CASE C-430/21 RS: THE ROMANIAN TALES

Γεράσιμος Λευκαδίτης
Maastricht University LLM (c.) on European Public Law
Νομική ΕΚΠΑ, ΜΔΕ Δικαίου Περιβάλλοντος
Δικηγόρος Αθηνών

Το παρακάτω σχόλιο αφορά το φλέγον σε επίπεδο συνταγματικού δικαίου της ΕΕ ζήτημα της δικαστικής ανεξαρτησίας και των εγγυήσεων που αυτή επιτάσσει υπό το φως του rule of law και των Συνθηκών. Πέρα από την αυστηρή στάση του Δικαστηρίου του Λουξεμβούργου αναφορικά με το περιθώριο που έχουν τα κράτη μέλη να ετεροκαθορίσουν τις προϋποθέσεις για την επίτευξη της ανεξαρτησίας αυτής, το ΔΕΕ καταπιάνεται στην παρούσα απόφαση και με τη σωστή χρήση του διαδικαστικού εργαλείο του προδικαστικού ερωτήματος ως μέσου επίτευξης των ενωσιακών στόχων, αλλά και με το ζήτημα της αρχής της προτεραιότητας (primacy) του Ευρωπαϊκού Δικαίου και της συνταγματικής τάξης της Ενωσης.

The following comment concerns the burning issue of judicial independence and the guarantees it requires in the light of the rule of law and the Treaties, which is a burning issue in EU constitutional law. In addition to the strict attitude of the Court of Justice of Luxembourg regarding the leeway of the Member States to determine the conditions for achieving such independence, the CJEU also deals in this judgment with the correct use of the procedural tool of the preliminary question as a means of achieving the Union's objectives, but also with the question of the primacy of European law and the Union's constitutional order.

I. INTRODUCTION

In the light of the principle of EU law primacy, the Court of Justice (CJEU), in its recent judgement of 22nd February 2022 on the *RS* Case[1], tried to strike a delicate balance between the constitutional orders of the Union and the Member States, through a judgment generated from a conflict on the very crucial topic of judicial independence. In this judgement, CJEU deconstructed the conditions of setting disciplinary liability for a judge in the EU legal order and anatomized the principle of judicial independence and the rule of law aspect of it. The Court also highlighted

[1] Case C-430/21, *RS*, Preliminary Reference of Curtea de Apel Craiova under 267 TFEU.

the significance of preliminary reference mechanism for the effective cooperation of national Courts and Member States, in and out the umbrella of EU law effectiveness requirements. Finally, it dealt with the questionable –at least for the national courts of particular Member States– relationship between the primacy of EU law and the competences of the constitutional courts of Member States. This case note will try to keep track on the facts of the case and the preliminary references, delve into the viewpoint of the Advocate General and the Court on the conditions of judicial independence, and criticize the findings of the Court under the principles of both primacy[2] of EU law and conferral of powers[3].

II. FACTUAL AND LEGAL CONTEXT

The procedural process started from a request for a preliminary ruling by the Craiova Court of Appeal, in the matter of whether a national legislation establishing a specialized section within the public prosecutor's office for the investigation of criminal offences committed within the judiciary was compatible with Union law. The starting point of this procedure was complaint from a Romanian Citizen, RS, concerning the duration of criminal proceedings in response to a complaint lodged by his wife. It is notable that, in an era of plenty controversial judicial reforms in Romania, the use of the preliminary reference mechanism was understood by Romanian judges as an *ultimum refugium* to defend judicial independence after negotiating, along with domestic courts European litigation in form of ECtHR, proved insufficient[4].

CJEU had already in previous judgments clarified that this establishment, in order to be compatible with EU law, must be justified objectively and followed by very specific guarantees[5]. In contrast, Romanian Constitutional Court, with its no. 390/2021 decision, argued that the provisions for this establishment were constitutional: Art. 148(2) of the Romanian Constitution establishes the primacy of EU law over contrary national provisions, however primacy cannot overcome the boundaries of national constitutional identity. Furthermore, the Romanian Constitutional Court considered that, despite the fact that an ordinary court has jurisdiction to examine the conformity with EU law of a provision of national legislation, such an ordinary court has no jurisdiction to examine the conformity with EU law of a national provision which has been found to comply with Article 148 of the Romanian Constitution by the Constitutional Court.

