



# **RULE OF LAW IN EUROPE PERSPECTIVES FROM PRACTITIONERS AND ACADEMICS**

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# FOREWORD

It is with great pleasure that I introduce to you “Rule of Law in Europe. Perspectives from practitioners and academics”, produced by the European Judicial Training Network (EJTN) within the Pilot training project for justice professionals on key issues of fundamental rights and rule of law, implemented in 2018 - 2019 as part of the European Commission’s strategy for the effective implementation of the EU Charter of Fundamental Rights.

Before explaining the aim of this publication, how it came about and its content, I wish to share some background information about the EJTN.

The EJTN is the principal platform and promoter for the European judiciary’s training and exchange of knowledge. The EJTN represents the interests of over 120,000 European judges, prosecutors, judicial trainers and trainees across Europe. Formed in 2000, the EJTN’s fields of interest include EU, civil, criminal, commercial and administrative law, as well as EU fundamental rights, linguistics and societal issues training. The vision of the EJTN is to help foster a common legal and judicial European culture.

Based on this mandate, the EJTN promotes training programmes with a genuine European dimension for members of the European judiciary.

The *EJTN Strategic Plan 2021-2027* stipulates that the rule of law, judicial independence and accountability are core competencies of judges and prosecutors, and that these aspects should be enhanced through training offered by the EJTN. The EU’s judicial systems are based on the principles of independence, impartiality, integrity, transparency, accountability and professionalism, all of which are key to the rule of law, upholding public trust and ensuring the effective delivery of justice.

With this publication, the EJTN aims to increase judges and prosecutors’ knowledge about key elements of the rule of law and its practical implications in their professional and private lives. Awareness of the values and rules that judges and prosecutors need to adhere to in their work, such as integrity and competence, and EU law requirements and standards concerning independence, media communication strategies and appointment or disciplinary procedures, is essential to reinforcing the rule of law.

The objectives of this publication are to strengthen a rule of law culture and increase knowledge of the rule of law standards deriving from several sources, such as EU law, the case-law of the Court of Justice of the European Union (CJEU), the case-law of the European Court of Human Rights (ECtHR), as well as the recommendations and standards of numerous European and international organisations such as the Council of Europe. The publication aims to enable practitioners from different countries to respond to the various challenges relating to the rule of law, and to be aware of how to implement mechanisms to prevent, correct and sanction abuse of the rule of law in practitioners’ daily activities. Also central to this publication is the sharing of experiences of European colleagues and increasing mutual understanding.

The publication consists of four articles authored by four prominent academics and practitioners: Paul Craig; Stanislas Adam; Nuria Diaz Abad; and Lorenzo Salazar. I am grateful to them for their contributions, and for the support provided to the EJTN in the implementation of actions in the field of the rule of law.

Essential for the production of this publication was the information gathered from the seminars and webinars implemented by the said project, which was financed by the European Commission and implemented by the EJTN. The project was concluded with a final conference hosted by the Court of Justice of European Union on 13-14 May 2019, with three excellent keynote speeches addressed to the audience by CJEU President Koen Lenaerts, ECtHR First Vice-President Angelica Nussberger and Mr Emmanuel Crabit, EC Director, all annexed to this publication.

In parallel to this publication, another output of this project was the publication of the *Training Guide on the rule of law (RoL) for judges and prosecutors*.

EJTN's acknowledgements go to the members of the EJTN experts' group, which provided the scientific oversight for this project and its outputs. The group was coordinated by judge Nicolae Horatius Dumbrava (RO) and consisted of Professor Rafael Bustos Gisbert, Ms Karolina Rokicka (The Academy of European Law, ERA), judge Andrea Chis (RO, European Networks of Councils for the Judiciary), judge Zeller Edith (AT, Association of European Administrative Judges, AEAJ), Astrid Hopma (NL), prosecutor Lara Barberic (HR), Eva Pastrana (Council of Europe, CoE), Jana Gajdosova (European Union Agency for Fundamental Rights, FRA), prosecutor Sava Petrov (BG), judge Luca Perilli (IT), Claudia Weisbart (DE) and Wojciech Postulski (EJTN). The EJTN is also grateful to the European Commission's representatives supporting the experts' group.

The project was managed by Mr Georgios Klis, EJTN Project Manager, to whom I owe much gratitude for his commitment and dedication to the project's implementation.

Finally, I wish to thank the Tipik Communication Agency S.A. for its efficient collaboration in the implementation of the project.

I am sure this publication will become a source of daily advice and assistance, as well as inspiration for performing the everyday duties common to judges and prosecutors across Europe.

**Wojciech Postulski**

Judge and Secretary General of the European Judicial Training Network

# BIOGRAPHIES

**Paul Craig** is an Emeritus Professor of law at St John's College, Oxford. He teaches, researches and writes on Constitutional law, Administrative law, EU law and Comparative Administrative law. He is a Fellow of the British Academy, and an Honorary QC. He was the UK Alternate Member of the Venice Commission on Law and Democracy from 2011-2019, and was Delegate of Oxford University Press from 2009-2019.

**Stanislas Adam** is a legal secretary at the Court of Justice of the European Union (Luxembourg), in the chambers of President Koen Lenaerts, and professor of European Union law at Ghent University, where he is in charge of the course 'EU Competition Law'. After graduating in law at the University of Louvain (U.C.L.) and in European law at Ghent University, he was awarded a doctorate fellowship from the National Fund for Scientific Research – Flanders (FWO). He defended his doctoral thesis in 2010, under supervision of Professor Marc Maresceau (*La procédure d'avis devant la Cour de justice de l'Union européenne*, Bruylant 2011). He then obtained a Master of Laws at Harvard University (LL.M. '11), where he benefitted from the *Frank Boas Scholarship for Graduate Studies*. After graduation, he was appointed as a legal secretary at the CJEU, working in turn for Judge Nicholas James Forwood (General Court), Advocate General Eleanor Sharpston and Judge Ricardo da Silva Passos (General Court). Stanislas Adam joined the chambers of the President of the Court in 2017. He published extensively in European and Belgian administrative and constitutional law and was a guest lecturer at the Universities of Namur (FUNDP) and Luxembourg.

**Nuria Díaz Abad** is "Abogado del Estado" to the Administrative Court in Madrid (Audiencia Nacional) since 2018. Agent for the Kingdom of Spain to the Court of Justice of the European Union (1997-2014) and legal advisor in the Legal Service of the Ministry of Public Works, Transports and Environment (1992-1997). Member of the Spanish General Council for the Judiciary (since 2013). President of the European Network of Councils for the Judiciary (2016-2018). Member of the Board of Directors of the Spanish Association for European Law Studies (AEDEUR). Honours and awards: Cross of Civil Merit, San Raimundo de Peñafort Medal of Honour and Order of Isabel the Catholic and Medal "Bene Merentibus Iustitiae" by the National Council of the Judiciary of Poland. Author of several publications in the field of Administrative Law and European Union Law.

**Lorenzo Salazar** is *Deputy Prosecutor General to the Court of Appeal of Naples*. He graduated *cum laude* in the Rome University "La Sapienza" in 1980. Entered the Judiciary in 1982; judge in the Court of Busto Arsizio from 1984 till 1987 when appointed *Reférendaire* of the Italian Advocate General in the Court of Justice of the European Union in Luxembourg. From 1989 to 1996 Member of the *Ufficio Legislativo* in the Ministry of Justice. 1997-2004 Counsellor for Judicial Cooperation in the Italian Permanent Representation to the European Union in Brussels. 2005-2008 Member of the Cabinet of the Vice President of the European Commission, Commissioner for Justice and Home Affairs. 2008-2015 Director for Legislative and International Criminal Affairs in the Italian Ministry of Justice. Since March 2015 Deputy Prosecutor General to the Court of Appeal of Naples. Since 2014 Vice-Chair of the Working Group on International Bribery (WGB) of the OECD. Former Chair of the Multidisciplinary Group against Corruption (GMC) (1996-2000) and of the European Committee for Crime Problems (CDPC) (2011-2013) of the Council of Europe. Coordinator of the 2014 Italian Presidency of the EU and Chair of the Working Group on the European Public Prosecutor's Office (EPPU). Author of many articles on judicial cooperation in criminal matters and fight against corruption, fraud and organized crime.

# LIST OF ABBREVIATIONS

ACA Europe	Association of the Councils of State and Supreme Administrative Courts
AEAJ	Association of European Administrative Judges
AFSJ	Area of Freedom, Security and Justice
CCJE	Consultative Council of European Judges
CCPE	Consultative Council of European Prosecutors
CETA	EU-Canada Comprehensive Economic and Trade Agreement
CJEU	Court of Justice of the European Union
CM/Rec	Committee of Ministers of the Council of Europe Recommendation
COM	Commission Communication
CSM Portugal	Conselho Superior da Magistratura
EAJ	European Association of Judges
EAW	European Arrest Warrant
ECHR	European Convention on Human Rights
ECLI	European Case Law Identifier
ECtHR	European Court of Human Rights
EJTN	European Judicial Training Network
ENCJ	European Network of Councils of the Judiciary
EPPO	European Public Prosecutor's Office
EU	European Union
GRECO	Group of States Against Corruption (Council of Europe)
HFC	United Nations Human Rights Council
IAJ	International Association of Judges
IAP	International Association of Prosecutors
MEDEL	Magistrats européens pour la démocratie et les libertés
OBT	National Judicial Council of the Hungarian Judiciary
OECD	Organisation for Economic Co-operation and Development
OECD WGB	Organisation for Economic Co-operation and Development Working Group on Bribery
OJ	Official Journal of the European Union
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
UN	United Nations
UNCAC	United Nations Convention against Corruption
UNODC	United Nations Office on Drugs and Crime

## CHAPTER 1

# DEFINITION AND CONCEPTUALISATION OF THE RULE OF LAW AND THE ROLE OF JUDICIAL INDEPENDENCE THEREIN

PAUL CRAIG

## 1. INTRODUCTION

This publication is concerned with the rule of law, with a particular focus on the importance of judicial independence as a component of the rule of law. The objective of this part of the publication is to provide the theoretical and conceptual foundations for the rule of law. The case law concerning judicial independence is explained in a later section of this publication. It is important to be mindful of the elements that comprise the rule of law. This is crucial for an understanding of the more detailed checklist of components of the rule of law contained in Venice Commission documents, and for an understanding of the more detailed case law on judicial independence.

The following sections will, therefore, elaborate on three components of the rule of law, and will address the relationship between each of them and judicial independence. It is important, when reading the material that follows, to be aware of the following point. The three components of the rule of law are interconnected/should be seen as complementary. The first component is the most narrowly defined one, the second is broader, and the third is the most far-reaching.

## 2. THE RULE OF LAW: LAWFUL AUTHORITY

### 2.1. The first component

The core idea of the rule of law is that the legislature and government must be able to point to some basis for its action that is regarded as valid by the relevant legal system. Thus, for example in the UK such action would commonly have its foundation in statute, the prerogative or in common law power. The relevant measure would have to be made by the properly authorised person or institution, in the properly authorised manner. This is the principle of legality or lawful authority.

The same point can be made about any legal system, as exemplified by the EU. The European Union is based on attributed power. It only has the powers conferred on it by the Lisbon Treaty, as elaborated by the EU courts. The EU institutions must, therefore, be able to point to a Treaty foundation for the enactment of legislative acts pursuant to Article 289 TFEU, which is why every such measure will specify the Treaty article pursuant to which the legislative act has been made. This is equally true of other EU legal acts. Thus, for example, a delegated act made pursuant

to Article 290 TFEU must meet the requirements stipulated in that Treaty article, which will be tested against the legislative act that provides the foundation for the delegated act. If the EU institutions cannot provide a legal foundation for its action then it will be unlawful, since there will be no lawful authority for it.

This component of the rule of law tells one nothing as to the nature of the challenged governmental action. The government might be seeking to achieve some benign objective, or it might be attempting to do something that most would regard as undesirable. This is irrelevant for the purposes of the present inquiry. The measure would be equally contrary to the rule of law if the government could not point to some basis for its action that would be regarded as valid by that legal system.

## **2.2. The Importance of this component of the rule of law**

This component of the rule of law is narrow, but it is nonetheless central, in the sense that any component of the rule of law must embrace the requirement of lawful authority. This is because it is expressive of a fundamental precept. Citizens accept that the government has authority to take action, but only if it is in accord with the rules of that system as to what constitutes lawful authority. Citizens might also accept that the rules of that particular legal system as to what constitutes lawful authority require amendment. If the change occurs, it will be put into effect through the pre-existing rules as to what constitutes legal authority.

Citizens do not accept that the government can act beyond the existing rules as to what constitutes legal authority. All the more so since the rules as to what constitutes lawful authority in any particular legal system express fundamental values of that system. Thus, if these rules stipulate certain procedures for the enactment of legislation, it would not be acceptable for the executive to bypass these and purport to enact legislation that did not conform to these conditions. It would equally be unacceptable for the government or executive to arrogate to itself discretionary power that went beyond the bounds of lawful authority recognised by that legal system.

## **2.3. The principle of lawful authority and Judicial Independence**

Judicial independence is central to this component of the rule of law, for reasons that are not hard to divine. If the government or legislature exceeds the boundaries of its lawful authority, then its action will be null or invalid. There must be independent courts to assess, in an objective manner, whether the limits on lawful authority have been exceeded. If the courts lack such independence, or are subservient to the will of the political branch of government, then there is a real danger that fundamental limits on the scope of political power will be ignored.

Lack of judicial independence may also manifest itself in other ways, which are equally dangerous. Thus, if the courts are beholden to the political branch of government they may well interpret the boundaries of lawful authority in an over-expansive manner, thereby legitimating legislative or executive action that ought to be annulled. If there are doubts as to whether the government or legislature has exceeded the boundaries of its lawful authority, the courts should therefore provide a clear and objective answer, which is respectful to the values that underlie those limits, viewed against the constitution of that country.

## 3. THE RULE OF LAW: GUIDING CONDUCT

### 3.1. The second component

The component of the rule of law considered in the preceding section is important, but limited. Any law properly passed by the legislature would meet the standard of legality defined in this manner. Thus, the fact that laws are enacted in the correct legal manner is a necessary facet of the rule of law, but it is not sufficient.

It is for this reason that the rule of law demands more than this. A further important aspect of the rule of law is that the laws thus promulgated should be capable of guiding one's conduct in order that one can plan one's life; in other words, they should ensure legal certainty. It is from this general precept that Joseph Raz deduced a number of more specific attributes that laws should have in order that they comply with the rule of law.<sup>1</sup> These are all related to the idea of enabling individuals to be able to plan their lives.

The 'list' includes the following: that laws should be prospective, not retrospective; that they should be relatively stable; that particular laws should be guided by open, general and clear rules; that there should be an independent judiciary; that there should be access to the courts; and that the discretion which law enforcement agencies possess should not be allowed to undermine the purposes of the relevant legal rules.

It is important to understand that this second component of the rule of law does not address the actual content of the law. If a law is prospective, stable, applied by an independent judiciary, and individuals have access to courts, then it complies with the rule of law. The content of the law may be morally good, or it may be morally reprehensible. This does not, however, affect compatibility with this second component of the rule of law. Thus, a 'good law' as determined by its content might still not meet this component of the rule of law, if it was unclear or vague. By parity of reasoning, a 'bad law' as determined by its content could comply with the component of the rule of law articulated by Joseph Raz.

This component of the rule of law is therefore not concerned with the actual content of the law, in the sense of whether the law is just or unjust, if the formal precepts of the rule of law are themselves met. It is necessary to consider the content of the law to decide whether it complies with the precepts of the rule of law concerning clarity, generality, non-retrospectivity, etc. However, if it does so comply then that is the end of the inquiry.

It follows that the components of the rule of law articulated here could be met by regimes whose laws were morally objectionable, provided they comply with the formal precepts of the rule of law. It also follows that not all laws passed by a democratic regime will necessarily comply with the rule of law.

### 3.2. The Importance of the second component of the rule of law

The important precept underlying this second component of the rule of law is that people should be able to plan their lives, knowing the legal consequences of their actions. Thus, on this view, the rule of law demands not only that the government and legislature act within the bounds of their lawful authority. It also demands that the laws they enact meet the conditions for this second component of the rule of law, and are therefore capable of guiding a person's conduct, so that they can know the legal consequences of their action.

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1. 'The Rule of Law and its Virtue' (1977) 93 Law Quarterly Review 195.

The link between the ability to plan one's life and this second component of the rule of law is readily apparent. Laws must of course change over time, but if laws are not relatively stable, then citizens will not be able to plan their life with knowledge of the legal outcomes. This is even more apparent in relation to the requirement that laws must be prospective and not retrospective. If a law is applicable to facts that occurred prior to its enactment then by definition an individual cannot plan his or her life knowing the legal outcome of their choices. This is because the legal outcome has changed retrospectively after they had already taken the relevant action.

This second component of the rule of law is essentially a negative value. Given that the law can empower the state to do all manner of things, the rule of law minimises the danger created by the law itself. It does so by ensuring that whatever the content of the law, at least it should be open, clear, stable, general and applied by an impartial judiciary. It would, however, be mistaken not to recognise the more positive side of this component of the rule of law. Thus, even if the actual content of the law is morally reprehensible, conformity to the rule of law will often be necessary to ensure that individuals comply with the demands that the law imposes.

It is also important to recognise that the facet of the rule of law in the above sense is only one virtue of a legal system, and there is a margin of appreciation to attain certain desired ends. We may sacrifice the rule of law virtues of having clear, general laws if the best, or only way, to achieve a desired goal is to have more discretionary, open-textured legal provisions. This may be so where it is not possible to lay down in advance in the enabling legislation clear rules in sufficient detail to cover all eventualities. This is not forbidden or proscribed.

### **3.3. The second component of the rule of law and Judicial Independence**

There are two senses in which judicial independence is central to this component of the rule of law. They may be termed the primary and the secondary connection.

#### **3.3.1. The Primary Connection**

The primary connection follows from the fact that an independent judiciary is one of the express conditions for this component of the rule of law. The reason for its inclusion is readily apparent, and relates directly to the idea that the rule of law is to enable people to plan their lives knowing the legal consequences of their actions. Consider the following simple example:

The legislature has enacted a law designed to deter and punish governmental corruption in public procurement. Company X follows this law to the letter, and does not even consider offering any direct or indirect inducement to the public body in order to secure the contract. Company Y is awarded the contract, and it transpires that it offered financial inducements that would, on an ordinary reading of the legislation, be regarded as illegal.

If the judiciary is independent, it will find that the award of the contract to Company Y was illegal, and apply the appropriate penalties provided for in the legislation. Company X will be awarded the contract and the rule of law will be vindicated. Company X planned its action on the basis of the relevant law, the independent judiciary applied the law in accord with its text and intent, and the rule of law, conceived in terms of the ability to plan one's life knowing the legal outcome, is upheld.

If the judiciary is not independent, then the components of the rule of law presently under consideration will be transgressed. We assume that the non-independent judiciary gives an interpretation to the legislation, which does not accord with its text or purpose. It does so in order to shield the executive from a penalty, and/or because it has links with Company Y. In

either eventuality, the rule of law has been violated, since Company X, which planned its action on an interpretation of the legislation that was in conformity with its text and purpose, will be robbed of the contract.

### **3.3.2. The Secondary Connection**

There is a secondary connection between an independent judiciary and this second component of the rule of law. The essence of the connection is apparent and important in equal measure: the judiciary must be independent in order to give legal effect to the other precepts that comprise this component of the rule of law. The powers of the judiciary in this respect will necessarily vary between legal systems. The heterogeneity between legal systems will affect, for example, the more particular judicial powers to annul legislation, or executive action, and the grounds on which this can be done. The nature of the secondary connection between the rule of law and the need for an independent judiciary can, nonetheless, be exemplified in a way that resonates for many legal systems. For the sake of clarity, it bears repetition that we are considering the connection between the precepts that comprise this component of the rule of law, and the requirement of an independent judiciary.

Consider in this respect the precept that laws should not be retrospective. Independent courts have a number of juridical techniques at their disposal to deal with retrospective legislation. It might be annulled, because it offends the constitution. It might be invalidated pursuant to a statute that protects human rights, assuming that such a statute invests the judiciary with the power to invalidate legislation that contravenes the human rights protected by the statute. The retrospective legislation might be interpreted very narrowly, thereby reducing its impact as far as possible.

The options open to an independent judiciary are even greater if the retrospective provision is contained not in a primary statute, but in a rule made pursuant to a statute. The rule might be invalidated on the grounds set out above, and it might be interpreted very narrowly. The courts might, in addition, conclude that the statute pursuant to which the rule was made gave no authority to make a rule of this kind. It is axiomatic in terms of legal principle that a rule made in furtherance of a statute must come within the remit of the statute. If the statute contains no express power to make retrospective rules pursuant to it, then an independent court will very likely conclude that the contested rule was *ultra vires* the enabling legislation, and therefore invalid. If, for example, a minister purports to make a measure retrospective, the courts will require express authorisation from the enabling statute, or something closely akin thereto, before they will be willing to accept that the minister's powers extended this far.

Consider a second precept of this version of the rule of law, which is that laws should, whenever possible, be relatively stable and clear. Independent courts have a number of techniques at their disposal when faced by legislation that does not meet these desiderata. If a law is vague and unclear it might lead to annulment for incompatibility with the constitution, or with a bill of rights contained therein. The subject matter of the contested statute would almost certainly have an impact on the likelihood of constitutional challenge. The courts may, alternatively, interpret such a statute narrowly, in favour of the individual in such circumstances. Courts have considerable interpretive techniques at their disposal to ensure that legislation that fails to meet the requirements of the rule of law set out above is construed narrowly in favour of the individual. This is more particularly so, given that the strength of the interpretive presumption can vary considerably, and the choice in this respect resides with the judiciary.

The options available to the courts are commensurately greater where the vagueness, or lack of clarity, is found not in legislation, but in an administrative decision, or a rule made by the administration. In most legal systems, there is nothing to prevent the courts from invalidating such measures, using one of the principles of judicial review. Thus, if the contested ministerial measure was vague, or unclear, the courts might decide that this was not consistent with the primary legislation; that the vagueness of the measure was indicative that the minister was acting for improper purposes; or that the challenged measure was an unreasonable exercise of the discretionary power vested in the minister.

Consider, by way of a third example, access to court. This is central for the component of the rule of law concerned with helping people to plan their lives, cognizant of the legal consequences of their action. Access to court is central to this component of the rule of law. If individuals do not have such access, or it is excessively difficult to gain legal redress through the courts, then this component of the rule of law is thereby undermined. A legal system may have an impressive array of constitutional, procedural and substantive rules designed, inter alia, to protect individuals, but if they cannot access the courts such protections remain largely illusory. If they are indeed illusory, this then undermines the idea that an individual can plan their life knowing the legal consequences of their action. If access to court is excessively difficult or impossible, individuals cannot question whether, for example, their interpretation of legislation, or an administrative decision, on which they planned their action, was correct or not. This is especially problematic where, for example, state officials deny benefits that individuals believe they are entitled to under the relevant legislation.

There are limits to what courts can do to foster access, although the precise nature of those limits will necessarily vary between legal systems. However, in many legal systems, access to court is intimately connected with issues such as the legal aid budget, the size of which is determined by the government and not the courts. It would nonetheless be wrong to conclude that courts have no role to play in fostering or protecting access. Thus, if legislation or ministerial action threatens access to court, or unduly restricts it, the courts have a range of powers at their disposal to combat such action. These include invalidation of the contested measure, interpreting the contested measure very narrowly, and mandatory court orders requiring the government to make better provision for access in a particular type of case.

It is important to pause and take stock of the preceding argument in this section. We have considered three different precepts that are central to this particular component of the rule of law, and the role that courts play in vindicating and upholding these important principles. The relevant point for present purposes is simple and stark: if the courts lack independence, then they will not protect these principles in the manner set out above. Whether they fail wholly in this respect depends on the extent to which their independence is compromised. Independence is not a unitary concept. It can be compromised to different degrees, with variables including the period of time for which this infirmity lasts, and the class of case that it affects. Where the lack of judicial independence is systemic, where it is deep-rooted and long-lasting, then the effect is most damaging. In such circumstances, the courts will not protect the citizen against retrospective legislation, they will not limit the impact of vague laws on individual rights and they will not protect access to court. The consequences of lack of judicial independence may, however, be very serious, even where the problems are not systemic. Judicial independence is, therefore, central to the realisation of the rule of law, since without it, the very principles that constitute this component of the rule of law will be devoid of judicial protection.

## 4. THE RULE OF LAW: RIGHTS, JUSTICE AND ACCOUNTABLE GOVERNMENT

### 4.1. The third component

The rule of law has the attributes mentioned in the previous two sections, but it also has more far-reaching implications, in two respects, which means that the rule of law is a substantive, and not merely a procedural concept.

First, there is a rights-based component to the rule of law, with the consequence that the rule of law does address the content of laws, and administrative decisions, produced by the legislature and the executive. Certain rights are based on, or protected by the rule of law, such that violation of these rights constitutes infringement of the rule of law.

Secondly, the rule of law provides the foundation for the controls exercised by the courts over governmental action through judicial review. This component of the rule of law is expressive of how the state ought to behave towards individuals in society. This component of the rule of law demands that governmental action conforms to precepts of good administration, this being an essential facet of accountable government in a democratic society. The constraints imposed through judicial review are in part procedural and in part substantive. The range of these principles varies, but includes the following ideas: legality, procedural propriety, participation, fundamental rights, openness, rationality, relevancy, propriety of purpose, reasonableness, equality, legitimate expectations, legal certainty and proportionality.

### 4.2. The Importance of the third component

We can appreciate the importance of the core idea underlying this component of the rule of law by looking more closely at the reasoning of the work of a prominent academic theorist, and a leading judge.

This aspect of the rule of law underpins the work of the leading theorist, Ronald Dworkin. He argues that, subject to questions of 'fit', the courts should decide legal questions according to the best theory of justice, which is central to the resolution of what rights people currently possess.<sup>2</sup> According to this theory, 'propositions of law are true if they figure in or follow from the principles of justice, fairness and procedural due process that provide the best constructive interpretation of the community's legal practice'.<sup>3</sup> It is integral to the Dworkinian approach that, subject to questions of fit, the court should choose between 'eligible interpretations by asking which shows the community's structure of institutions as a whole in a better light from the stand-point of political morality'.<sup>4</sup> An individual will have a right to the legal answer that is forthcoming from application of the above test.

Dworkin accepts the components of the rule of law set out in the previous section, labelling this the 'rule book' conception. This requires that the government should never exercise power against individuals, except in accordance with rules that have been set out in advance and made available

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2. R Dworkin, *Law's Empire* (Fontana, 1986).

3. *Ibid.*, pp. 225.

4. *Ibid.*, p. 256.

to all.<sup>5</sup> Such values feature in any serious theory of justice.<sup>6</sup> However, as Dworkin notes, this says little if anything about the content of the laws that exist within a legal system.

Dworkin argues for a rights-based understanding of the rule of law. Thereby citizens have moral rights and duties with respect to one another, and political rights against the state. These moral and political rights should be recognised in positive law, and citizens should be able to enforce them through the courts. The rule of law in this sense is the ideal of rule by an accurate public conception of individual rights. In the words of Dworkin, this view of the rule of law 'does not distinguish, as the rule book conception does, between the rule of law and substantive justice; on the contrary it requires, as part of the ideal of law, that the rules in the book capture and enforce moral rights'.<sup>7</sup> It does not mean that this component of the rule of law is consistent with only one theory of justice or freedom. There is no such argument. It does mean that it is not independent of the particular theory of justice, or vision of freedom, which constitutes its content at any point in time.

Lord Bingham was justly regarded as one of the leading UK judges of his generation. He espoused an understanding of the rule of law that was both formal and substantive. Lord Bingham articulated eight principles that comprised the rule of law. Certain of these principles address the more formal aspects of the rule of law, considered in the previous section.<sup>8</sup> These include the idea that the law must be accessible; that it should, as far as possible, be intelligible, clear and predictable; that questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion; and that means should be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes that the parties were unable to resolve.

It is, however, clear that Lord Bingham considers the rule of law as extending beyond these more formal precepts. Lord Bingham viewed the principles of judicial review as having their foundation in the rule of law. Thus, he states that 'ministers and public officers 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',<sup>9</sup> and 'adjudicative procedures provided by the state should be fair'.<sup>10</sup> For Lord Bingham, the rule of law covers the essential principles of equality, such that the laws of the land should apply equally to all, save to the extent that objective differences justified differentiation. The rule of law also demands that the law should afford adequate protection for fundamental rights.<sup>11</sup>

A state which savagely repressed or persecuted sections of its people could not in my view be regarded as observing the rule of law, even if the transport of the persecuted minority to the concentration camp or the compulsory exposure of the female children on the mountainside were the subject of detailed laws duly enacted and scrupulously observed. So to hold would, I think, be to strip the existing constitutional principle affirmed by section 1 of the 2005 Act of much of its virtue and infringe the fundamental compact which ... underpins the rule of law.

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5. R. Dworkin, *A Matter of Principle* (1985), pp. 11–12.

6. *Ibid.*, pp. 12–13.

7. *Ibid.*, pp. 11–12.

8. Lord Bingham, 'The Rule of Law' The 6th Sir David Williams Lecture (2006).

9. *Ibid.*, p. 23.

10. *Ibid.*, p. 26.

11. *Ibid.*, p. 18.

This component of the rule of law requires some choice as to what are to count as fundamental rights, and the more particular meaning ascribed to such rights. The choice will reflect assumptions as to the importance of differing interests in society. This is unavoidable. It is true that any democracy to be worthy of the name will have some attachment to particular liberty and equality interests. If, however, we delve beneath the surface of phrases such as liberty and equality then significant differences of view become apparent even amongst those who subscribe to one version or another of liberal belief.

### **4.3. The third component and Judicial Independence**

There are two senses in which judicial independence is central to these components of the rule of law framed in terms of rights, justice and accountable government. They may be termed the primary and the secondary connection.

#### **4.3.1. The Primary Connection**

The primary connection between these components of the rule of law and judicial independence is both simple and fundamental. Independent courts are a condition precedent to attainment of these components of the rule of law. Courts that lack independence cannot fulfil the core ideas that underpin these components of the rule of law. They cannot be trusted to enforce rights, and they cannot be trusted to apply the precepts of judicial review.

This is reflective of the centrality of judicial independence to the rule of law, and serves to explain the reasons why it has received so much attention in the EU legal order. The case law will be explicated in detail in a later part of this publication. Suffice it to say for the present, that the extract from a recent Commission Communication casts into sharp relief the reason why judicial independence is perceived to be so important in terms of the goals of the EU, which include protection for fundamental rights. In this extract, the Commission explains its enforcement strategy under Article 258 TFEU, and why it accords a high priority to enforcement where there are systemic weaknesses in a Member State's legal system.<sup>12</sup>

The obligation to take the necessary measures to comply with a judgment of the Court of Justice has the widest effect where the action required concerns systemic weaknesses in a Member State's legal system. The Commission will therefore give high priority to infringements that reveal systemic weaknesses which undermine the functioning of the EU's institutional framework. This applies in particular to infringements which affect the capacity of national judicial systems to contribute to the effective enforcement of EU law. The Commission will therefore pursue rigorously all cases of national rules or general practices which impede the procedure for preliminary rulings by the Court of Justice, or where national law prevents the national courts from acknowledging the primacy of EU law. It will also pursue cases in which national law provides no effective redress procedures for a breach of EU law or otherwise prevents national judicial systems from ensuring that EU law is applied effectively in accordance with the requirements of the rule of law and Article 47 of the Charter on Fundamental Rights of the EU.

#### **4.3.2. The Secondary Connection**

The reasoning in the preceding section can be reinforced by understanding in outline what independent courts do when ensuring compliance with these components of the rule of law. We can then better understand what is lost when courts lack independence. The particular powers

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12. Commission Communication, Better Results through Better Application, [2017] OJ C18/02.

that courts have will, as noted earlier, vary as between legal systems. There are, nonetheless, examples of judicial power that will be recognised by courts in many legal systems, even if the details of such power might differ.

