



# Initial training of justice professionals serving the rule of law

## REPORT

FEBRUARY 22>23 | 2022

**BORDEAUX**

**Europe Direct is a service to help you find answers  
to your questions about the European Union.**

**Freephone number (\*):**

**00 800 6 7 8 9 10 11**

(\*) Certain mobile telephone operators do not allow access to 00 800 numbers or these calls may be billed.

**EUROPEAN COMMISSION**

Directorate-General for Justice and Consumers

Directorate B — Criminal law

Unit B.1 — General criminal law and judicial training

*E-mail:* [just-judicial-training@ec.europa.eu](mailto:just-judicial-training@ec.europa.eu)

*European Commission*

*B-1049 Brussels*

Manuscript completed in May 2022

#### LEGAL NOTICE

This document has been prepared for the European Commission however it reflects the views only of the authors, and the European Commission is not liable for any consequence stemming from the reuse of this publication. More information on the European Union is available on the Internet (<http://www.europa.eu>).

---

PDF ISBN 978-92-76-51555-5 doi:10.2838/975216 DS-08-22-114-EN-N

---

Luxembourg: Publications Office of the European Union, 2022

© European Union, 2022



The reuse policy of European Commission documents is implemented based on Commission Decision 2011/833/EU of 12 December 2011 on the reuse of Commission documents (OJ L 330, 14.12.2011, p. 39).

Except otherwise noted, the reuse of this document is authorised under a Creative Commons Attribution 4.0 International (CC-BY 4.0) licence (<https://creativecommons.org/licenses/by/4.0/>). This means that reuse is allowed provided appropriate credit is given and any changes are indicated.

For any use or reproduction of elements that are not owned by the European Union, permission may need to be sought directly from the respective rightholders.

# Executive Summary

This two-day conference in the French city of Bordeaux discussed the initial training of justice professionals, in particular magistrates and lawyers, the respect for the rule of law in the EU, and their links. Jointly hosted by the [French Presidency of the Council of the EU](#), the [École Nationale de la Magistrature \(ENM\)](#) and the [European Commission](#), the conference brought together over 150 national and European level training providers and associations in charge of post-university training for judges, prosecutors and lawyers, from all 27 EU Member States and the Western Balkans, alongside trainees from those professions and an online audience. As such it aimed to support and to contribute to the priorities of the [European judicial training strategy for 2021-2024](#).

There was no doubt that this was a conference about the spirit of the EU itself and the rule of law. “Judicial training is so central to the idea of creating Europe,” said **Nathalie Roret, Director of the École Nationale de la Magistrature (ENM)**, in a speech to open the two-day conference. Europe is “a community of law,” said **Peter Csonka, Deputy Director for Criminal Justice, Directorate General for Justice and Consumers, at the European Commission**, speaking after Ms Roret. Speakers and onsite participants over the course of three plenary sessions and nine parallel workshops looked for ways of enhancing the European dimension of initial training. The [European judicial training strategy](#) calls for newly appointed justice professionals to be “well prepared to play a role as European professionals, and contribute significantly to upholding the rule of law,” said **Didier Reynders, Commissioner for Justice at the European Commission**. **Éric Dupond-Moretti, Garde des Sceaux, Minister of Justice for France**, was hopeful. In 1990, most legal professionals in Europe had never participated in any form of EU legal training but now he said “more than half” have. **Marküs Brückner, Judge and Secretary General of the European Judicial Training Network (EJTN)**, added that, while the rule of law is a shared EU value, the initial training of justice professionals differs widely between EU countries. **James MacGuill, President of the Council of Bars and Law Societies of Europe (CCBE)**, called for more resources to be invested in the training of justice professionals all around Europe.

**Lauren Blatiere, Professor at the Angers University in France**, then kicked off the second plenary session with an explanation of how the rule of law came to be a vital part of the EU, and the place of the rule of law in the EU treaties. **José de Sousa Lameira, Judge and Vice-President of the Superior Council of the Magistracy, Portugal**, set out why the recruitment and training of judges is so central to the rule of law in the EU. **Aileen Donnelly, Judge at the Court of Appeals and Chairperson of the Judicial Studies Board in Ireland**, said it was important to remember the role played by judges in modern Europe. Judges, she explained, hold governments to account. Even if they at times have to make unpopular decisions, judges and judicial training exist to protect fundamental rights.

The plenary sessions of the first day also covered topics ranging from early access to EU law courses, cross-border exchange programmes, digitalisation, the role of the European courts in upholding national justice, and the diversity of national training programmes.