III. THE PRELIMINARY REFERENCES

In this context, Craiova Court of Appeal asked CJEU for preliminary ruling[6] in the following matters: Firstly, the Romanian court asked if the principle of the independence of the judiciary

---

2 For the principle of primacy, see C. Bernard/S. Peers, *European Union Law*, 2020, p. 174.

3 For the principle of conferral, see C. Bernard/S. Peers, supra, pp. 110-113.

4 M. Moraru/R. Bercea, (), *The First Episode in the Romanian Rule of Law Saga: Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, Asociația 'Forumul Judecătorilor din România, and their follow-up at the national level*, European Constitutional Law Review, 18, 2022, pp. 82-113.

5 Cases C-83/19, C-127/19 etc.

6 It is notable that the case has been found pursuant to the expedited procedure, as it concerned fundamental issues of national constitutional law and EU law that were able to bring uncertainty to both legal orders.

precludes a national provision according to which national courts have no jurisdiction to examine the conformity with EU law of a provision of national law that has been found to be constitutional by a decision of the Constitutional Court of a Member State. The second question referred to the initiation of disciplinary proceedings in respect of a judge for failure to comply with a decision of the Constitutional Court, where that judge is called upon to apply the primacy of EU and regards the CJEU judgements as taking precedence. The final reference concerned the matter of national judicial practices precluding a judge, on pain of incurring disciplinary liability, from applying the case-law of the Court of Justice in specific fields as criminal law proceedings.

IV. THE OPINION OF ADVOCATE GENERAL COLLINS

The Opinion of AG Collins in the *RS* Case was publicized on 20 January 2022[7]. The interesting clue is that it discusses in a very strong language the relevance of Constitutional Court decisions to the respect of the principle of independence of the judiciary[8]. First AG set the principles under which the case should be determined: the primacy of EU law, the principle of sincere cooperation under Article 4(3) TEU and the threshold to which the national identity of Member States can be invoked as a limit to the primacy of EU law, when the controversial EU provisions pose a genuine and sufficiently serious threat to a fundamental interest of the society[9], clarifying that vague, general and abstract assertions do not reach that threshold. In this sense, Advocate General characterized the Romanian Constitutional Court judgement as 'prohibited external interventions'[10] and defined the purpose of this judgement as aiming to prevent national court from ensuring the application of EU law and protection of the rights of individuals. In conclusion, noting that the Constitutional Court unlawfully arrogated competence to itself, AG suggested that principle of judicial independence precludes the lack of examining the conformity with EU law. *A fortiori*, he opined that this principle precludes the initiation of disciplinary proceedings in respect of a judge arising from such an examination[11].

V. THE JUDGEMENT OF THE COURT OF JUSTICE

According to the Court of Justice, the organization of justice in the Member States, including the establishment, composition and functioning of a constitutional court, falls within the national competences. Nevertheless, when exercising such competence, the Member States are required – in order to comply with their obligations deriving from EU law and, in particular from Articles 2 and 19(1) TEU[12] to ensure judiciary independence. The construction of the arguments

---

[7] See Bloomberg, *Romania Can't Bar Judges From Ensuring Rules Comply With EU Law*, Available on link, (Last Access: 10.10.2021).

[8] B. Selejan-Gutan, Op-Ed: *Constitutional Court versus EU Law – A Romanian Saga. The Judgment in Case C-430/21 RS*, EU Law Live, 2022, Available on link, (Last Access: 07.10.2022).

[9] Opinion of Advocate General on Case C-430/21, *RS*, para. 62.

[10] The strong and strict language that AG used, had a big impact on the outcome of this case. B. Selejan-Gutan, supra, fn.8.

[11] Opinion of Advocate General on Case C-430/21, *RS*, para. 85.

[12] For the questionable normative nature of obligations that derive from Art. 2 TEU see M. Bonelli, *Infringement*

of CJEU in this case, are mainly based on three pillars of how EU conceptualizes the judicial independence of national courts under the ruling of EU law primacy: The definition of judicial independence, the effectiveness of the dialogue between the national Courts and the CJEU and the limits of the jurisdiction that national constitutional courts bear under the principle of primacy EU law. Before analyzing the path that CJEU followed to reach its judgement, it would be prudential to keep in mind how the Court answered the preliminary references.

