

EDITORIAL

RULE OF LAW, INDEPENDENCE OF THE JUDICIARY AND PRIMACY OF EU LAW

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1.- In its landmark decision *Associação Sindical dos Juízes Portugueses*¹, the Court of Justice of the European Union (CJEU) held that Article 19(1), second paragraph TEU, entails an obligation for Member States to ensure that national courts adjudicating in the fields covered by EU law meet the requirement of effective judicial protection, including, in particular, that of independence. Following this decision, many cases have been brought before the CJEU, on certain reforms of national judicial systems and their compliance with the principle of judicial independence enshrined in Article 19(1) TEU and in Article 47 of the Charter of Fundamental Rights of the European Union (the Charter).

In *A.K. and others*², the CJEU indicated the criteria for establishing the independence of a court. In *A.B. and others*³, the CJEU acknowledged that art. 47 of the Charter and art. 19(1), second paragraph TUE, meet the requirements of clarity, precision and unconditionality for a EU norm to have direct effects, and further specified that the principle of primacy of EU law obliges national court to disapply any provision, whether of a legislative or constitutional origin, infringing the principle of judicial independence.

The view taken by the Court in Luxembourg has triggered strong reactions in certain Member States, where the internal organisation of national justice continues to be considered as a domain outside the competences conferred on the EU and,

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¹ Judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*, case C-64/16, ECLI:EU:C:2018:117.

²² Judgement of 19 November 2019, *A. K. v Krajowa Rada Sądownictwa*, joined cases C-585/18, C-624/18 and C-625/18, ECLI:EU:C:2019:982.

³ Judgement of 2 March 2021, *A.B. and Others v Krajowa Rada Sądownictwa and Others*, case C-824/18, ECLI:EU:C:2021:153.

therefore, reserved to internal political choices. Similar reactions took place with respect to certain decisions, where the European Court of Human Rights (ECtHR) found a violation of the right to a fair trial by an impartial and independent tribunals established by the law, granted by article 6 of the European Convention on Human Rights (ECHR).

2.- The Constitutional Tribunal of Poland blatantly declared that the Polish Constitution has primacy over both the European Convention on Human Rights (ECHR) and the Treaties on European Union. By its decision of June 15, 2021⁴, the Constitutional Tribunal in Warsaw held that the *Xero Flor* judgment of the European Court of Human Rights (ECtHR), which found a violation of art. 6(1) ECHR for the illegal appointment of a constitutional judge, “was issued without legal grounds, overstepping the ECtHR’s jurisdiction, and constitutes unlawful interference in the domestic legal order, in particular in issues which are outside the ECtHR’s jurisdiction; for these reasons it must be considered as a non-existent judgment”⁵.

A similar conflict broke out in the field of EU law.

In application of the principles set forth in the judgement *A.B. and others*, on 14 July 2021 the Vice-President of the CJEU ordered the immediate suspension of any activity of the new Disciplinary Chamber of the Polish Supreme Court, for not meeting the requirements of independence⁶. The next day, the CJUE declared that the Republic of Poland, by failing to guarantee the independence and impartiality of the Disciplinary Chamber and by allowing the content of judicial decisions to be classified as a disciplinary offence, has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU⁷. The Polish Constitutional Tribunal responded on 7 October 2021, declaring Articles 1, 4(3) and 19(1) TEU incompatible with the Polish,

⁴ Decision of 15 June 2021 Case P 7/20, case P 7/20, in https://ruleoflaw.pl/wp-content/uploads/2021/06/20819_P-7_20_eng.pdf.

⁵ Judgment of 7 May 2021, *Xero Flor w Polsce sp. z o.o. v. Poland* (application no. 4907/18)

⁶ Order of the Vice-President of the Court of 14 July 2021, *Commission v Poland*, case C-204/21 R, EU:C:2021:593.

⁷ Judgement of 15 July 2021 (Grand Chamber), *European Commission v. Republic of Poland*, case C-791/1, ECLI:EU:C:2021:596.

constitution insofar as they require national courts to give precedence to EU law over the Polish Constitution and to disregard national provisions, including the constitutional ones, in case of a contrast with EU law. Moreover, the Constitutional Tribunal held Articles 2 and 19(1) TEU inconsistent with the Polish Constitution, insofar as they allow Polish judges to assess the independence of domestic Courts. The judgement of the Constitutional Tribunal in Warsaw was issued the day after the CJEU dismissed the appeal of the Republic of Poland against the order of 14 July 2021⁸. A few days after the new judgment of the Polish Constitutional Tribunal, the Vice-President of the CJEU, considering that Poland had not fulfilled its obligations under the order of 14 July 2021, has imposed on such Member State a daily penalty of one million euros, until compliance.

A strong confrontation between the Constitutional Tribunal and the CJEU is taking place also in Romania. The object of the dispute is a reform in the field of justice and the fight against corruption in Romania, which has been monitored at EU level since 2007 under the cooperation and verification mechanism established by Decision 2006/928 on the occasion of Romania's accession to the European Union⁹. The Curtea Constituțională (Constitutional Court of Romania), in its judgement of 6 March 2018 n. 104, held that EU law would not take precedence over the Romanian constitutional order, and that Decision 2006/928 could not constitute a reference provision in the context of a review of constitutionality under Article 148 of the Constitution, according to which Romania is required to comply with the obligations under the Treaties to which it is a party. The CJEU, in the *Asociația 'Forumul Judecătorilor din România'* judgement, took the opposite view, by ruling that Decision 2006/928 and the reports drawn up by the Commission on the basis of that decision constitute acts of

⁸ Order of the Vice-President of the Court, 6 October 2021, case C-204/21 R-RAP, ECLI:EU:C:2021:834.