Independent courts will enforce the rights-based component of the rule of law through the powers invested in the judiciary in that legal system. This may enable the courts to invalidate legislation for infringement of rights that are enshrined in the constitution. This is the common position in many continental legal systems, where the constitution either expressly affords the courts the power to annul legislation that infringes constitutional rights, or the courts interpret the constitution as investing them with such power, even if contains no express provision to this effect. The legal system may not embody such hard-edged constitutional review. The courts may have softer powers of review over statute, whereby they can use strong interpretive techniques in order to read the legislation to be inconformity with fundamental rights. If they are not able to do so, then the courts may, as in the UK, make a declaration that the legislation is incompatible with the protected rights, and send it back to the legislature, which will be expected to correct the infirmity in the legislation.

Independent courts will also develop and enforce the precepts of the general law on judicial review, which are designed to render government accountable, irrespective of whether the claimant has a constitutional right to, for example, free speech, or freedom of religion. The general law of judicial review plays an important part in ensuring that the regulatory powers exercised by government in diverse areas conform to precepts of good governance that comprise the doctrinal building blocks of judicial review and administrative law. The precise details of these doctrinal building blocks may vary as between legal systems, and so too may the nomenclature. There will, nonetheless, be much commonality between them. Thus, most legal systems will have controls cast in terms of error of law, error of fact, abuse of discretion, rationality and/or proportionality, fair procedures, equality, legal certainty and legitimate expectations. There will also be provision for monetary relief.

Insofar as the rule of law is regarded as the foundation of the principles of judicial review then it follows that breach of the rule of law, manifested through breach of one of the more particular principles of judicial review, can lead to annulment of the measure. Some legal systems render the applicability of such doctrinal relief dependent on proof of a subjective right, while others abjure use of this conceptual pre-condition. There will also be variance as between legal systems as to how far the preceding doctrinal categories are developed by the courts, and how far they are laid down in a code, or something equivalent thereto. The degree of difference in this respect should not, however, be exaggerated. This is because even where a code exists, the grounds for intervention may be set at a relatively high degree of generality, with the consequence that the courts will flesh out their detailed meaning.

The salient point for present purposes is the deleterious impact of judges who lack independence on fulfilment of the precepts set out above. The seriousness of this impact will depend in part on the degree to which judicial independence is compromised. The different ways in which this can occur will be elaborated more fully below. Suffice it to say for the present, that other things being equal, the more serious is the problem with judicial independence, then the more likely it is that important components of the rule of law, rights and accountable government, will not be enforced.

## 5. RULE OF LAW: DIMENSIONS OF JUDICIAL INDEPENDENCE

It was recognised in the previous analysis that judicial independence can be endangered in different ways, but there was no detailed elaboration of these differences. This section of the publication explores these differences.

### 5.1. Judicial Independence: Systemic Deficiencies

It is readily apparent that judicial independence is placed at the greatest risk by systemic deficiencies that undermine such independence and affect the entirety of the judiciary, or a significant portion thereof. It is, nonetheless, necessary to press further to understand what we mean by systemic deficiency, or to put the same point in a different way, systemic deficiency can arise in different ways. For something to be worthy of the appellation systemic deficiency, the malaise must, however, have three features: it must have a generality of application, although this does not mean that it has to be universal in its impact on all judges; it must have a seriousness of effect; and it will almost always be intentional.

Consider in this respect a paradigm of systemic deficiency wherein the independence of the judiciary is undermined: the courts, or the top courts, are packed with judges chosen by the government, from those who support government policy, with the additional political leverage that the government arrogates to itself the power to remove judges, as well as appoint them. This would clearly constitute a systemic deficiency in judicial independence, and would meet the three criteria set out above: the malaise would have a generality of application, it would have a seriousness of effect, and it would be intentional.

The preceding systemic deficiency is clearly at the extreme end of the scale, and is useful to set the end-point of the spectrum of meanings that the term can bear. There can clearly be very serious/systemic dangers to judicial independence that fall short of this extreme. The political branch of government can be considerably more subtle in the ways in which it seeks to constrain the independence of the courts. It may do so by, for example, altering the criteria for judicial appointment to favour people from the background from which it derives its principal support. It may alter remuneration systems with the intent and effect to render judges more beholden to the executive. It may modify the tenure of judges, or the criteria for promotion, with the aim of making the judiciary less secure in their jobs, and thus less inclined to rule against the governing elite. These are all worthy of the appellation systemic deficiency and they present significant dangers to the rule of law.

### 5.2. Judicial Independence: Bias and Partiality

Judicial independence can also be compromised by bias, or partiality. It is for this reason that all legal systems have some rules to address this danger. It is axiomatic that a judge should decide the case dispassionately on the evidence presented. This is clearly undermined if the judge in the particular case is biased or partial to one side, for reasons that do not relate to the strength of the contending arguments. It can indeed be argued that the requirement to be impartial is part of the very definition of what it means to be a judge. If a judge is not impartial, this has both first and second order consequences. The first order consequence is that there is an injustice to one of the parties in the particular case heard by that judge. The second order consequence is that this can lead to wider distrust of the legal system, if individuals come to believe that their cases will not be objectively determined on the basis of the law, properly interpreted and applied.

The bias can take various forms. Pecuniary bias is the most obvious, which is why many legal systems will have strict rules requiring a judge to stand down from a case if he or she has any financial interest, direct or indirect, in the subject matter of the proceedings. Other personal interests may disqualify the judge if it is felt that the interest gives rise to a reasonable suspicion or real danger of bias. Much will depend on the factual nexus between the decision-maker and another party involved in the dispute. Family relationship, business connections, and commercial ties, are examples of the interests that can undermine the independence of the judge, which should thereby disqualify him or her from hearing a particular case.

There may also be bias, or the danger of the judge being perceived to be biased, for more institutional reasons. This is exemplified by instances where the prosecutor of an offence is also the judge. A judge may, in addition, be automatically disqualified from hearing a matter in his own cause, not only where the judge has a pecuniary interest in the outcome, but where the judge's decision would lead to the promotion of a cause in which the judge was involved with one of the parties.

A legal system will necessarily have to develop legal tests to determine the degree of likelihood of bias that should exist before a judge is disqualified from hearing a case. There is a significant choice in this respect. The legal system might decide to have a simple *per se* rule for certain types of bias, such that, for example, any pecuniary interest in the outcome automatically disqualifies the judge. In other instances, the legal system might use a test of the following kind: whether, having regard to the relevant circumstances, the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the judge was biased.

### 5.3. Judicial Independence: Internal and External Dimensions

The CJEU has recognised both senses of judicial independence considered above, and has referred to them respectively as the external and the internal dimension of judicial independence.<sup>13</sup>

The first, external, aspect presumes that the court exercises its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever. It is therefore protected against external intervention, or pressure, which is liable to jeopardise the independent judgment of its members as regards proceedings before them.

The second, internal, aspect is linked to impartiality and seeks to ensure a level playing field for the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. This requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law.

## 6. RULE OF LAW: THE EUROPEAN UNION

In the European Union context, the rule of law is a well-established principle, well-defined in its core meaning, and which can be objectively assessed so that shortcomings can be identified on a sound and stable basis. The rule of law is enshrined in Article 2 of the Treaty on European Union as one of the founding values of the Union. The Court of Justice of the European Union and the European Court of Human Rights (ECtHR) have recognised that it includes principles

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13. See, e.g., C-503/15 *Ramón Margarit Panicello v Pilar Hernández Martínez*, EU:C:2017:126, [37]–[38].

such as legality, implying a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibiting the arbitrary exercise of executive power; effective judicial protection by independent and impartial courts, effective judicial review including respect for fundamental rights; separation of powers; and equality before the law.

The European Commission's Communication, of 2014, on a 'New Framework to Strengthen the Rule of Law', is based on this case law, and made clear that respect for the rule of law was intrinsically linked to respect for democracy and for fundamental rights. This vision was reinforced by the six elements that lie at the heart of the rule of law in the EU.<sup>14</sup>

The same understanding of the rule of law underpins the 2019 Commission Communication 'Strengthening the Rule of Law within the Union, A Blueprint for Action'.<sup>15</sup> The Commission's definition of the rule of law emerges forcefully from the following extract.<sup>16</sup>

Under the rule of law, all public powers always act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts. The rule of law has a direct impact on the life of every citizen: it is a precondition for ensuring equal treatment before the law and the defence of individual rights, for preventing abuse of power by public authorities and for decision-makers to be held accountable. Respect for the rule of law is also essential for citizens to trust public institutions. Without such trust, democratic societies cannot function. The rule of law covers how accountably laws are set, how fairly they are applied, and how effectively they work. As recognised by the Court of Justice of the European Union and the (ECtHR), it also covers institutional issues such as independent and impartial courts, and the separation of powers. Recent rulings of the Court of Justice of the European Union have continued to underline that the rule of law is central to the EU legal order.

The European project relies on permanent respect of the rule of law in all Member States. It is a prerequisite for the effective application of EU law and for mutual trust between Member States. It is also central to making the European Union work well as an area of freedom, security and justice and an internal market, where laws apply effectively and uniformly and budgets are spent in accordance with the applicable rules. Threats to the rule of law therefore challenge the legal, political and economic basis of how the EU works. This is why promoting and upholding the rule of law is a central imperative of the European Commission's work as guardian of the Treaties. Deficiencies as regards respect for the rule of law in one Member State impact other Member States and the EU as a whole, and the Union has a shared stake in resolving rule of law issues wherever they appear.

The 2019 Commission Communication is primarily directed towards the ways in which the rule of law can be strengthened within the EU, in the light of recent challenges posed by actions in certain Member States. The creation of a Rule of Law Review Cycle lies at the heart of the strategy. The Review Cycle will cover all the different components of the rule of law, including for example systemic problems with the process for enacting laws, lack of effective judicial protection by

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14. *Ibid.*, p. 4, and Annex 1.

15. Commission Communication, Strengthening the Rule of Law within the Union, A Blueprint for Action, COM(2019) 343 final. See also, Commission Communication, Further strengthening the rule of law within the Union – State of play and possible next steps, COM(2019) 163 final.

16. *Ibid.*, p. 1.

independent and impartial courts, or non-respect for the separation of powers. The review will also examine the capacity of Member States to fight corruption and, where there is a connection with the application of EU law, look at issues in relation to media pluralism and elections. The Commission Communication echoes once again the centrality of judicial independence to the realisation of the rule of law.<sup>17</sup>

Another core obligation of Member States is to guarantee to citizens the exercise of their rights, notably through access to justice and fair trial. Article 19 TEU entrusts the responsibility for ensuring the full application of EU law in all Member States and judicial protection of the rights of individuals under that law to national courts and tribunals and to the Court of Justice. Indeed, the role of national courts and tribunals in the application of EU law is crucial as they are responsible in the first place for the application of EU Law and for initiating the preliminary ruling procedure provided for in Article 267 TFEU, in order to secure the consistency and uniformity in the interpretation of EU law. In this regard, and as confirmed by the Court of Justice of the European Union's recent case law, the guarantee for judicial independence is a legal obligation at the core of the rule of law.

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17. *Ibid.*, p. 4.

## CHAPTER 2

# JUDICIAL INDEPENDENCE AS A FUNCTIONAL AND CONSTITUTIONAL INSTRUMENT FOR UPHOLDING THE RULE OF LAW IN THE EUROPEAN UNION

STANISLAS ADAM<sup>18</sup>

## 1. INTRODUCTION

A new step in the constitutional development of the EU legal order has recently started under impulse from both the European Commission and the Court of Justice of the European Union (Court). At the crux of that evolution is the requirement of judicial independence, which is a key feature of the right to a fair trial and to the rule of law. Its significance cannot be overstated. Not only is accession to the EU conditional upon compliance with that principle.<sup>19</sup> As the Court notoriously held in *Les Verts*, respect for the rule of law is also *the cornerstone of the EU legal order*, 'inasmuch as neither [the] Member States nor [the EU] institutions can avoid a review of the question whether the measures adopted by them<sup>20</sup> are in conformity with the basic constitutional charter, the Treaty'.<sup>21</sup> That is apparent, in particular, in Article 2 TEU, which ranks it among the values common to the Member States, and on which the Union is based. Observance of the rule of law value is therefore a precondition to the very existence and successful development of the EU as a model of legal and political integration.

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18. All opinions expressed are personal to the author. Some parts of this Chapter build upon the following article: S. Adam, P. van Elsuwege, 'L'exigence d'indépendance du juge, paradigme de l'Union européenne comme union de droit', 253 *Journal de droit européen* (2018), pp. 334-343.

19. See Article 49 TEU and the so-called 'Copenhagen criteria', adopted at the Copenhagen European Council on 21-22 June 1993 (available at: [http://www.europarl.europa.eu/enlargement/ec/pdf/cop\\_en.pdf](http://www.europarl.europa.eu/enlargement/ec/pdf/cop_en.pdf), see p. 1).

20. That latter expression refers not only to measures adopted by the EU institutions but also those adopted by the 'bodies, offices or agencies of the Union' (as is clear, inter alia, from Article 263, first subparagraph, TFEU). As regards the Member States, not only national authorities are subject to the rule of law but all public bodies, whether national, regional or local.

21. See the Judgment of 23 April 1986, *Les Verts v Parliament*, 294/83, EU:C:1986:166, paragraph 23.

As Professor Craig observes in Chapter 1,<sup>22</sup> the rule of law applies to all branches of government, and even to all public bodies. However, judges bear special responsibility for upholding it as their judicial function consists in settling disputes and indeed authoritatively interpreting and applying the law. Courts thus operate as the ultimate guardians of the *Rechtsstaat*, a conception of the state in which public authorities are subject to the law and the state accepts courts' authority.<sup>23</sup> It is against that background that the Court has repeatedly held that 'the very existence of effective judicial review designed to ensure compliance with provisions of EU law is inherent in the existence of the rule of law'.<sup>24</sup>

Delivering justice in a manner consistent with that value requires not only that judges decide on the merits of all admissible actions submitted to them but also that they do it *independently*, that is, in accordance with the law and only the law.<sup>25</sup> In EU law, judicial independence as a component of the rule of law comes into play in a variety of situations. Politically, judicial independence has long served as a yardstick for promoting the rule of law. The rule of law is among the principles, set out in Article 21 TEU, which guide the Union's action on the international scene. Improvement of judicial independence and, more generally, increased respect for the rule of law have been requested from third countries wishing to enter into cooperation or association agreements with the Union.<sup>26</sup> That conditionality is part of a broader effort of the Union to promote democracy, the rule of law and fundamental rights in the world. The Commission has recently proposed to extend such conditionality to the granting of EU funding to the Member States themselves.<sup>27</sup> If adopted by the Parliament and the Council, that instrument would supplement the procedures laid down in Article 7 TEU.

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22. Definition and Conceptualisation of the Rule of Law and the Role of Judicial Independence Therein', especially sections 2 and 3. See also, on the concept of the 'rule of law' in the EU, A. Magen, 'Cracks in the Foundations: Understanding the Great Rule of Law Debate in the EU', 54 J.C.M.S. (2016), p. 1050-1061.
  23. See P. Pescatore, *Introduction à la science du droit*, 2ème réimpression, Bruxelles, Bruylant, 2009, p. 363 et 364 ('Théorie de la juridiction').
  24. See, for example, judgments of 6 October 2015, *Schrems*, C362/14, EU:C:2015:650, paragraph 95 and case law cited, and of 21 December 2016, *Club Hotel Loutraki and Others v Commission*, C131/15 P, EU:C:2016:989, paragraph 49.
  25. Article 97.1 of the Grundgesetz (German Basic Law) unequivocally expresses that idea: 'The Judges are independent and subject only to the law' ('Die Richter sind unabhängig und nur dem Gesetze unterworfen'). See also, to that effect, the Bangalore Principles of judicial conduct, annexed to Resolution 2006/33 of the UN ECOSOC, 'Strengthening basic principles of judicial conduct', adopted on 27 July 2006.
  26. See, for example, Article 1 of the Enhanced Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the other part (OJ 2016, L 29, p. 3), and Article 2 of the Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part (OJ 2014, L 161, p. 3). In both cases, the rule of law constitutes 'an essential element' of the agreement, which suggests that disrespect for that principle may give rise to suspension of all or part of the international commitments.
  27. See Commission Proposal of 2 May 2018, for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, COM(2018) 324 final.

Whilst those political expressions of the rule of law raise interesting issues<sup>28</sup> and sometimes give rise to critical comments,<sup>29</sup> this Chapter focuses instead on the *legal function* of judicial independence as an instrument for upholding the rule of law in the EU legal order. That requires first to set out the scope of that requirement, as it results from the case law of the Court and of the ECtHR (2). The Chapter subsequently sheds light on the two main functions of judicial independence in the EU legal order. Although judicial independence primarily applied as a *functional requirement* contributing to the effective implementation of EU law (3), recent case law makes clear that it also forms part of that legal order's *constitutional features* (4). That last part of the Chapter shows how Articles 2 and 19 TEU enable the Court to monitor whether deficiencies in the judicial organisation of the Member States are such as to undermine judicial independence and therefore *per se* violate EU law.

## 2. THE CONCEPT OF JUDICIAL INDEPENDENCE IN EU LAW

The second subparagraph of Article 47 of the Charter of Fundamental Rights of the European Union (Charter) contains specific normative expression to the guarantee of judicial independence, which corresponds in EU law to the requirement in Article 6(1) of the ECtHR.<sup>30</sup> Even before the Charter entered into force, the Court had applied that requirement as it forms part of the fundamental right to an effective remedy before an independent tribunal,<sup>31</sup> which is among the constitutional traditions common to the Member States and, therefore, also a general principle of EU law.<sup>32</sup> As an essential component of the right to a fair trial, independence must be effectively incorporated into everyday administrative attitudes and practices and is subject to judicial review.<sup>33</sup>

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28. See, in this respect, the speech delivered by the First Vice-President of the Commission Franz Timmermans at the European University Institute (EUI, Florence) Conference on 'The State of the Union' on 2 May 2019 (panel session on 'Rule of law oversight in the EU: can value conditionality be reinforced?'), available at: [www.ec.europa.eu/commission/commissioners/2014-2019/timmermans/announcements/speech-first-vice-president-frans-timmermans-state-union-conference-european-university-institute\\_en](http://www.ec.europa.eu/commission/commissioners/2014-2019/timmermans/announcements/speech-first-vice-president-frans-timmermans-state-union-conference-european-university-institute_en)
  29. See for example, for a critical analysis of conditionality in the context of accession, D. Kochenov, *EU Enlargement and the Failure of Conditionality. Pre-Accession Conditionality in the Fields of Democracy and the Rule of Law*, Kluwer Law International (2008, Alphen aan den Rijn), vol. 59.
  30. Judgment of 22 December 2010, *DEB* (C279/09, EU:C:2010:811), paragraph 32.
  31. Judgments of 15 May 1986, *Johnston*, 222/84, EU:C:1986:206, paragraphs 18 and 19, of 15 October 1987, *Heylens and Others*, 222/86, EU:C:1987:442, paragraph 14, of 27 November 2001, *Commission v Austria*, C424/99, EU:C:2001:642, paragraph 45, of 25 July 2002, *Unión de Pequeños Agricultores v Council*, C50/00 P, EU:C:2002:462, paragraph 39, and of 19 June 2003, *Eribrand*, C467/01, EU:C:2003:364, paragraph 61.
  32. See, on the right of access to an independent and impartial tribunal under both Article 6 ECHR and Article 47 Charter, Handbook on European law relating to access to justice, EU Agency for Fundamental Rights/European Court of Human Rights/Council of Europe, 2016, pp. 23–39. The Court refers from time to time to the national (constitutional) requirements of independence when it examines whether a national body should be regarded as a 'court or tribunal of a Member State' capable of addressing a reference for a preliminary ruling to it. See, for example, judgment of 17–July 2014, *Torresi*, C58/13 and C59/13, EU:C:2014:2088, paragraph 22.
  33. See, to that effect, ECtHR, judgment of 6 October 2011, *Agrokompleks v. Ukraine*, CE:ECHR:2011:1006JUD002346503, paragraph 136.

## 2.1. 'External' and 'internal' aspects of judicial independence

As already made clear in Chapter 1,<sup>34</sup> that requirement, which indistinctly applies to EU courts and courts in the Member States,<sup>35</sup> has an external aspect and an internal aspect to it.<sup>36</sup>

The *external aspect* means that the body concerned and its members should exercise their functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking any orders or instructions from any source whatsoever. That requires protection of the judicial body against external intervention or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them and to influence their decisions.<sup>37</sup> That external aspect has two components. The first relates to protection of judicial bodies as a whole from external pressure, whereas the second relates to personal independence of members of those bodies.<sup>38</sup> What is 'external' for the purposes of that aspect is construed broadly. Although 'independence' is guaranteed primarily vis-à-vis the other powers, especially the executive,<sup>39</sup> it also precludes judges who are not members of the formation from influencing the latter in any way.<sup>40</sup> Thus, judicial independence requires that judges designated to decide a case be free from directives or pressures from the fellow judges or those who have administrative responsibilities in the court such as the president of the court or the president of a division in the court, and who are not members of the formation.

The *internal aspect* is linked to impartiality.<sup>41</sup> Judges should maintain equal distance from the parties to the proceedings and their respective interests with respect to the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the

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34. Chapter 1, section 5.c.

35. See section 2. The independence of EU judges is expressly recalled in EU primary law and also a general principle of Union law applicable to all court proceedings. Article 19(2), third subparagraph, TEU provides that '[t]he Judges and the Advocates-General of the Court of Justice and the Judges of the General Court shall be chosen from persons whose independence is beyond doubt [...]'. (See also Article 253, first subparagraph, TFEU).

36. That distinction also corresponds to the conception of judicial independence in the Bangalore Principles to which reference was made above.

37. See, to that effect, judgments of 19 September 2006, *Wilson*, C506/04, EU:C:2006:587, paragraph 51 and case law cited, of 17 July 2014, *Torresi*, C58/13 and C59/13, EU:C:2014:2088, paragraph 18, of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C64/16, EU:C:2018:117, paragraph 44, and of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C619/18, EU:C:2019:531, paragraph 72.

38. See, on that distinction, P. Nihoul, 'L'indépendance et l'impartialité du juge', 24 *Rev. eur. de droit public* (2012), pp. 53–127, esp. pp. 60–75.

39. See, for example, ECtHR, judgment of 24 November 1994, *Beaumartin v. France*, CE:ECHR:1994:1124JUD001528789, paragraph 38, and CJEU, judgment of 24 June 2019, *Popławski*, C573/17, EU:C:2019:530, paragraph 96.

40. See for example, concerning a situation where the president of a Supreme court was also acting as a president of the High Council of the Judiciary but not as a member of the ad hoc formation of that court deciding on challenges against disciplinary sanctions adopted by that Council, ECtHR, judgment of 6 November 2018 [GC], *Ramos Nunes de Carvalho e Sá v. Portugal*, CE:ECHR:2018:1106JUD005539113, paragraphs 153–156. See also the Bangalore Principles on judicial conduct, cited above.

41. The ECtHR has long recognised that the concepts of independence and impartiality are closely related and may sometimes require joint examination (see, for example, ECtHR, judgment of 6 November 2018 [GC], *Ramos Nunes de Carvalho e Sá v. Portugal*, CE:ECHR:2018:1106JUD005539113, paragraphs 150 and 152).

outcome of the proceedings apart from the strict application of the rule of law.<sup>42</sup> It also has two components to it.<sup>43</sup> First, members of judicial bodies should be *subjectively impartial*, which means that they must not show any bias or personal prejudice in the case.<sup>44</sup> Second, the judicial body must be *objectively impartial*, that is to say, it must offer guarantees sufficient to exclude any legitimate doubt in this respect.<sup>45</sup> The common law principle that ‘justice should not only be done, but also be seen to be done’ encapsulates that latter idea, which is paramount to the confidence that courts must inspire in the public in a democratic society.<sup>46</sup>

## 2.2. Criteria for assessing independence of a judicial body and of its members

Those guarantees of independence and impartiality do not only require that persons entrusted with judicial functions verify in each case attributed to them whether they are in a position to decide on it without ‘bias or partiality’.<sup>47</sup> They also require an appropriate statutory framework, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, that are such as to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it.<sup>48</sup> That is in line with the position of the ECtHR: when assessing whether a judicial body can be regarded as independent, that court takes into account the manner of appointment of its members and their term of office, the existence of guarantees against outside pressure, whether the body presents an appearance of

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42. Judgments of 25 July 2018, Minister for Justice and Equality (Deficiencies in the system of justice), C216/18 PPU, EU:C:2018:586, paragraph 65, and of 24 June 2019, Commission v Poland (Independence of the Supreme Court), C619/18, EU:C:2019:531, paragraph 73.

43. See, for example, ECtHR, judgment of 9 January 2018, Nicholas v. Cyprus, CE:ECHR:2018:0109JUD006324610, paragraph 49 and case law cited.

44. Personal impartiality is nevertheless presumed. That has led the Court to decide that the fact that one or more of the judges were present in two successive formations and exercised the same functions is in itself irrelevant to assessing compliance with the requirement of impartiality, since those duties are performed in a collegiate formation of the court (Judgment of 1 July 2008, Chronopost v UFEX and Others, C341/06 P and C342/06 P, EU:C:2008:375, paragraphs 53, 58 and 59). That concerns not only the referral of a case back to the General Court following annulment of a judgment by the Court, as in Chronopost v UFEX and Others, but also, a fortiori, situations where the two successive formations do not decide identical cases (see Judgment of 19 February 2009, Gorostiaga Atxalandabaso v Parliament, C308/07 P, EU:C:2009:103, paragraph 45).

45. Ibid. Article 4 of the Statute of the Court of Justice of the European Union provides an illustration. Pursuant to that provision, members of the Court and General Court are precluded from ‘hold[ing] any political or administrative office’ and from ‘engag[ing] in any occupation, whether gainful or not, unless exemption is exceptionally granted by the Council’. The Statute moreover precludes judges and advocates general from taking part in the disposal of any case in which they have previously taken part as agent or adviser or have acted for one of the parties, or in which they have been called upon to pronounce as a member of a court or tribunal, of a commission of inquiry or in any other capacity (Article 18, first subparagraph). The same rule applies to judges of the General Court (Article 47, first subparagraph, of the Statute).

46. ECtHR, judgment of 25 September 2018, Denisov v. Ukraine, CE:ECHR:2018:0925JUD007663911, paragraph 63 and case law cited.

47. See Chapter 1 of this Manual, section 5.b.

48. Judgments of 19 September 2006, Wilson, C506/04, EU:C:2006:587, paragraph 53, of 25 July 2018, Minister for Justice and Equality (Deficiencies in the system of justice), C216/18 PPU, EU:C:2018:586, paragraph 66, and of 24 June 2019, Commission v Poland (Independence of the Supreme Court), C619/18, EU:C:2019:531, paragraph 74.

independence,<sup>49</sup> and whether doubts expressed by the litigant concerning the independence of the judicial body settling the dispute or members of that body are objectively justified.<sup>50</sup>

Concerning first the *conditions of appointment*, it is common ground that confidence in a given judicial system is conditional upon the selection of highly qualified and personally reliable judges.<sup>51</sup> More generally, all decisions concerning the career of members of the judiciary should be based on merit, applying objective criteria within the relevant legal framework.<sup>52</sup> It results from case law of both the ECtHR<sup>53</sup> and the Court<sup>54</sup> that the requirement of independence is compatible with the fact that an executive authority has competence to appoint judges, provided that there are sufficient guarantees that the appointed members do not receive instructions when carrying out their judicial functions.<sup>55</sup> However, the European Charter on the statute for judges, prepared within the Council of Europe and which is not a legally binding instrument, suggests that, when the executive appoints judges, such appointments should take place, at least, on a recommendation from an independent body composed of a majority of members of the judiciary.<sup>56</sup> That corresponds in essence to the role conferred upon the panel set up in accordance with Article 255 TFEU, to give an opinion on candidates' suitability to perform the duties of Judge and Advocate-General of the Court of Justice and the General Court before the governments of the Member States appoint them.<sup>57</sup>

Conditions of 'appointment' are not limited to conferring the title and function of judge or prosecutor but extend to the assignment of cases to those members. That implies, in particular, that reassignment of a case must be exclusively motivated by proper administration of justice<sup>58</sup> and, therefore, not be such as to call into question the objectivity of the judge(s) to whom the case is reassigned.

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49. See, for example, ECtHR, judgment of 28 June 1984, *Campbell and Fell v. United Kingdom*, CE:ECHR:1984:0628JUD000781977, paragraph 78.

50. See, for example, ECtHR, judgment of 3 July 2012, *Ibrahim Gürkan v. Turkey*, CE:ECHR:2012:0703JUD001098710, paragraph 13. As Paul Craig explains in section 5.b of Chapter 1, there are various possible legal tests for determining the degree of likelihood of bias that should exist before a judge is disqualified from hearing a case, ranging from a *per se* rule for certain types of bias to an assessment of how objectively an external observer would perceive the judge's position in the case, taking into account all relevant circumstances.

51. European Commission for Democracy through Law (Venice Commission), Report on the independence of the judicial system. Part I: The independence of judges, 12-13 March 2010, point 8.

52. *Ibid.*, point 27.

53. A. Power, *Judicial Independence and the Democratic Process: Some Case Law of the European Court of Human Rights*, Int'l Bar Ass. Conference 2012, p. 5.

54. Opinion 1/17 of 30 April 2019, EU:C:2019:341, paragraph 227.

55. ECtHR, judgment of 22 October 1984, *Sramek v. Austria*, CE:ECHR:1984:1022JUD000879079, paragraph 38.

56. Article 1.3 in conjunction with Article 3.1 of the European Charter on the statute for judges.

57. See Council Decision 2010/124/EU of 25 February 2010 relating to the operating rules of the panel provided for in Article 255 of the Treaty on the Functioning of the European Union (OJ 2010, L 50, p. 18).

58. That may for example happen when it appears from deliberation on a case initially attributed to a chamber composed of three or five members of the Court that that case raises difficult or important questions warranting reassignment to a larger formation, for example the Court's Grand Chamber. See, for an illustration, order of 16 July 2015, *PFE*, C689/13, not published, EU:C:2015:521, paragraph 8.

Concerning next the *duration of appointment of members of the judiciary*, the key principle is “irremovability”, which is a fundamental tenet of judicial independence.<sup>59</sup> That does not require lifelong appointment but instead security of tenure until the term for which the judge has been appointed expires. As a result, judges may remain in post provided that they have not reached the obligatory retirement age or until the expiry of their mandate, where that mandate is for a fixed term.<sup>60</sup> That involves, in particular, protection against the lowering of the age of retirement when it is conceived in such a manner that a non-judicial body may exercise pressure on members of the judiciary or otherwise influence their decisions.<sup>61</sup> Security of tenure does not only protect the status of members of the judiciary as such against dismissal or any other form of premature removal from office, but also specific judicial functions such as presidency of a judicial body or a chamber of that body.<sup>62</sup> Likewise, a judge should not be appointed to another office or assigned elsewhere, even by way of promotion, against his will.<sup>63</sup> That said, the lack of formal recognition of irremovability in the law does not in itself undermine judicial independence provided that it is recognised in fact and that the other necessary guarantees are present.<sup>64</sup>

While irremovability is not absolute, there can be no exceptions to it unless they are warranted by legitimate and compelling grounds, subject to the principle of proportionality. Judges may be dismissed if they are deemed unfit for the purposes of carrying out their duties on account of incapacity or a serious breach of their obligations, provided the appropriate procedures are followed.<sup>65</sup> *Disciplinary regimes* are compatible with the requirement of independence if there are sufficient guarantees preventing any risk of that regime being used as a system of political control of the content of judicial decisions. Thus, rules which define conduct amounting to disciplinary offences and the penalties actually applicable, which provide for the involvement of an independent body in accordance with a procedure which fully safeguards the rights enshrined in Articles 47 and 48 of the Charter, in particular the rights of the defence, and which lay down the possibility of bringing legal proceedings challenging the disciplinary bodies’ decisions, constitute a set of guarantees that are essential for safeguarding independence.<sup>66</sup> Grounds of dismissal

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59. See Opinion No 1 of (2001) of the Consultative Council of European Judges (CCJE) on standards concerning the independence of the judiciary and the irremovability of judges, adopted on 23 November 2001, paragraph 57, and Opinion of Advocate General Tanchev in Commission v Poland (Indépendance des juridictions de droit commun), C192/18, EU:C:2019:529, points 104 and 105.