Regarding the first question, on the jurisdiction of national Courts to examine the conformity of a norm that has been judged constitutional by a Constitutional Court, the CJEU answered that EU law precludes any national rules under which a national judge may incur disciplinary liability on the ground that applied EU law, thereby departing from case-law of the constitutional court of the Member State, concerning that is incompatible with the principle of the primacy of EU law. According to the next two questions, the Court vocalized the principle of EU law primacy, as it held that EU law precludes the disciplinary liability of a national judge on the ground of refusing to apply a decision of the national constitutional court by which that court refused to give effect to a preliminary ruling from the Court. *Inter alia*, the Judges in Luxembourg emphasized in the necessity for national courts to fully apply any provision having direct effect ensuring equality and uniformity through the Member States, in the effectiveness of EU law and in the undermining of system of cooperation between CJEU and national courts[13].

VI. DECONSTRUCTING THE JUDGEMENT

In this part, we will try to focus on the main pillars of this judgment, trying to follow –with a critical view– the path that led to the final rulings.

1. ASPECTS OF JUDICIAL INDEPENDENCE

From the very first steps of its legal reasoning, the Court defines the aspects of judicial independence: Relating to the way that CJEU conceptualizes this form of independence, we can track some inextricable elements of it: Firstly, a court should function wholly autonomously, *without being subject to any hierarchical constraint or subordinated to any other body*, thus being protected against external interventions or pressure liable to impair the independent judgment of its members. CJEU has also clarified that judges should be protected not only from direct influence, but also from indirect types of influence, which are liable to have an effect on their decisions[14]. Furthermore, it should function with impartiality[15] and ensure that an equal distance

Actions 2.0: How to Protect EU Values before the Court of Justice, Cambridge Core, 2022, Available on link, (Last Access: 14.10.2022). See also Torres Perez, A. (2020), From Portugal to Poland: The Court of Justice of the European Union as watchdog of judicial independence, Maastricht Journal of European and Comparative Law.

[13] See T. Wahl, *CJEU again Finds Romanian Judicial System Flawed*, eucrim, 2022, Available on link, (Last Access: 11.10.2022).

[14] Case C- 585/18, *A.K. and Others*, ECLI:EU:C:2019:982.

[15] See ECtHR, *Guide on Article 6 the European Convention of Human Rights- Right to a Fair Trial*, Available on link, (Last Access: 07.10.2022). The approach of the ECtHR is, if not totally identical, very similar to the approach of CJEU. See also the CJEU *Wilson* Case C-506/04, in which the Court designated the conditions of impartiality: "*..guarantees of independence and impartiality require rules, particularly as regards the composition of the body and*

is maintained from the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. Additionally, the Court sticks to the caselaw created with the *ASJP*[16] case, interpretating the requirement of effective judicial protection[17] of art. 19(1) TEU as including and premising judicial independence[18].

All in all, in very suspicious ages regarding the rule of law, it is never redundant to recall the conditions on judicial independence, and prompt national courts, especially in Member States like Poland[19] and Hungary[20], that European institutions consistently and compactly safeguard Union's values. The political and intergovernmental justifications for abstaining from confronting Member States that systematically threaten rule of law are reasonable[21]. On the other hand, rule of law is –and should be– as a core EU value one of the biggest concerns of the Court of Luxembourg, but also of the Commission, as the guardian of the Treaties. Subsequently, the treatment by the EU institutions should be concrete, stringent, and unconditional.

In my opinion, an additional reason for strengthening and safeguarding judicial independence is an ethical one: A concrete Union approach on this topic will reinforce the perception of EU

the appointment, length of service and the grounds for abstention, rejection and dismissal of its members, in order to dismiss 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".

