicial system.

The referring court therefore asked whether the general violations of the principle of judicial independence in Poland following the judgments delivered by the CJEU implied that there was no longer a sufficient basis for the necessary mutual trust in order to execute the EAW at hand.

The CJEU referring to the *Aranyosi and Caldararu*-judgment[27] stated that "limitations may be placed on the principles of mutual recognition and mutual trust between Member States in «exceptional circumstances»"[28]. The Court also noted that "not only the decision on executing a European arrest warrant, but also the decision on issuing such a warrant, must be taken by a judicial authority that meets the requirements inherent in effective judicial protection – including the guarantee of independence"[29].

The CJEU continued to follow the reasoning of the *Aranyosi and Caldararu*-judgment and told the executing judicial authority to "determine, specifically and precisely, whether, having regard to his personal situation, as well as to the nature of the offence for which he is being prosecuted and the factual context that form the basis of the European arrest warrant, and in the light of the information provided by the issuing Member State [...] there are

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[26] CJEU, judgment of 25 July 2018, *LM*, case C-216/18 PPU, EU:C:2018:586 (*Deficiencies in the system of justice*).

[27] CJEU, judgment of 5 April 2016, *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen*, joined cases C-404/15 and C-659/15 PPU, EU:C:2016:198.

[28] CJEU, *LM*, *cit.*, para 46.

[29] CJEU, *LM*, *cit.*, para 56.

substantial grounds for believing that [the wanted person] will run such a risk if he is surrendered to that state"[30].

The essentially same question has come back to the CJEU on references mostly from Dutch courts. The answers given so far[31] have been in line with the answers in *Minister for Justice and Equality,* but we have still pending cases on these and similar issues[32]. I should also mention here a reference from the Italian Constitutional Court on the application of the *Aranyosi and Caldararu* "logic" on individual health issues[33].

I believe it is fair to say that the CJEU, in particular when it comes to the FD EAW has given a certain priority to the principle of mutual recognition based on mutual trust. The Court has accepted that the EU legislator has set the bar quite high before a general or individual (risk of) breach of the principle of rule of law and judicial independence in the issuing Member State obliges the executing Member State to not execute an EAW.

It is finally important here to bear in mind that - different from say the area of the Dublin-regime - we are with the FD EAW confronted with a kind of Goldilocks' squeeze.

The administrative and judicial authorities "have to get it just right", when interpreting the FD. They must surrender the requested person, unless a sufficiently qualified breach of fundamental rights exceptionally obliges them not to surrender. They are not allowed to be more generous in applying the fundamental rights "to be on the safe side."

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[30] CJEU, *LM*, *cit.*, para 67.

[31] CJEU, judgments of 17 December 2020, *L and P*, joined cases C-354/20 PPU and C-412/20 PPU, EU:C:2020:1033, and of 22 February 2022, *X and Y v Openbaar Ministerie*, Joined Cases C-562/21 and C-563/21 PPU, EU:C:2022:100.

[32] *Pending case Puig Gordi and Others*, case C-158/21. In this case, the ADVOCATE GENERAL delivered his *Opinion* on 14 July 2022, EU:C:2022:573.

[33] *Pending case E.D.L.*, case C-699/21.


CVRIA