

# Judicial independence in Poland and Hungary – Going, Going, Gone?

## *Preliminary Requests and Disciplinary Procedures - A shocking development*

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Summary: 1. Stating the obvious. 2. Judicial Independence as a core value of EU Law. 3. Disciplinary procedures in Hungary and Poland.

### 1. **Stating the obvious.**

The reference for a preliminary ruling, provided for Article 19(3)(b) of the Treaty on European Union and Article 267 of the Treaty on the Functioning of the European Union is an essential instrument for the European Union and, in particular, for national judges.

It is aimed to guarantee the uniform interpretation and application of EU law by offering to the courts and tribunals of Member States a procedure to acquire from the Court of Justice of the European Union a preliminary ruling concerning the interpretation of EU law or the validity of acts adopted by the institutions of the Union.

As easily predictable, the impact of a preliminary ruling procedure in EU legal system is immense also because the rulings of European Court of Justice (ECJ) are assumed as generally binding.

The ECJ itself does not have a power to enforce the accurate application of EU law; this is the reason why national courts or tribunals are obliged to bring the matters in question before the Court as frontrunners of the application of EU law.

The reference for a preliminary ruling is the only way for the national judges to directly convey with ECJ. This procedure helps the ECJ control on how the national courts apply EU law providing the uniformity and certainty essentials to the success of our Union.

Another aspect of major significance could be furthermore underlined: the preliminary ruling also ensures the protection of the rights of individuals. EU laws, in particular the criminal law, fall to be interpreted in accordance with the Charter of Fundamental Rights. The Article 6(1) of the Treaty of European Union affirms: “The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union ... which shall have the same legal value as the Treaties”. In general terms, the Charter applies to Member States when they

implement Union law (Case C-292/97 *Karlsson and Others*); therefore, the interpretation of the Charter provisions tends to be, if not now, in the foreseeable future, a fertile ground for the use of the preliminary ruling procedures.

The Member States are bound to respect fundamental rights in judicial cooperation, for instance, if a Member State is extraditing someone to another Member State in accordance with the scheme established by the European Arrest Warrant Framework Decision.

The Charter is similar in many ways to the European Convention on Human Rights (ECHR); article 52(3) of the Charter states that meaning and scope of corresponding rights shall be the same as the ECHR, whilst not precluding a higher level of protection under the Charter.

For all these reasons, in a context of a coherent and harmonic application of EU law, it is obvious that national judges should be able to decide on using unreservedly these preliminary requests not only to assure the uniformity of EU law but also to protect fundamental rights of European citizens. Without fear or constraints.

## **2. Judicial Independence as a core value of EU law**

In a landmark decision of 27 February 2018, case C-64/16, following the judgment *Associação Sindical dos Juizes Portugueses*, the European Court of Justice stated that Member States must ensure that courts, in the fields covered by EU law, meet the requirements of effective judicial independence.

To interpret the concept of independence, the Court reached to the case law developed under Art. 47 of the Charter although the point of reference remained Art. 19, para. 1, of the Treaty of European Union. In particular, the Court of Justice held that an independent court is one that exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint and without taking orders from anyone, enjoying protection against any external interventions and pressures. In an effort that must be much welcomed, the ECJ is now presenting concrete examples of these external pressures that, in the end, endangered judicial independence on a way that clearly contradict the EU law. Just to quote a recent case of November 4<sup>th</sup> (Case C-192/18 - *Commission v Poland*) ECJ clarified that Poland has failed to fulfil its obligations under EU law by conferring on the Minister for Justice the power to extend the period of active service of judges of the ordinary courts.

Due to ECJ recent rulings the EU countries have now a specific guide on how to substantiate judicial independence. To compel judicial decisions through disciplinary procedures, hierarchical instructions or (in)formal pressures emanated from political appointed bodies, obedient to the momentary ruling Government, are practices condemned by ECJ and undisputed violations of the founding Treaties of European Union.

### **3. Disciplinary Procedures in Hungary and Poland.**

A new forbidden boundary was recently crossed in Poland and Hungary. Breaches of judicial independence have recently impact on the preliminary ruling mechanism under Article 267 TFEU and thus on the capacity of Member State courts to act as EU Courts.

