Presidente della Corte Costituzionale
Prof. Silvana Sciarra

1952-2022: Forum straordinario dei magistrati in occasione del 70° anniversario della Corte di giustizia dell'Unione europea sul tema "Una giustizia vicina al cittadino"

Lussemburgo - 5 Dicembre 2022

Judicial activism and judicial wisdom

It is a great honor for me to speak in this opening session, during a most evocative celebration of the Court of Justice of the European Union. From a personal experience, I can add with no hesitation – despite some initial worry about increased wrinkles – that to be seventy-year-old is a wonderful time in life, to enjoy in an ongoing search for a deeper knowledge of oneself and greater confidence in future achievements.

I argue in my presentation that this is the self-analysis the Court of Justice is currently undergoing. The outcome of such a complex exercise is also due to the cooperation of national courts in preliminary references, with a special emphasis to be acknowledged whenever constitutional and supreme courts take the lead.

Constitutional courts are in the position to create unforeseen threads of integration: as courts of last instance, they also act as guardians of national constitutional identities. They are pillars supporting the European building and they should, because of this responsibility, disseminate common European visions.

In particular, the 'identity clause' assigns to national constitutional courts the highest responsibility in concretizing the spirit of mutual cooperation. **The point to be made is that national identities are protected not against Europe, but because of Europe**: there is a need to open up a constant and evolving interaction, based on common values. Preliminary references must play a role in pushing the CJEU towards enhanced coherence, with a view to strengthen democracy and the rule of law.

Celebrations often involve a short analysis of the past, with an immediate projection into the future. Since we are discussing preliminary references, memories go to leading cases which have contributed to shape the European legal order and have set the scene for the current discussion.

No need to quote them before such a distinguished audience. But it is noteworthy that the Court itself quotes them in recent judgments, as if this thread of continuity should help to fortify its responsibility and display coherence as a qualifying element of its own reasoning.

In *RS*, for example, *Van Gend & Loos* is mentioned to recollect that 'unlike standard international treaties, the Community Treaties established a new legal order, integrated into the legal systems of the Member States on the entry into force of the Treaties and which is binding on their courts'.[1] *Costa* and the well-known passage mentioning the 'Community's own legal system' is also quoted, to remind all of us that reciprocity among Member states 'means, as a corollary, that they cannot accord precedence to a unilateral and subsequent measure over that legal system or rely on rules of national law of any kind against the law stemming from the EEC Treaty'.[2]

In early discussions on preliminary references commentators put forward concerns – as well as appreciation – for the innovative solutions brought forward by this original form of communication among courts. Some of that criticism can be looked at now from a different perspective, due to the different phase European integration is experiencing and to new challenges to the rule of law.

For example, judicial activism – which was in the past perceived as a potential problem with regard to specific fields, one of them in particular being social law and its balance with market values – appears now among the concerns of the Polish Constitutional Court in a completely different perspective. Following the CJEU's decision on interim measures, adopted in order to preserve the independent functioning of the judiciary,[3] the 'CJEU's progressive activism' – it is maintained – ends up interfering with the competence of state authorities and undermining the Polish constitution.[4] This point is accompanied by the description of a hierarchical system of sources, whereby the TEU 'occupies a position which is lower than that of the Constitution, and just as any ratified international agreement […] the TEU must be consistent with the Constitution'. Furthermore, judgments delivered

[1] Case C-430/21, *RS* (Grand Chamber), EU:C:2022:99, para 47, where mention is made of recent cases in this line of reasoning.
[2] *Ibid*., para 48.
[3] Case C-791/19 (Grand Chamber), *Commission* v *Republic of Poland*, EU:C:2021:596. This judgment was delivered in an action brought by the Commission for failure to fulfil obligations under Article 258 TFEU. On 17 July 2019 the Commission had issued a reasoned opinion, stating that the new measures on disciplinary actions for judges, adopted by Poland, were not in compliance with art 19(1) TEU and the second and third paragraphs of Article 267 TFEU, despite the letter of formal notice sent by the Commission on 3 April 2019. Poland replied to this letter denying infringements of EU law.
[4] Press Release After the Hearing, Polish Constitutional Tribunal, Ref. No. K 3/21, point 22. https://trybunal.gov.pl/en/news/press-releases/after-the-hearing/art/11664-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej

by the CJEU are 'hybrid in character' and are not necessarily to be deemed as binding sources of law. Hence, the criticism addressed to the CJEU for its invasion of national prerogatives.