[16] Case C-64/16, *Associação Sindical dos Juízes Portugueses vs Tribunal de Contas*. The key contribution of the decision is the foundation of a general obligation of Member States to guarantee and ensure the independence of national courts and judicial bodies. After the *Unibet* Case (see below fn. 22) and the invoking of ECHR protection of judicial independence, in this very case CJEU made a very broad and creative reading of 19TFEU. In a sense, EU intervened and enforced EU law in a national competence. Someone could suggest that in this case CJEU essentially enforced fundamental rights.
CJEU goes one step further in *European Commission vs Poland* Case C-619/18, clarifying precisely the restrictions that set by Art. 19 TEU as regards judicial independence, but also by setting out in each case. CJEU in this case established as an additional criterion for the imposition of restrictions on the independence of judges, in addition to the legitimate purpose: the proportionality test. For further analysis, see M. Simonelli, *Quod Licet Iovi non Licet Bovi. The appointment process to the Court of Justice and the reform of judiciary in Poland*, European Law Blog, 2018, Available on link, (Last Access: 07.10.2022).

[17] See C. Bernard/S. Peers, supra, pp. 180-183. If there are no EU procedural rules, it is national responsibility to enforce EU law following the general national procedures. Thus, in this autonomy there are two qualifications: i. requirement of equivalence, and ii. requirement of effectiveness. In the light of these principles, the recent case law of the Court has shifted the discussion concerning national remedies more in terms of effective judicial protection. This terminological move corresponds to the changes brought about by the Treaty of Lisbon.

[18] A. Torres Perez, supra, fn.12.

[19] Poland is a Member State that occupied CJEU with judicial independence issues more than once. See Case C-619/18 (fn.11) in which CJEU found that measure lowering the retirement age of sitting judges of the Polish Supreme Court not justified by a legitimate objective and accordingly undermining the principle of the irremovability of judges. See also Case C-791/19, *European Commission vs Poland*, in which CJEU decided that Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU. See further Case C-204/21, European *Commission vs Poland*, in which CJEU imposed interim measures to Poland after an amendment to governance of its justice system. For a critique in the Poland 'muzzle show', see L. Pech/W. Sadurski/K. L. Scheppele, *Open Letter to the President of the European Commission regarding Poland's "Muzzle Law"*, Verfassungsblog, 2020, Available on link, (Last Access: 10.10.2022).

[20] See Politico, *The recent Brussels' rule of law warning against Hungary*, Available on link, (Last Access: 13.10.2022).

[21] See A. Aranguiz/S. Garben, *Combating income inequality in the EU: a legal assessment of a potential EU minimum wage directive*, European Law Review, 2021, pp. 156-174. See also BBC, *EU budget blocked by Hungary and Poland overrule of law issue*, Available on link, (Last Access: 15.10.2022).

citizens on the supranational power of EU law and empower the conception that EU institutions will be in readiness to tackle every hurdle against the democratic values of the Union. In other words, the strict and non-conditional confrontation will contribute to the making of a common democratic identity under the EU citizenship. But, again, that demands one specific condition to concur: the belief that EU institutions, when it comes to protecting the fundamental values, will be in readiness.

2. EFFECTIVENESS OF MECHANISMS OF INTERACTION BETWEEN THE TWO LEGAL ORDERS

The effectiveness[22] of the cooperation between the Court of Justice and the national courts established by the preliminary-ruling mechanism and, therefore, of EU law would be in jeopardy if the outcome of a plea of unconstitutionality before the constitutional court of a Member State could have the effect of deterring a national court hearing a case governed by EU law from exercising the discretion or, as the case may be, satisfying the obligation, under Article 267 TFEU. The application of such a national rule or practice would also undermine the effectiveness of the cooperation between the Court of Justice and the national courts established by the preliminary-ruling mechanism. This argument, that has its foundations in the concept of dialogue[23] between the national courts and the CJEU, has a strong justification in the field of effectiveness of its mechanism: The preliminary reference is interpretated by the Court of Justice as the *ultimate manifestation* of the relationship of cooperation between itself and the national courts[24]. In its caselaw, the Court refers to preliminary ruling mechanism as the keystone of the multilevel EU legal system[25].

By this procedure, the sophisticated EU legislator achieves three major aims: The legal unity security, the further development of legal order itself, and the protection of individuals and their rights[26]. The preliminary ruling mechanism serves the consistency and full effect of EU law[27] and contributes, in a sense, to the judicial coherence in the EU legal order. As far as I am concerned, in terms of achieving legal certainty and 'integrated' judicial protection –at least in the sense of effectiveness that interests EU law–, preliminary mechanism is the main channel.