⁹ The reform contains certain provisions threatening the independence of the judiciary, regarding: (i) the establishment of a specialized section of the public prosecutor for the investigation of crimes committed within the judicial system (SIRG), (ii) the governmental power to appoint the head of body in charge for disciplinary proceedings and proceedings concerning the personal responsibility of judges, and (iii) the personal liability of judges for damage caused by judicial error. The Commission, in exercising the power of verification provided for by Decision 2006/928, concluded that the above provisions give rise to serious doubts of consistency with EU law.

an EU institution, which are binding on Romania. In addition, the CJEU reaffirmed that the principle of the primacy of EU law must be interpreted as precluding national rules or a national practice under which the ordinary courts of a Member State have no jurisdiction to examine the compatibility with EU law of national legislation which the constitutional court of that Member State has found to be consistent with the national constitution¹⁰. The response of the Curtea Constituțională was not long in coming. With a judgement of 8 June 2021, n. 390¹¹, the Court in Bucharest harshly replied to that in Luxembourg, by reaffirming the primacy of the national Constitution over EU law, by rejecting as unfounded the doubts unconstitutionality raised in respect to the disputed provisions of the Romanian judicial reform and, finally, by reaffirming that ordinary judges have 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. With the latest decision of this saga, issued on 22 February 2022, the CJEU, while reaffirming the primacy of EU law, concluded that EU law precludes national rules or a national practice under which the ordinary courts of a Member State have no jurisdiction to examine the compatibility with EU law of national legislation which the constitutional court of that Member State has found to be consistent with the national Constitution. Also, the CJEU declared that EU law precludes any domestic legislation allowing disciplinary penalties to be imposed on a judge for assessing the conformity of a national provision with EU law¹².

3.- Those who defend the rule of law as the fundamental principle, which binds the Member States of the European Union together and constitutes the essence of the European identity, hope that, in the current tug-of-war, the reasons of the CJEU will prevail. For this to happen, however, the CJEU cannot be left alone. A

¹⁰ Judgment of 18 May 2021, *Asociația 'Forumul Judecătorilor din România' and Others*, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393.

¹¹ Curtea Constituțională, sentența 8 giugno 2021, n. 390, in *ccr.ro/wp-content/uploads/2021/10/Decizie_380_2021.pdf*.

¹² CJEU, Grand Chamber, judgement of 22 February 2022, *RS*, case C-430/21, ECLI:EU:C:2022:99.

prompt and resolute intervention by the other European institutions is needed.

Political dialogue has so far proved to be ineffective. The Article 7(2) procedure requires unanimity in the Council to determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2 TEU and to suspend certain of the rights conferred by the Treaties to that Member State. Such an unanimity requirement, however, is quite difficult to be reached, given the possibility that Member States having problems with the respect of the Rule of Law would use their veto power to help each other. This is currently the case of Poland, Hungary and Romania. The Commission should, therefore, resolutely launch new infringement procedures against those Member States which have so seriously questioned the fundamental principles of the EU legal order. In addition, financial leverage should be used in order to convince reluctant Member States to respect the Rule of Law and restore the independence of the judiciary. It is worth noting that the CJEU, with its recent “twin decisions”¹³, has dismissed the complaints of Hungary and Poland against the “Conditionality Regulation”¹⁴, which aims at protecting the Union budget against breaches of the principles of the rule of law. The CJEU emphasized that the rule of law and solidarity constitute the foundations of mutual trust between EU member states and that the Union should be able, within the limits of its powers, to defend these values. Compliance by a Member State with the values contained in Article 2 TEU is a condition for the enjoyment of all the rights deriving from the application of the Treaties to that Member State¹⁵. The CJEU also indicated that the

¹³ See judgements of 16 February 2022, *Poland v Parliament and Council*, C-157/21, ECLI:EU:C:2022:98 and *Hungary v Parliament and Council*, C-156/21, ECLI:EU:C:2022:97.

¹⁴ Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 *on a general regime of conditionality for the protection of the Union budget*, OJ L 433I, 22.12.2020, p. 1

¹⁵ See judgements of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, paragraph 63; of 18 May 2021, *Asociația ‘Forumul Judecătorilor din România’ and Others*, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, paragraph 162; of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraph 162 and of 16 February 2022, *Hungary v Parliament and Council*, C-156/21, ECLI:EU:C:2022:97, paragraph 126 and *Poland v Parliament and Council*, C-157/21, ECLI:EU:C:2022:98, paragraph 144.

principles of sound financial management and the protection of financial interests of the Union “cannot be fully guaranteed in the absence of effective judicial review designed to ensure compliance with EU law”, and that “the existence of such review, both in the Member States and at EU level, by independent courts and tribunals, is of the essence of the rule of law”¹⁶.

Since the guidelines for the enforcement of the Conditionality Regulation have been finally approved¹⁷, there is no further obstacle for the European Commission to include the financial leverage in the toolbox available to protect and restore the Rule of Law in the European Union.

¹⁶ See judgements of 16 February 2022, *Hungary v Parliament and Council*, C-156/21 ECLI:EU:C:2022:97, paragraph 132 and of 16 February 2022, *Poland v Parliament and Council*, C-157/21 ECLI:EU:C:2022:98, paragraph 150.

¹⁷ See the Communication from the Commission, *Guidelines on the application of the Regulation (EU, EURATOM) 2020/2092 on a general regime of conditionality for the protection of the Union budget*, Brussels, 2.3.2022 C (2022) 1382 final.