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ONLINE SYMPOSIUM: THE RULE OF LAW AND JUDICIAL INDEPENDENCE IN EUROPEPARALLELISM OF JURISPRUDENCE, IDENTITY OF VALUES

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The article of President Spano, inspired by the recent ECtHR judgment in *Ástráðsson v. Iceland* case (application no. 26374/18) on the rule of law principle as a lodestar for judges provides food for thought for the 'European Community of judges'. These judges should be independent in order to fulfil the standards of Article 6 ECHR within the countries bound by the European Convention on Human Rights. The European Union, with all its economic pragmatism, is also a Community of values and one of those major values is the rule of law principle. One can legitimately presume that both the principle of the rule of law and the notion of judicial independence should be interpreted in the same manner under the ECHR and within the EU. This paper briefly explains the position in EU law, showing clearly that many analogies can be drawn between the interpretation of the ECtHR as expressed in the *Ástráðsson v. Iceland* case and the recent case law of the Court of Justice on judicial independence.

Rule of Law in the EU System

The principle of the rule of law forms part of the European legal order under Article 2 of the Treaty on the European Union, next to the democratic character of the Union. It forms an element of trust in the system as without the rule of law the EU would not function as a space of liberty, security and justice. There are various elements of the rule of law principle. In the first place, there is the notion of legality**,** understood as a transparent, accountable, democratic and pluralistic process for enacting laws. The rule of law implies also that the legislative process should be transparent and democratic, both at national and EU levels. So it covers legal certainty and transparency of legislative process. The law should be transparent, accessible, created in dialogue with and upon the consultation of civil society.

Furthermore, the rule of law principle means that the public authorities act within the limits of the law, according to democratic values and the respect of fundamental rights. Their actions are subject to review by independent courts. It has been clearly stated in the case *Les Verts* (294/83) that the European Community (now EU) is a community of law, which means that both the Member States and the institutions should adopt acts that can be reviewed in light of the founding Treaties (*Les Verts*, paragraph 23). This is accompanied by the prohibition of arbitrariness in the use of executive powers and the independence and impartiality of the courts, where effective judicial review maintains the respect for fundamental rights and equality before the law. This leads to the core issue of the role of the courts in light of the rule of law principle. The rule of law is mainly exercised by the judiciary - as that is the body able to verify whether the actions undertaken by different state organs are in accordance with legal rules.

The values listed in Article 2 TEU, including the rule of law principle, have dual protection. First, they form part of the so-called Copenhagen criteria, verified for the countries that are candidates for EU membership. Respect for such values is a precondition for

entry to the EU. Second, after accession, the Member States must observe and promote EU values, as otherwise they might face the mechanism enshrined in Article 7 TEU, which lays down a procedure for sanctioning a Member State that does not uphold those values. The mechanism of Article 7 TEU is primarily political however, whereas the real protection of the rule of law principle takes place at the judicial level.

Judicial Independence as a Component of the Rule of Law

The rule of law is upheld by courts. This requires that the courts are independent, according to Article 47 of the Charter on Fundamental Rights. Article 19 of the Treaty on the European Union (TEU) provides that such independence is necessary for the effective implementation of EU law at the national level, because the national judges are EU judges. The most seminal judgment as to the combined application of Article 2 TEU, Article 19 TEU and Article 47 of the Charter, remains the judgment in the so-called 'Portuguese judges' case. There the Court of Justice explained for the first time the relationship between the rule of law, Article 19 TEU and the principle of effective judicial protection in national courts. Article 19 gives concrete expression to the founding value of rule of law by entrusting 'the responsibility for ensuring the judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals' (*Associação Sindical dos Juízes Portugueses*, C-64/16, paragraph 32). There is 'an unbreakable link between compliance with the rule of law and the principle of effective judicial protection – one cannot exist without the other'. If a court is called upon to apply EU law, its independence must be protected, as only such permanent protection can be sufficient. In order to really guarantee the rule of law, the independent judicial review is necessary – in the Court's case law, a broader scrutiny of EU institutions of the compliance with the rule of law at national level is gradually appearing (*Associação Sindical dos Juízes Portugueses*; C-441/17 R *Commission v Poland*). There is therefore no doubt that the effective application of EU law forms part of the rule of law

principle (*Commission v Poland*, paragraph 102) and can only be exercised by an independent court.