Back in 1989 concerns about judicial activism inspired, among others, judge Federico Mancini. In reply to the Court's fiercest critics, he wrote that the making of a constitution for Europe was the utmost result of the case law elaborated from the early days onwards. However, he specified, 'the court would have been far less successful had it not been assisted by two mighty allies: the national courts and the Commission'.[5]

Let us contextualize such a phrase in the current discussion.

Breaches of the rule of law in Hungary and Poland were at the core of two CJEU's judgements dealing with access to European funds as provided for in Regulation 2020/2092. The latter, according to the Court with regard to Hungary, satisfies the principle of legal certainty, since the Commission bases its assessments on objective opinions. Breaches of the rule of law are not raised as such, but to protect the Union budget, when those breaches affect the sound financial budget of the Union 'in a sufficiently direct way'. The Commission – as this example shows very clearly – was and continues to be a 'mighty' ally of the Court.

Arguing on similar grounds and addressing the Polish case, the Court underlined that measures taken to protect financial interests must be considered 'strictly proportionate to the effect of the breaches which have been determined of the principles of the rule of law on the Union budget'.[6]

In linking together respect for the rule of law and access to financial support, the Court directs a message to Member States, underlying the many facets of membership of the Union. The Court, however, is not alone in playing this role; it is part of an interinstitutional strategy, whereby all other actors have been focussing on the same issues and trying to reach reluctant governments. Among those actors the Commission is visible. Yet, the same is true for the European Parliament, which adopted several resolutions on the need to immediately apply the 'Rule of Law Conditionality Mechanism'.[7]

Let us now move to the other 'mighty allies' of the CJEU, namely national courts.

National courts have become over the years more experienced interlocutors and at times severe ones. **Lodging a preliminary reference does not necessarily foresee full agreement with the Court's answer;** it may imply a challenge, testing the ground for affirming a separate point of view and bringing this result back into the national arena, to show the dominance of one discourse over the

[5] G. F. Mancini, *Democracy & Constitutionalism in the European Union. Collected essays*, Hart, Oxford, 2000, p. 2.
[6] Case C-157/21 (Full Court), *Poland* v *European Parliament and the Council of the European Union*, EU:C:2022:98, para 359.
[7] European Parliament, Resolution of 25 March 2021 on the application of Regulation (EU, Euratom) 2020/2092, the rule-of-law conditionality mechanism (2021/2582(RSP)); European Parliament, Resolution of 10 March 2022 on the rule of law and the consequences of the ECJ ruling (2022/2535(RSP)).

other. **This game is part of what I suggest describing as 'institutional pluralism', an attempt to compare different experiences and to search solutions**.

However, should national identity be the crucial card of the game, played to deny European identity, this move could result into a perilous path to follow. It would have been equally perilous, back at the origin of this debate among courts, to deny support to an emerging status of the European court, acting as a quasi-federal court, choosing the tool of preliminary references whenever possible.

In the early debate – the one Mancini refers to – the need to discover general principles of European law was preeminent. In the current discussion, we discover, in addition to that early approach, what the search for common values really means, in the prospect of preserving and even enriching the European integration process.

The notion of cooperation is momentous in the overall structure of preliminary reference procedures, enshrined in Article 267 TFEU. In its recent case-law the CJEU has emphasised such centrality even further, in the attempt to strengthen the principle underlying Article 19 (1) TEU, namely its own task in ensuring 'that in the interpretation and application of the Treaties the law is observed'.

The CJEU clarified the connection between Article 267 and Article 19 (1) in a renowned decision dealing with an association of Portuguese judges, which sets the beginning of a long chain of decisions. Ruling on the independence of judges and its compatibility with temporary wage reductions, due to constraints in the state budget, the Court stated that Article 19 (1) TEU 'which gives concrete expression to the value of the rule of law stated in Article 2 TEU, entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals'.[8] The connection established among such articles is new and of extreme relevance, linked, as it is in a systematic interpretation with Article 47 CFREU.