[22] See also T. Wahl, *CJEU Rules on Compatibility of Romanian Constitutional Court Decisions with Effective Prosecution PIF Crimes*, 2022, Available on link, (Last Access: 04.10.2022).

[23] This dialogue is important to stimulate European judicial cooperation, to enable national courts to apply EU law correctly, but also to preserve the effectiveness and uniformity of EU law throughout the EU. See also the relevant judgement *Commission vs France*, C-416/17, in which CJEU strengthens the mandate to national instance courts to seek its guidance on the correct interpretation of EU law. F. Behre, *For the sake of effectiveness: a tightened approach to preliminary reference obligations of the CJEU*, 2018, Available on link, (Last Access: 09.10.2022).

[24] C. Bernard/S. Peers, supra, p. 316.

[25] Opinion of the Court of 18 December 2014.

[26] For a critical view on the preliminary reference procedure, see also J. Bajwa, *'Grow Up!': Rethinking the Preliminary Reference Procedure from the Perspective of Maturity*, LSE Law Review Vol. VI, 2020, pp. 65-108.

[27] T. Nguyen/M. Chamon, *The ultra vires decision of the German Constitutional Court – Time to fight fire with fire?*, Hertie School Jacques Delors Centre Policy Paper, 2020.

3. JURISDICTION OF CONSTITUTIONAL COURTS AND PRIMACY OF EU LAW

From an EU law perspective, it is clear that if a Constitutional court of a Member State considers that a provision of secondary EU law infringes the obligation to respect the national identity of that Member State, that court must stay the proceedings and make a reference to the Court for a preliminary ruling. Under EU law, this judgement is in exclusive jurisdiction of the Court of Justice to make[28]. Only the Court has competence to interpret common Union law in a binding manner[29]. On this matter there is also a different opinion. Some scholars argue that, since the fundamental principle of competences is the conferral of powers, the Member States remain the masters of the Treaties. In that sense, a national Constitutional Court has the legitimacy, in principle and a priori, to examine the conformity of a norm with the respect of constitutional identity[30], which is included in national identity. As a result, form this point of view, a national Court in specific cases has jurisdiction to declare an EU act as invalid[31].

In my opinion, this point of view contradicts not only the particular caselaw of CJEU about unconditional primacy but the EU legal order *per se*, as it circumvents the autonomy and uniformity of it and undermines its validity. For all those reasons, the aspect of the Judges in Luxembourg, that only CJEU has the power to declare an EU act as invalid, is more convincing. In a more supranational judicial point of view, in times that primacy of EU law has a lot of contesters[32], it is crucial for the Union's best interest that the highest Court speaks the last word. It is, except from a matter of principle[33] and constitutional order, a crucial necessity to achieve equality and unity.

VII. CONCLUSION

The judgement a has weighty importance in terms of safeguarding, consistently and concretely, the core European Union values: in the case at hand, the rule of law. The strong language of Advocate General and the clear decision of the Court clarify the strict requirements that EU law constructors and CJEU, as an authentic interpreter, have set through the development of EU law. They also indicate the path that Member States need to follow in order to fulfil their obligations by the Treaties. Additionally, the judgment defines once again the significance of the preliminary ruling mechanism in the European Union structure: the consistent activation of this mechanism by the Member States is crucial not only in terms of legitimacy, but also in terms of effectiveness, uniformity, and equal application of EU law. *In fine*, CJEU emphasizes one more on its viewpoint on the principle of primacy of EU law: regarding the EU norms that have direct effect, primacy is unnegotiable. ❑

[28] Case C-314/85, *Foto-frost*, EU:C:1987:452.
[29] See in this sense T. Wahl, supra, fn 7.
[30] Art. 4(2) TEU.
[31] See for instance B. Riedl, *Ultra Vires Control and European Democracy*, Verfassungsblog, 2021, Available on link, (Last Access: 11.10.2022).
[32] See BVerfG on *PSPP* Judgment.
[33] In a similar vein, see T. Nguyen, *A Matter of Principle*, Verfassungsblog, 2021, Available on link, (Last Access: 17.10.2022).