Judicial Independence defined in EU Jurisprudence

In order to have this independent judicial review, we need to be certain of the independence of judges within the political system of the country. Effective judicial review must include the possibility of deciding upon matters appertaining to fundamental rights. As already stated, it is enough that the national court may only potentially apply EU law in order for it to be subject to the requirements stemming from Article 19 TEU and Article 47 of the Charter. In its case law, the Court of Justice has provided a precise description of the requirements for Member State judicial independence (*LM*, C-216/18 PPU, paragraphs 63-67; *Commission v Poland,* C-619/18 R). The courts should be independent from the executive (*Netherlands and van der Wal v Commission*, C-174/98 P and C-189/98 P, paragraph 17) or even both legislative and executive powers (*A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, C-624/18 and C-625/18, paragraph 124; *Commission v Poland*, C-791/19 R, paragraph 66). Otherwise there will be no *effet utile* of the rule of law. The requirement that courts be independent is inherent in the task of adjudication and has two aspects. The first aspect, which is external in nature, presupposes that the court concerned 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, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions (see, to that effect, *Associação Sindical dos Juízes Portugueses*, paragraph 44). In this context, guarantees against removal from office are necessary to ensure this requirement is respected in practice. The second aspect is internal in nature, and it is linked to impartiality. It seeks to ensure that an equal distance is maintained from the parties to the proceedings and their respective

interests with regard to the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law (*Wilson*, C-506/04, paragraph 52). In the Court of Justice's eyes, those 'guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, in order 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. In order to consider the condition regarding the independence of the body concerned as met, the case-law requires, inter alia, that the dismissal of its members should be determined by express legislative provisions' (*TDC*, C-222/13, paragraph 32). The requirement of independence also means that the disciplinary regime governing those who have the task of adjudicating in a dispute must display the necessary guarantees in order to prevent any risk of it being used as a system of political control of the content of judicial decisions. Guarantees that are essential for safeguarding the independence of the judiciary include rules which define both conduct amounting to disciplinary offences and the penalties actually applicable. They also encompass 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.

In the recent *Simpson v Council* case, Article 47 of the Charter was subject to broad interpretation as regards the notion of judicial independence (C-542/18 RX-II, C-543/18 RX-II). The Court of Justice was – within the scope of review under Article 256(2) TFEU – led to examine two issues: in what circumstances the appointment of a judge may form the subject matter of an incidental review of legality and, if that irregularity concerning the appointment procedure is

established, whether it can lead to an infringement of the first sentence of the second paragraph of Article 47 of the Charter, justifying the setting aside of the decisions taken by such a court? First and foremost, the Court of Justice stated that the question of independence of the court is a matter of public policy (paragraph 57). In that regard, it stated that the guarantees of access to an independent and impartial tribunal previously established by law, and in particular those which determine what constitutes a tribunal and how it is composed, represent the cornerstone of the right to a fair trial. That right means that every court is obliged to check whether, as composed, it constitutes such a tribunal where a serious doubt arises on that point. That examination is necessary for the confidence which the courts in a democratic society must inspire in those subject to their jurisdiction. In that respect, such a check is an essential procedural requirement, compliance with which is a matter of public policy and must be verified of the court's own motion (see, to that effect, *Chronopost and La Poste v UFEX and Others*, C-341/06 P and C-342/06 P, paragraphs 46 and 48). Second, the Court of Justice held that the requirements that courts be independent and impartial form part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, which are of fundamental 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 set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded. Those requirements require rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, in order 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 (*Simpson v Council*, paragraph 71. Cf also *Commission v Hungary,* C-286/12*;* or the EFTA court judgment *Pascal Nobile v DAS Rechtsschutz-Versicherungs,* E-21/16). As regards, in particular, the appointment decisions, it is necessary that the