60. Judgment of 24 June 2019, Commission v Poland (Independence of the Supreme Court), C619/18, EU:C:2019:531, paragraph 76.

61. *Ibid.* Part IV of this Chapter contains a detailed analysis of that judgment.

62. See, to that effect, ECtHR, judgment of 23 June 2016, *Baka v. Hungary*, CE:ECHR:2016:0623JUD002026112, paragraph 172.

63. European Commission for Democracy through Law (Venice Commission), Report on the independence of the judicial system, cited above, points 41 to 43.

64. ECtHR, judgment of 9 November 2006, *Sacilor Lormines v. France*, CE:ECHR:2006:1109JUD006541101, paragraph 67 and case law cited.

65. Judgment of 24 June 2019, Commission v Poland (Independence of the Supreme Court), C619/18, EU:C:2019:531, paragraph 76.

66. See judgments of 25 July 2018, Minister for Justice and Equality (Deficiencies in the system of justice), C216/18 PPU, EU:C:2018:586, paragraph 67, and of 24 June 2019, Commission v Poland (Independence of the Supreme Court), C619/18, EU:C:2019:531, paragraph 77 and case law cited.

should be laid down in express legislative provisions<sup>67</sup> and be sufficiently precise to guarantee a satisfactory level of predictability.<sup>68</sup> An illustration is Article 6 of the Statute of the Court of Justice, which provides that '[a] Judge [or an Advocate-General] may be deprived of his office or of his right to a pension or other benefits in its stead only if, in the unanimous opinion of the Judges and Advocates-General of the Court of Justice, he no longer fulfils the requisite conditions or meets the obligations arising from his office'. The Rules of Procedure of the Court and the General Court, as well as the Code of Conduct for Members and former Members of the Court of Justice of the European Union, specify in precise terms the conditions and obligations the disrespect of which may justify disciplinary sanctions against the member(s) concerned. Substantive and procedural safeguards are in any event required to avoid a discretionary exercise of disciplinary powers vis-à-vis members of the judiciary.<sup>69</sup>

Each legal system should also contain rules protecting members of the judiciary against *any form of external pressure or influence*.

That implies, first and foremost, that decisions of judicial bodies must be binding and can only be overruled or otherwise altered by a judicial authority in accordance with procedures laid down by law.<sup>70</sup> That specific expression of the rule of law value has for example led the Court to reject as inadmissible requests for a preliminary ruling referred to it by organs exclusively entrusted with an advisory function.<sup>71</sup> As the recent judgment in *Torubarov*<sup>72</sup> illustrates, guaranteeing the right to an effective remedy may require – depending on the legal and factual circumstances – that the judicial body seized of an appeal against an administrative decision has the power to vary that decision in situations where the authority which adopted that decision has disregarded a previous judgment of that body.<sup>73</sup> The right to an effective remedy would be illusory if a Member State's legal system were to allow a final, binding judicial decision to remain inoperative to the detriment of one party.

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67. See order of 14 May 2008, *Pilato*, C109/07, EU:C:2008:274, paragraph 24, and judgments of 31 January 2013, *D. and A.*, C175/11, EU:C:2013:45, paragraph 97, of 9 October 2014, *TDC*, C222/13, EU:C:2014:2265, paragraph 32, and of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C216/18 PPU, EU:C:2018:586, paragraph 66.

68. In principle, reference to 'serious misconduct' is not sufficiently precise if that ground of dismissal has not been specified by the authority empowered to remove court members from office. See, to that effect, order of 16 November 2017, *Air Serbia and Kondić*, C476/16, not published, EU:C:2017:874, paragraph 25.

69. See for example, ECtHR, judgment of 28 February 2011, *Henryk Urban and Ryszard Urban v. Poland*, CE:ECHR:2010:1130JUD002361408, paragraph 49.

70. ECtHR, judgments of 19 April 1994, *Van de Hurk v. the Netherlands*, CE:ECHR:1994:0419JUD001603490, paragraph 45, and of 25 February 1997, *Findlay v. the United Kingdom*, CE:ECHR:1997:0225JUD002210793, paragraph 77.

71. See, inter alia, order of 5 March 1986, *Greis Unterweger*, 318/85, EU:C:1986:106, paragraph 4. Case law on that issue may not be settled, however. See Judgment of 16 October 1997, *Garofalo and Others*, C69/96 to C79/96, EU:C:1997:492, paragraph 27 and case law cited.

72. Judgment of 29 July 2019, *Torubarov*, C556/17, EU:C:2019:626.

73. *Ibid.*, paragraph 74. In that case, the Hungarian Immigration Office had rejected a third time an application for international protection, despite the fact that the two previous rejections had been annulled by a Hungarian Court and that, moreover, the information available to the Court indicated that that third decision did not fully respect the authority of the previous judgments.

Moreover, when the subject-matter of the dispute is a decision adopted by a public authority, the judicial body concerned must act as a third party in relation to that authority.<sup>74</sup> That precludes in particular the existence of organic and functional links between the authority in question and the body reviewing its decisions.<sup>75</sup> In contrast, the fact that the body concerned is exclusively composed of persons exercising the same profession as one of the parties to the dispute is not as such incompatible with the independence requirement.<sup>76</sup>

Another important protection against external pressure is a level of remuneration commensurate with the importance of the functions carried out by members of the judiciary.<sup>77</sup> That contributes to protecting them from attempts of corruption. The level of remuneration satisfying that requirement depends on multiple factors, including average salaries and living costs in the Member State concerned, whether functions are exercised at first instance or in appeal or the degree of responsibilities assumed within a given judicial body. That does not imply that members of the judiciary are immune from any measure negatively affecting their remuneration, provided that that measure is justified by a legitimate objective and proportionate to that objective.<sup>78</sup> Not only the level of remuneration but also the parameters used for determining it are relevant in terms of judicial independence. Thus, remuneration should be based on a general standard and rely on objective and transparent criteria, rather than on an assessment of the individual 'performance' of a judge.<sup>79</sup>

Furthermore, the independence requirement precludes interpretations of the law provided by a governmental authority from being binding upon governmental authorities. Thus, in *Beaumont v. France*,<sup>80</sup> the ECtHR concluded to a violation of Article 6(1) ECHR in a situation where the French Minister for Foreign Affairs had the exclusive power to interpret treaties when the administrative court dealing with the case encountered serious difficulties of interpretation. That corresponds in essence to the position recently adopted by the Court in *Poptawski II*,<sup>81</sup> in the context of Framework Decision 2002/584 on the European arrest warrant and the surrender procedures

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74. Judgment of 19 September 2006, *Wilson*, C506/04, EU:C:2006:587, paragraph 49.

75. See, for example, judgment of 30 March 1993, *Corbiau*, C24/92, EU:C:1993:118, paragraphs 15 and 16. A fortiori, the authority which has competence to adopt a disciplinary sanction cannot be regarded as 'impartial' in proceedings involving the professional concerned. See order of 28 November 2013, *Devillers*, C167/13, not published, EU:C:2013:804, paragraph 20.

76. See, concerning the National Bar Council in Italy, judgment of 17 July 2014, *Torresi*, C58/13 and C59/13, EU:C:2014:2088, paragraphs 15–30. See however, on the composition of a military court, ECtHR, judgment of 3 July 2012, *Ibrahim Gürkan v. Turkey*, CE:ECHR:2012:0703JUD001098710, paragraph 19.

77. See judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C64/16, EU:C:2018:117, paragraph 45, and Opinion 1/17 of 30 April 2019, EU:C:2019:341, paragraph 224.

78. Judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C64/16, EU:C:2018:117, paragraphs 46 to 51. In the same vein, the Belgian Constitutional Court has decided that judicial independence, which is guaranteed in Article 151(1) of the Belgian Constitution, and separation of powers do not preclude alignment of remuneration and pension rights of magistrates on those applicable to public servants (judgment of the Belgian Constitutional Court No 67/2013, *Union royale des Juges de Paix et Juges au tribunal de police de Belgique et autres v. Belgian State*, paragraph B.7.2).

79. European Commission for Democracy through Law (Venice Commission), Report on the independence of the judicial system, cited above, point 46.

80. ECtHR, judgment of 24 November 1994, *Beaumont v. France*, CE:ECHR:1994:1124JUD001528789, paragraphs 38 and 39.

81. Judgment of 24 June 2019, *Poptawski*, C573/17, EU:C:2019:530, paragraph 96.

between Member States.<sup>82</sup> The case concerned the conditions for applying the optional ground of non-execution of a EAW in Article 4(6) of the EAW Framework Decision.<sup>83</sup> It was unclear from Dutch law applicable at the material time whether, as required under that provision, execution of a EAW in the Netherlands could be refused on that ground only if the sentence which formed the basis of that EAW was actually executed in that Member State. The referring court explained that interpreting national law in conformity with that requirement in Article 4(6) was conceivable but expressed doubts whether it would be entitled to opt for that interpretation since the Minister of Security and Justice opposed it. The Court decided that, when implementing the optional ground of nonexecution in Article 4(6), the executing judicial authority should act *without any interference from an executive body* and must endeavour to interpret national law, to the greatest extent possible, in a manner ensuring an outcome which is compatible with the objective pursued by that provision.<sup>84</sup> That said, in Opinion 1/17 on the Comprehensive Economic and Trade Agreement between the EU and its Member States, of the one part, and Canada, of the other part (CETA), the Court accepted that a political body established by the Parties has the power to adopt interpretations of that agreement that will be binding upon the CETA tribunals, as that is neither illegitimate nor unusual in international relations.<sup>85</sup> However, the Court protected those tribunals' independence by precluding such interpretations from influencing disputes already resolved or brought prior to their adoption.<sup>86</sup>

Similarly, legitimate doubts as to the independence and impartiality of a judicial body may result from insufficient safeguards within the judiciary, in particular in relations between judges and their judicial superiors.<sup>87</sup> However, that does not preclude certain members of the judiciary to assume organisational responsibilities, such as the attribution of new cases or the monitoring of other member's productivity, insofar as those responsibilities are not exercised as a disguised means for influencing the outcome of proceedings.<sup>88</sup> Whether a measure remains within the boundaries of the proper 'administration of justice' and hence does not fall foul of the judicial independence requirement depends on a wide range of factors, such as resources available, qualification of judges, conflict of interests or accessibility of the place of hearings.<sup>89</sup> By analogy, it can be safely assumed that coordination measures designed to foster coherence of judicial decisions adopted by a court or tribunal are not, in principle, incompatible with the requirement of independence.

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82. Council Framework Decision of 13 June 2002 (OJ 2002, L 190, p. 1, the 'EAW Framework Decision').

83. Pursuant to that provision, '[t]he executing judicial authority may refuse to execute the European arrest warrant ... if the [EAW] has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law'.

84. Judgment of 24 June 2019, *Popławski*, C573/17, EU:C:2019:530, paragraphs 95 to 98.

85. Opinion 1/17 of 30 April 2019, EU:C:2019:341, paragraph 233.

86. *Ibid.*, paragraphs 236 and 237.

87. See, for example, ECtHR, judgment of 22 December 2009, *Parlov-Tkalčić v. Croatia*, CE:ECHR:2009:1222JUD002481006, paragraph 86.

88. See, to that effect, ECtHR, judgment of 22 December 2009, *Parlov-Tkalčić v. Croatia*, CE:ECHR:2009:1222JUD002481006, paragraph 88.

89. See ECtHR, judgment of 3 May 2007, *Bochan v. Ukraine*, CE:ECHR:2007:0503JUD000757702, paragraph 71.

### 3. JUDICIAL INDEPENDENCE AS A FUNCTIONAL REQUIREMENT FOR ENSURING THE EFFECTIVENESS OF EU LAW

The independence requirement applies to the courts and tribunals of the Member States, as a matter of Article 19 (1) TEU in the fields covered by EU law,<sup>90</sup> and as a matter of Article 47 of the Charter when they are ‘implementing Union law’.<sup>91</sup> From that perspective, it operates primarily as a *functional* instrument fostering the effectiveness of EU law. First, it forms an essential part of the ‘right to an effective remedy’ in case of violation of rights and freedoms guaranteed by EU law (A). Second, it is also a key aspect of the preliminary ruling procedure, through the reference made in Article 267 TFEU to the concept of ‘court or tribunal of a Member State’ (B). Third, it also serves as an interpretive tool of EU secondary law referring to the concept of ‘judicial’ body or authority (C).<sup>92</sup>

#### 3.1. An essential component of the ‘right to an effective remedy’ in case of violation of rights and freedoms guaranteed by EU law

In the absence of EU rules on the matter, it is for each Member State to establish procedural rules for actions intended to safeguard the rights which individuals derive from EU law, in accordance with the principle of procedural autonomy.<sup>93</sup> Nevertheless, two conditions must be satisfied in order for a Member State to assert the principle of procedural autonomy in situations governed by EU law. First, those national rules cannot be less favourable than those governing similar domestic situations (*principle of equivalence*). Second, they cannot make it excessively difficult or impossible in practice to exercise the rights conferred by EU law (*principle of effectiveness*). Those requirements ‘embody the general obligation on the Member States to ensure judicial protection of an individual’s rights under EU law’,<sup>94</sup> of which the second subparagraph of Article 19(1) TEU constitutes a specific expression.

The Court has recognised early on that such protection can only be effective if the judicial bodies dealing with cases involving EU law fully satisfy the requirement of independence. Thus, in *Johnston*,<sup>95</sup> a case decided in 1986, the Court clarified the scope of a requirement, laid down in a directive on equal treatment between men and women, that all persons who consider themselves wronged by discrimination must be able to pursue their claims by judicial process. In the main proceedings, Mrs Johnston challenged a decision of the Royal Ulster Constabulary refusing to renew her contract as a member of full-time police reserve and to allow her to be given

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90. That is without prejudice however to the application of an analogous guarantee under national law in all disputes brought before those courts. Being an essential component of the rule of law value, judicial independence is also a (constitutional) guarantee common to the Member States. See for example, Article 97.1 of the Grundgesetz (German Basic Law, cited above), Article 151(1) of the Belgian Constitution, Articles 104, first subparagraph, 108, second subparagraph, and 111, second subparagraph of the Italian Constitution, as well as Articles 141 and 144 of the Constitution of the Slovak Republic.

91. Article 51(1) of the Charter.

92. E.g. the notion of ‘issuing judicial authority’ or ‘executing judicial authority’ in Article 6(1) and 6(2) of Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States (OJ 2002, L 190, p. 1).

93. See, inter alia, judgment of 13 December 2017, *El Hassani*, C403/16, EU:C:2017:960, paragraphs 26 and 27 and case law cited.

94. *Ibid.*, paragraph 28.

95. Judgment of 15 May 1986, *Johnston*, 222/84, EU:C:1986:206.

training in the handling and use of fire-arms. The Chief Constable had justified that refusal by a policy under which men only should carry firearms in the regular course of their duties as police officers. Under national law, such difference of treatment was to be regarded as lawful if justified for safeguarding national security or protecting public safety or public order. Furthermore, a certificate issued by or on behalf of the competent secretary of state certifying that an act is justified by such purposes constituted 'conclusive evidence that it was done for that purpose'. In practice, this precluded courts reviewing such acts from exercising proper judicial review. The Court concluded that such limitation was not compatible with the requirement of access to a judicial process laid down in the directive as it allowed the competent authority to deprive an individual of the possibility of asserting by judicial process the rights conferred by that directive.<sup>96</sup> The Court referred to judicial review as a general principle of Community law and to Articles 6 and 13 of the ECHR.<sup>97</sup> That reasoning relates closely to judicial independence because, in essence, the domestic rule at issue compelled the court to 'mechanically' accept the justification of a difference of treatment advanced by a governmental authority.

It is now settled case law that the requirement of independence is an essential component of the right to an effective remedy in situations where rights and freedoms guaranteed by EU law are violated.<sup>98</sup>

The judgment in *El Hassani* provides an illustration.<sup>99</sup> The Supreme Administrative Court of Poland sought guidance on a provision of the 'Community Visa Code'<sup>100</sup> requiring that applicants who have been refused a visa in a Member State have the right to appeal that decision 'in accordance with the national law of that Member State'.<sup>101</sup> Under Polish law, no appeal before administrative courts was available for challenging such refusal. A refusal by the Consul to deliver a visa was only subject to a review procedure before that same Consul. M. El Hassani, a Moroccan national, planned to visit his wife and son in Poland and therefore applied for a visa in that Member State. The Consul of Poland in Rabat rejected that application. Upon request for review submitted, the Consul confirmed that decision. M. El Hassani challenged that refusal before Polish administrative courts, which had doubts whether the review procedure before the consul could be regarded as an 'appeal' satisfying the requirement in the Community Visa Code. The Court decided first that, as the case of M. El Hassani concerned the implementation of EU law in a Member State, Article 47 of the Charter applied to the proceedings. Against that background, it recalled that independence, 'which is inherent in the task of adjudication, implies above all that the body in question acts as a third party in relation to the authority which adopted the contested

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96. *Ibid.*, paragraphs 20 and 21.

97. *Ibid.*, paragraph 18.

98. It should be emphasised however that, in its judgment of 30 September 2003, *Köbler*, C224/01, EU:C:2003:513, the Court set aside Austria's argument to the effect that judicial independence would be altered if a violation of EU law by a national court were liable to trigger a Member State's non-contractual liability (paragraph 42). That is consistent with the possibility to declare, in the context of infringement proceedings, that a Member State has violated EU law as a result of action on the part of its courts or tribunals [see, for example, judgment of 4 October 2018, *Commission v France (Advance payment)*, C416/17, EU:C:2018:811].

99. Judgment of 13 December 2017, *El Hassani*, C403/16, EU:C:2017:960.

100. Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (OJ 2009, L 243, p. 1).

101. Article 32(3) of the Community Visa Code.

decision'.<sup>102</sup> That provision requires, at a certain stage of the proceedings, the possibility to bring the case concerning a final decision refusing a visa before a court, which Polish law failed to do.<sup>103</sup> Access to such independent review is essential for ensuring that visa applicants effectively benefit from the rights that they derive from EU secondary law.

### 3.2. A condition for qualifying as a 'court or tribunal of a Member State' within the meaning of Article 267 TFEU

Another area where judicial independence has played a major role in the Court's case law concerns the issue of whether a national body seeking guidance from the Court in a reference for a preliminary ruling is a 'court or tribunal of a Member State' within the meaning of Article 267 TFEU. That question is governed by EU law, which means that the concept of 'court or tribunal of a Member State' must be interpreted in a uniform manner in the EU.<sup>104</sup> In order to determine whether a body making a reference is a 'court or tribunal' within the meaning of that Article, the Court takes a number of factors into account, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and *whether it is independent*.<sup>105</sup> That latter condition is inextricably linked to the requirement that the national body referring a question for a preliminary ruling is called upon to give judgment in proceedings leading up to a judicial decision.<sup>106</sup>

A first issue that may arise concerns the condition that the referring body should be acting as a third party in relation to the authority which adopted the contested decision.<sup>107</sup> Thus, the Court held that that condition was not satisfied in a situation where the referring body had an organisational and functional link with the authority that had adopted the measure at issue.<sup>108</sup> Likewise, attachment of the referring body to a ministry does not as such call into question its quality as a 'court or tribunal'. That authority should nevertheless not have any functional links with that ministry or take orders or instructions from any source whatsoever,<sup>109</sup> and the minister should not be entitled to remove the case member of the referring body on request from one of the parties.<sup>110</sup>

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102. Judgment of 13 December 2017, El Hassani, C403/16, EU:C:2017:960, paragraph 40.

103. *Ibid.*, paragraph 41.

104. See, for example, judgment of 19 December 2012, Epitropos tou Elegktikou Sinedriou, C363/11, EU:C:2012:825, paragraph 18.

105. *Ibid.* See also judgments of 31 January 2013, Belov, C394/11, EU:C:2013:48, paragraph 38 and case law cited, of 12 June 2014, Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta, C377/13, EU:C:2014:1754, paragraph 23, of 9 October 2014, TDC, C222/13, EU:C:2014:2265, paragraph 27, and order of 13 December 2018, Holunga, C370/18, not published, EU:C:2018:1011, paragraph 14.

106. Judgments of 12 November 1998, Victoria Film, C134/97, EU:C:1998:535, paragraphs 14 and 15, of 30 November 2000, Österreichischer Gewerkschaftsbund, C195/98, EU:C:2000:655, paragraph 25, of 31 May 2005, Syfait and Others, C53/03, EU:C:2005:333, paragraph 35, and of 31 January 2013, Belov, C394/11, EU:C:2013:48, paragraph 39.

107. Judgments of 22 December 2010, RTL Belgium, C517/09, EU:C:2010:821, paragraph 3 and case law cited, and of 6 October 2015, Consorti Sanitari del Maresme, C203/14, EU:C:2015:664, paragraphs 19–21.

108. See the case law cited at footnote 55.

109. Judgment of 24 May 2016, MT Højgaard and Züblin, C396/14, EU:C:2016:347, paragraph 26.

110. See, to that effect, order of 16 November 2017, Air Serbia and Kondić, C476/16, not published, EU:C:2017:874, paragraph 24.

As highlighted in section 2 of this Chapter, another key parameter for assessing a body's independence is the existence of sufficient statutory safeguards functionally protecting it from external pressure or influence. For example, the Court concluded in *Margarit Panicello*<sup>111</sup> that a *Secretario Judicial* (registrar of a Spanish court) could not be regarded as a 'court or tribunal' even in cases where, in accordance with Spanish law, that registrar settles a dispute in an administrative procedure for recovery of unpaid lawyer's or agent's fees. The Court observed that the *Secretario Judicial* exercised that competence following the instructions and under supervision of his hierarchical superior within the tribunal in which he is employed.

In *Syfait and Others*,<sup>112</sup> the Court refused to answer a reference for a preliminary ruling from the Greek Competition Commission (*Epitropi Antagonismou*). The Greek Ministry for development supervised that commission and was therefore entitled, within certain limits, to review the lawfulness of the decisions adopted by the Commission. Moreover, although members of that Commission were personally and functionally independent, Greek law did not contain any particular safeguards in respect of their dismissal or the termination of their appointment. Therefore, they were not sufficiently protected from undue intervention or pressure from the executive.<sup>113</sup> The later judgment in *TDC*<sup>114</sup> contains a similar reasoning. In that case, the Court concluded that the Danish Telecommunications Complaints Board (*Teleklagenævnet*) is not a 'court or tribunal' of a Member State capable of addressing a request for a preliminary ruling to it, again due to a lack of guarantees protecting its members' independence vis-à-vis the executive. In particular that, under Danish law, those members could be removed from office by the Minister for Enterprise and Growth, who also has the power to appoint them, and that the conditions of their dismissal are not subject to any specific rules, other than the general rules of administrative law and employment law which apply in the event of an unlawful dismissal.<sup>115</sup> It followed that the dismissal of members of the Telecommunications Complaints Board was not subject to specific guarantees such as to dispel any reasonable doubt as to the independence of that body,<sup>116</sup> including a sufficiently precise definition of the grounds of dismissal.<sup>117</sup> The Court observed moreover that decisions of that board can be challenged before Danish courts and that the board in question has the status of a defendant in such proceedings. It is therefore not acting as a third party in the administrative proceedings, which rules out the possibility to regard it as a 'judicial' body.<sup>118</sup>

The relevance of judicial independence in the context of Article 267 TFEU is however not limited to defining the concept of 'court or tribunal of a Member State'. It also protects the very *function* of the preliminary reference mechanism, which is to ensure uniformity in the interpretation and application of EU law. Thus, in essence, all national courts should be able to refer preliminary questions in interpretation autonomously, the assessment of the relevance and necessity of

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111. Judgment of 16 February 2017, *Margarit Panicello*, C503/15, EU:C:2017:126.

112. Judgment of 31 May 2005, *Syfait and Others*, C53/03, EU:C:2005:333.

113. *Ibid.*, paragraphs 30 and 31.

114. Judgment of 9 October 2014, *TDC*, C222/13, EU:C:2014:2265

115. *Ibid.*, paragraphs 34 and 35.

116. *Ibid.*, paragraph 36, referring to the order of 14 May 2008, *Pilato*, C109/07, EU:C:2008:274, paragraph 28.

117. See section 2.b above.

118. Judgment of 9 October 2014, *TDC*, C222/13, EU:C:2014:2265, paragraph 37.

the question for a preliminary ruling being in principle the responsibility of the referring court alone. That has several consequences, including that the determination and formulation of the questions to be put to the Court devolves upon national courts alone and that the parties to the main proceedings may not change their tenor.<sup>119</sup>

Furthermore, national procedural rules cannot affect the powers and obligations conferred on national courts under Article 267 TFEU.<sup>120</sup> It follows, *inter alia*, that, where a case is pending for the second time before a court sitting at first instance after a judgment originally delivered by that court has been quashed by a supreme court, the court of first instance remains free to refer questions to the Court pursuant to that provision, regardless of the existence of a rule of national law whereby the lower court is bound on points of law by the rulings of a superior court.<sup>121</sup> As the Court explained, the autonomous jurisdiction which Article 267 TFEU confers on national courts to make reference for a preliminary ruling would be called into question if the appellate court could prevent the referring court from exercising the right to make such reference.<sup>122</sup> It is true that EU law does not preclude the existence of appeal proceedings against a decision to refer a question for a preliminary ruling to the Court. However, it is for the referring court alone to draw the proper inferences from a judgment delivered on appeal against its decision to refer and, in particular, to decide whether to maintain the reference for a preliminary ruling, or to amend it or to withdraw it.<sup>123</sup> It is only if the appeal court were to decide, in accordance with the applicable national rules of procedure, to annul the referring court's refusal to take note of the withdrawal of the applicant's action in the main proceedings and to order that the referring court's request for a preliminary ruling be withdrawn, that the Court could consider drawing itself the consequences from the appeal court's decision and potentially remove the case from the register, after seeking, if necessary, the observations of the referring court in that regard.<sup>124</sup> It is therefore clear that the Court would under no circumstances draw any inference from an appeal court's decision calling into question the *opportunity* to make a reference for a preliminary ruling, as long as the referring court maintains that reference.

That aspect of independence equally applies within each national judicial body. Thus, the Court has declared incompatible with EU law a procedural mechanism whereby a chamber of a court of final instance must, if it does not concur with the position adopted on an EU law issue by a decision of that court sitting in plenary session, refer the question to that plenary session and is therefore precluded from itself making such a reference.<sup>125</sup> That is coherent with the scope of judicial independence as described above.

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119. See the judgments of 18 July 2013, Consiglio Nazionale dei Geologi and Autorità Garante della Concorrenza e del mercato, C136/12, EU:C:2013:489, paragraph 29 and case law cited, and of 6 October 2015, T-Mobile Czech Republic and Vodafone Czech Republic, C508/14, EU:C:2015:657, paragraph 28

120. Judgment of 18 July 2013, Consiglio Nazionale dei Geologi and Autorità Garante della Concorrenza e del mercato, C136/12, EU:C:2013:489, paragraph 32 and case law cited.

121. Judgment of 16 December 2008, Cartesio, C210/06, EU:C:2008:723, paragraph 94 and case law cited. See, for a fuller account of that case law and a discussion of the critical comments that it raised, K. Lenaerts, I. Maselis and K. Gutman, *EU Procedural Law*, Oxford, OUP, 2014, pp. 67–69.

122. *Ibid.*, paragraph 95.

123. Judgment of 27 February 2014, Pohotovost', C470/12, EU:C:2014:101, paragraph 31.

124. *Ibid.*, paragraph 33.

125. Judgment of 5 April 2016, PFE, C689/13, EU:C:2016:199, paragraph 36.

Case law concerning the so-called ‘priority’ questions of constitutionality also illustrates how the Court protects ‘lower’ national courts’ independent powers and obligations under Article 267 TFEU. That provision precludes national legislation under which ordinary courts hearing an appeal or adjudicating at final instance are under a duty, if they consider a national statute to be contrary to EU law, to apply, in the course of that procedure, to the constitutional court for that statute to be generally struck down, and may not simply refrain from applying that statute in the case before them, to the extent that the priority nature of that procedure prevents all the other national courts or tribunals from exercising their right or fulfil their obligation to refer questions to the Court for a preliminary ruling.<sup>126</sup> Such a procedure for reviewing the constitutionality of national statutes is compatible with EU law only if ordinary courts remain free to make a reference to the Court at whatever stage of the proceedings they consider appropriate, and even at the end of the interlocutory procedure for the review of constitutionality, in respect of any question which they consider necessary, to adopt any measure necessary to ensure interim judicial protection of rights conferred under the EU legal order, and to disapply, at the end of such an interlocutory procedure, the national legislative provision at issue if they consider the latter to be contrary to EU law.<sup>127</sup> That protection echoes the principle that the effectiveness of EU law would be impaired by any rule of national law, either of a legislative or administrative nature, or even resulting from judicial practice, withholding from national courts having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent EU rules from having full force and effect.<sup>128</sup>

### 3.3.A tool for interpreting EU secondary law

A third function of judicial independence is to serve as an interpretive tool of EU secondary law referring to concepts such as ‘court’, ‘judicial body’ or ‘judicial authority’. Some EU mechanisms of judicial cooperation in the area of liberty, security and justice are indeed formally limited to judicial authorities.

An example is Regulation of the European Parliament and of the Council of 12 December 2012 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters (‘Brussels I bis’). In *Pula Parking*,<sup>129</sup> the Court interpreted the notion of ‘court’ decisions subject to the recognition and execution mechanism established by that Regulation. It underlined the need to ‘enable the national courts of the Member States to identify judgments delivered by other Member States’ courts and to proceed, with the expeditiousness required by that regulation, in enforcing those judgments’.<sup>130</sup> The Court further stated that ‘[c]ompliance with the principle of mutual trust in the administration of justice in the Member States [...] which underlies that regulation requires, in particular, that judgments the enforcement of which is sought in another Member State have been delivered in court proceedings offering guarantees of independence and impartiality and in compliance with the principle of *audi alteram partem*’.<sup>131</sup> Those conditions

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126. See to that effect, inter alia, the judgments of 11 September 2014, *A*, C112/13, EU:C:2014:2195, paragraph 46, and of 4 June 2015, *Kernkraftwerke Lippe-Ems*, C5/14, EU:C:2015:354, paragraph 36.

127. Ibid.

128. See, inter alia, the judgments of 9 March 1978, *Simmmenthal*, 106/77, EU:C:1978:49, paragraph 22, and of 4 June 2015, *Kernkraftwerke Lippe-Ems*, C5/14, EU:C:2015:354, paragraph 33.

129. Judgment of 9 March 2017, *Pula Parking*, C551/15, EU:C:2017:193.

130. Ibid., paragraph 54.

131. Ibid.

were not fulfilled in the main proceedings, which concerned the execution of a writ issued by a notary on the basis of an ‘authentic document’.