In this frame of reference, collaboration with the CJEU is for national courts the fulfilment of a duty, functional to a system of effective legal remedies. The concretization of a value – the rule of law – through a combined reference to Articles 267 and 19 (1), is not meant as mere symbolism. A preliminary reference, which is at the origin of the case previously quoted, promoted stronger commitments towards an even stronger collaboration of the two levels: the CJEU and national courts. Such a combined effort goes into the direction of enforcing common European values.

Furthermore, in *Repubblika*, in response to a preliminary reference lodged by a Maltese court acting as a constitutional court, **the Court recalls Article 2 TEU and mentions trust among Member States and among their judges as a product of shared values, in particular the rule of**

[8] Case C-64/16 (Grand Chamber), *Associação Sindical dos Juízes Portugueses*, EU:C:2017:395, para 32.

law, as it is concretised in Article 19 (1). Whenever changes are foreseen – the Court adds – national legislatures are bound by a clause of non-regression,[9] which, in the end, aims at guaranteeing a balance between effective judicial protection, as in Article 47 of the CFREU, and the independence of the judiciary. There can be no regression from the founding values written in Article 2 TEU.

In *RS* the CJEU clarified even further the connection that keeps together the preliminary ruling procedure and the second subparagraph of Article 19 (1) TEU, with regard to judicial independence, whenever the principle of primacy of EU law is at stake. Ordinary courts should not enforce national rules or national practices under which a national judge may incur disciplinary liability, for having applied EU law, as interpreted by the Court, and having left aside the case-law of the Constitutional Court, the one of Romania in the specific case.[10]

Although no precise constitutional model is imposed by EU law, it is important to underline that preliminary references in recent cases set in motion a cooperative mechanism, leading towards a forward-looking interpretation of Article 4 (2). **Full respect of national identities strengthens the notion of a European identity.**

Cooperation prompted by preliminary references can also be mentioned in view of achieving further exploration of the impact of the CFREU. Indeed, over the first ten-year period of the binding Charter, they have increased in a significant way (from 19 to 84).[11] Suffice here to recall two recent cases in which the contribution of this cooperative mechanism is particularly evident.

In *X v Staatssecretaris van Justitie en Veiligheid*,[12] upon reference for a request of an interpretative preliminary ruling from a Dutch District Court, the CJEU had the chance to highlight that the fundamental rights enshrined in the Charter lie at the core of the development of the Area of Freedom, Security and Justice, and, thus, of the EU integration process as a whole.

In this judgment, rendered on 22 November 2022, the Grand Chamber reached the conclusion, *inter alia*, that some provisions of secondary law 'read in conjunction' with Articles 1, 4, and 19 (2) CFREU must be interpreted as precluding a Member State from adopting a return decision or removing a third-country national who is staying illegally and suffering from a serious illness, where there is substantial ground for believing that that person will be, in that event, exposed to a real risk of a significant, permanent and rapid increase in his or her pain.

The Court points to the fact that **when the question submitted concerns the interpretation or the validity of a rule of EU law, it enjoys a 'presumption of relevance', so that the Court is,**

[9] Case C-896/19 (Grand Chamber), *Repubblika*, EU:C:2021:311, paras 62-63.
[10] Case C-430/21, n 1 above.
[11] European Commission, 2018 Report on the application of the EU Charter of Fundamental Rights, COM (2019)257, p. 14.
[12] Case C-69/21 (Grand Chamber), *X v Staatssecretaris van Justitie en Veiligheid*, EU:C:2022:913.

in principle, bound to give a ruling.[13] In this perspective, it is important to underline the expression **'read in conjunction', which links together the interpretation of secondary law with articles of the Charter**.

Amongst the passages of the Court's reasoning that would deserve to be recalled, it is worth mentioning the close tie found to exist between the principle of non-refoulement and the fundamental right to respect for private life protected in Article 7 of the Charter,[14] without – however – allowing an undue extension of the Charter beyond its scope of application.[15] In other words, this case is one of the many examples where the CJEU has been able to extensively, fruitfully, and wisely make use of the 'assist' on the Charter offered by the referring court in the context of the preliminary ruling procedure.