substantive conditions and detailed procedural rules governing the adoption of those decisions are such that they cannot give rise to reasonable doubts with respect to the judges appointed (*A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, paragraphs 120, 123 and 134). The real risk of reasonable doubt implies, according to the Court of Justice, that there be no 'unjustified use of powers, undermining the integrity of the outcome of the appointment process' – so no doubts in the minds of individuals as to the independence and the impartiality of the judge could arise (*Simpson v Council*, paragraphs 75 and 79).
In principle, the Court of Justice also confirms that the situation of infringement of judicial independence is not only for the courts to handle. The European Commission should engage in a structural dialogue with a Member State concerned in cases where the threats to the rule of law are systemic in nature. There are three criteria that should be fulfilled in order to identify such a threat: (1) the measures or situations that are likely to systematically and adversely affect, (2) the integrity, stability or the proper functioning of the institutions and the safeguard mechanisms, (3) established at national level to secure the rule of law.

Symbiotic Relationship between Strasbourg and Luxembourg

It follows from Article 52(3) of the Charter that the meaning and scope of rights that correspond to those contained in ECHR should be the same as those laid out in that European Convention. Article 52(3) requires that rights contained in the Charter which correspond to the rights guaranteed by the ECHR are given the same meaning and scope as those laid down by the ECHR (*Liga,* C-426/16, paragraph 40). The level of protection guaranteed by the Charter may not disregard that guaranteed by the ECHR (*K. v Staatssecretaris van Veiligheid en Justitie*, C-18/16, paragraph 50; *Menci*, C-524/15, paragraph 62; *Staatssecretaris van Veiligheid en Justitie,* C-180/17). In accessing the rules or requirements on judicial independence, the Court of Justice makes reference to the case law of ECHR. Since the *Bosphorus* judgment, there also is a presumption of equivalence of

such protection (recently confirmed in *Avotinš v. Latvia*, application no. 17502/07, paragraph 102). The ECHR constitutes a minimum threshold of protection (*TC*, C-492/18 PPU, paragraph 57). Both the ECHR and EU are committed to protecting fundamental rights but their respective systems of protection operate in different ways. The EU system of fundamental rights protection is an internal component of the rule of law within the EU, based on principles of primacy and direct effect; *XC and Others*, C-234/17, paragraph 36). Therefore, the EU looks at Strasbourg in all cases where a human rights dimension is present and quite naturally this leads to a mutually inspiring discussion also on the issue of the definition of rule of law and judicial independence.

Conclusions

To conclude, it needs to be underlined that there is a similar, if not identical, set of criteria to assess if the rule of law is observed when calling judges to office, exercising their mandates in an impartial manner and ending their mandates. There is certainly mutual consideration on both sides – the Court of Justice cites the ECHR and vice versa. This might be described as an axiological convergence in the definition of the notions of rule of law and judicial independence. This axiological convergence and mutual inspiration is necessary if we consider that we are assessing the conditions in which national judges exercise their functions as EU judges, bound both by the ECHR and by the EU law. The ECtHR's judgment in *Ástráðsson v. Iceland* will certainly be a source of important inspiration and guidance on the notion of judicial independence for EU judges.

R. Spano, 'The rule of law as the lodestar of the European Convention on Human Rights: The Strasbourg Court and the independence of the judiciary', *European Law Journal* 2021, pp. 1-17.

K. Lenaerts, 'The Role of the EU Charter in the Member States' in M. Bobek, J. Adams-Prassl, *The EU Charter of Fundamental Rights in the Member States*, (Hart, 2020) p. 24.

S. O'Leary, 'The EU Charter Ten Years On: A View from Strasbourg', in M. Bobek, J. Adams-Prassl, op.cit, p. 34.