The concept of court or judicial authority is also central to the mechanism of transfer established by the EAW Framework Decision. The function of judicial independence here was illustrated above with the judgment in *Poptawski II*.<sup>132</sup>

In other cases, the Court had to interpret the concepts of ‘issuing or executing judicial authority’ for the purposes of that EAW Framework Decision. Thus, in *O.G. (Parquet de Lübeck)*,<sup>133</sup> the main proceedings concerned execution in Ireland of two EAWs issued by the Office of the Prosecutor in Lübeck and in Zwickau. The Supreme Court of Ireland had doubts whether those offices could be regarded as ‘issuing judicial authorities’ within the meaning of the EAW Framework Decision, considering in particular that they are subject to possible direction or instruction either directly or indirectly from the Ministry of Justice of the *Land* concerned. The Court confirmed first that the concept of ‘judicial authority’ is broader than that of ‘court’ and that, consequently, a ‘judicial authority’ within the meaning of the EAW Framework Decision may include authorities of a Member State which, although not necessarily judges or courts, participate in the administration of criminal justice in that Member State.<sup>134</sup> That covers public prosecutors’ offices, which have an essential role in the conduct of criminal proceedings.<sup>135</sup> However, the EAW Framework Decision aims to introduce a simplified system of surrender directly between judicial authorities in the Member States, without any intervention or assessment of the executive.<sup>136</sup> Furthermore, the issuing of a EAW is capable of impinging on the right to liberty of the person concerned, enshrined in Article 6 of the Charter.<sup>137</sup> As a result, where the law of the issuing Member State confers the competence to issue an EAW on an authority which, whilst participating in the administration of justice in that Member State, is not a judge or a court, the decision to issue a EAW must itself meet all requirements inherent in effective judicial protection.<sup>138</sup> The Court thus held that the issuing judicial authority must in such a case exercise its responsibilities ‘objectively, taking into account all incriminatory and exculpatory evidence, without being exposed to the risk that its decision-making power be subject to external directions or instructions, in particular from the executive, such that it is beyond doubt that the decision to issue a [EAW] lies with that authority and not, ultimately, with the executive’.<sup>139</sup> In line with its previous case law, the Court held that that independence requires the existence of statutory rules and an institutional framework guaranteeing that the issuing judicial authority is not exposed, when adopting such a decision, to an instruction in a specific case from the executive.<sup>140</sup> Based on the information available to Court, it could not be ruled out that the competent minister in Germany was empowered to issue instructions in respect of public prosecutors’ offices and thus have a direct influence on

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132. See section 2.b above.

133. Judgment of 27 May 2019, *OG and PI (Public Prosecutor’s Office in Lübeck and in Zwickau)*, C508/18, EU:C:2019:456.

134. *Ibid.*, paragraph 51.

135. *Ibid.*, paragraph 61.

136. *Ibid.*, paragraph 65.

137. *Ibid.*, paragraph 68.

138. *Ibid.*, paragraph 69.

139. *Ibid.*, paragraph 73. The Court restated here its finding at paragraph 42 of the judgment of 10 November 2016, *Kovalkovas*, C477/16 PPU, EU:C:2016:861.

140. *Ibid.*, paragraph 74.

whether to issue or, in some cases, not to issue a EAW. Therefore, the public prosecutors' offices in Germany could not be regarded as an 'issuing judicial authority' within the meaning of the EAW Framework Decision,<sup>141</sup> which justified refusing the execution of the EAWs at issue in the main proceedings.

A distinct issue is whether, even when a judicial authority has issued the EAW, doubts in the executing Member State concerning the effectiveness of judicial independence in the issuing Member State justify derogating from the transfer mechanism established by the EAW Framework Decision. The Court addressed that very sensitive question a few months only after the seminal judgment in *Associação Sindical dos Juizes Portugueses*, which is examined in section 4 below. Thus, in the case *Minister for Justice and Equality (Deficiencies in the system of justice)*, the High Court of Ireland asked whether a judicial authority may refuse executing a EAW if there is a risk that the person concerned would suffer a breach of his fundamental right to an independent tribunal in the event of transfer to the Member State in which that EAW was issued. Mutual recognition of judicial decisions is the 'cornerstone' of judicial cooperation in the area of liberty, security and justice and is based on mutual trust, which requires Member States to consider that all the other Member States comply with EU law and, in particular, with fundamental rights.<sup>142</sup> In *Aranyosi and Căldăraru*,<sup>143</sup> the Court had already accepted limitations on mutual recognition and mutual trust 'in exceptional circumstances'. Subject to certain conditions, surrender of the requested person can be refused where it would otherwise result in that person being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter. Following analogous reasoning, the Court held in *Minister for Justice and Equality (Deficiencies in the system of justice)* that, subject to strict conditions, such a risk allows the executing judicial authority to refuse transfer.<sup>144</sup> Independence of the judiciary, which is of the 'essence' of the right to a fair trial,<sup>145</sup> is key to effective judicial protection and, therefore, to upholding the rule of law within the EU.<sup>146</sup> That requirement is also pivotal in the context of the EAW Framework Decision, which establishes a simplified system of direct surrender between 'judicial authorities' founded on the assumption that they all meet the requirements of effective judicial protection.<sup>147</sup>

However, since such a limitation derogates from mutual trust, refusing the execution of a EAW on that basis is only conceivable in exceptional circumstances.<sup>148</sup> The executing judicial authority should carry out first an objective assessment of the operation of justice in the issuing Member State and therefore verify whether there is a real risk of systemic and generalised deficiencies in that Member State's judicial system and hence of breaches of the fundamental right to a fair

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141. *Ibid.*, paragraph 88.

142. On mutual trust in the ALSJ, see L. Bay Larsen, 'Quelques remarques sur la place et les limites de la confiance mutuelle dans le cadre du mandat d'arrêt européen', 112 *L'Observateur de Bruxelles* (2018), pp. 10–15.

143. Judgment of 5 April 2016, *Aranyosi and Căldăraru*, C404/15 and C659/15 PPU, EU:C:2016:198.

144. Judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C216/18 PPU, EU:C:2018:586, paragraph 59.

145. *Ibid.*, paragraph 48.

146. *Ibid.*, paragraphs 51 to 53.

147. *Ibid.*, paragraphs 55 and 58.

148. See also K. Lenaerts, 'Upholding the Rule of Law through Judicial Dialogue', *Yearbook of European Law* (2019, to be published), p. 6.

trial, guaranteed in Article 47 of the Charter.<sup>149</sup> ‘Particularly relevant’ in that context is information contained in the reasoned proposal submitted by the Commission to the Council on the basis of Article 7(1) TEU. If such a real risk can be identified, the executing judicial authority must then assess specifically and precisely whether, in the particular circumstances of the case, there are substantial grounds for believing that, following surrender, the requested person will run that risk.<sup>150</sup> The executing judicial authority must request from the issuing judicial authority any supplementary information necessary for carrying out that assessment.<sup>151</sup> The position is different however if the European Council adopts a decision based on Article 7(2) TEU, determining that there is a serious and persistent breach of the principles set out in Article 2 TEU in the issuing Member State, and if the Council suspends the EAW Framework Decision in respect of that Member State. In that case, the executing judicial authority should refuse automatically to execute any EAW that that Member State issues, irrespective of the situation of the person concerned.<sup>152</sup>

## 4. JUDICIAL INDEPENDENCE AS A CONSTITUTIONAL REQUIREMENT OF EU LAW

### 4.1. Introductory remarks

Until recently, it could be safely assumed that a violation of the judicial independence requirement could not be sanctioned as such in EU law but only incidentally, with a view to enforcing a (another) rule of EU primary or secondary law.

For example, in *El Hassani*, the independence requirement was exclusively used for identifying a violation of the requirement of an effective judicial remedy in the Union’s visa code. That incidental or instrumental nature of the independence requirement appears clearly also in the case law examined above on the concept of ‘court or tribunal of a Member State’ in Article 267 TFEU.<sup>153</sup> The requirement, set out in the second subparagraph of Article 19(1) TEU, that Member States should ‘provide remedies sufficient to ensure effective legal protection in the fields covered by Union law’ may have been regarded essentially as a procedural one: remedies should exist in the Member States, available to those complaining about a breach of the rights which they derive from EU law.<sup>154</sup> Support for that position was found in Article 51(2) of the Charter, which provides that the latter ‘does not extend the field of application of Union law beyond the powers of the Union or establish any power or task for the Union, or modify powers and tasks as defined in the Treaties’. That rule applies to the right to an effective remedy before an independent tribunal as guaranteed in Article 47 Charter. It is true that neither the EU Treaty nor the FEU Treaty seem to confer expressly upon the Union a competence concerning judicial organisation at national level.

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149. Judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C216/18 PPU, EU:C:2018:586, paragraph 61.

150. *Ibid.*, paragraph 68.

151. *Ibid.*, paragraph 76.

152. *Ibid.*, paragraph 82.

153. See section 3.b above.

154. See, to that effect, Opinion of Advocate General Saugmandsgaard Øe in *Associação Sindical dos Juizes Portugueses*, C64/16, EU:C:2017:395, point 63.

It is equally true that models of judicial organisation are part of the Member States' procedural autonomy, unless EU secondary law specifies conditions under which certain actions are to be exercised before national courts.<sup>155</sup>

It appears from recent case law however that judicial independence in the Member States can no longer be regarded as a mere incidental or purely functional tool for enforcing EU law. As a specific expression of the rule of law value, that independence belongs to the constitutional features of the EU legal order and thus warrants some degree of not only political but also judicial monitoring at EU level.

## 4.2. The Member States' duty to guarantee judicial independence of national courts acting in the field of EU law

### 4.2.1. The founding step: the Portuguese Court of Auditors' case

The first step in that direction was the seminal judgment in *Associação Sindical dos Juizes Portugueses*, delivered on 27 February 2018.<sup>156</sup> That case raised the issue whether a national court or tribunal can rely directly on EU law to protect its independence, when it takes the view that either legislative or executive action threatens that independence. In the main proceedings, members of the Portuguese Court of Auditors (the *Tribunal de Contas*) contested temporary salary-reduction measures affecting them and which, they argued, threatened their judicial independence guaranteed by Article 19 TEU and Article 47 of the Charter.<sup>157</sup> The salary reductions at issue, which formed part of cuts in public spending decided in response to the EU programme of financial assistance to Portugal, did not target the judiciary but applied to a vast group of public servants and other officials.

As a preliminary point, the Court stated that the requirement of 'effective legal protection' in Article 19(1), second subparagraph, TEU, applies *ratione materiae* to the 'fields covered by EU law' irrespective of whether the Member States are implementing EU law.<sup>158</sup> That scope of application is thus broader than that of Article 47 of the Charter since it is not limited to national measures implementing EU law within the meaning of Article 51(1) of the Charter. That requirement therefore *applies horizontally* to all proceedings before national courts *in which EU law might apply*.

Next, the Court emphasised that the right to an effective legal protection in Article 19(1) TEU, the fundamental right to an effective remedy and the rule of law value in Article 2 TEU are inextricably linked. Article 19 TEU 'gives concrete expression to'<sup>159</sup> and 'is of the essence of'<sup>160</sup> the value of the rule of law stated in Article 2 TEU and entrusts national courts and tribunals, in cooperation with the Court of Justice, with the responsibility for ensuring judicial review in the EU legal order. Consequently, all 'courts or tribunals' in the Member States within the meaning of Article 267 TFEU must meet

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155. See for example, concerning effective remedies against acts of the contracting authority in public procurement, judgment of 15 September 2016, *Star Storage and Others*, C439/14 and C488/14, EU:C:2016:688, paragraph 39.

156. Judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C64/16, EU:C:2018:117.

157. Unlike the courts of auditors in some other Member States, the Tribunal de Contas may, in certain cases, operate as a court of law.

158. Judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C64/16, EU:C:2018:117, paragraph 29.

159. *Ibid.*, paragraph 32.

160. *Ibid.*, paragraph 36, citing the judgment of 28 March 2017, *Rosneft* (C72/15, EU:C:2017:236), paragraph 73. See on that latter judgment *infra*, section 3.

the requirements of effective judicial protection.<sup>161</sup> The second subparagraph of Article 19(1) TEU itself requires those national courts or tribunals, in so far as they may rule on EU law questions, to be 'independent' within the meaning of Article 47, second subparagraph, of the Charter.<sup>162</sup>

A key aspect of the Court's reasoning is how judicial independence relates to the preliminary ruling procedure. The former 'is, in particular, essential to the proper functioning of the [latter]' as only national bodies satisfying the requirement of independence may enter into dialogue with the Court of Justice through that procedure.<sup>163</sup> As President Lenaerts has made clear, the underlying rationale is pretty simple: no hindrance should result from pressure exercised on the judge to refer or not to refer questions to the Court and, after delivery of the preliminary ruling, only independent courts can ensure proper implementation of it in the main proceedings.<sup>164</sup> That protection of national judges' independence through Article 19(1) TEU boils down to protecting national judges as the *arm* of EU law (or, put more simply, as 'European judges') and, by extension, to safeguarding the uniformity and effectiveness of EU law which the preliminary ruling procedure seeks to achieve.<sup>165</sup> The second subparagraph of Article 47 of the Charter confirms for its part that preserving judicial independence forms part of the fundamental right to an effective remedy. On the merits, the Court nevertheless concluded that the salary reductions at issue did not undermine judicial independence.<sup>166</sup>

#### **4.2.2. Deficiency in judicial organisation as an autonomous violation of the second subparagraph of Article 19(1) TEU: The Independence of the Supreme Court of Poland case**

The judgment in *Associação Sindical dos Juizes Portugueses* already suggested that requirements under Article 19(1), second subparagraph, TEU cover the *undermining of judicial independence* as a result of the legal framework applicable to national courts' activity in a Member State. That may have comforted the Commission in its intention to initiate the first infringement proceedings against a Member State for a violation of that provision, read together with Article 47 of the Charter, on the lowering of the retirement age of Supreme Court (Sąd Najwyższy) judges in Poland as part of the reform of the Polish judicial system put in place in 2017.<sup>167</sup> In its judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, the Court plainly confirms that interpretation.<sup>168</sup>

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161. *Ibid.*, paragraph 37.

162. *Ibid.*, paragraph 42.

163. *Ibid.*, paragraph 43. That condition of admissibility of requests for a preliminary ruling was examined in section 3.b.

164. K. Lenaerts, *op. cit.*, p. 4.

165. *Ibid.*

166. They were objectively justified by the need to reduce budget deficit, were limited to a part of the salary varying in accordance with the level of salary, were temporary in nature and did not specifically target the judiciary but were part of a comprehensive effort to be made by public officials generally to cut spending in the public sector. See Judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C64/16, EU:C:2018:117, paragraphs 46 to 50.

167. That case differs from previous infringement proceedings which gave rise to the judgment of 6 November 2012, *Commission v Hungary*, C286/12, EU:C:2012:687. Although the Commission also took issue in that case with a national scheme requiring the compulsory retirement of, *inter alia*, judges and prosecutors at a given age, the legal argument was different as it concerned a difference of treatment based on age with other persons in the labour force, which the Court declared incompatible with Articles 2 and 6(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

168. Judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C619/18, EU:C:2019:531.

The issues raised by the Commission in that case concerned, in essence, circumvention of the security of tenure in the judiciary through measures significantly lowering the age of pension for judges. In the Commission's view, the measures at issue were a disguised means to 'dismiss' certain judges as a result of their actions carried out during their judicial office and, conversely, to reward others on the same grounds by maintaining them in office. That risk occurs in particular where, as was the case here, the lowering, which is to apply directly to judges in office, comes together with possible derogations: as a result of the reform of the judicial system in Poland, the President of the Republic of Poland received discretionary power, upon request of the judges of the Supreme Court concerned, to extend twice, each time for a three-year term, their period of judicial activity beyond the new retirement age fixed in the law. The Commission, inspired in particular by critical views expressed on that reform by the Venice Commission<sup>169</sup> and by the UN Special Rapporteur on the independence of judges and lawyers,<sup>170</sup> raised two complaints in this respect. First, in the Commission's view, it was incompatible with the guarantee of irremovability to apply the lowering at issue to judges in post before the entry into force of the new law, combined with the possibility given to the President of the Republic to increase the number of posts within the Supreme Court.<sup>171</sup> The second complaint targeted the discretionary power conferred upon the President of the Republic of Poland to extend, on individual request from the judges concerned, the period of activity of judges having attained the age of retirement. Those arguments were similar to those raised by the Commission in its proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, founded on the procedure set out in Article 7(1) TEU.<sup>172</sup> The first subparagraph of Article 269 TFEU provides, in respect of that 'political' track, that '[t]he Court of Justice ... shall have jurisdiction to decide on the legality of an act adopted by the European Council or by the Council pursuant to Article 7 [TEU] solely at the request of the Member State concerned by a determination of the European Council or of the Council *and in respect solely of the procedural stipulations contained in that Article*'.<sup>173</sup> The judgment in *Associação Sindical dos Juizes Portugueses* had already made clear however that no such limitation to the Court's jurisdiction exists in the context of other types of procedures, such as infringement proceedings based on Article 258 TFEU.

The judgment clarifies the scope of the judicial independence requirement under the second subparagraph of Article 19(1) TEU, and how that provision relates to the right to an effective remedy before an independent tribunal vested in Article 47 of the Charter.

The reform of the judicial system at issue did not specifically concern a law implementing Union law or even connected with EU law, which prompted Advocate General Tanchev to take the view that the Commission's action was inadmissible insofar as it relied on Article 47 of the Charter. In

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169. See European Commission for Democracy through Law (Venice Commission, Council of Europe), Opinion No 904/2017 on the draft act amending the act on the national council of the judiciary, on the draft act amending the act on the Supreme Court of Poland, and on the draft act on the organisation of ordinary courts, 11 December 2017.

170. Special Report of 5 April 2018, A/HRC/38/38/Add.1.

171. As the UN Special Rapporteur underscored, the sensitiveness of that aspect of the reform was reinforced by its broader context: 'The judges who leave the bench as a result of the lowering of the retirement age will be replaced by new judges, appointed by the President of the Republic upon recommendation of the newly constituted National Council of the Judiciary, which will be largely dominated by the political appointees of the current ruling majority' (*Ibid.*, point 56).

172. COM(2017) 835 final, 20 December 2017.

173. Emphasis added.

essence, the Advocate General argued that that provision could not be ‘imported’ into the scope of the second subparagraph of Article 19(1) TEU in the absence of an assessment of the applicability of the Charter based on its Article 51(1), that is without verifying whether the measures at issue amounted to ‘implementing EU law’.<sup>174</sup>

The Court only referred to the second subparagraph of Article 19(1) TEU when it upheld the Commission’s action. The fact remains however that the judgment differs from the Opinion of the Advocate General on how that provision and Article 47 of the Charter relate to each other. Even within the sphere of judicial organisation, an impairment of judicial independence violates an autonomous requirement of EU law under that subparagraph, *construed in the light of Article 47 of the Charter*. Although not formally applying the Charter, the Court unambiguously refers to it when interpreting the requirements resulting for the Member States from that same subparagraph.<sup>175</sup> After all, the requirement of judicial independence forms part of the principle of effective judicial protection, which is itself ‘a general principle of EU law stemming from the constitutional traditions common to the Member States [...] now reaffirmed by Article 47 of the Charter’.<sup>176</sup>

On the applicability of the second subparagraph of Article 19(1), the Court had no difficulty to conclude that the Polish Supreme Court is indeed a judicial body ruling on questions concerning the application or interpretation of EU law.<sup>177</sup> That does not amount to applying EU law *ultra vires* because the Court, by requiring the Member States to comply with that provision, is not ‘in any way claiming to exercise [the competence of the Member States concerning the organisation of justice] nor is it, therefore, [...] arrogating that competence’. The Court’s jurisdiction is limited to verifying whether the Member States exercise that competence in compliance with EU law,<sup>178</sup> including the guarantee of independence ‘which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected *and* that the values common to the Member States in Article 2 TEU, in particular the value of the rule of law, will be safeguarded’.<sup>179</sup> The Court thus confirmed the Commission’s position that a breach of that second subparagraph occurs when judicial organisation in a Member State, in the broad sense, precludes national courts applying EU law from complying with the right to effective legal protection.

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174. See Opinion of Advocate General Tanchev in [Commission v Poland \(Independence of the Supreme Court\)](#), C619/18, EU:C:2019:325, points 53, 56 and 57. That being so, the Advocate General nuanced that approach in his Opinion in [Commission v Poland \(Indépendance des juridictions de droit commun\)](#), C192/18, EU:C:2019:529. Here, the Advocate General emphasised first that ‘the content of the guarantee of the rule of law under Articles 2 and 19(1) TEU, second subparagraph, and respect for the irremovability and independence of judges inherent therein, is determined, pursuant to Article 6(3) TEU, by the ECHR [...] and constitutional traditions common to the Member States’ (point 96). He added: ‘A constitutional passerelle exists, therefore, between Article 47 of the Charter and Article 19(1) TEU, given that these same sources are relevant to determining the content of the right to ‘an independent and impartial tribunal previously established by Law’ under Article 47 of the Charter. The second subparagraph of Article 19 (1) TEU and Article 47 of the Charter are further linked by their relationship with general principles of law. They must be interpreted in harmony with them, so that the case law elaborated beneath the two provisions inevitably intersects’ (point 97).

175. See, for example, judgment of 24 June 2019, [Commission v Poland \(Independence of the Supreme Court\)](#), C619/18, EU:C:2019:531, paragraphs 57 and 74.

176. *Ibid.*, paragraph 49. See however, section 4.c below.

177. *Ibid.*, paragraph 56.

178. *Ibid.*, paragraph 52.

179. *Ibid.*, paragraph 58 and case law cited (emphasis added).

On the merits, the Court clarified first the requirement of ‘irremovability’. It implies, in particular, that judges may remain in post provided that they have not reached the obligatory retirement age or until expiry of their mandate, where that mandate is for a fixed term, and may be subject to exceptions warranted by legitimate and compelling grounds, subject to the principle of proportionality.<sup>180</sup> Although such exceptions concern primarily the disciplinary regime applicable to members of the judiciary, irremovability also requires that certain conditions are satisfied for accepting that a lowering of the age of retirement applies to judges in office, which results in those judges prematurely ceasing to carry out their judicial office. The Court upheld both complaints of the Commission.<sup>181</sup> On the first complaint, the Court held that, in principle, applying a measure lowering the retirement age of judges to judges already serving on the court under consideration is acceptable if such application ‘is justified by a legitimate objective [that] it is proportionate in the light of that objective and inasmuch as it is not such as to raise reasonable doubt in the minds of individuals as to the imperviousness of the court concerned to external factors and its neutrality with respect to the interests before it’.<sup>182</sup> Such legitimate objectives may consist in standardising the age limits for mandatorily ceasing activity in the public sector or establishing a more balanced age structure by facilitating access to judicial offices for young people.<sup>183</sup> However, in this case, the Court observed in the first place that preparatory works of the Polish law at issue contained information ‘that [wa]s such as to raise doubts as to whether the reform of the retirement age of serving judges [of the Supreme Court] was made in pursuance of such objectives, and not with the aim of side-lining a certain group of judges of that court’.<sup>184</sup> Next, and most importantly, the Court emphasised that the lowering of the retirement age at issue was accompanied by a new mechanism allowing the President of the Republic to decide, on a discretionary basis, to extend the shortened period during which a judge carries out his or her duties by two consecutive 3-year periods.<sup>185</sup> That system, combined with the fact that the lowering at issue affected immediately almost a third of the serving members of the Supreme Court of Poland, was such as to create the impression that the aim of the reform was in fact to exclude a predetermined group of judges of that court.<sup>186</sup> The aspect of the reform at issue also disregarded the principle of proportionality insofar as it lowered immediately and significantly the age limit for compulsorily ceasing to serve as a judge of the Supreme Court, without introducing transitional measures protecting the legitimate expectations of the persons concerned who were in post upon the entry into force of the contested provisions.<sup>187</sup> The Court thus concluded that the immediate application of the lowering of retirement age to

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180. *Ibid.*, paragraph 76.

181. *Ibid.*, paragraph 78.

182. *Ibid.*, paragraphs 78 and 79. Moreover, as the UN Special Rapporteur has made clear, a state is in principle free to determine the mandatory retirement age of its judges. See Report cited above, point 55.

183. *Ibid.*, paragraph 81, citing the judgments of 21 July 2011, *Fuchs and Köhler*, C159/10 and C160/10, EU:C:2011:508, paragraph 50, and of 6 November 2012, *Commission v Hungary*, C286/12, EU:C:2012:687, paragraphs 61 and 62.

184. Judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C619/18, EU:C:2019:531, paragraph 82.

185. *Ibid.*, paragraph 83.

186. *Ibid.*, paragraphs 85 and 86.

187. *Ibid.*, paragraph 91 and case law cited.

judges in post was not, in light of all relevant circumstances, justified by a legitimate objective and therefore undermined the principle of the irremovability.<sup>188</sup>

On the second complaint, the Court upheld the Commission's argument that the power conferred upon the President of the Republic of Poland was incompatible with judicial independence. The latter protects courts from external interventions or pressure liable to impair the independent judgment of their members and to influence their decisions.<sup>189</sup> The Court made clear at the outset that the presidential power at issue did not concern the appointment process – in which intervention of the executive is possible and even usual<sup>190</sup> – but instead the possibility for judges in office to continue to carry out their judicial duties.<sup>191</sup> Entrusting the President with the power of extending the period of judicial activity beyond the normal retirement age is moreover not sufficient in itself for concluding that judicial independence has been undermined. However, the position is different where that power is exercised without any substantive and detailed procedural rules such as to waive any reasonable doubts as to the imperviousness of the judges asking for an extension to external factors and as to their neutrality.<sup>192</sup> That is consistent with the analogous requirements applicable to the disciplinary regime for members of the judiciary.<sup>193</sup> The New Law on the Supreme Court did not satisfy those conditions because the decision of the President of the Republic was not based on objective criteria and thus discretionary in nature. The requirement that the National Council of the Judiciary delivers an opinion on requests for extension did not call that conclusion into question. The Court pointed to the fact that opinions delivered so far, whether positive or negative, either did not state any reasons at all or simply made general reference to the terms in which the criteria fixed in the New Law were set out, which did not provide the President of the Republic of Poland with any objective information such as to assist him in exercising his power to grant or refuse extensions.<sup>194</sup> In the final part of the judgment, the analogy proposed by the Republic of Poland with the discretion that Member States enjoy to renew or not a judge of the Court of Justice whose mandate comes to an end was rejected.<sup>195</sup> Firstly, members of the Court, unlike members of the Supreme Court of Poland, are appointed for a 6-year fixed term. Secondly, each Member State does not have full discretion as regards renewal, which – like appointment of a new member – requires the common accord of the Member States, after consultation of the '255-Committee'. In any event, the conditions for appointing members of the Court of Justice cannot modify the scope of the obligations resulting from second subparagraph of Article 19(1) TEU.<sup>196</sup>

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188. *Ibid.*, paragraph 96.

189. *Ibid.*, paragraph 108.

190. See section 2.b above.

191. Judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C619/18, EU:C:2019:531, paragraph 109.

192. *Ibid.*, paragraph 111.

193. See section 3.b above.

194. Judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C619/18, EU:C:2019:531, paragraph 117.

195. *Ibid.*, paragraph 121.

196. *Ibid.*, paragraph 122.

In separate infringement proceedings, which are still pending, the Commission argues, *inter alia*,<sup>197</sup> that the parallel lowering of the retirement age of judges of the ordinary courts, combined with the Minister of Justice's discretionary power to prolong on request an individual judge's mandate, disregards for analogous reasons the judicial independence requirement laid down by Article 19(1), second subparagraph, TEU, read in conjunction with Article 47 of the Charter.<sup>198</sup> The Commission points in particular to the lack of objective criteria to be applied by the Minister when making such decisions (not any obligation to state reasons therein), and to the fact that the Minister is not subject to any deadline in this respect. Another aspect of the reform of the Polish justice system put in place in 2017 that will be addressed by the Court in the near future concerns national measures establishing the Disciplinary Chamber of the Supreme Court and national measures modifying the manner of appointing the judicial members of the National Council for the Judiciary.<sup>199</sup> The preliminary references here touch, more particularly, on whether the newly established Disciplinary Chamber of the Supreme Court offers sufficient guarantees of independence under EU law to hear actions initiated by judges affected by Polish measures lowering the judicial retirement age. The references concern in particular the fact that the group of judges eligible for appointment by the President of the Republic of Poland to that Disciplinary Chamber are selected by the newly established National Council of the Judiciary, the composition of which is now primarily determined by the legislative and executive authorities.

#### 4.3. The specific role of Article 47 of the Charter for 'non-systemic' violations of the right to an effective remedy before an independent Tribunal

The question remains what *types of infringements* of the independence requirement exactly are caught by the second subparagraph of Article 19(1) TEU.

As it appears from the previous sections, there has so far never been any direct monitoring by the Court of *specific* allegations of a violation of the independence requirement by a *given* court or tribunal of a Member State, for example because a national judge did not withdraw despite a conflict of interest calling into question his impartiality. The judgments in *Associação Sindical dos Juizes Portugueses* and *Commission v Poland (Indépendance des juridictions de droit commun)* concerned alleged flaws in the *statutory framework* governing action of (certain) courts in the Member States concerned, within the meaning set out in section 2 of this Chapter. Likewise, the nuance to mutual trust in the context of the EAW Framework Decision introduced in *Minister for Justice and Equality (Deficiencies in the system of justice)* is, as was made clear above, limited to exceptional circumstances where the executing judicial authority identifies, on the basis of objective elements, a real risk of *systemic and generalised* deficiencies in the judicial system of the issuing Member State.

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197. Infringement proceedings in Case C-192/18 also concern (albeit on a different legal basis) the different retirement age introduced for men and women judges of the ordinary courts and of the Supreme Court, and for State Prosecutors, namely 60 for women and 65 for men, compared to a compulsory age of retirement of 67 previously applicable for both sexes.

198. See Opinion of Advocate General Tanchev in *Commission v Poland (Indépendance des juridictions de droit commun)*, C192/18, EU:C:2019:529.

199. See, in this respect, the Opinion of Advocate General Tanchev in *Joined Cases A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, C585/18, C624/18 and C625/18, EU:C:2019:551.

Against that background, Advocate General Tanchev recently submitted that the second subparagraph of Article 19(1) TEU only addresses ‘structural infirmity in a given Member State’, as opposed to ‘individual or particularised incidences of breach of the irremovability and independence of judges’,<sup>200</sup> to be dealt with under Article 47 of the Charter where the Member States are implementing EU law.<sup>201</sup> That position echoes the Commission’s concern for situations of ‘a *systemic threat* to the rule of law’ in Member States in its 2014 framework to strengthen the rule of law.<sup>202</sup> Support for that interpretation might be found in the wording of Article 19(1) TEU, which refers to the Member States’ duty to ‘*provide remedies* sufficient to ensure effective legal protection’.<sup>203</sup> That wording seems to suggest that that requirement concerns, at least primarily, the *legal environment* in which national courts and tribunals ruling on EU law issues operate. It is true that, as Paul Craig submits in Chapter 1, judicial independence ‘is placed at the greatest risk by systemic deficiencies that undermine such independence and affect the entirety of the judiciary, or a significant portion thereof’.<sup>204</sup> The Court has however not clarified the matter so far, which means that, under EU law, no definitive conclusions can be drawn at this point on that important issue.

## 5. CONCLUSION

The Court’s judgments examined in section 4.b of this Chapter depart from the functional or utilitarian use of judicial independence in earlier case law. By linking that guarantee to the rule of law value in Article 2 TEU, to which the effective judicial protection requirement in Article 19(1) TEU gives concrete expression, the Court unequivocally endorses a constitutional approach of judicial independence and recognises that the latter forms part of the essential features of the EU legal order. In that sense, that recent case law builds upon and simultaneously develops the foundational principles set out in *Les Verts v Parliament*,<sup>205</sup> *Segi and Others v Council*,<sup>206</sup> or *Rosneft*,<sup>207</sup> in which the Court established – although within the sphere of action of the EU institutions – the constitutional value of the right to an effective remedy.