Moreover, in a preliminary reference lodged by the Italian Constitutional Court, dealing with maternity and childbirth allowances, Article 34 of the Charter is mentioned as an additional parameter to be taken into account, when interpreting EU secondary law. In relation to this latter, the emphasis placed on this provision of the Charter proves the constitutional significance that, *today*, preliminary reference questions, directly involving the CFREU, have for the development of the Union legal order.

In the CJEU's response to this reference, **the spirit of mutual respect is exemplified in the 'presumption of relevance' endorsed to the referring constitutional court,** since the latter 'is not the court called upon to rule directly in the disputes in the main proceedings, but rather a constitutional court to which a question of pure law has been referred'.[16] Furthermore, the CJEU affirms that by the reference to Regulation No. 883/2004 Article 12 (1) e of Directive 2011/98 'gives specific expression to the entitlement to social security benefits provided for in Article 34 (1) and (2) of the Charter'.[17]

These two passages of the Court's judgment are instructive. The acknowledgement of the **special role performed by a constitutional court runs parallel to the exploration of synergies among national constitutional standards and Charter's rights**. The 'presumption of relevance' has in this case, as compared to the other example I quoted, an even more innovative significance, since it is meant to emphasise both the national and European dimension of preliminary references, when constitutional values are at stake.

After receiving the requested clarifications from Luxembourg, the Italian Constitutional Court returned to its own case and ruled unconstitutional the provisions of national legislation which the

[13] *Ibid.*, para 41
[14] *Ibid.*, paras 92-94.
[15] *Ibid.*, para 87 and para 96 ff.
[16] Case C-350/20 (Grand Chamber), *INPS*, EU:C:2021:659, para 39.
[17] *Ibid.*, para 46. In order No. 182/2020, point of law 7.1 the Constitutional Court asked the Court of Justice 'whether Article 34 of the Charter must be interpreted as meaning that its scope includes the childbirth and maternity allowances.

CJEU had held incompatible with EU law. In confirming the necessary interaction with the CFREU, in order to establish 'a systemic and unfragmented protection', the Court recalls that Article 34 CFREU expressly refers to 'national laws and practices', when recognising the right of access to social security benefits. Hence, it cannot fail to take into account the guarantees enshrined in constitutions.[18]

Making entitlement to childbirth and maternity allowances conditional upon holding a long-term residence permit, Italian legislation arbitrarily discriminates against both mothers and the new-born, bearing no reasonable relation to the purpose of the benefits in question.

In this judgment, which concludes a fruitful conversation with the CJEU, coinciding goals emerge, when addressing the principle of equality (Article 3) and providing support for families (Article 31), both enshrined in the Italian Constitution. Article 34 of the CFREU is interpreted in close connection with European secondary law, functioning as a guide in ascertaining who the beneficiaries of social security allowances are, when all requirements of legal residence are met.

It is time to draw some conclusions and to underline again the importance of celebrations – such as the present one – which open the floor to re-evaluation of the past, in order to look ahead and gain a positive understanding of progresses achieved.

To 'judicial activism' negative connotations have often been attributed.

We could now explore the expression **'judicial wisdom'**, since we are celebrating the anniversary of a seventy-year-old Court, namely a well-established institution and certainly a very active one, with an even more accentuated aptitude to listening and building consensus.

It is now time to go further and put more fuel in the engine of integration.

The engine is mostly efficient when national courts – and constitutional courts in particular – collaborate in maximising the enforcement of common values, enhancing the 'principle of sincere cooperation' echoed in Article 4(3), which is intrinsic to the notion of 'full mutual respect'. This common effort – which characterises so vividly the current state of affairs within an open interinstitutional exchange – is made possible because, back in the past, the CJEU was active in creating a coherent environment, mostly insisting on the enforcement of structural European principles, such primacy and direct effect.

'Judicial wisdom' implies further responsibilities and further responsiveness towards all institutional actors.

---

[18] *Corte costituzionale*, Judgment No. 54/2022 of 11 January 2022, Point of law No. 10, available at https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/SENTENZA%20n.%2054%20del%202022%20-%20red.%20Sciarra%20EN.pdf.