The latest decision of the Acting President of the Budapest-Capital Regional Court (Fővárosi Törvényszék) to initiate disciplinary proceedings against Judge Csaba Vasvári for referring questions to the ECJ under Article 267 of the Treaty on the Functioning of the European Union constitutes an eloquent example on this regard and it is completely inadmissible.

The motion, which argues that the content of the questions violates the “dignity of the judiciary”(!), dangerously, undermines the functioning of the EU legal order by exerting a chilling effect on judges through discouraging the use of preliminary references intended to ensure a must needed uniform application of EU law.

It is mandatory that all relevant European stakeholders, in particular the European Commission, continue to monitor this appalling situation and take the necessary steps to maintain the effective application of the Treaties and the values enshrined in Article 2 of the Treaty on the European Union.

The same situation emerged in Poland raising a similar alarm.

On 3 April 2019, the European Commission launched an infringement procedure on the grounds that the new disciplinary regime in this country undermines the judicial independence of judges and does not ensure the necessary guarantees to protect judges from political control, as required by ECJ. Specifically, according to the European Commission and in line with the recurrent complaints presented by independent Polish Judges and by Iustitia, the courageous national association, the Polish law allows ordinary court judges to be subjected to disciplinary investigations, procedures and sanctions on the basis of the content of their judicial decisions, including even the exercise of their

right under Article 267 of the Treaty on the Functioning of the European Union to request preliminary rulings from the Court of Justice of the EU.

Moreover, the new disciplinary regime does not guarantee the independence and impartiality of the Disciplinary Chamber of the Supreme Court, which is composed solely of judges selected by the National Council for the Judiciary, which is itself politically appointed by the Polish Parliament (Sejm). Furthermore, it empowers the President of the Disciplinary Chamber to determine, on an ad-hoc basis and with an almost unfettered discretion, the disciplinary court of first instance to hear a given case brought against an ordinary court judge.

The European Commission has decided to refer Poland to the Court of Justice of the EU on this topic. In view of the potential impact of the disciplinary regime on judicial independence, a request for an expedited procedure was warranted, to obtain a final judgment as soon as possible.

Perhaps the most aggressive form of threat to Judicial Independence is to interfere directly on the content of judicial decisions.

If the intrusion is materialized on punishing the use of a mechanism devoted to uphold the EU law – the reference for a preliminary ruling by a EU court – the violation of the most basic standards for Rule of Law could not be more manifest.

The European Association of Judges (EAJ) has constantly denounced the terrible situation experienced by the Polish judiciary. During its General Assembly in 18<sup>th</sup> September, in Nur Sultan, EAJ alerted namely to the legislation giving to the Minister of Justice the power to appoint prosecutors before judicial disciplinary tribunals and the power to replace the right of appeal with a review provided by a non-independent chamber, Izba Dyscyplinarna. The EAJ urged the government of the Republic of Poland to immediately bring to an end disciplinary proceedings brought against any judge based on a decision to request a preliminary ruling from the Court of Justice of the European Union and to amend the new system of disciplinary procedures to ensure they are independent of government and the Minister of Justice.

The EAJ also called directly the international community to take a stance against these inadmissible attacks.

In this context, adopting an unprecedented attitude, the President of European Network of Presidents of Supreme Courts, the President of European Network of Councils for the Judiciary and the President of the European Association of Judges decided to write a joint letter to the new elected President of the European Commission,

Mrs Ursula Von der Leyen, requesting for an urgent meeting. In the letter, it was pointed out that the current destruction of the independence of the judiciary in some Member States has numerous consequences for European citizens, for the investments of companies and for the mutual trust between countries. Being just an instrument of the government, the judiciaries cannot uphold the fundamental rights of the citizens, including those from other EU countries.

In the assessment of the three most representative leaders of the European judiciary, completely detached of any political considerations, the described situation puts in serious peril the effectiveness of the Union.

These range of reactions from different European organizations are not a dramatization of a detected problem but purely the ascertainment of inescapable sombre facts particularly the current absurd trend of persecuting judges for the content of their decisions with the additional perplexity when disciplinary procedures are put in motion due to interpellations by national judges of the European Court of Justice, a common procedure that should be welcomed instead.

The debacle of Rule of Law in some EU countries must be taken by the European Commission and, in general, by those who defend our fundamental values, has a crucial combat for the near future. The new EU Commission must be conscious of these grave circumstances relying on the resilient determination of European judges in defending its independence on the sole interest of their fellow citizens.