Leaving aside that relationship with earlier judgments, the interpretation which the Court recently gave to the requirement of ‘effective legal protection’ in the second subparagraph of Article 19(1) TEU, read together with Article 2 TEU, appears to be in line with the rule of law as a precondition for acceding to the EU.<sup>208</sup> It thus opens the door to judicial monitoring that Member States effectively

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200. That comes close to what Paul Craig describes as cases of bias or partiality at section 5.b of Chapter 1.

201. Opinion of Advocate General Tanchev in *Commission v Poland (Indépendance des juridictions de droit commun)*, C192/18, EU:C:2019:529, points 115 and 116.

202. Communication from the European Commission, A new EU Framework to strengthen the Rule of Law, COM(2014) 158 Final, 11 March 2014, p. 3 (emphasis added).

203. Emphasis added.

204. See P. Craig, Chapter 1 of this Manual, at 5.a.

205. Judgment of 23 April 1986, *Les Verts v Parliament*, 294/83, EU:C:1986:166.

206. Judgment of 27 February 2007, *Segi and Others v Council*, C355/04 P, EU:C:2007:116, paragraphs 51 to 55.

207. Judgment of 28 March 2017, *Rosneft*, C72/15, EU:C:2017:236, paragraphs 72 to 74.

208. S. Adam, P. Van Elsuwege, op. cit., p. 340.

act in compliance with the rule of law in terms of independence of their judiciaries.<sup>209</sup> Whilst that judicial lever focuses on the rule of law, it seems reasonable to assume that it also offers indirect protection to other key values in Article 2 TEU such as ‘freedom’, ‘respect for human rights’ and ‘justice’, all of which risk being compromised if the rule of law does not apply consistently and reliably in practice. With that in mind, it becomes clear that effective judicial independence throughout the Union is pivotal to the proper functioning of the Union and, ultimately also, to the citizen’s confidence upon it.

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209. See, for a provisional assessment of the incentive which that combination of political and judicial instruments creates, R. Tinière, ‘La délicate question de la détermination des sanctions pour violation de l’État de droit’, 2 *Revue Trimestrielle de Droit Européen* (2019), pp. 293–304.

## CHAPTER 3

# JUDGES', PRESIDENTS' OF COURTS AND MEMBERS OF JUDICIAL COUNCILS PERSPECTIVE

NURIA DIAZ ABAD

## 1. MECHANISMS FOR IDENTIFYING AND PREVENTING RULE OF LAW VIOLATIONS

As already mentioned, the European Union is not only a community of Law, but also a community of values.<sup>210</sup> Among these values, Article 2 TEU mentions the Rule of Law. The Judiciary plays an important role in upholding and protecting the Rule of Law in a Member State, as judicial independence is one of the key elements of the Rule of Law. Judges must have effective instruments and mechanisms at their disposal enabling them to preserve the Rule of Law and, when necessary, to restore it. This section will examine some of these mechanisms. In some cases judges have the ability to turn to institutions or associations to help them in their duty to preserve the Rule of Law, in other cases it will be up to the judges themselves to react, assuming they are ethical in this respect. We will focus on the European standards developed by the Council of Europe, especially by the Committee of Ministers, the Consultative Council of Judges of the Council of Europe (hereinafter CCJE) and the European Commission for Democracy through Law (Venice Commission), as well as the European Network of Councils for the Judiciary (hereinafter ENCJ).

### 1.1. Councils for the Judiciary

According to the Council of Europe 'where judges consider that their independence is threatened, they should be able to have recourse to a council for the judiciary or another independent authority, or they should have effective means of remedy.'<sup>211</sup> It is precisely their independence of the executive and legislative power that should allow them to protect judicial independence. Therefore, they can establish internal proceedings to defend judicial independence.

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210. See Chapter 1, Part 2 of this publication and the reference to Case C-64/16, *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas* (ECLI:EU:C:2017:117), case C216/18 PPU, LM (ECLI:EU:2018:586), case C- 621/18, *Wightman and others* (ECLI:EU:C:2018:999), and case C-619/18 R, *Commission v Poland*, order of 17 December 2018 (ECLI:EU:C:2018:582).

211. Recommendation CM/Rec(2010)12 on Judges: independence, efficiency and responsibilities, point 6

Twenty of the 28 EU Member States have established independent, autonomous bodies for organising the Judiciary. The main function of these Councils for the Judiciary is to defend the independence of the Judiciary. In that sense, the Magna Carta of Judges approved in 2010 by the Consultative Council of European Judges (CCJE) stipulated that ‘to ensure independence of judges, each state shall create a Council for the Judiciary or another specific body, itself independent from legislative and executive powers, endowed with broad competences for all questions concerning their status as well as the organisation, the functioning and the image of judicial institutions (...).’<sup>212</sup> CCJE’s Opinion no. 10 on the Council for the Judiciary in the service of society states that the general mission of these councils is to safeguard both the independence of the judicial system and the independence of the individual judges, as ‘the existence of independent and impartial courts is a structural requirement of a state governed by the rule of law.’<sup>213</sup> Section V of this Opinion is devoted to a listing and explanation of the extensive powers of these bodies to guarantee the independence and the efficiency of the Judiciary, given that ‘overall the Council for the Judiciary should have a wide role in respect of competences which are interrelated, in order that it can better protect and promote judicial independence and the efficiency of justice.’<sup>214</sup>

It is also important to protect judicial independence so that the disciplinary measures against judges should only be applied by the Council while fully respecting the judicial functions of the judges, as disciplinary measures cannot be a method of correcting judicial decisions. Any interference of the executive in disciplinary measures against judges may be seen as a threat to their independence. In that sense, in a case regarding the Portuguese CSM, the ECtHR recognised ‘the particular importance of the CSM’s responsibilities under the Constitution in a key area from the perspective of the rule of law and the separation of powers. As a body specifically set up to interpret and apply the rules governing the disciplinary conduct of judges, the CSM has the task of contributing to the smooth operation of the justice system.’<sup>215</sup> The ECtHR emphasised ‘the growing importance attached to the separation of powers and to the necessity of safeguarding the independence of the judiciary.’<sup>216</sup>

## 1.2. The European Network of Councils for the Judiciary (ENCJ)

The ENCJ was established in Rome in 2004 as an association of the bodies governing the Judiciary in Europe with the objective of reinforcing an independent but accountable Judiciary and promoting best practices to enable the Judiciary to deliver timely, effective and high-quality justice for the benefit of all citizens.<sup>217</sup> The ENCJ has developed common standards for the Justice sector in the EU, as well as guidelines and recommendations on a wide variety of topics concerning the Judiciary. The ENCJ has also developed a **request for cooperation** to examine

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212. Magna Carta of Judges, point 13

213. CCJE Opinion no. 10, point 8

214. CCJE Opinion no. 10, point 41

215. Ramos Nunes de Carvalho e Sá v. Portugal, nos 55391/13, 57728/13 and 74041/13, 6 November 2018, § 195

216. Prager and Oberschlick v. Austria, 26 April 1995, § 34, Series A no. 313; Kudeshkina v. Russia, no. 29492/05, § 86, 26 February 2009; and Stafford v. the United Kingdom [GC], no. 46295/99, § 78; Kleyn and Others v. the Netherlands [GC], nos 39343/98 and 3 others, § 193; and Bakav. Hungary [GC], no. 20261/12, § 165, Ramos Nunes § 197

217. [www.encj.eu](http://www.encj.eu)

situations in individual countries where judicial independence is under threat. The Executive Board of the ENCJ made statements regarding the judicial reforms in Poland<sup>218</sup> on the basis of these requests for cooperation and issued opinions on the compatibility of the Presidential draft Act on the National Council of the Judiciary of Poland with European standards including, in particular, regarding the independence of the judiciary and the status of councils for the judiciary. In principle, the ENCJ does not issue opinions on draft legislation, although it has set out the generally applicable ENCJ principles.<sup>219</sup>

### 1.3. Associations of judges

Judges have freedom of speech and the right of association.<sup>220</sup> Associations of judges at national or international level are also called to defend the independence of their members and of the Judiciary as a whole.

Their involvement in this task is of paramount importance with regard to the media and the citizens. Their influence on the perception of independence has been examined by the ENCJ in three surveys taken among judges in 2015, 2017 and 2018.

**International associations of judges** bring together national associations of judges with the objective of safeguarding the independence of the Judiciary. The three most representative associations of judges in Europe are the Association of European Administrative Judges (AEAJ), the European Association of Judges (EAJ) and ‘Magistrats Européens pour la Démocratie et la Liberté’ (MEDEL).

The **AEAJ**, founded in 2000, pursues such objectives as the promotion of the legality of administrative acts, thereby helping Europe to grow together in freedom and justice. Its website presents information on the activities of other associations with regard to judicial independence. The AEAJ, which enjoys observer status within the CCJE, has recently asked for an opinion on the legal setting of the position of a Court president<sup>221</sup> and has sent letters<sup>222</sup> and adopted statements in situations that are particularly sensitive for judges.<sup>223</sup>

The **EAJ** is one of the regional groups within the International Association of Judges (IAJ) and, according to its statutes, it ‘works to promote closer European cooperation in all areas pertaining to the judiciaries of the member states and international and supranational judiciaries, not exceeding the European level. Therefore, the association specifically aims to strengthen and support the rule of law, as well as judicial independence and impartiality within the European scope and in all member states (...)’. The EAJ has adopted various opinions and resolutions

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218. [ENCJ Executive Board’s statement concerning judicial reforms in Poland \(26 April 2017\)](#) and [statement on the latest draft Act on the National Council of the Judiciary of Poland \(5 December 2017\)](#)

219. [Opinions of 30 January 2017, 17 July 2017 and 13 October 2017](#)

220. The freedom of associations is stated in some European documents – Opinion no. 3 of the CCJE, point 34 (<https://rm.coe.int/16807475bb>) or point 1.7. from the European Charter on the statute for judges (<https://rm.coe.int/16807473ef>). The same Charter very clearly presents the role of professional associations of judges: to ‘contribute in particular to the defence of judges’ statutory rights before such authorities and bodies’.

221. [Opinion of the CCJE of 29 March 2019.](#)

222. [Letter of 13 February 2019.](#)

223. [Statement of 22 July 2016.](#)

regarding threats to judicial independence in several countries.<sup>224</sup> **MEDEL** is an association, the objectives of which include ‘the defence of the independence of the judiciary in the face of every other power as well as of specific interests’. It actively disseminates information on the independence of the Judiciary in Europe. It publishes statements on the situation of the Judiciary in various countries.<sup>225</sup>

#### 1.4. The role of court presidents

Court presidents are also responsible for defending the independence of judges. This subject has been examined in CCJE opinion no. 19 (2016) as a part of their task of representing the court and fellow judges, as their main duty ‘must be to act at all times as guardians of the independence and impartiality of judges and of the court as a whole’<sup>226</sup> and as part of their relationship within the court. In this respect, the Opinion emphasises that court presidents should themselves respect the internal independence of judges within their courts.<sup>227</sup> If court presidents evaluate the performance of individual judges, legal and transparent safeguards must be in place to ensure that judicial independence is not threatened and, if they have a role in receiving and responding to complaints of parties regarding cases that are pending in the court, they should have due regard for the principle of the independence of judges.

The position of the presidents of Supreme Courts is of special importance. This position is held in some states together with the position of President of the Council for the Judiciary. The Presidents of the Supreme Courts of the Member States of the EU constituted a Network, which has also intervened in some issues related to the defence of the Rule of Law.<sup>228</sup> There is also an Association of the Councils of State and Supreme Administrative Jurisdictions (ACA Europe),<sup>229</sup> which was established with the objective of ‘obtaining a better understanding of EU law by the judges of the Supreme Administrative Courts across Europe and a better knowledge of the functioning of the other Supreme Administrative Courts in the implementation of EU law; improving the mutual trust between judges of the Supreme Administrative Courts; fostering an effectively and efficiently functioning of administrative justice in the EU; providing an exchange of ideas on the rule of law in the administrative judicial systems and, finally, ensuring access to the decisions of the Supreme Administrative Courts implementing EU law.’

A question that was examined in one of the seminars<sup>230</sup> and gave rise to debate was whether the role of the court presidents in unifying the interpretation of the law can affect judicial

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224. E.g. the resolution on the Polish Act amending the Act on the National Council of the Judiciary and the Act on the System of Administrative Courts (10 May 2019) or the Report on the fact-finding mission of the EAJ to Hungary, adopted on request of the Association of Hungarian Judges (Magyar Bírói Egyesület – MABIE) and of the National Judicial Council of the Hungarian Judiciary (OBT).

225. Statement on the new infringement procedure launched by the European Commission against Poland regarding the new disciplinary regime for judges in Poland (29 April 2019) or on the revision of the three basic laws of the Judiciary (the Statutes of Judges and Prosecutors, the organization of Courts and of the Prosecution Service and the organisation of the Superior Council of Magistracy) in Romania (9 March 2019) or on the Constitutional and legal provisions of Montenegro related to the election of members of the Judicial Council (8 June 2018)

226. CCJE Opinion no. 19, paragraph 7

227. CCJE Opinion no. 19, paragraph 13

228. Network of Presidents of the Supreme Courts of the EU.

229. ACA EUROPE.

230. See Training Guidelines.

independence and therefore threaten the Rule of Law. CCJE opinion no. 20 (2017) on the role of the Courts with respect to the uniform application of the law considers that the need to ensure the uniform application of the law should not call the principle of judicial independence into question.<sup>231</sup> In that sense, some semi-informal procedures (such as regularly scheduled meetings of judges, guidelines) or informal mechanisms (such as informal consultations among judges or judicial training) may be put in place to promote the uniform application of the law, although conclusions drawn in these contexts cannot breach the independence of the individual judges.

### 1.5. The judges themselves: the principles of judicial ethics

So far, we have examined some of the mechanisms judges may turn to in order to help them defend the Rule of Law. But what can the judges themselves do in the case of serious breaches of the Rule of Law? In this regard, judges should be aware of the standards of judicial ethics and see judicial ethics as a last resort for defending judicial independence on their own. If the ethical obligation to exercise reserve breaks down when the Rule of Law is in danger, in some cases, judges have publicly expressed their views on these problems or have even participated in demonstrations.

Several organisations have developed principles of judicial ethics in recent years. At international level, the United Nations developed the Bangalore Principles of Judicial Conduct,<sup>232</sup> which are articulated around six core values, including independence. The Bangalore Principles understand independence as a prerequisite for the Rule of Law and a fundamental guarantee of a fair trial. Independence is defined in the Commentary to the Bangalore Principles on Judicial Conduct<sup>233</sup> as ‘the responsibility imposed on a judge that enables the judge to adjudicate a dispute honestly and impartially on the basis of the judge’s assessment of the facts and in accordance with a conscientious understanding of the law, without any external pressure, influence, inducement, threat or interference by anyone.’<sup>234</sup> The United Nations Office on Drugs and Crime (UNODC) has developed several instruments to implement the United Nations Convention against Corruption (UNCAC), promoting the adoption of codes of judicial conduct and preparing the Resource Guide on Strengthening Judicial Integrity and Capacity and the Implementation Guide and Evaluative Framework for Article 11. In 2016, UNODC launched a global programme for promoting a culture of lawfulness and the Global Judicial Integrity Network was established as a part of this programme, to share best practices, create a database of relevant resources and develop and implement a code of conduct together with manuals, training programmes and other tools.<sup>235</sup>

Two other organisations need to be mentioned at regional level: the Ibero-American Judicial Summit and the ENCJ. In 2006, the Ibero-American Code of Judicial Ethics, which was signed by the Spanish and the Portuguese Councils for the Judiciary, was proposed as a model for approving and implementing those principles in the regulations of all their countries. The Ibero-American Code on Judicial Ethics provides that independence is not a privilege of the judge, but a guarantee for the citizen, who has the right to be judged according to legal parameters, as a way of avoiding arbitrariness, pursuing the constitutional values and safeguarding fundamental rights.

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231. [CCJE Opinion no. 20](#), paragraph 1.

232. [Bangalore Principles of Judicial Conduct 2002](#).

233. [Commentary to the Bangalore Principles on Judicial Conduct](#)

234. Commentary 22

235. [Global Judicial Integrity Network](#)

In 2010, the ENCJ stated in the London Declaration of Judicial Ethics: ‘the affirmation of principles of professional conduct for judges strengthens public confidence and allows a better understanding of the role of the judge in society.’<sup>236</sup> In its Report on Judicial Ethics, the ENCJ stated that ‘the judge has an educational role to play in support of the law, together with other institutions which have the same mission’, but ‘when democracy and fundamental freedoms are in peril, a judge’s reserve may yield to the duty to speak out.’<sup>237</sup> In this way, judicial ethics become an important instrument in the defence of the Rule of Law. Judicial training on ethics is needed to raise awareness of this aspect of judicial ethics.

In 2014, the ENCJ also considered the need for a code of conduct. Its reports on independence and accountability consider the existence of a code of ethics as being one of the indicators of objective accountability of the individual judge, given that such ethical principles lay down the standards of conduct that society can expect from its judges and for which judges can be held accountable. A code of judicial ethics can strengthen public confidence and promote a better understanding of the role of the judge in society.

Most Member States of the EU have developed Codes of Judicial Ethics at national level.

Another important aspect of these codes of ethics is the establishment of a Commission on Judicial Ethics. In this respect, UNODC recommends ‘establishing a judicial ethics advisory committee of sitting and/or retired judges to advise its members on the propriety of their contemplated or proposed future conduct.’<sup>238</sup> The Ibero-American Code of Judicial Ethics established the Ibero-American Commission on Judicial Ethics in 2006 to assist their Judiciaries in dilemmas regarding judicial ethics and to facilitate the discussion, dissemination and development of these issues. In 2015, the ENCJ recommended that national judicial authorities should consider establishing a judicial ethics advisory committee of sitting and/or retired judges to advise judges.<sup>239</sup>

When addressing these Committees on Judicial Ethics, judges may consider aspects of their duties related to the defence of the Rule of Law. Nevertheless, it should be borne in mind that the opinions can only be related to concrete and personal cases and not to abstract situations or hypothetical cases, because they cannot be used to question the behaviour of other judges.<sup>240</sup>

## 1.6. European Commission

Upholding the Rule of Law, one of the fundamental values of the European Union, is a shared responsibility of all Member States and EU institutions. The European Commission, in particular, has a variety of instruments at its disposal to protect the rule of law (the so-called rule of law toolbox),<sup>241</sup> which includes the ability to trigger Article 7 TEU (which can also be triggered by one third of the Member States or by the European Parliament), a Communication to the European

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236. [The London Declaration on Judicial Ethics](#), Judicial Ethics – Principles, Values and Qualities, London, 2–4 June 2010, p. 1

237. [ENCJ Report 2009–2010 on Judicial Ethics](#), p. 6

238. [I Measures for the Effective Implementation of the Bangalore Principles](#), 2010, paragraphs 2.1 and 2.2.

239. [ENCJ Report 2014–2015, Minimum Judicial Standards V. Disciplinary proceedings and liability of judges](#), p. 22.

240. [Spanish Committee on Judicial Ethics](#), opinions 4/2018, 23 October and 9/2018, 3 December.

241. In its Communication Further strengthening the Rule of Law within the Union – State of play and possible next steps, [COM\(2019\) 163 final](#), the European Commission provides information on the full Rule of Law Toolbox.

Parliament and the Council 'A new EU Framework to strengthen the Rule of Law'<sup>242</sup> and infringement procedures before the CJEU. More recently, the European Commission published its Communication to the European Parliament, the European Council and the Council 'Further strengthening the Rule of Law within the Union. State of play and possible steps,'<sup>243</sup> and opened a public debate on this matter. Next, the Commission issued a second Communication on 17 July 2019 on 'Strengthening the rule of law within the Union – a blueprint for action,'<sup>244</sup> which sets out a series of concrete actions to promote a common rule of law culture, prevent rule of law problems and ensure an effective response to rule of law breaches.

The most important mechanism to protect the Rule of Law established in the EU Treaties is the mechanism enshrined in **Article 7 TEU**.

The fact that the adoption of any measures requires unanimity has made the application of this mechanism difficult and, in any case, Article 7 TEU is an exceptional procedure for attempting to solve a crisis in the case of a serious and persistent breach of the Rule of Law. No decisions under the preventive and sanctioning mechanisms of Article 7 have been adopted to date, although Article 7(1) has already been triggered in two cases: in December 2017, by the Commission with regard to Poland<sup>245</sup> and in September 2018, by the European Parliament with regard to Hungary.<sup>246</sup>

The European Commission decided to establish an **EU Framework to strengthen the Rule of Law** in its Communication of 11 March 2014. This Framework seeks to enable the Commission to find a solution with the Member State concerned to prevent the emergence of a systemic threat to the rule of law in that Member State that could develop into a 'clear risk of a serious breach' within the meaning of Article 7 TEU and established a three-step procedure based on finding a solution through a dialogue with the Member State in question, ensuring an objective and thorough assessment of the situation at hand, respecting the principle of equal treatment of Member States, indicating swift and concrete actions that could be taken to address the systemic threat and avoid the use of the Article 7 TEU mechanisms.

The 2014 Communication foresees that 'depending on the situation, the Commission may decide to seek advice and assistance from members of the judicial networks in the EU, such as the networks of the Presidents of Supreme Courts of the EU, the Association of the Councils of State and Supreme Administrative Jurisdictions of the EU or the Judicial Councils. The Commission will examine, together with these networks, how such assistance could be provided swiftly where appropriate, and whether particular arrangements are necessary to that end.'<sup>247</sup>

As already mentioned, on 17 July 2019, the Commission issued a Communication setting out a number of concrete actions to uphold and strengthen the rule of law on three pillars, namely

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242. [COM\(2014\) 158 final](#).

243. [COM\(2019\)163 final](#).

244. [COM/2019/343 final](#).

245. Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law (COM(2017) 835 final, 20 December 2017).

246. European Parliament Resolution of 12 September 2018 calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)).

247. This has already been the case during the proceedings against Poland, where a meeting of the First Vice-President of the European Commission and representatives of the three judicial associations mentioned took place.

promotion, prevention and response. The Commission also analyses the role of the Judiciary within these three pillars.

As for promoting the Rule of Law culture, European networks, such as the European Network of Presidents of Supreme Courts, ACA Europe, ENCJ and the European Judicial Training Network (EJTN), play an important role in promoting and exchanging ideas and best practices. Meanwhile, national judiciaries also have an important role to play. 'The participation of national judicial councils, judges and prosecutors in national debates on judicial reforms is in itself an important part of national checks and balances.'<sup>248</sup>

In preventing Rule of Law problems, the Commission considers that 'national judiciary, together with other national checks and balances, such as constitutional courts and ombudspersons, are the first key lines of defence against attacks to the rule of law from any branch of the state.'<sup>249</sup> The Commission proposed the establishment of a network of national contact points in the Member States to be set up for a dialogue on Rule of Law issues and believes it would be up to the Member States to designate the contact points, which could, for example, be located in the public administration or the judiciary. Judicial networks could also be invited to share their expertise and present their views.

Finally, as for the response to the threats to the Rule of Law, the Commission clearly states that, where national rule of safeguards of the law do not seem capable of addressing them, it is the responsibility of the EU institutions and the Member States to take steps to remedy the situation and reiterates that 'recent judgments of the Court of Justice have, for example, highlighted the impact of generalised deficiencies relating to judicial independence on the mutual trust on which instruments in the area of freedom, security and justice are based.'<sup>250</sup> In that sense, the infringement procedures allow the Commission or another Member State to raise a claim before the CJEU against the failures of other Member States to comply with EU law. Interim measures may be adopted in such proceedings to guarantee the execution of the judgment.

## 1.7. The CJEU

The CJEU has been confronted in two different ways with questions related to the Rule of Law: through infringement procedures and through requests for preliminary rulings submitted by national judges.

The relevant case law of the CJEU has already been analysed in detail in the second part of this Publication.

As for the **preliminary rulings**, it should be borne in mind that they are a way for national judges, who need to apply European Union law to a case, and the CJEU to cooperate to resolve the doubts of the national judge on the validity or the interpretation of EU law. In this respect, however, the question of the Rule of Law, as one of the fundamental values on which the European Union is based, has become of increasing importance in some requests for preliminary rulings submitted by judges in recent years. This is how the preliminary rulings have become an important tool in the hand of judges.

Nevertheless this mechanism needs to be used within the limits of the TFEU and the case law of the CJEU.

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248. COM (2019)343 final, p. 7

249. COM (2019)343 final, p.9

250. COM (2019)343 final, p.15

## 2. SELECTED STANDARDS OF THE RULE OF LAW REGARDING JUDICIAL INDEPENDENCE

### 2.1. Councils for the Judiciary

Councils for the Judiciary are subject to the Recommendation CM/Rec (2010) 12 of the Committee of Ministers of the Council of Europe. According to this Recommendation 'not less than half the members of such councils should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary.'<sup>251</sup>

This recommendation clearly states that 'where judges consider that their independence is threatened they should be able to have recourse to a council for the judiciary or another independent authority, or they should have effective means of remedy.'<sup>252</sup>

The CCJE developed the Magna Carta of Judges and has studied several aspects of judicial independence in opinion no. 1 (2001) on standards concerning the independence of the judiciary and the irremovability of judges, no. 8 (2006) on the role of judges in the protection of the rule of law and human rights in the context of terrorism, no. 10 (2007) on the Council for the Judiciary in the service of society, no. 17 (2014) on the evaluation of judges' work, the quality of justice and respect for judicial independence, no. 18 (2015) on the position of the judiciary and its relationship with the other powers of state in a modern democracy and no. 21 (2018) on preventing corruption among judges.

According to the CCJE, some decisions of the Council for the Judiciary regarding the management and administration of the justice system, as well as the decisions regarding the appointment, mobility, promotion, disciplining and dismissal of judges (if it has any of these powers) should contain an explanation of their grounds and have binding force, subject to the possibility of a judicial review. Indeed, the independence of the Council for the Judiciary does not mean that it is beyond the law and exempt from judicial supervision.<sup>253</sup>

The European Commission for Democracy through Law ('Venice Commission') provides a non-exhaustive list of common standards on the Rule of Law: Report on the Rule of Law (2011), including a checklist for evaluating the state of the rule of law in single states, which includes access to justice before independent and impartial courts.

The Council for the Judiciary should have the power not only to disclose its views publicly, but should also take all necessary steps before the public, the political authorities and, where appropriate, the courts to defend the reputation of the judicial institution and/or its members.<sup>254</sup>

The ENCJ Report 2010–2011 on Councils for the Judiciary has established several principles on how these Councils should be organised. They should have a constitutional status to secure their independence from the other state powers. In this respect, the standards of the Council of Europe require that the majority of their members are judges and that these judges must be elected by their peers. They also must have economic independence to be able to defend the Judiciary.

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251. Appendix to the Recommendation CM/Rec (2010) 12, point 27.

252. Appendix to the Recommendation CM/Rec (2010) 12, point 8.

253. Opinion No. 10 (2007) of the Consultative Council of European Judges on the Council for the Judiciary at the service of society.

254. CCJE Opinion No. 10 (2007) on the Council for the Judiciary at the service of society.

While commenting on these European standards, the European Commission considers that ‘it is up to the Member States to organise their justice systems, including whether or not to establish a Council for the Judiciary. However, where such a Council has been established ... its independence must be guaranteed in line with European standards.’<sup>255</sup>

According to the ENCJ, the fundamental role of the Council is to safeguard the independence of the Judiciary and the Council has a distinctive position with respect to other democratic institutions, as it has the legitimacy to defend the judiciary, as well as individual judges, in a manner which is consistent with its role as a guarantor in the face of any measures that threaten to compromise the core values of independence and autonomy.<sup>256</sup>

The ENCJ advises that a Council for the Judiciary must be self-governing and operate autonomously to guarantee judicial independence, the maintenance of the Rule of Law, the promotion of civil liberties and individual freedoms, basic human rights and the effective and transparent administration of justice. Therefore, the following should be wholly or partly under the control of a Council for the Judiciary or equivalent independent and autonomous bodies: (1) the appointment and promotion of judges; (2) the training of judges; (3) judicial discipline and judicial ethics; (4) complaints against the judiciary; (5) the management of the judiciary; (6) the administration of the courts; (7) the financing of the judiciary; and (8) the proposal of legislation on the courts and the judiciary. Besides, a Council for the Judiciary should control its own finances and activities independently of both the legislative and executive branches of government.

## 2.2. Recruitment of judges

The Venice Commission Rule of Law Checklist considers the need to include objective procedures and criteria for judicial appointments, tenure and discipline and removals.

It is important that the appointment and promotion of judges is not based on political or personal considerations, while the system should be constantly monitored to ensure that this is so.

The Council of Europe considers that decisions on the selection and the career path of judges should be based on objective criteria laid down by law or by the competent authorities. Such decisions should be based on merit, with consideration given to the qualifications, skills and capacity required to adjudicate in cases by applying the law while respecting human dignity.<sup>257</sup>

The ENCJ also insists that judicial appointments should only be based on merit and capability.<sup>258</sup> If the government or the head of state plays a role in the ultimate appointment of members of the judiciary, the involvement of a minister or the head of state is not in itself in conflict with the principles of independence, fairness, openness and transparency if their role in the appointment is clearly defined and their decision-making processes clearly documented, while the involvement of the government or the head of state does not affect those principles if they give recognition to decisions made in the context of an independent selection process.

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255. Recommendation 2018/103 of 20 December 2017, regarding the Rule of Law in Poland, paragraph 31.

256. Councils for the Judiciary. Report 2010 – 2011 of the ENCJ.

257. Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe of 17 November 2010, on judges: independence, efficiency and responsibilities, point 44.

258. [2011–2012 Report: Indicators related to Minimum Standards regarding recruitment, selection, appointment and promotion of members of the judiciary.](#)

### 2.3. Appointment of court presidents

The CCJE refers to the qualifications required for becoming a court president, emphasising that ‘when judges are given responsibility for the administration of the courts, they should receive appropriate training and have the necessary support to carry out the task.’<sup>259</sup>

#### 2.3.1. Irremovability

According to the ENCJ, judges may not be transferred to a different post or function without their consent. Acceptable exceptions should be laid down by law or otherwise established methods. The reasons for the transfer should be clearly specified and a mandatory transfer should be decided upon in transparent proceedings conducted by an independent body, the decisions of which are subject to challenge or review.

### 2.4. Individual professional evaluation of judges

According to the CCJE ‘the rule of law in a democracy requires not only judicial independence but also the establishment of competent courts rendering judicial decisions of the highest possible quality.’<sup>260</sup> ‘[...] The fundamental rule for any individual evaluation of judges must be that it maintains total respect for judicial independence. When an individual evaluation has consequences for a judge’s promotion, salary and pension or may even lead to his or her removal from office, there is a risk that the evaluated judge will not decide on cases according to his or her objective interpretation of the facts and the law, but in a way that may be thought to please the evaluators. Therefore, any evaluation of judges by members of the legislative or executive arms of the state is especially problematic. However, the risk to judicial independence is not completely avoided, even if the evaluation is undertaken by other judges. Judicial independence depends not only on freedom from undue influence from external sources, but also requires freedom from undue influence internally, which, in some situations, may come from the attitude of other judges, including the presidents of the courts.’<sup>261</sup>

‘In order to evaluate the quality of a judge’s decision, the evaluators should concentrate on the methodology a judge applies in his/her work overall, rather than assessing the legal merits of individual decisions. The latter must be determined solely by the appeal process. Evaluators must consider all aspects that constitute good judicial practice, in particular legal knowledge, communication skills, diligence, efficiency and integrity. To do that, the evaluators should consider the whole breadth of a judge’s work in the context in which that work is done. Therefore, the CCJE continues to consider it problematic to base evaluation results on the number or percentage of decisions reversed on appeal, unless the number and manner of the reversals demonstrates clearly that the judge is lacking the necessary knowledge of the law and procedures.’<sup>262</sup>

### 2.5. Efficient allocation of resources (human, financial, capital)

The Venice Commission draws attention to the fact that it is generally assumed that the main purpose of the very existence of the Council for the Judiciary is to protect the independence of

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259. CCJE Opinion No. 19(2016) on the Role of Court Presidents.

260. [CCJE Opinion 17 \(2014\)](#) on the evaluation of judges’ work, the quality of justice and respect for judicial independence, paragraph 1.

261. Paragraph 6.

262. Paragraph 35.

judges by isolating them from undue pressures from other powers of the state in matters such as the selection and appointment of judges and the exercise of disciplinary functions.<sup>263</sup>

The CCJE suggests that ‘the arrangements for the parliamentary adoption of the judicial budget should include a procedure that takes into account the opinions of the judiciary.’<sup>264</sup> In this manner, transparency is ensured and shortfalls in Council financing are avoided. Nevertheless, extending the Council’s powers in the area of financial management will imply ‘its accountability not only vis-à-vis the executive and the legislature, but also vis-à-vis the courts and the public.’<sup>265</sup>

The ENCJ advises that Councils for the Judiciary must have adequate financial and administrative resources to properly perform their functions.<sup>266</sup> It also considers that the maintenance of the Rule of Law requires long-term financial stability in the funding of the judiciary. Courts should not be funded annually but should have the certainty of longer-term financial budgets. Financing of courts should be protected against fluctuations caused by political instability. The creation of the budget should be systemically and practically free from inappropriate political interference, so that courts are financed on the basis of objective and transparent criteria.

## 2.6. External transparency and external communication

The ENCJ takes the view that the objective and subjective independence of the Judiciary is closely related to public confidence.<sup>267</sup> Increasing and improving trust in the Judiciary is not fully possible in isolation but must be accompanied by building trust in institutions generally and the way the Judicial Councils communicate about the judiciary and its function is vital for enhancing public confidence and improving the image of justice.

# 3. PRACTICAL EXAMPLES OF THE IMPLEMENTATION OF STANDARDS

Judges must become aware of the fact that they have to examine whether the conditions of the Rule of Law are satisfied and that it is their duty to protect the Rule of Law. They might be confronted with situations in which they have to speak out when the Rule of Law is in danger in their country. Some examples of this were examined during the seminars held in the context of the EJTN Rule of Law project.

As for the *freedom of speech* of judges, it was emphasised during the seminars that it is desirable that every court has a spokesperson to explain the main cases and the situation should be avoided where the judges do it themselves, but judges may collaborate with these spokespeople to draft

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263. European Commission For Democracy Through Law (Venice Commission) Compilation of Venice Commission opinions and Reports concerning Courts and Judges Strasbourg, 5 March 2015 CDL-PI(2015)

264. *Opinion no. 10 (2007)* of the CCJE to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society, adopted in Strasbourg, 21–23 November 2007, at paragraph 73.

265. *Opinion no. 10(2007)* of the CCJE to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society, adopted in Strasbourg, 21–23 November 2007, at paragraph 75.

266. ENCJ Councils for the Judiciary Report 2010–2011.

267. [Report on Public Confidence and the Image of Justice \(2017–2018\)](#).

the press releases in a professional language and to disseminate this information. The use of social media is nevertheless controversial. It should be kept in a formal and objective manner. Participation in academic activities is desirable, but the explanation on the running of cases should be avoided.

*Transparency* in public and private lives is also desirable. Therefore, an asset declaration is required from judges in some countries. This measure also helps prevent corruption. The disclosure of private activities also contributes to the confidence of the public in the justice system.

In order to safeguard the independence of the judges, it was suggested during the seminars that the *rules on allocations of cases* are made public. In courts with a large amount of work, there should be a balance between timeliness and reasoning of the case. Criteria should be established to measure this overload of work and the quality of the work of the judges should be taken into account for the purpose of their appraisals and promotions.

Some aspects of the ordinary work of the judges fall under the *principles on judicial ethics*. Questions like contact with the parties, invitations to different events (conferences, meetings, etc.) or gifts can affect their image of impartiality. Therefore, judges should take care to protect their image of impartiality in order to safeguard the image of independence of the Judiciary as a whole and show respect for the parties and reservation on cases they are handling.

## CHAPTER 4

# PROSECUTORS', HEADS AND MEMBERS OF PROSECUTORIAL HIGH COUNCIL'S PERSPECTIVE

LORENZO SALAZAR

*“The Office of the Public Prosecutor,..., has as its mission that of promoting the operation of justice in defense of the Rule of Law, of citizens' rights and of the public interest as safeguarded by the Law”*

(Spanish Constitution of 1978, art. 124.1)

## 1. INTRODUCTION

The definition of the Rule of Law and its connections with judicial independence is dealt with in the first part of this publication, which has also exhaustively elaborated on the need for the full independence and absolute impartiality of judges and courts, so it does not need to be developed any further in the context of this Chapter.

Although opinions on the subject are not as unanimous about the possibility of applying the same principles to the role of the prosecutors, the interrelated nature of their mission with that of the judges – in a ‘holistic’ view of the judiciary – has been repeatedly highlighted and can raise the question of public trust in the prosecutorial systems as an equally important component for the appropriate functioning of the judiciary and a pillar of the effective respect of the Rule of Law.

Prosecutors play an important role in implementing the Rule of Law and keeping communities safe by bringing citizens, government officials and companies that have committed crimes to justice. Therefore, the proper functioning of the justice system is also based on the equally independent, impartial and well-informed activity of the prosecutors, which is complementary to that of the judges.

Among the different factors that may bear an influence on the ‘vision’ of the mission of prosecutors, one of the most important is the difference between legal systems that are inspired by the principle of ‘mandatory prosecution’ (more commonly referred to as the ‘legality principle’<sup>268</sup>) as the basis for prosecutions and states which have opted for the principle of ‘opportunity’ or for a mixture of both principles.

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268. Although the expression ‘legality principle’ (French: ‘principe de légalité’, German: ‘Legalitätsprinzip’, Italian: ‘principio di legalità’) is more commonly and frequently used, including in EU legal texts, such as the recent Regulation on the European Public Prosecutor’s Office – EPP0, its use will be avoided throughout this chapter, to prevent any potential confusion with the same term, which is also a key element of the Rule of Law, while reference will be made to the term ‘mandatory prosecution’.

Apart from the key distinction between the ‘*mandatory*’ and ‘*opportunity*’ principles and with no direct connection to the model adopted by each system, the role and the tasks assigned to prosecutors vary considerably from one state to another, within Europe, as well as throughout the rest of the world, in line with the respective legal systems.

The general assessment is that, in practically all criminal justice systems, public prosecutors make the decision on whether to initiate or continue prosecutions against natural and/or legal persons, conduct prosecutions before the courts, appeal or handle appeals with regard to all or some court decisions.

They are only entitled to implement the national crime policy (including adapting it, where appropriate, to regional and local circumstances), conduct, direct or supervise investigations, to ensure that victims are effectively assisted, to decide on alternatives to prosecution, etc. in a more limited number of legal systems.<sup>269</sup>

In some countries, their role is strictly confined to criminal prosecution, whereas in others it also includes powers of the prosecutors in civil and family matters or in the enforcement of sentences and the supervision of detainees and prisons. Prosecutors also have very different powers regarding the deprivation of personal freedom of people involved in criminal proceedings, a matter where the shifting of power between judges and prosecutors can vary considerably.

Notwithstanding the above considerable differences in the role and functions of the various judicial systems, international and European standards seem to be converging in the establishment of a link between the capacity of the prosecutors to play an effective role in promoting the respect of the Rule of Law and their general conditions of work, starting as early as from the selection criteria and the training received.

In fact, both recruitment and training are only uniform with those of the judges in a limited number of cases, whereas some systems consider the strict separation between the two functions as directly inherent to the full independence of the judges and therefore strictly prohibit any form of ‘contamination’ between the different functions at any stage of the career.

As for their relationships with the police, the role of direction or supervision of the prosecutors over investigators and investigations can also vary considerably from one state to another, not only in connection with the provisions of statutory law but also in terms of the specific balance of powers between them and the police.

Further differences exist in the amount of space that prosecutors can have at their disposal while handling prosecutions, namely in a more ‘proactive’ manner, with a great deal of discretion in deciding on the investigative measures to be taken or being bound by the police reports, as well as in the way they supervise the legality of investigations before presenting their results to the judge.

## 2. RULE OF LAW AND PUBLIC PROSECUTORS

In a state governed by the Rule of Law, the latter is crucial for setting an appropriate legal framework for the activities of the public prosecutors who play just as important a role as judges (albeit from a different angle) in ensuring the respect of the Rule of Law, especially by guaranteeing the fair and impartial administration of justice.

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269. See Recommendation Rec(2000)19 of the Committee of Ministers of the Council of Europe, on ‘The Role of Public Prosecution in the Criminal Justice System’.

Additionally, from the point of view of the fundamental right of access to justice, prosecutors can play an important role in implementing and providing justice to citizens when they cannot have direct access to the Court or to an appeal because of limitations of the law or personal conditions. In such cases, it has been repeatedly pointed out that a prosecutor, who is autonomous from the executive to some extent, must be able to ensure that breaches of the law, when not denounced by the victims, can be nevertheless brought before the courts<sup>270</sup> or that appeals can be filed against an unjust verdict of the first instance.

Furthermore, in legal systems where conformity of the laws enacted by the parliament with the Constitution can be directly challenged by the courts before a Constitutional Court, prosecutors, although not usually being legitimised to autonomously raise a case, can play a crucial role in detecting the existence of a problem and in presenting good arguments to the Court to persuade it to raise the question of constitutionality.

Similar reasoning is also applicable to requests for preliminary rulings submitted to the CJEU regarding the interpretation of the Treaties or the validity of EU acts under Article 267 TFEU raised by a court or a tribunal of a Member State. In such situations, prosecutors, together with and no less than defence lawyers, should have the *réflexe* to catch any question underlying the particular case submitted to their attention and which is likely to breach fundamental rights or the principle of the Rule of Law in order to attract the court's attention about the need to request a preliminary ruling of the CJEU. This is also applicable after the recent entry into force of Protocol No. 16 to the ECHR, which allows the highest courts and tribunals of a state to request the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention.

### 3. LEGAL FRAMEWORK

#### 3.1. Case Law of the European Courts

The presentation of the various legal texts of potential relevance to this chapter must be preceded by a reference to the case law of the ECtHR in Strasbourg and of the CJEU in Luxembourg which have both provided very important indications and criteria that are useful for determining the conditions under which a Prosecution Service could (or could not) be regarded as fully respecting the principles governing the Rule of Law.

##### 3.1.1. ECHR

After having confirmed, in general terms, that the Rule of Law principle inspires the whole European Convention of Human Rights (ECHR) and is inherent in all of its articles<sup>271</sup> and that a state based on it has the duty to apply the necessary measures to uphold the law within its territory and to ensure the security of all, as well as the enjoyment of human rights<sup>272</sup> showing the necessary diligence in the implementation of criminal law in order to prevent and repress

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270. Venice Commission, Report Rule of Law Inventory Report, Hague Institute for the Internationalisation of Law, Discussion Paper for the High Level Expert Meeting on the Rule of Law of 20 April 2007, p. 16; see also Study No. 512/2009, adopted in 2011, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2011\)003rev-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)003rev-e)

271. ECtHR, Engel and Others, 8 June 1976, § 69; Amuur, 25 June 1996, § 50.

272. ECtHR, Lelièvre, 8 November 2007, § 104.

crime and protect the citizens,<sup>273</sup> the ECtHR developed important case law in support of the independence of prosecutors, regardless of whether they are considered to be a judicial authority or not, considering them, as has been imaginatively said, as ‘*the advanced watchdog of human rights*.’<sup>274</sup>

If a state intends to confer or maintain the status of judicial authority for prosecutors within the meaning of the ECHR, it should ensure that they enjoy all the guarantees, in particular, those required for independence, which are attached to this status, as specified by its case law.<sup>275</sup> Cases of an alleged breach of Article 5 § 3 of the Convention have provided important opportunities to the Court for clarifying the characteristics and powers of the judicial officers in charge of the review of the lawfulness of an arrest or detention. While examining the requirement for the legitimacy of the review of an arrest where the supervision of detention is entrusted to a prosecutor, the ECtHR considered that the latter must, in any case, be independent, impartial, able to control the validity of the measure and have the power to order the release, again insisting on the need for the independence of the prosecutor *vis-à-vis* the executive and the parties.<sup>276</sup>

In another case the Court stated that the absence of the prosecutor at the hearing could lead to a breach of the principle of a fair trial. The Court noted, in particular, that the lack of a prosecuting party could undermine the impartiality of a trial, when the judge or tribunal had to assume roles that would have been performed by a prosecutor had one been present. That could cause the court to confuse the roles of prosecutor and judge and gave legitimate grounds for doubting its impartiality. Therefore, the Court held that there had been a breach of the accused person’s right to an impartial trial, because of the lack of a prosecutor at his trial and appeal.<sup>277</sup>

In another case,<sup>278</sup> related to civil matters, the fact that the prosecutor stood in for a court himself, deciding to act on his own, without an effective remedy for the defendant, was also challenged by the Court. The prosecutor made the decision on his own, whereas a tribunal would normally have the competence to deal with the matter if it were referred to it by another person or entity. Furthermore, the decision was not accompanied by any sort of proceedings involving the entity concerned and the Prosecutor’s Office enjoyed a considerable amount of freedom in determining what course of action to pursue, which appeared to the Judges of Strasbourg to be hardly compatible with the notions of the rule of law and legal certainty that are inherent in judicial proceedings. Notwithstanding the possibility of introducing an appeal against these decisions to the higher levels of the Prosecution Office, the Court declared that the appeal procedure did not have the due procedural safeguards, also taking into account that, in an another judgment, it found that the prosecutors of the Country involved in the case could not be considered to be officers authorised by law to exercise judicial power, within the meaning of Article 5(3), as they could subsequently appear in criminal proceedings against the person whose detention they had confirmed.

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273. ECtHR, Saygılı, 8 January 2008, § 35.

274. In these terms André Potocki, judge of the ECtHR, at a conference held in Paris, on 17 May 2018, before the Network of Prosecutors General of the Supreme Courts of the European Union.

275. ECtHR, Medvedyev, 29 March 2010.

276. ECtHR, Schiesser, 4 December 1979.

277. ECtHR, Karelin, 20 September 2016

278. ECtHR, Zlinsat, 15 June 2006.

### 3.1.2. CJEU

Building on the case law of the CJEU set out in Part 2, the interpretation of the definition of ‘judicial authority’ for the purpose of issuing a European arrest warrant has been the object of an important recent judgment of the Court of Justice<sup>279</sup> in a case involving a European arrest warrant (EAW) issued by a prosecutor; although this decision does not directly involve the relationship between prosecution services and the Rule of Law, it provides clear guidance on how and when they can be qualified as ‘judicial authorities’.

The Court held that this definition, within the meaning of the framework decision, does not include the public prosecutor’s offices of a Member State which are exposed to the risk of being subject, directly or indirectly, to directions or instructions in a specific case from the executive, such as the Minister of Justice, in connection with a decision being made to issue a European arrest warrant. According to the Court, the public prosecutor’s office plays a key role in handling criminal proceedings and can be regarded as participating in the administration of criminal justice. However, as the authority responsible for issuing a European arrest warrant, he must act independently in the fulfilment of his functions, even where that arrest warrant is based on a national arrest warrant issued by a judge or a court. In such a capacity, he must be capable of exercising his functions objectively, taking into account all incriminating and exculpatory evidence, without being exposed to the risk that his decision-making power is subject to external direction or instructions, especially from the executive, so there is no doubt that the decision to issue a EAW lies with that authority and not, ultimately, with the executive.

As for the public prosecutor’s offices in the specific case (regarding Germany), the Court held that the legislation does not rule out their ability to make decisions to issue a European arrest warrant from being subject, in the given case, to instruction from the Minister of Justice of the relevant Land. Accordingly, those public prosecutor’s offices do not appear to meet one of the requirements of being regarded as an ‘issuing judicial authority’ within the meaning of the framework decision, namely the requirement to provide a guarantee to the judicial authority responsible for executing the European arrest warrant that they will act independently when issuing it.

## 3.2. Standards

A number of legal texts, mainly of “soft law” (i.e. Recommendations, Guidelines and Declarations, mostly from the Council of Europe’s bodies, as opposed to ‘hard law’ texts, such as Conventions or EU Directives and Regulations), reflect the diversities in the statutes of the public prosecutors within and outside Europe, simultaneously emphasising the strict interconnection between their role and the Rule of Law.

Recent standards have further developed the concept of the independence of prosecutors and established a closer relationship between their statutes and the respect of the Rule of Law.

### 3.2.1. ‘Soft Law’: Recommendations

As early as in 1990, the **UN Guidelines on the Role of Prosecutors**<sup>280</sup> intended to secure and promote the effectiveness, impartiality and fairness of this role presenting principles that are still

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279. Judgments in Joined Cases C-508/18 OG (Public Prosecutor’s office of Lübeck) and C-82/19 PPU PI (Public Prosecutor’s office of Zwickau) and in Case C-509/18 PF (Prosecutor General of Lithuania).

280. Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

current in matters of selection, training, status and conditions of service, freedom of expression and association and disciplinary measures.

As for the role of prosecutors in criminal proceedings, while emphasising the need to keep it '*strictly separated from judicial functions*', the Guidelines insisted on the need to perform it actively, supervising the legality of investigations, respecting and protecting human dignity and upholding human rights, '*thus contributing to ensuring due process and the smooth functioning of the criminal justice system*.'

In 1999, the 'Standards' adopted by the **International Association of Prosecutors (IAP)**<sup>281</sup> emphasised, among other things, that the essential duties and rights of the prosecutors in terms of independence included the importance that '*... the use of prosecutorial discretion, when permitted in a particular jurisdiction, should be exercised independently and be free from political interference*.'

It was only at the beginning of this century that the first and explicit relationship was established between the Rule of Law and the role of the prosecutors by **Recommendation Rec(2000)19** of the Council of Europe, on 'The Role of Public Prosecution in the Criminal Justice System.'<sup>282</sup> Given that the criminal justice system plays a key role in safeguarding the Rule of Law, the recommendation notes 'the great differences' between the institutional positions of the public prosecutors from various countries, both in terms of their relationship with the executive power (from subordination to independence) and the relationship between prosecutors and judges (belonging to a single professional corps or entirely separate careers).

Recommendation (2000)19 identifies a number of fundamental principles against this variegated background – which are common to both types of system – that should guide and govern the actions of the public prosecution service into the new millennium, notably by defining its functions and the related safeguards, its relationship with the executive and legislative powers, court judges, the police, its duties with respect to individuals and its role in international cooperation.

The organisation and the internal operation of the public prosecution service, especially the issue of assignment and re-assignment of cases, should meet the requirements of impartiality and independence and maximise the proper operation of the criminal justice system.

The Parliamentary Assembly of the Council of Europe built on Recommendation (2000)19 by adopting **Recommendation 1604 (2003)** on 'The Role of the public prosecutor's office in a democratic society governed by the Rule of Law'<sup>283</sup> which, while welcoming the establishment of a 'Conference of Prosecutors General of Europe' and after having reviewed the national practices of member states giving rise to concern as to their compatibility with the Council of Europe's basic principles, addresses a list of recommendations intended to ensure conformity of the national statutes of the prosecution service with the principles of the Rule of Law, both in criminal and non-criminal matters, the first of which incites keeping responsibility for prosecutions with a body that is 'separate from and independent of the police'.

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281. International Association of Prosecutors (IAP), 'Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors', 1999.

282. See footnote 270.

283. <http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?fileid=17109&lang=EN&search=UmVjKDE2MDQp>.

At its plenary session in Budapest in May 2005, the above Conference of Prosecutors General of Europe, approved the European Guidelines on Ethics and Conduct for public prosecutors ('**The Budapest Guidelines**')<sup>284</sup> which, despite not making any explicit reference to the Rule of Law, further insists on trying to set out standards of conduct and practice for all prosecutors, regardless of the differences between them throughout Europe.

Further references to the strict connection between the Rule of Law and the statutes of the judiciary, including judges and prosecutors, can be found in the '**Bordeaux Declaration**' on 'The Relations between Judges and Prosecutors', jointly adopted in 2009 by the Council of European Prosecutors (CCPE) and the CCJE<sup>285</sup> with an effort made in parallel by the two representative bodies of the judiciary at continental level.

The Bordeaux Declaration repeatedly emphasised the 'distinct but complementary' role of judges and prosecutors in guaranteeing the Rule of Law through the fair, impartial and effective administration of justice, particularly focusing on the need to ensure a proper judicial review of any decision of a prosecutor not to prosecute.

Shortly afterwards, having stated that the mission of the judiciary 'is to guarantee the very existence of the Rule of Law', the '**Magna Carta of Judges**'<sup>286</sup> (adopted in 2010 by the CCJE, with the intention of summarising, updating and codifying the main conclusions of its opinions), added that 'an independent status for prosecutors is a fundamental requirement of the Rule of Law'.

The European Commission for Democracy through Law (**Venice Commission**) has also provided important indications about the statutes of prosecutors and collected appropriate information into documents representing a general overview of the issue at stake, such as the 'Rule of Law Checklist'<sup>287</sup> or the 'Compilation of the Venice Commission's opinion and reports concerning prosecutors'<sup>288</sup> which, notwithstanding the unavoidable differences related to each specific national situation, seem to reveal a clear general tendency towards an increasingly independent system of public prosecution throughout the Continent.

In its '**Report on the Rule of Law**'<sup>289</sup> adopted in 2011, the Venice Commission confirmed that the existence of a prosecutor, who is also autonomous of the executive to some extent and who ensures that breaches of the law, when not denounced by the victims, can be brought before the courts, is an important component of the right to the effective access to justice before independent and impartial courts.

In its '**Report on European Standards as Regards the Independence of the Judicial System: Part II – The Prosecution Service**'<sup>290</sup> from the same time, the Venice Commission also tried to strike a balance in the 'essential difference' in the concepts of independence or autonomy when applied to judges or to the prosecutor's office. Although the independence of the judiciary as a whole and

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284. <https://rm.coe.int/conference-of-prosecutors-general-of-europe-6th-session-organised-by-t/16807204b5>.

285. See CCJE Opinion No.12 (2009), CCPE Opinion No. 4 (2009).

286. Doc. CCJE (2010)3 final, <https://rm.coe.int/16807482c6>.

287. Doc CDL-AD(2016)007.

288. Doc. CDL-PI(2018)001.

289. Study no. 512/2009, adopted in 2011, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2011\)003rev-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)003rev-e).

290. Study no. 494/2008, adopted in 2010, <https://rm.coe.int/1680700a60>.

its separation from the executive authority are a cornerstone of the Rule of Law, the independence of the prosecutor's office cannot be considered absolutely equivalent to that of the judges, as there may be hierarchical control of the decisions and activities of prosecutors other than the prosecutor general.

As for 'external' independence, there is a general acceptance of the possibility that – unlike instructions in a given case – instructions of a general nature (such as for example directives to prosecute certain types of crimes more severely or speedily), can be addressed to the prosecution service through appropriate channels, such as the prosecutor general.

Meanwhile, the 'internal' independence of prosecutors (other than the prosecutor general) can be seen more as a non-interference principle, which is intended to ensure that the prosecutor's activities in judicial procedures are free of external pressure as well as from undue or illegal internal pressures from within the prosecution system.

These principles have been reiterated and even reinforced in the '**Charter of Rome**' adopted in 2014 by the CCPE.<sup>291</sup> After having confirmed that prosecutors contribute to ensuring that the Rule of Law and public order are guaranteed by the fair, impartial and effective administration of justice at all stages of the legal proceedings, the Charter of Rome states that the independence of prosecutors, which is essential for the Rule of Law, must be guaranteed by law, at the highest possible level, 'in a manner similar to that of judges'.

More recently the CCPE<sup>292</sup> has further insisted on the independence and impartiality of the prosecution services as one of the pillars of the Rule of Law, indicating that, ahead of the differences between systems of criminal justice throughout Europe, 'the most important convergence and what really brings all these systems together is the requirement of the independence of the prosecution services as a prerequisite for the Rule of Law.'

In the new Opinion of 2018,<sup>293</sup> the CCPE further elaborated on and developed the concepts of '**Independence, accountability and ethics of prosecutors**'.

Given that, just as in the case of judges, prosecutors also perform their functions within the framework of the Rule of Law principle, the concept of their independence is developed in the sense that the prosecutors must be free of unlawful interference when exercising their duties to ensure the full respect for and application of the law and the principle of the Rule of Law and they are not subjected to any political pressure or unlawful influence of any kind. Independence applies both to the prosecution service as a whole and to individual prosecutors, introducing the establishment of an independent professional authority for prosecutors (for instance, consisting of a majority of judges and prosecutors elected by their peers), such as a council for the judiciary or for prosecutors (only), who are competent for appointment, promotion and discipline, among the conditions for such independence.

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291. Consultative Council of European Prosecutors (CCPE), 'European norms and principles concerning prosecutors (The Charter of Rome)', Opinion No. 9 (2014).

292. See doc. CCPE-BU(2017)6, 'Report on the independence and impartiality of the prosecution services in the Council of Europe member States in 2017'.

293. Opinion No. 13(2018) of the CCPE: 'Independence, accountability and ethics of prosecutors'.

As a recent development at the level of the Council of Europe, on 3 September 2019, in a recent communication on ‘The independence of judges and the judiciary under threat’,<sup>294</sup> the **Commissioner for Human Rights** suggested being ‘stronger, more resolute and more vocal in defending the rule of law and the independence of the judiciary’. The Commissioner added that, as noted by the Venice Commission, ‘the Rule of Law would just be an empty shell without permitting access to human rights’ and insisted on the fact that Council of Europe member states need to fully comply with the European standards in this field and uphold the independence of the judiciary while a scrutiny of the rule of law in these states ‘should be carried out more systematically’.

Last but not least, recent developments at the level of the European Union, following a reflection started by the European Commission as early as in 2014,<sup>295</sup> must also be very much welcomed, including also in connection with its potential impact on the statutes of the public prosecution services in the Member States.

After the first steps taken in 2014, with a new **Communication**<sup>296</sup> published in April 2019, the Commission enriched the debate on further strengthening the Rule of Law, presenting an overview of the current toolbox to address the challenges to it within the Union and asking for a reflection and comments by stakeholders on how to reinforce it. After the public consultations, the Commission adopted a **new Communication**<sup>297</sup> announcing concrete initiatives grouped around 3 ‘pillars’, intended to strengthen the Rule of Law. With reference to the ‘first pillar’, the Commission, acknowledging that national judiciaries also have an important role to play in promoting Rule of Law standards, intends to strengthen cooperation with the Council of Europe and other international organisations, as well as with judicial networks (including the CCPE), in order to promote a ‘Rule of Law culture’ and plans to prioritise financial support for projects focusing on the Rule of Law.

The Communication also draws attention to the identification of problems in managing risks related to the protection of EU financial interests and the possible involvement of the European Public Prosecutor’s Office (EPPO) and calling for the swift adoption of the **Commission’s proposal for a Regulation** intended to help protect the EU’s financial interests in the case of general deficiencies related to the Rule of Law, with the consequent possibility of reacting in such cases.<sup>298</sup>

The proposed Regulation provides for the ability to take ‘appropriate measures’ (such as the suspension of payments to the Member State being scrutinised) in the case of shortcomings that

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294. [https://www.coe.int/en/web/commissioner/blog/-/asset\\_publisher/xZ32OPEoxOkq/content/the-independence-of-judges-and-the-judiciary-under-threat?\\_101\\_INSTANCE\\_xZ32OPEoxOkq\\_languageId=en\\_GB](https://www.coe.int/en/web/commissioner/blog/-/asset_publisher/xZ32OPEoxOkq/content/the-independence-of-judges-and-the-judiciary-under-threat?_101_INSTANCE_xZ32OPEoxOkq_languageId=en_GB)

295. See COM(2014) 158 final, 11 March 2014, Communication of the Commission to the European Parliament and the Council, on ‘A new EU Framework to strengthen the Rule of Law’.

296. See COM(2019) 163 final, 3 April 2019, Communication of the Commission to the European Parliament, the European Council and the Council, on ‘Further strengthening the Rule of Law within the Union. State of play and possible next steps’.

297. See COM(2019) 343 final, 17 July 2019, Communication of the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions on ‘Strengthening the Rule of Law within the Union. A blueprint for action’.

298. See COM(2018) 324, Proposal for a Regulation on the protection of the Union’s budget in case of generalised deficiencies as regards the Rule of Law in the Member States.

are found with regard to the rule of law affecting the principles of sound financial management or the protection of the financial interests of the Union. Among such shortcomings, those affecting the correct functioning of investigations and public prosecution services with regard to the prosecution of fraud, corruption or other breaches of Union law relating to the implementation of the Union budget should be particularly noted.

More generally, the European Union can provide a significant contribution to the difficult exercise of building up mutual knowledge and mutual confidence among judicial authorities, while simultaneously encouraging an exchange of best practices.

A recent example of this is the 2018 Conference on the effectiveness of justice systems, co-organised by the European Commission and the Austrian Presidency of the Council of the EU on 30 November 2018 in Vienna,<sup>299</sup> with the aim of taking stock of the efforts undertaken across Europe to improve the effectiveness of justice, as well as to examine how the EU can further support these efforts, given that the independence, quality and efficiency of justice systems are crucial for upholding the values upon which the EU is founded.

### 3.2.2. Instruments of International Cooperation in Criminal Matters

International cooperation is essential for the effective fulfilment of the mission of a prosecution service at national and international level. Prosecutors should treat international requests for assistance within their jurisdiction with the same diligence as in the case of their work at national level and should have at their disposal the necessary tools, including training, to promote and sustain genuine and effective international judicial cooperation.

This is also a key element and a precondition for strengthening mutual trust and for the effective implementation of the principle of mutual recognition of judicial decisions and judgments, ‘the cornerstone of judicial cooperation in both civil and criminal matters within the Union’, which was endorsed twenty years ago by the European Council in the conclusions of its meeting held in Tampere on 15–16 October 1999.<sup>300</sup>

In this light, the general principles and standards specifically referring to the Rule of Law and to prosecutors and their independence can also be found in several binding international instruments in the area of judicial cooperation or approximation of substantive criminal law, together with the monitoring mechanisms put in place to survey their effective and full implementation through systems of ‘peer’ or ‘mutual’ evaluation, being particularly (but not exclusively) active in the area of the prevention of and fight against corruption.

A good example of this assumption is offered by the **OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions**, concluded in 1997 and, since then, monitored by its Conference of the state parties, the OECD Working Group on Bribery (WGB), often considered as the ‘golden standard’ regarding systems of peer evaluation.

Article 5 of the OECD Convention on enforcement stipulates that the investigation and prosecution of the bribery of a foreign public official must not be influenced by considerations of national economic interest, the potential effect upon relations with another state or the identity of the natural or legal persons involved. While acknowledging the full legitimacy of national regimes of

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299. <https://www.eu2018.at/calendar-events/political-events/BMVRDJ-2018-11-30-Conference-on-the-Rule-of-Law-and-the-effectiveness-of-justice-systems.html>

300. Point 33 of the Conclusions.

natural or legal persons involved. While acknowledging the full legitimacy of national regimes of prosecutorial discretion, Article 5 also recognises that, in order to protect the independence of prosecution, such discretion is to be exercised on the basis of professional motives and is not to be subject to improper influence by concerns of a political nature.<sup>301</sup>

Since the adoption of the Convention and the launch of its monitoring mechanism, the WGB has constantly focused its attention on the effective implementation of Article 5 especially insisting on the need for true proactive and independent action on the part of the prosecutorial authorities of all state parties.

After having emphasised how much corruption threatens the Rule of Law, democracy and human rights and undermines good governance, fairness and social justice, Article 20 of the **Council of Europe 1999 criminal law convention against corruption**<sup>302</sup> stipulates that persons or entities, such as prosecutors, specialised in the fight against corruption must enjoy the necessary independence to be able to carry out their functions effectively and free from any undue pressure.<sup>303</sup>

In its fourth evaluation round, the Convention monitoring mechanism, the GRECO,<sup>304</sup> focused its attention on assessing systems in terms of their capacity to act independently when conducting an investigation and on the use of internal and external safeguards against corruption, acknowledging that, in practice, this area of criminal law proves to be a true test of the independence, impartiality and professionalism of the justice system as a whole.<sup>305</sup>

The majority of countries received recommendations during the fourth round regarding the need to adopt codes of conduct for prosecutors, which should include a clear set of ethical standards that are to be applicable to all prosecutors, including on conflicts of interests and related issues. The vast majority of recommendations related to prosecutors can be grouped into three main headings: supervision and enforcement, ethical standards and career. In this context, GRECO invited countries to build integrity frameworks that go beyond the mere adoption of general codes of conduct. Together with the establishment of clear and transparent rules and codes of conduct in the area of conflicts of interest and asset declarations, prosecution services are also invited to consider the establishment of advisory mechanisms (such as confidential counselling for prosecutors) on matters pertaining to ethics on the understanding that prosecutors will be able to benefit from private discussions with their peers about possible ethical dilemmas encountered in their day-to-day work.

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301. See Commentaries on the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions Adopted by the Negotiating Conference on 21 November 1997.

302. European Treaty Series – No. 173.

303. See also Resolution (97)24 of the Committee of Ministers of the Council of Europe, on the Twenty Guiding Principles for the Fight Against Corruption, which, in principle no. 2, states that each state party shall develop and implement or maintain effective, coordinated anticorruption policies that promote the participation of society and reflect the principles of the Rule of Law, proper management of public affairs and public property, integrity, transparency and accountability.

304. Resolution (98) 7 and (99) 5 of the Committee of Ministers of the Council of Europe, authorising and adopting respectively the partial and enlarged Agreement establishing the 'Group of States against Corruption – GRECO'.

305. See the document on conclusions and trends from the Fourth Evaluation Round of the GRECO at <https://rm.coe.int/corruption-prevention-members-of-parliament-judges-and-prosecutors-con/16807638e7m>.

Every state party is obliged under Article 5 (Preventive anti-corruption policies and practices) of the 2003 UNCAC (the ‘**Merida Convention**’)<sup>306</sup> to develop and implement effective, coordinated anticorruption policies that promote public participation ‘and reflect the principles of the Rule of Law’.

The Merida Convention devotes an entire article (Article 11) to preventive measures relating to the judiciary and prosecution services. Recalling the independence of the judiciary and its important role in combating corruption, every state party is bound under the Convention to take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary and within the prosecution service in those states where ‘it does not form part of the judiciary but enjoys independence similar to that of the judicial service.’

It is also worth recalling that the 2000 ‘**Palermo Convention**’ against Transnational Organised Crime<sup>307</sup> already contained specific provisions against corruption<sup>308</sup> obliging state parties to take measures to ensure effective action by their authorities against corruption of public officials, ‘including providing such authorities with adequate independence to deter the exertion of inappropriate influence on their actions’.

## 4. JUDICIAL COUNCILS

‘Great differences’ in the institutional position of the public prosecutors from one country to another (see above in § 3.a) can also be found in the very disparate situation of the governance of the prosecution service in the Member States, which is also characterised by huge differences.

In many systems, the ‘status’ of prosecutors, which involves recruitment, training, promotion, mobility, rates of remuneration and pensions, career in general, disciplinary proceedings, physical and/or moral protection, relies more or less directly on the government or on the parliament, whereas in others it is closer to the status of judges, sometimes including both of them within the same career or at least providing for a single route of entry into the career.

In most cases, these functions have been conferred, totally or partially, to separate and independent bodies of self-governance, which may or may not be established jointly with those of the judges. These self-governance bodies are often referred to as the (High or Superior) ‘Council’ of the Judiciary and consist of members of the judiciary and of other categories (such as Lawyers, Academics or Politicians), in varying proportions, but more frequently with the majority of members taken from the judiciary.

Indications and recommendations from the relevant international organisations, which focus on the Rule of Law and democracy or on the fight against corruption, seem to be in agreement in indicating that the establishment of Councils of prosecutors – whether or not jointly with those of the judges – could be considered a good mechanism for protecting prosecutors against external and internal interference and pressure and can provide transparency of their appointment, career and disciplinary measures in a similar manner to that of judicial councils. In particular, the Venice Commission has stated that the establishment of two separate councils, one for judges and one

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306. [https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026\\_E.pdf](https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf)

307. <https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>

308. See in particular Article 8 and 9 of the United Nations Convention against Corruption (UNCAC).

for prosecutors, or to have a joint judicial and prosecutorial council (with separate chambers, if necessary), are both legitimate avenues, also noting that the first option ‘may even be preferable in countries with a strong prosecution service and a weak judiciary, since the presence of the prosecutors in the joint council may be perceived as a threat to the independence of judges.’<sup>309</sup>

In this light, one of the main challenges councils are confronted with, at least in some countries, seems to involve mainly a possible lack of resources compared to the respective tasks falling within their responsibilities (which, in some cases, also include training the judiciary).

## 5. THE EUROPEAN PUBLIC PROSECUTOR’S OFFICE (THE ‘EPPO’) AND THE RULE OF LAW

The recent establishment of a European Public Prosecutor’s Office (EPPO) to protect the financial interests of the European Union<sup>310</sup> represents a new challenge and constitutes an innovative example of a real supranational prosecutor (a global première) which also simultaneously constitutes a model of sustainable compatibility among different legal systems.

After the entry into force of the Lisbon Treaty and its Article 86 TFEU, which stipulates the legal basis for the establishment of the EPPO, many years were needed firstly to prepare the proposal of the Regulation and then to bring the negotiations to an end, eventually through the special reinforced cooperation procedure established under the same Article 86. With the only exception of those Member States which decided to stay out of the reinforced cooperation, these negotiations have demonstrated the general acceptance and sustainability of a unified model of a ‘European Prosecutor’, which is compatible with the various legal systems of all Member States participating in the reinforced cooperation.

Article 5 of the Regulation, setting out the basic principles of the activities of the EPPO, establishes that the EPPO shall respect the rights enshrined in the Charter of Fundamental Rights and shall be bound by the principles of Rule of Law and proportionality in all its activities.

Notwithstanding the repeatedly mentioned differences between the legal systems across the EU, the EPPO will have the powers to investigate, prosecute and bring the perpetrators of criminal offences affecting the financial interests of the Union falling under its competence to judgment before the national courts of each participating Member State.

Independence has been at the heart of the project since the very beginning and is the core characteristic of the EPPO.

Article 6 of the Regulation establishes that ‘the EPPO shall be independent’. This independence means that each and every component of the Office, both at central and decentralised level (the European Chief Prosecutor, his Deputies, the European Prosecutors, the European Delegated Prosecutors, the Administrative Director and the staff) shall act only in the interest of the Union and neither seek nor take instructions from any person external to the EPPO, any Member State or any institution, body, office or agency of the Union. The Regulation further insists on this aspect, also prescribing that Member States and the institutions, bodies, offices and agencies

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309. Venice Commission, doc. CDL-PI(2018)001, p. 55.

310. Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor’s Office (‘the EPPO’), OJ 31 October 2017, L283.

of the Union ‘shall respect the independence of the EPPO and shall not seek to influence it in the exercise of its tasks’.

Although fully independent, the EPPO simultaneously remains fully accountable to the European Parliament, the Council and the Commission for its general activities without prejudice to its obligation of discretion and confidentiality regarding individual cases.

When conducting its investigations and prosecutions, the EPPO is guided by the principles of legality (i.e. ‘mandatory prosecution’), proportionality, impartiality and fairness towards the suspect or accused persons and will have to seek all types of evidence, in their favour or against them.<sup>311</sup>

Given the difficulties encountered during the negotiations and the sometimes imaginative solutions needed to reach an acceptable compromise capable of satisfying the 22 participating Member States, the European Prosecutor, together with its main features, can currently be considered a reference model for a prosecution system at continental level and beyond (even though the two main common law systems, United Kingdom and Ireland, are not represented among the participating Member States).

## 6. CONCLUSIONS

Some indications can be derived from the large number of indications emerging from the elements collected above, which facilitate considerations of a general nature being made, representing a type of set of ‘statutes’ of a prosecution service, which have been created under the Rule of Law umbrella, which can also provide guidelines that are useful to prevent or resolve possible situations of a potential conflict of interests or embarrassment in specific cases.

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311. See points 65 and 66 of the preamble of the Regulation.

## ANNEX 1

# OVERVIEW OF THE CASE LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION WITH RESPECT TO THE RULE OF LAW\*

KOEN LENAERTS\*\*

Esteemed fellow justices,

Dear friends and colleagues,

First of all, may I take this opportunity to welcome you all at the seat of the Court of Justice of the European Union on the occasion of this rule of law conference organised by the European Judicial Training Network.

As you all know, a number of cases relating to various Member States have recently been brought before the Court of Justice concerning respect for the rule of law. For the purposes of my speech, I will strictly limit myself to giving you an overview of the existing case law on this common value on which the Union is founded.

I would like to start today by reminding you of a basic truth that is self-evident but nevertheless fundamentally important. The European Union (EU) is neither an empire nor even a State. It is a voluntary Union of sovereign Member States. Those States have not renounced their national sovereignty but have pooled a significant part of it in a new, *sui generis* legal order that belongs to them all collectively.

It is against that background that the Court of Justice recalled in its recent *Wightman* judgment, a preliminary ruling concerning the revocability of a Member State's notification under Article 50 TEU of its intention to leave the Union, that Member States join the Union and stay in the Union of their own free sovereign will. Consequently, a Member State exercises its sovereignty both when activating the mechanism for leaving the Union under the Treaty, and when withdrawing any such notification.<sup>1</sup>

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\* Speech delivered on 13 May 2019 at the occasion of the final conference of the Pilot training project for justice professionals on key issues of fundamental rights and rule of law implemented by EJTN in 2018 - 2019 as part of the European Commission's strategy for the effective implementation of the EU Charter of Fundamental Rights

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1. Judgment of 10 December 2018, *Wightman and Others*, C-621/18, EU:C:2018:999, para. 44.

Each Member State has thus, whilst retaining ultimate ownership of its national sovereignty, conferred part of that sovereignty on the EU institutions in order for certain competences to be exercised *supranationally* in the interests of all Member States, including the Member State concerned.

Unlike ordinary international treaties, the EU treaties created a new autonomous legal order.<sup>2</sup> As the French President Emmanuel Macron rightly stated in his speech on a European renewal, “Europe is not just a market. It is a project [...] an unprecedented project of peace, prosperity and freedom. [...] A market is useful, but it should not detract from the need for [...] values that unite.”

The value that unites us for today’s conference is the respect for the rule of law. It is a value that is shared and cherished by the constitutional traditions common to the Member States. It is one of the foundational values of the EU itself as is clearly stated in Article 2 TEU.

The rule of law is so fundamental to our European system of modern, democratic governance that when speaking of its importance one hardly knows where to begin. It is, quite simply, the bedrock on which everything else in our society is built. Democracy cannot function without it. The rule of law is the only reliable bulwark against the arbitrary exercise of power. It guarantees that those who are in power cannot oppress those who lack the capacity to defend themselves, and that we as citizens are subject to what one of the principal US founding fathers, John Adams, famously called ‘a government of laws and not men’.

As defined by the constitutional traditions common to the Member States of the European Union, our societies are built on the understanding that, regardless of their political affiliation, religious belief or cultural heritage, individuals enjoy a sphere of self-determination that must, at all times, be free from all forms of unjustified interference, both public and private. That is why both EU law and the constitutions of the Member States entrust judges – as independent umpires – with the task of enforcing the rules that protect that individual sphere of self-determination. The very idea of justice itself is thus inextricably linked to that of upholding the rule of law.

The role of the Court of Justice of the European Union is, as Article 19 of the Treaty on European Union itself states, to ‘ensure that in the interpretation and application of the Treaties the law is observed’. In other words, the very *raison d’être* for our institution’s existence is to uphold the rule of law. It was in 1986 in its seminal *Les Verts* judgment<sup>3</sup> that the Court first explicitly affirmed the principle that the EEC, as it then was, ‘is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty’.

Each Member State as well as each Union institution, body or agency is thus bound by ‘the rules of the game’, which comprise not only the Treaties but also the Charter of Fundamental Rights of the EU (the ‘Charter’) as well as the general principles of EU law.

I will focus today on the Member States’ respect of the rule of law within the EU legal order and shall divide my speech in two parts. First, I shall look at the preliminary reference procedure as a means of enforcing the rule of law within the EU – *indirectly* through a dialogue between the courts of the Member States and the Court of Justice. In the second part, I shall briefly examine another way of guaranteeing respect for the rule of law, notably by means of enforcement actions

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2. Judgment of 10 December 2018, *Wightman and Others*, C-621/18, EU:C:2018:999, paras 44 and 45.

3. Judgment of 23 April 1986, *Les Verts v. Parliament*, 294/83, EU:C:1986:166.

brought by the European Commission *directly* before the Court of Justice. In the absence of any case law of the Court of Justice on Article 7 TEU, I will, however, not dwell on the enforcement procedure provided for in that provision – a procedure that may ultimately lead the Council to suspend the voting rights of the Member State concerned.

## 1. THE PRELIMINARY REFERENCE PROCEDURE

Member States' courts are not only courts of national law but also courts of EU law. By applying EU law in disputes submitted to them, they play a key role in guaranteeing effective protection of the rights that EU law confers and in protecting the rule of law within the EU legal order.

Since EU law must be applied in a uniform manner throughout the Union, however, it is ultimately for the Court of Justice to ensure that 'in the interpretation of the Treaties the law is observed'.<sup>4</sup> The dialogue, which the preliminary ruling procedure establishes, is key to that uniformity.<sup>5</sup> Whenever a national court has doubts as to how it should interpret an EU act, it is entitled – or even required – to seek guidance from the Court of Justice; the answer has authority not only in the main proceedings but also in all cases where that same act applies. That led the Court to explain, in *Opinion 2/13* on accession to the ECHR, that the preliminary reference procedure serves to ensure not only the consistency and full effect of EU law, but also 'its autonomy as well as, ultimately, the particular nature of the law established by the Treaties'.<sup>6</sup>

That imperative of uniformity also justifies the rule that, where a national court has doubts concerning the validity of an act of EU secondary law, that court should not itself review the legality of that act but should rather refer the matter to the Court of Justice.<sup>7</sup>

The preliminary ruling mechanism is therefore essential for ensuring protection of the rights that EU law confers on individuals, and indeed for upholding the rule of law within the EU.

In order for this cooperative mechanism under Article 267 TFEU to succeed, there must be a culture of mutual trust between the Court of Justice and national courts. It is essential that this trust operates in both directions: On the one hand, the Court of Justice must trust national courts in their assessment of the need to make a reference. On the other hand, national courts must trust the Court of Justice to deliver, within a reasonable time, well-reasoned judgments that not only enable them to settle the disputes in the main proceedings, but also to take due account of societal and technological changes where appropriate.

Inasmuch as national courts must remain confident that the Court of Justice is faithful only to the law of the EU, the Court of Justice must be confident that national courts apply that law faithfully, regardless of any political considerations. It follows that only national courts that are genuinely independent may have recourse to the preliminary ruling mechanism in order to engage in a dialogue with the Court of Justice.

The Court of Justice's judgment of 27 February 2018 in *Associação Sindical dos Juizes Portugueses*

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4. Article 19(1), first subparagraph, TEU.

5. *Opinion 2/13* (Accession of the European Union to the ECHR) of 18 December 2014, EU:C:2014:2454, para. 176.

6. *Ibid.*

7. Judgments of 22 October 1987, *Foto-Frost*, 314/85, EU:C:1987:452, and of 6 December 2005, *Gaston Schul Douane-expediteur*, C461/03, EU:C:2005:742, para. 17.

is pivotal in that respect.<sup>8</sup> The central question in this case was the following: can a national court or tribunal *rely directly on EU law to protect its independence*, when the latter is – or might be – threatened by the government?

The dispute concerned an alleged interference into the independence of members of the Portuguese Court of Auditors ('Tribunal de Contas') as a result of temporary salary-reduction measures. Those measures formed part of cuts in public spending decided in 2014 in response to the EU financial assistance programme. The salary reductions related to public officers and employees, including members of the legislature, the executive and the judiciary. Unlike the courts of auditors in some other Member States, the Tribunal de Contas may, in certain cases, operate as a court of law. The Union of Portuguese Judges challenged before Portuguese courts the salary reduction which, it argued, threatened the judicial independence guaranteed by Article 19 TEU and Article 47 of the Charter.

In the first part of the judgment, the Court clarified the requirement in Article 19(1), second subparagraph, TEU, that the Member States should ensure 'effective legal protection'. That provision applies *ratione materiae* to the 'fields covered by EU law', irrespective of whether the Member States are implementing EU law within the meaning of Article 51(1) of the Charter.<sup>9</sup> The scope of application of the second subparagraph of Article 19(1) TEU is therefore broader than that of Article 47 of the Charter: it is not limited to national measures implementing EU law but applies horizontally to all proceedings before national courts in which EU law might apply.

The Court went on to explain the unbreakable link that exists between the right to an effective legal protection in Article 19 TEU, the fundamental right to an effective remedy and the rule of law. Article 19 TEU 'gives concrete expression to the value of the rule of law stated in Article 2 TEU' and entrusts national courts and tribunals, in cooperation with the Court of Justice, with the responsibility for ensuring judicial review in the EU legal order.<sup>10</sup> Since the very existence of judicial review to ensure compliance with EU law 'is of the essence of the rule of law',<sup>11</sup> all 'courts or tribunals' in the Member States within the meaning of Article 267 TFEU must meet the requirements of effective judicial protection.<sup>12</sup> Thus, Article 19 TEU itself requires those national courts or tribunals, insofar as they may rule on questions concerning the application or interpretation of EU law, to be 'independent' within the meaning of Article 47, second subparagraph, of the Charter.<sup>13</sup> That guarantee is 'inherent in the task of adjudication' and means, in particular, that judges should receive a level of remuneration 'commensurate with the importance of the functions they carry out'.<sup>14</sup>

Pivotal in the Court's reasoning is the link between judicial independence – and by extension the rule of law principle – and the procedure for a preliminary ruling. The former 'is, in particular, essential to the proper functioning of the [latter]' as it is settled case-law that only national bodies that satisfy the criterion of independence may refer questions to the Court of Justice

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8. Judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C64/16, EU:C:2018:117.

9. *Ibid.*, para. 29.

10. *Ibid.*, para. 32.

11. *Ibid.*, para. 36, citing the judgment of 28 March 2017, *Rosneft*, C72/15, EU:C:2017:236, para. 73.

12. *Ibid.*, para. 37.

13. *Ibid.*, para. 42.

14. *Ibid.*, para. 46.

for a preliminary ruling.<sup>15</sup> The underlying logic is simple: *upstream*, no hindrance should result from pressure exercised on the judge to refer – or not to refer – a request for a preliminary ruling to the Court of justice, or to ask a specific question instead of another one; *downstream*, only independent courts can ensure the proper implementation of preliminary rulings. By protecting national judges' independence through Article 19 TEU, the Court thus also protects national judges as the *arm* of EU law (or, put more simply, as 'European judges'); by extension, it preserves the uniformity and effectiveness of EU law which the preliminary ruling procedure seeks to achieve.

As to the salary reductions at issue, they did not entail any breach of judicial independence: they were justified by mandatory requirements linked to the elimination of the Portuguese State's excessive budget deficit, were limited to a percentage of the salary varying in accordance with the level of salary, were temporary in nature and, most importantly, did not target the judiciary specifically but were part of a comprehensive effort to be made by public officials generally to cut spending in the public sector.<sup>16</sup>

The Court of Justice's interpretation of Article 19 TEU in a manner that protects the national judges' independence has also a broader consequence: it enhances *mutual trust* between the Member States as regards the rule of law. Mutual trust is based on the premiss that Member States share a set of common values on which the European Union is founded, as stated in Article 2 TEU.<sup>17</sup> Compliance with those values is indeed a prerequisite for the accession of a new Member State to the EU.<sup>18</sup> For some time, it may have been assumed that the monitoring of those values would be essentially political in nature. *Juízes Portugueses* makes it clear that there is also scope for judicial monitoring at Union level. The fundamental right to an effective remedy before an independent tribunal forms part of the requirement for 'effective legal protection' in Article 19 TEU, which is itself an essential component of the rule of law. As that provision applies 'horizontally' in areas covered by EU law, the Court of Justice has jurisdiction to monitor compliance with the rule of law in each Member State.

The judgment in *LM*, delivered on 25 July 2018, further illustrates that mutual trust and the rule of law are closely related.<sup>19</sup> That judgment confirms, although from a very different angle, that the premiss of Member States' compliance with the values in Article 2 TEU is not absolute and hence that mutual trust is not blind trust.

In that case, the High Court of Ireland asked, in essence, whether a judicial authority of a Member State may refuse to execute a European Arrest Warrant ('EAW') delivered by the judicial authority of another Member State in accordance with Framework Decision 2002/584/JHA<sup>20</sup> if there is a risk that the person concerned would suffer a breach of his or her fundamental right to an

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15. *Ibid.*, para. 43.

16. Judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C64/16, EU:C:2018:117, paras 46 to 50.

17. Opinion 2/13 (Accession of the European Union to the ECHR) of 18 December 2014, EU:C:2014:2454, para. 168, and judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C64/16, EU:C:2018:117, para. 30.

18. Art. 49, first subparagraph, TEU.

19. Judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C216/18 PPU, EU:C:2018:586.

20. Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (O.J. 2002 L 190, p. 1).

independent tribunal in case of surrender to that latter Member State. The principle of mutual recognition of judicial decisions (in this case of EAWs) is the 'cornerstone' of judicial cooperation in the area of freedom, security and justice. It is itself based on mutual trust, which requires Member States to consider that all the other Member States comply with EU law and, in particular, with fundamental rights. In *Aranyosi and Căldăraru*,<sup>21</sup> a case concerning the conditions of detention in the issuing Member State, the Court had already accepted limitations on mutual recognition and mutual trust 'in exceptional circumstances'. Subject to certain conditions, surrender of the requested person can be refused where it would otherwise result in that person being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter. The question in *LM* was therefore: should that apply by analogy to the risk of breach of the fundamental right to an independent tribunal, as guaranteed by Article 19 TEU and Article 47 of the Charter?

The Court's answer was 'Yes'. Subject to strict conditions, such a risk allows the executing judicial authority to refuse the surrender.<sup>22</sup> The Court largely relied upon *Juízes Portugueses* to confirm that independence of the judiciary, which forms part of the 'essence' of the fundamental right to a fair trial,<sup>23</sup> is key to effective judicial protection and, in turn, to upholding the rule of law within the EU.<sup>24</sup> That independence is also pivotal in the EAW mechanism: Framework Decision 2002/584 establishes a simplified system of direct surrender between 'judicial authorities' of the Member States, founded on the premiss that they all meet the requirements of effective judicial protection.<sup>25</sup>

As such a limitation derogates from the premiss of mutual trust between the Member States, refusing the execution of an EAW on that basis is nevertheless possible in exceptional circumstances only. In a first step, the executing judicial authority should carry out an objective assessment of the operation of the system of justice in the issuing Member State. That involves verifying whether there is a real risk of systemic and generalised deficiencies in that Member State and hence of breaches of the fundamental right to a fair trial. The Court pointed out that information to that effect contained in a reasoned proposal submitted by the Commission to the Council on the basis of Article 7(1) TEU is 'particularly relevant'.<sup>26</sup> If the executing judicial authority finds that there is such a real risk, it must, in a second step, assess specifically and precisely whether, in the particular circumstances of the case, there are substantial grounds for believing that, following surrender, the requested person will run that risk.<sup>27</sup> The executing judicial authority must request from the issuing judicial authority any supplementary information necessary for assessing whether there is such a risk.<sup>28</sup> It is only if the European Council adopts a decision based on Article 7(2) TEU, determining that there is a serious and persistent breach of the principles set out in Article 2 TEU in the issuing Member State, and the Council then suspends Framework Decision 2002/584 in respect of that Member State, that the executing

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21. Judgment of 5 April 2016, *Aranyosi and Căldăraru*, C404/15 and C659/15 PPU, EU:C:2016:198.

22. Judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C216/18 PPU, EU:C:2018:586, para. 59.

23. *Ibid.*, para. 48.

24. *Ibid.*, paras 51 to 53.

25. *Ibid.*, paras 55 and 58.

26. *Ibid.*, para. 61.

27. *Ibid.*, para. 68.

28. *Ibid.*, para. 76.

judicial authority is required to automatically refuse to execute any EAW which that Member State issues, without having to carry out any assessment of whether the person concerned runs the risk that the essence of his right to a fair trial will be affected.<sup>29</sup> Following the judgment in *LM*, the referring court carried out such an assessment and held that the conditions for refusing execution of the EAW were not met.<sup>30</sup>

So far, I have stressed the importance of judicial independence and of the preliminary reference mechanism to ensure that EU law is observed and, in turn, to uphold the rule of law within the EU. That is not, however, the only functional protection which EU law offers to national courts and tribunals. As I said at the beginning of this speech, where national courts apply EU law, they must have the possibility and, where appropriate, the obligation to engage in a dialogue with the Court of Justice. That is essential not only to the uniformity and effectiveness of EU law, but also – by extension – to its autonomy. Those objectives would be seriously compromised if either the EU political institutions or the Member States could remove a given field of EU law from the jurisdiction of national courts and thereby from the scope of the preliminary reference procedure.

A recent illustration is the judgment in *Achmea*,<sup>31</sup> delivered only a week after *Juizes Portugueses*.

It is worth spending some time on this case as that judgment's rationale and significance have sometimes been misunderstood. Slovakia challenged before German courts an award by an arbitral tribunal established in accordance with the 1991 Bilateral Investment Treaty ('BIT') between the then Czech and Slovak Federative Republic and the Netherlands. Slovakia had decided to liberalise the private sickness insurance sector in 2004. That prompted Achmea, an undertaking belonging to a Dutch insurance group, to invest in that Member State. Later on, however, Slovakia went back on that liberalisation, in particular by prohibiting the distribution of profits generated by the private sickness insurance activities. Achmea sought compensation of the harm that that U-turn had caused to it before the arbitral tribunal. That tribunal ordered the Slovak Republic to pay Achmea damages in the principal amount of EUR 22.1 million.

The Slovak Republic contested that decision before German courts (the parties had chosen Germany as the place of arbitration). As Slovakia had now become an EU Member State, doubts arose as to the compatibility of the arbitration clause in the BIT with, in particular, the preliminary ruling mechanism and the prohibition for the Member States, in Article 344 TFEU, to 'submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein'. The *Bundesgerichtshof* (Federal Court of Justice, Germany) therefore made a reference to the Court of Justice.

In its preliminary considerations, the Court reminded of its finding in *Opinion 2/13* that the autonomy of EU law with respect both to the law of the Member States and to international law is justified by the essential characteristics of the EU and its legal order, relating in particular to the constitutional structure of the EU and the very nature of EU law.<sup>32</sup> It is in order to preserve those characteristics that the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law,<sup>33</sup> in which national courts and tribunals

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29. *Ibid.*, para. 82.

30. High Court (Ireland), 19 November 2018, [2018] IEHC 639. Appeal pending before the Supreme Court.

31. Judgment of 6 March 2018, *Achmea*, C284/16, EU:C:2018:158.

32. *Ibid.*, para. 33.

33. *Ibid.*, para. 35.

share responsibility with the Court of Justice for ensuring the full application of EU law and judicial protection of the rights created by that law.<sup>34</sup> The Court held that the preliminary ruling mechanism is the 'keystone' of that judicial system and an essential instrument for preserving the particular nature of EU law.<sup>35</sup> That formed the background to a three-step reasoning.

In its judgment, the Court of Justice found that the arbitral tribunal could have been called upon to interpret and apply rules and principles of EU law, in particular the freedom of establishment and the free movement of capital, in order to rule on possible infringements of the BIT.

The Court of Justice noted, however, that the arbitral tribunal did not form part of the EU judicial system, since the very *raison d'être* of the arbitration clause contained in the BIT was precisely to prevent investor-related disputes from being submitted to the courts of the Contracting Parties. As a result, it ruled that the tribunal could not be classified as a court or tribunal 'of a Member State' within the meaning of Article 267 TFEU.

Thus, the Court of Justice found that the autonomy of EU law precludes an international agreement between Member States, the effect of which would be to remove from the jurisdiction of national courts – and thus from the preliminary reference procedure – disputes that may involve the uniform application and interpretation of EU law.

In the last part of the judgment, the Court distinguished this case from settled case-law under which an international agreement concluded by the EU and establishing a dispute-settlement mechanism is in principle compatible with EU law, provided that the autonomy of the EU and its legal order is respected.<sup>36</sup> That case-law which was recently confirmed in Opinion 1/17<sup>37</sup> on the free trade agreement between the EU and Canada, did not apply in *Achmea* because the arbitration clause in the BIT, which is an agreement binding upon Member States, was such as to call into question both mutual trust between them and the particular nature of EU law, and therefore amounted to a violation of the principle of sincere cooperation set out in the first subparagraph of Article 4(3) TEU.<sup>38</sup> Following the Court's preliminary ruling, the *Bundesgerichtshof* annulled the arbitral award.<sup>39</sup>

What the Court refused to accept in *Achmea* was an *anachronism*: following accession of Slovakia to the EU on 1 May 2004, distrust can no longer be the premiss characterising the relations between Member States. On the contrary, the premiss *within* the Union must be mutual trust in respect of the values set out in Article 2 TEU. Since those values include, in particular, the rule of law and justice, any Member State should be in principle confident that, in the fields covered by Union law, the judicial system of the other Member States ensures effective legal protection within the meaning of Article 19 TEU. It is here that a clear link appears with the reasoning in *Juizes Portugueses*: that mutual trust requirement is all the more justified given that the Court of Justice bears judicial responsibility for monitoring *effective compliance* by the Member States with the rule of law, through the application of Article 19 TEU read together with Article 2 TEU.

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34. *Ibid.*, para. 36.

35. *Ibid.*, para. 37.

36. *Ibid.*, para. 57 and case-law cited.

37. Opinion 1/17 of 30 April 2019, EU:C:2019:341.

38. *Ibid.*, para. 58.

39. Beschluss vom 31. Oktober 2018 (I ZB 2/15).

It is against that constitutional background that *Achmea* should be understood, and certainly not as a rejection of international arbitration *en bloc* as it has – erroneously – been suggested. On the contrary, Opinion 1/17<sup>40</sup> on the free trade agreement between the EU and Canada expressly confirmed the Court’s openness to an investor–state dispute settlement mechanism provided that the specific characteristics and the autonomy of the EU legal order are preserved.

## 2. ENFORCEMENT ACTIONS UNDER ARTICLES 258-260 TFEU

Let us now turn briefly to the “direct route” for guaranteeing respect of the rule of law within the EU legal order: the enforcement actions brought before the Court of Justice under Articles 258 to 260 TFEU. Whilst such actions can either be lodged by the Commission or another Member State, the rule of law enforcement actions brought so far before the Court of Justice have all been lodged by the Commission.

It should be stressed that the question whether an enforcement action is brought against a defaulting Member State before the Court of Justice is a political question. The Commission enjoys full discretion in this regard. This means that individuals may not compel the Commission to bring an enforcement action.

Enforcement actions have recently been brought by the Commission against a Member State in which the Commission claims that the Member State concerned failed to properly respect the independence of judges and so infringing the second subparagraph of Article 19 TEU, read in conjunction with Article 47 of the Charter. As I already mentioned, since these cases are still pending, I shall not comment on them.

However, it can be inferred from existing case-law that the Court of Justice can effectively protect the rule of law within the framework of enforcement actions, only if it can take interim measures which prevent a Member State from putting into effect measures which may irreversibly undermine the rule of law.

In a case brought against a Member State concerning legislation lowering the retirement age for Supreme Court judges, the Commission had requested the Court of Justice to take interim measures. The Court of Justice granted the application since there was a risk that the independence of the Supreme Court concerned could not be ensured pending delivery of the final judgment. This was likely to cause serious damage to the EU legal order and, accordingly, to the rights that individuals derive from EU law, and the values, set out in Article 2 TEU, on which the EU is based, including that of the rule of law. Moreover, that same risk would have negatively affected the principle of mutual trust on which the judicial cooperation between the courts of different Member States is founded.<sup>41</sup>

What is moreover apparent from existing case-law of the Court of Justice is that respect for the rule of law in the EU legal order requires full and immediate compliance with judicial decisions by all subjects of the law, not least by the national authorities of the Member States themselves. Indeed, it was the need to ensure the effectiveness of final judicial decisions and, thus, the need to uphold the rule of law within the EU, that led the Court of Justice to hold in November 2017

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40. Opinion 1/17 of 30 April 2019, EU:C:2019:341.

41. Order of 17 December 2018, *Commission v. Poland*, C619/18 R, EU:C:2018:1021.

in *Commission v Poland*, on an interim measures application brought by the Commission with a view to preventing further logging in the Białowieża Forest, which is both a world heritage site and an EU Natura 2000 Special Area of Conservation, that the adoption of interim measures may be accompanied by the imposition of a periodic penalty payment in the event that the Member State concerned fails to comply with those measures.<sup>42</sup> The imposition of such a payment is not to be seen as a sanction, but rather as a means of ensuring the effective application of EU law in circumstances where there are grounds for doubting that a Member State has complied adequately with a previous interim relief order or that it is prepared to comply effectively with any subsequent order. A final judgment in this case, finding in favour of the Commission, was delivered on 17 April 2018.<sup>43</sup>

Time has come to conclude briefly. The cases that I have discussed demonstrate that the Court is ready to bear its full responsibility for upholding the rule of law within the EU. That responsibility lies at the very heart of its function of ensuring that ‘in the interpretation and application of the Treaties the law is observed’. Those cases equally attest to the fact that the Court would not be in a position to uphold the rule of law and thus to preserve the Union’s autonomous legal order without judicial dialogue with the national courts of the Member States.

I thank you for your attention.

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42. Order of 20 November 2017, *Commission v. Poland*, C441/17 R, EU:C:2017:877.

43. Judgment of 17 April 2018, *Commission v. Poland*, (Białowieża Forest), C441/17, EU:C:2018:255.

## ANNEX 2

# RULE OF LAW IN EUROPE DEMANDS AND CHALLENGES FOR THE EUROPEAN JUDICIARY\*

ANGELIKA NUßBERGER\*\*

## 1. RULE OF LAW IN EUROPE - A SUCCESS STORY?

“In a world divided by differences of nationality, race, colour, religion and wealth [the rule of law] is one of the greatest unifying factors, perhaps the greatest, the nearest we are likely to approach to a universal secular religion.”<sup>1</sup> These are the words of one of the most famous fighters for rule of law, the British Supreme Court judge Lord Bingham. He was not only a fighter for rule of law, but also an optimist. Is such optimism justified in Europe in the present times?

Perhaps yes, perhaps no. There are two narratives on rule of law in Europe – a success story and a story of lost illusions.

The challenge is that the notion of “rule of law” or “Rechtsstaat” is vague and open. We might not always agree on what it means. And, what makes it really complicated – we do not have only one interpreter, but many – the European Courts in Luxembourg and Strasbourg, the national constitutional courts, and, to a certain extent, all the ordinary courts as well. It is a concept enshrined in European law as well as a basic principle of constitutional law in all member States be it of the Council of Europe, be it the European Union. It is omnipresent. That’s a great achievement, but a challenge at the same time.

## 2. COMMON FEATURES OF THE EUROPEAN CONCEPT OF RULE OF LAW

If we are optimists we will argue that there is a sophisticated and workable concept of rule of law that is generally accepted. It is mainly based on the jurisprudence of the European Court

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\* Speech delivered on 13 May 2019 at the occasion of the final conference of the Pilot training project for justice professionals on key issues of fundamental rights and rule of law implemented by EJTN in 2018 - 2019 as part of the European Commission’s strategy for the effective implementation of the EU Charter of Fundamental Rights

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1. Tom Bingham, *The Rule of Law*, 2010, p. 174.

of Human Rights elaborated on the basis of the principle of subsidiarity and in a dialogue with national constitutional courts and the European Court in Luxembourg.

Lord Bingham enumerated in his famous book “Rule of Law” the eight “ingredients” of rule of law: Accessibility and predictability of the law, exclusion of discretion in the application of rights and liabilities, equality, good faith, adequate protection of human rights, conflict resolution on the basis of law, fair trial, and compliance with the obligations under international law. These “ingredients” coincide to a large extent with what the European Court of Human Rights has elaborated as principles. In six decades of jurisprudence we find hundreds or even thousands of concrete examples about what that means in practice. Some elements are worth mentioning:

- The principle of proportionality helps to find balanced solutions in difficult cases.
- The idea of legal security, foreseeability and accessibility of the law has been clarified.
- There is a rich case-law on independence of judges.
- The ingredients of a fair criminal trial have been defined, e.g. in relation to trials in absentia, condemnations on the basis of the testimony of an absent witness, the presence of a lawyer from the very beginning of the procedure, and the meaning of presumption of innocence.
- Not only access to court, but also reaching a result in a given case within a reasonable time has been built up as a generally accepted standard.

### **3. JURISPRUDENCE ON THE “INDEPENDENCE OF THE JUDICIARY” AS AN ESSENTIAL ELEMENT OF RULE OF LAW**

Let me single out one aspect of this jurisprudence which is especially relevant – the jurisprudence on what the concept of “independence of the judiciary” means. This is essential as all the other guarantees will not have much impact if there are no independent judges to enforce them.

In order to determine whether a court is “independent” the Strasbourg Court focuses on many aspects such as the manner of appointment of its members and their term of office, their irremovability and the existence of safeguards against external pressure to name just a few very important ones. Although the Convention does not require States to comply with any theoretical constitutional concept of State organisation, the Court emphasizes in its jurisprudence the principle of “separation of powers”.

The most complicated question in defining “independence” is, however, whether the body presents an “appearance of independence”. The famous quotation that “justice must not only be done, it must also be seen to be done” runs like a red thread through the Court’s case-law: An appearance of a lack of independence is sufficient for finding a violation of the Convention even if bias cannot be proven. What counts is trust: those seeking justice must be able to have trust in the courts’ independence.

One of the important cases the Court has decided in this context is the case of Oleksandr Volkov against Ukraine<sup>2</sup> concerning the dismissal of the President of the Military Chamber of the Supreme Court of Ukraine. Mr. Volkov had been charged with what was called “gross procedural violations” and was therefore dismissed by Parliament because of “breach of oath”; the judicial control by the Higher Administrative Court was restricted.

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2. Oleksandr Volkov v. Ukraine, no. 21722/11, 09/01/2013.

In this case the Court established numerous violations of the independence of the judiciary. Among other things it was considered to be a violation of the Convention that non-judicial staff appointed directly by the executive and the legislative authorities comprised the vast majority of the deciding body, the Higher Judicial Council. The Court stressed in this context “the importance of reducing the influence of the political organs of the government on the composition of the Higher Judicial Council”. It discerned “serious issues pointing both to structural deficiencies in the proceedings before the Higher Judicial Council and to the appearance of personal bias on the part of certain members determining the case” which were not corrected at a later stage of the procedure.<sup>3</sup>

The Court also found that the Higher Administrative Court, controlling the dismissal as last instance was not independent:

“The Court observes that the judicial review was performed by judges of the Higher Administrative Court who were also under the disciplinary jurisdiction of the Higher Judicial Council. This means that these judges could also be subjected to disciplinary proceedings before the Higher Judicial Council. Having regard to the extensive powers of the Higher Judicial Council with respect to the careers of judges (appointment, disciplining and dismissal) and the lack of safeguards for the Higher Judicial Council’s independence and impartiality (...), the Court is not persuaded that the judges of the Higher Administrative Court considering the applicant’s case, to which the Higher Judicial Council was a party, were able to demonstrate the “independence and impartiality” required by Article 6 of the Convention.”<sup>4</sup>

In the *Volkov* case the Chamber was unanimous in defining those standards: A court is not independent if it controls a decision taking by a body that has disciplinary power over the judges sitting on the bench.

## 4. RELEVANCE OF “LEGAL CULTURE” IN ASSESSING APPEARANCES OF LACK OF INDEPENDENCE

The problem was, however, whether all what had been said in the case of *Volkov v. Ukraine* in a very specific situation could be extrapolated as a general rule and transferred to other legal systems. It is here where the Strasbourg judges were no longer unanimous.

In the Grand Chamber case of *Ramos Nunez v. Portugal*<sup>5</sup> the Court was once again confronted with the assessment of a similar problem to the one it had to assess in *Volkov*, a disciplinary procedure against a judge, this time not leading to the dismissal, but to a disciplinary sanction, i.e. the suspension from office for a certain period of time. Once again, one of the problems of the case was the question of appearances. The Portuguese Supreme Court had to decide as last instance. The Judicial Council – an organ similar to the Higher Judicial Council in Ukraine, but composed differently – was in some way on both sides of the decision on the disciplinary measure. On the one hand it was responsible for the disciplinary measure, on the other hand it was “behind” the Supreme Court as it had a certain role to play regarding the careers of Supreme Court judges and disciplinary procedures against them.

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3. Oleksandr Volkov v. Ukraine, no. 21722/11, 09/01/2013, § 117.

4. Oleksandr Volkov v. Ukraine, no. 21722/11, 09/01/2013, § 130.

5. Ramos Nunez de Carvalho e Sá v. Portugal [GC], no, 55391/13, 06/11/2018.

Unlike in the Ukrainian context the Strasbourg court considered the risk as “purely abstract”. It explained that its findings in *Volkov v. Ukraine* could not be transferred to other cases without taking into account specific circumstances:

„... these findings should be regarded as a criticism based on the circumstances of the case and applicable in a system with serious structural deficiencies or an appearance of bias within the disciplinary body for the judiciary, as was the case in the specific context of the Ukrainian system at the time, rather than as a general conclusion.“ “...a purely abstract risk of this kind cannot be regarded as apt to cast doubt on the impartiality of a judge in the absence of specific circumstances pertaining to his or her individual situation.”<sup>6</sup>

Six out of 17 judges dissented on this point and wrote: “We believe that the principle set out in *Volkov* is fully applicable to the present case.”<sup>7</sup>

The general question is the following: If we speak about “appearances” and “trust” and “mistrust” in a judicial system, do we then have to analyse potential structural deficiencies in the context of the given system or detached from it? Do we have to take into account the respective legal culture?

In answering this question we somehow face Scylla and Charybdis. If we accept the respective legal culture as a relevant factor and thus restrict the applicability of the general standards we are faced with the problem of how to measure or evaluate the soft factor “legal culture”. If we establish abstract standards and completely ignore long-standing traditions and realities we might cause problems for well-functioning systems without any added value.

It is clear that these problems are much more difficult to solve if the divergences between the States concerned are huge. So the challenge is more important for the 47 member States of the Council of Europe than for the member States of the European Union. Just to give one example: in the case of *Sovtransavto v. Ukraine*,<sup>8</sup> a letter of the President of the Republic advising the judge on how to decide was found in the file. That may be considered to be a heritage of what was called “telephone justice” in communist times and might be difficult to imagine in many other States.

Yet, it seems to me that the problem cannot be ignored within the EU either. Just to refer to the Opinion of the Advocate General Evgeny Tanchev in the case *Commission v. Poland*<sup>9</sup> where he argues that the regimes of other Member States are not comparable to the situation in Poland, as they operate in a different legal, political and social context.

Let me cite another recent case to illustrate the problem, the case *Thiam v. France*.<sup>10</sup>

The then President Nicolas Sarkozy joined criminal proceedings against Mr. Thiam as he had been one of his victims of credit card fraud. Mr. Thiam was convicted. He complained to our Court that the fact that the President of France had joined the proceedings as a civil party had breached the principle of equality of arms and had infringed the right to an independent and impartial court.

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6. Ramos Nunez de Carvalho e Sá v. Portugal [GC], no. 55391/13, 06/11/2018, § 158.

7. Ramos Nunez de Carvalho e Sá v. Portugal [GC], no. 55391/13, 06/11/2018, dissenting opinion of judges Yudkivska, Vučinić, Pinto de Albuquerque, Turković, Dedov and Hüseyinov.

8. *Sovtransavto Holding v. Ukraine*, no. 48553/99, 25/07/2002.

9. C-619/18.

10. *Thiam v. France*, no. 80018/12, 18/10/2018.

According to Article 64 of the French Constitution the President of the Republic is “the guarantor of the independence of the judicial authority”, a position somehow outside the usual framework of the separation of power. The President is not considered to be part of the executive, but somehow “above”. The function of “guarantor of the independence of the judiciary” is, however, not only abstract. It implies that it is the President’s task to appoint judges. According to the Constitution he “shall be assisted by the National Legal Service Commission”, a Commission which is again similar to the Higher Judicial Council in Ukraine and the Judicial Council in Portugal in the Volkov and Ramos Nunez cases. The French President chairs (or, to be more precise: “chaired”; the respective regulation has been changed in the meantime) this National Legal Service Commission. And it is again this Commission which is responsible for the career of judges, i.e. – at least theoretically – also for the career of those judges adjudicating the case where the President is a civil party. So, in the Thiam case there were two problems of appearances of lack of independence: First, the judges deciding on the President’s case are appointed by the President, second, the National Legal Service Commission is responsible for the career of the judges deciding the case, and, furthermore, this Commission is even headed by the President. Can the judges adjudicating “the President’s” case be seen to be independent?

The Court said: Yes, they can.

In its analysis the Court found that their statutory situation protected the judges from any attempt to undermine their independence.

First, the fact alone that the President appointed the judges did “not entail a relationship of subordination if, once appointed, they are free from influence or pressure when carrying out their adjudicatory role”.<sup>11</sup>

Second, the following factors were seen to be decisive: the guarantee of the security of tenure, the fact that the judges were not in a position of subordination in relation to the Ministry of Justice and were not subjected to any pressure or instructions in the exercise of their judicial duties and, the fact that there were precise rules on the advancement and discipline of judges.

Finally, the Court also took into account the subject matter of the case:

“The Court observes in this connection that the case before the judges did not bear any relation to the political duties of Mr Sarkozy, who had neither brought the prosecution nor provided any evidence to establish the applicant’s guilt.”<sup>12</sup>

The conclusion was very carefully worded:

“The Court finds it necessary to reiterate that, where a high-ranking figure with an institutional role in the career path of judges acts as claimant in a dispute, such situation is capable of casting legitimate doubt on the independence and impartiality of the bench. However, in the present case, having regard to the foregoing and taking account of the subject-matter of the dispute, the Court does not see any reason to find that the judges called upon to adjudicate on the applicant’s case were not independent within the meaning of Article 6 § 1 of the Convention.”<sup>13</sup>

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11. Thiam v. France, no. 80018/12, 18/10/2018, § 80.

12. Thiam v. France, no. 80018/12, 18/10/2018, § 84.

13. Thiam v. France, no. 80018/12, 18/10/2018, § 85.

So, after all, I would call the Court's approach objective, yet case-specific. The Court did not directly refer to legal culture, but the elements enumerated were alluding to it.

All these are difficult cases and show that the assessment of the independence of the judiciary can be quite intricate.

## 5. RESPONSES TO ATTACKS ON JUDICIAL INDEPENDENCE

Attacks on judicial independence can be subtle and difficult to discern, they can also be quite blunt, but still difficult to capture. An example in this context would be the case of the former President of the Hungarian Supreme Court, Mr. Baka.<sup>14</sup> He was not dismissed, but lost his job as Court President with the adoption of a new Constitution setting up a new Supreme Court and defining the eligibility rules for becoming President in such a way that he was excluded. As there was no procedure of dismissal the attack on the irremovability of the judge could not be brought under Article 6. The only aspect that could be judged under Article 6 was "access to Court" as there was no remedy open to Mr. Baka against the new constitutional provision. The main thrust of the case was, however, discussed under Article 10, freedom of expression, as Mr. Baka alleged that the new structural setting of the Supreme Court in the newly adopted Constitution was a response to his critical remarks.

So what narrative about rule of law in Europe is true – is it a success story or a story of lost illusions? - Probably both.

We have elaborated good tools for assessing questions of rule of law, we can be proud of our detailed and refined jurisprudence. Sometimes subtle answers to difficult questions have to be given. But unsolved questions remain. And, what is really worrying – attacks on the most basic principles of rule of law, the independence of the judiciary, become more and more widespread; some of these attacks are in no way subtle, but very direct and aggressive. Taboos are broken in a way as if they were no more taboos.

So, to sum up, our task as judges is clearly twofold: We have to further refine our interpretation of our common standards in order to clarify what might still be unclear. And we have to give a firm answer to attacks on basic values in order to rebuild trust where it might have been lost.

## 6. CONCLUSION

The mission of all those striving for societies based on rule of law resembles the task of Sisyphus. We have a huge boulder in front of all of us. We have to push it up on top of a mountain. We can never exclude that the boulder might roll down again, but we must never give up. This mythological story can be interpreted in the perspective of Albert Camus. The last words of his philosophical study are:

“La lutte elle-même vers les sommets suffit à remplir un cœur d’homme. Il faut imaginer Sisyphe heureux.”<sup>15</sup>

Of course, we cannot be happy to see unprecedented attacks on the basic principles of rule of law. But we are happy to see that the majority agrees to push the boulder uphill again. And to do it together in Europe.

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14. Baka v. Hungary, no. 20261/12, 23/06/2016.

15. The struggle itself leading up to the summit is enough to fill a man's heart. We must imagine Sisyphus happy.

## ANNEX 3

# “DEVELOPING THE EU RULE OF LAW POLICY”\*

EMMANUEL CRABIT\*\*

I would like to thank the European Judicial Training Network for inviting me to participate to this conference.

I do not need to underline in front of this audience the importance of the rule of law! Judges at national and European level are at the front line to uphold the rule of law. What I would like to say today is that you are not alone! The European Parliament, the European Commission and the Council of the European Union have become more and more active over the past years to support your work and to promote and uphold the rule of law.

And this should not come as a surprise.

First, because, the rule of law, together with fundamental rights, and democracy are among the common values of the EU, enshrined in Article 2 of the Treaty on European Union. In this ‘tripod of values’, the rule of law is a prerequisite for fundamental rights and democracy.

President Lenaerts has already underlined that respect for the rule of law is crucial for the effective application of EU law; the very existence of a judicial review by independent national courts to ensure compliance with EU law *‘is of the essence of the rule of law’*. And rule of law is also essential for mutual trust, between national courts but also between Member States; and for the good functioning of the internal market and an investment-friendly environment.

This increasing interest of EU institutions results also, unfortunately, from the fact that respect for the rule of law cannot be taken for granted. Over the past years, we have seen rule of law concerns emerging in certain Member States.

These developments have only made the Commission more convinced of the importance of using all the instruments at its disposal to uphold the rule of law.

The Commission has gradually developed during the last years a “rule of law toolbox”. This “toolbox” enables the EU to address a diversity of challenges through a diversity of responses. But the experience of the last years shows that the EU needs to strengthen its capacity to uphold the rule of law.

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\* Speech delivered on 13 May 2019 at the occasion of the final conference of the Pilot training project for justice professionals on key issues of fundamental rights and rule of law implemented by EJTN in 2018 - 2019 as part of the European Commission’s strategy for the effective implementation of the EU Charter of Fundamental Rights. An “afterword” section has been added at the end to provide updated information on the adoption of a new communication by the European Commission. Certain footnotes also contain updated information.

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For this reason, on 3 April, the Commission decided to launch a reflection process with all interested parties on how to further strengthen the rule of law within the EU. To facilitate this reflection the Commission presented in a communication the current ‘rule of law toolbox’, the experience of the past years and possible avenues for the future.

Before the summer, the Commission intends to put forward its proposals, its ‘rule of law initiative’, taking into account the results of this reflection. Today, I would like to encourage you to contribute to this reflection process and I will present to you the three types of issues which need to be addressed:

- the promotion of the rule of law,
- the prevention of breaches of the rule of law and
- the response to be given when such breaches occur within the Union.

### [Response]

I would like to start by the last topic, the response in case of breaches of the rule of law. This is of crucial importance as the main problem today is the lack of capacity to act effectively when a problem occurs.

What are the current instruments in the rule of law toolbox in case of a breach of the rule of law?

The recent experience has shown that one of the most effective instruments is the infringement procedure. On the basis of the case law presented by President Lenaerts, in certain situations where the independence of the justice system of a Member State is affected, the Commission can launch infringement proceedings for violation of the principle of effective judicial protection and the right to an effective remedy, as guaranteed by Article 19(1) TEU and Article 47 of the EU Charter of Fundamental Rights.

The Commission has already used this case law to launch infringement proceedings to safeguard judicial independence in Poland. There are two infringement proceedings which are pending in the Court of Justice of the European Union relating to the forced retirement regimes for Supreme Court judges<sup>1</sup> and ordinary court judges<sup>2</sup>.

Recently, on 3 April, the Commission launched a new infringement procedure relating to the disciplinary regime for judges in Poland; again it is based on the reasoning of the Court of Justice of the European Union, in particular paragraph 67 of the *LM* judgement<sup>3</sup> which establishes clear requirements to be displayed by disciplinary regimes for judges in order to safeguard judicial independence.

In addition to judicial independence, infringement proceedings could also be relevant for other types of rule-of-law-related problems. For example, the obligation for Member States provided

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1. To be noted that after this conference, on 24 June 2019, the European Court of Justice issued a final judgment in this case, ruling that the Polish legislation concerning the lowering of the retirement age of judges of the Supreme Court is contrary to EU law requirements regarding judicial independence (Case C-619/18, *Commission v Poland*, ECLI:EU:C:2019:531). Before this judgement, the Court issued on 19 October 2018 (ECLI:EU:C:2018:852) and on 17 December 2018 (ECLI:EU:C:2018:1021), two orders on interim measures.
  2. European Commission, press release of 20 December 2017, “Rule of Law: European Commission acts to defend judicial independence in Poland” IP/17/5367, available at: [https://europa.eu/rapid/press-release\\_IP-17-5367\\_en.htm](https://europa.eu/rapid/press-release_IP-17-5367_en.htm).
  3. Judgement of 25 July 2018, C-216/18 PPU - Minister for Justice and Equality, ECLI:EU:C:2018:586.

in article 325 TFEU to effectively protect the financial interests of the EU could be used in cases where systemic problems relating to the rule of law affect Member States' capacity to fight against fraud, corruption and other illegal activities affecting the EU budget.

In the light of this recent case law, the Communication invites to reflect on how to make full use of its potential and how to disseminate this case law. I am sure that EJTN and judicial training activities can contribute to this work of dissemination.

In addition to the infringement proceedings, another instrument at the disposal of EU institutions are the mechanisms of Article 7 of the Treaty on European Union in case of a "clear risk of a serious breach of the [Union's] values" (Article 7(1) TEU) or in case of "the existence of a serious and persistent breach" of the Union's values (Article 7(2) TEU).

To prevent the emergence of a systemic threat to the rule of law that would require the use of the Article 7 mechanisms, the Commission established in 2014 the Rule of Law Framework. It provides for a process of dialogue with the Member State concerned, structured with opinions and recommendations from the Commission.

The deterioration of the situation of the rule of law in Poland led the Commission, to use the Rule of Law Framework in January 2016<sup>4</sup> and to initiate subsequently the procedure set out in Article 7(1) TEU in December 2017<sup>5</sup>.

In September 2018, the European Parliament decided to initiate the same procedure of Article 7(1) as regards Hungary<sup>6</sup>.

A new instrument which could become available in the future, is the Regulation on protecting the EU budget in the event of generalised deficiencies as regards the rule of law in the Member States<sup>7</sup>. The objective of this Regulation, which is not yet adopted by the Council and the Parliament, is to protect the EU budget by allowing the EU to suspend or restrict access to EU funding when generalised deficiencies as regards the rule of law affect or risk to affect the sound financial management or the EU financial interest.

### [Prevention]

Let me now turn to the prevention aspect which is also a crucial element of the current reflection.

We need to improve the early detection of rule of law problems in order to avoid their escalation. We need to ensure that Member States engaging in reforms comply with EU law and European standards on the rule of law.

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4. European Commission, press release of 13 January 2016, "College Orientation Debate on recent developments in Poland and the Rule of Law Framework: Questions & Answers", MEMO/16/62, available at: [https://europa.eu/rapid/press-release\\_MEMO-16-62\\_en.htm](https://europa.eu/rapid/press-release_MEMO-16-62_en.htm).

5. European Commission, Reasoned Proposal in accordance with Article 7(1) of the Treaty on European Union regarding the rule of law in Poland, Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, COM(2017) 835 final, 20 December 2017; European Commission, press release of 20 December 2017, "Rule of Law: European Commission acts to defend judicial independence in Poland" IP/17/5367, available at: [https://europa.eu/rapid/press-release\\_IP-17-5367\\_en.htm](https://europa.eu/rapid/press-release_IP-17-5367_en.htm).

6. European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)).

7. European Commission, Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, 2 May 2018, COM(2018) 324 final.

On this matter we are not starting from scratch.

Indeed, the Commission has over the last years developed a monitoring of the justice systems of the Member States within the institutional context of the European Semester, the EU's annual cycle of coordination of economic policies and structural reforms<sup>8</sup>.

Improving the independence, quality and efficiency of justice systems and the capacity to fight against corruption are a well-established priority of this coordination cycle of structural reforms.

This monitoring of national justice systems relies on two tools.

First, the annual EU Justice Scoreboard, which provides comparable data on independence, quality and efficiency of national justice systems. The Scoreboard relies on data from different sources, including judicial networks which provide the data on the independence chapter. Its seventh edition was published at the end of April<sup>9</sup>.

This comparative tool is complemented by a second tool, the country specific assessments which allow to make a deeper assessment based on the specific national legal and institutional context of a Member State. This is carried out through a bilateral dialogue with the national authorities and the stakeholders concerned. The main findings and challenges are presented every year in February in "annual Country Reports".

For 2019, these Country Reports touch upon relevant developments in national justice systems of 16 Member States<sup>10</sup>. The combined findings of these two tools may lead the Commission to propose to the Council to adopt Country Specific Recommendations ("CSR")<sup>11</sup>.

There is also the Cooperation and Verification Mechanism. The CVM was set up at the accession of Bulgaria and Romania to the European Union in 2007 to address shortcomings in judicial reform and the fight against corruption and, for Bulgaria, organised crime.

The Communication of 3 April invites a reflection on how the use of these existing tools, including the EU Justice Scoreboard and the European Semester, could be further developed to build a deeper and comparative knowledge on the rule of law situation in Member States.

There are already various proposals and ideas which will feed the reflection, including the EU mechanism on democracy, the rule of law and fundamental rights proposed by European Parliament<sup>12</sup> or the idea of a peer review mechanism proposed by Belgium and Germany.

### [Promotion]

Finally, the third issue which deserves further reflection is how to better promote a rule of law culture.

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8. On the tools used for monitoring the justice systems, see section 2.2 of the 2019 EU Justice Scoreboard, (COM/2019/198 final).

9. Idem.

10. The European Semester 2019 Country Reports are available at: [https://ec.europa.eu/info/publications/2019-european-semester-country-reports\\_en](https://ec.europa.eu/info/publications/2019-european-semester-country-reports_en)

11. In July 2019, the Council adopted Country Specific Recommendations as regards the justice systems of 7 Member States (HR, IT, CY, HU, MT, PT, SK); available at: [https://ec.europa.eu/info/publications/2019-european-semester-country-specific-recommendations-commission-recommendations\\_en](https://ec.europa.eu/info/publications/2019-european-semester-country-specific-recommendations-commission-recommendations_en).

12. European Parliament resolution of 14 November 2018 on the need for a comprehensive EU mechanism for the protection of democracy, the rule of law and fundamental rights (2018/2886(RSP)).

One of the lessons learned is that we need to improve the knowledge and awareness of the recent case law of the Court of Justice of the European Union and of the European Court of Human Rights as well as of European standards developed by the Council of Europe.

We often hear about the diversity of our national justice systems and the lack of a uniform common judicial model in Europe. However, this is not an issue: whatever the model of the justice system, the end result should be an effective judicial protection which requires independent courts. There are different manners to achieve this objective, depending on the legal and institutional context, but the end result should always be achieved. This is an EU law requirement.

The recent case law presented today by President Lenaerts and First Vice-President Nussberger concerning the rule of law should be the compass for national judges and lawyers, but also for national parliaments and all other stakeholders.

For example, we have already seen that the reasoning of the Court of Justice of the European Union on judicial independence has been used by national courts to make preliminary references concerning various aspects of judicial independence.

As regards the situation in Poland, currently, there are 11 requests for preliminary rulings pending: 7 have been made by the Supreme Court, 2 by the Supreme Administrative Court, and 3 by ordinary courts.

The DNA of the EU legal order is the cooperation between the national courts and the Court of Justice of the European Union. And this is why the knowledge of national judges about this case law should be promoted.

Also the European standards developed by the Council of Europe on the rule of law are important. For example, despite the diversity of justice models, the Committee of Ministers of the Council of Europe has adopted very clear standards on the independence of Councils for the Judiciary<sup>13</sup>. It is up to Member State to decide whether or not to establish such Council for the Judiciary, but if a Member State decides to do so, it is important that these standards are respected, in particular the requirement that the judges- members of the Council must be chosen by their peers, not by the Parliament or the executive power.

For all these reasons, there is a key role to play for judicial training. This is particularly true for cross border projects like the current one, which brings together members of the judiciary from across the EU to create room for reflection and for sharing best practices.

Therefore, I would like to thank all the participants for their commitment and encourage you all to participate to the current reflection.

Your experience as a judge is unique. The rule of law is not only a matter of legal texts but also of the application of the law on the ground.

Thank you.

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13. Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, available at: [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=09000016805afb78](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805afb78).

### *[Afterword]*

Following the reflection process launched by the April Communication, the European Commission presented on 17 July 2019 the “Communication on further strengthening the rule of law within the Union – A blueprint for action”<sup>14</sup>. The Communication presents a number of concrete actions within each of the key three areas of promotion, prevention and response.

As regards promotion, the Commission will make full use of funding possibilities to empower stakeholders - including civil society - to promote the rule of law, in particular among the general public. It will also promote EU law requirements and Council of Europe standards concerning the rule of law. The Commission will furthermore follow up on the idea of an annual rule of law event open to national stakeholders and civil society organisations.

As regards prevention, the Commission will establish an annual Rule of Law Review Cycle to develop a stronger awareness and understanding of developments in the individual Member States. To support the process, the Commission will prepare an annual Rule of Law Report and further develop its EU Justice Scoreboard.

As regards response, the Commission will develop a strategic approach on infringement proceedings based on the recent case law of the Court of Justice of the European Union . The Commission also calls on the European Parliament and the Council to reflect on intensifying a collective approach between institutions on Article 7 TEU procedures, and to adopt rapidly the Regulation on the protection of the Union’s budget in case of generalized deficiencies as regards the rule of law in the Member States.

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14. European Commission, “Strengthening the rule of law within the Union - A blueprint for action”, 17 July 2019, COM/2019/343 final, available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM%3A2019%3A343%3AFIN>.





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