The conference then moved to an afternoon of five parallel workshops on topics relating to the initial training of justice professionals in Europe. The content of each workshop was very rich, bringing together around 30 representatives of the legal professions for lively discussions. Highlights included: the importance of fostering bravery, as well as expertise and personal qualities, through initial training (session: “**Judicial independence and impartiality, guarantees of the rule of law**”); the possible need for harmonised courses on EU law and the Charter of Fundamental Rights of the European Union across different countries (session: “**Application of the Charter of Fundamental Rights of the European Union**”); gaps in

training and in understanding between different generations of judges, and how to address this through their education (session: **“What judicial control of the law within the rule of law?”**); problems of understanding and personnel, when national legal officials try to speak with their EU counterparts (session: **“The judicial dialogue between national courts and European courts”**); and how to reconcile a judge’s private life with their public role – including when it comes to managing stress (session: **“The rule of law training versus training on ethics, mismatch of the concepts”**).

On day 2, the conference reconvened for four additional parallel workshops in the morning using the **“Snowball methodology”**. These workshops touched for example upon: the value of using mock trials in initial training for candidate judges and prosecutors (session: **“Judicial initial training”**); the importance of offering theoretical EU law courses very early on in initial training courses, to counter a general lack of interest among young trainees (session: **“Initial training for lawyers”**); drawing on lessons learned during the Coronavirus pandemic to use digitalisation as a way of improving cooperation between professions and countries (session: **“Cross professional initial training sessions”**); and the need for a new code of conduct as legal training moves online (session: **“Digitalisation in initial training”**).

This shift online, with an increased expectation that digitalisation will transform many aspects of initial training, was the big change from previous debates on European judicial training, reflected at the conference conclusion. “I call on the Commission to drive this impetus at an EU level,” said **Benoît Chamouard, Magistrate, and Deputy Director of Human Rights at the Ministry of Europe and Foreign Affairs in France**, wrapping up the snowball workshops of day 2.

As another important part of day 2, three national representatives shared with the audience a sample of best practices to reflect on. In Finland, **Minna Koskinen, Judge at the Finnish Court of Appeal**, said a three-year training programme for junior judges makes it possible to serve as a judge on a lower court at the same time as carrying out initial training. In Bulgaria meanwhile, said **Nina Yaneva, Prosecutor at the National Institute of Justice (NIJ) in Bulgaria**, a nine-month interactive course gives trainees extensive training in EU law and the rule of law. **Alenka Košorok Humar, Director of the Slovenian Bar Academy**, said training in EU law remained voluntary for trainees, but she hoped that there would eventually be a recognised EU initial training programme for justice professionals.

The final word, appropriately enough, was about storytelling. **Tamara Čapeta, Advocate General at the Court of Justice of the European Union**, said the rule of law was the story chosen to unite the EU. Including the rule of law in initial training around Europe is “a guarantee that the story chosen by the EU will live, and that the rule of law will once again tomorrow become the most important story to know and to tell.”

Closing the conference, **Wojciech Postulski, Policy officer at the Directorate-General for Justice and Consumers of the European Commission**, and **Elie Renard, Deputy Director at the École Nationale de la Magistrature (ENM)**, both said that building on the key learnings of the two-day conference would help the EU to foster initial training, with the rule of law as its heart.



# Contents

|  |           |
|--|-----------|
| <b>Executive Summary</b>   | <b>4</b>  |
| <b>DAY ONE</b>   | <b>7</b>  |
| <b>First Plenary: A European Reflex for Judicial Training</b>                          | <b>7</b>  |
| <b>Second Plenary: Talking About the Rule of Law</b>                                   | <b>9</b>  |
| <b>Day One Workshops</b>   | <b>11</b> |
| Judicial Independence and Impartiality, Guarantees of the Rule of Law . . . . .        | 11        |
| Application of the Charter of Fundamental Rights of the European Union . . . . .       | 12        |
| What Judicial Control of The Law Within the Rule of Law? . . . . .                     | 13        |
| The Judicial Dialogue Between National Courts and European Courts. . . . .             | 14        |
| The Rule of Law Training Versus Training on Ethics, Mismatch of the Concepts . . . . . | 17        |
| <b>DAY TWO</b>   | <b>18</b> |
| <b>Day Two Workshops</b>   | <b>18</b> |
| Judicial Initial Training . . . . .  | 18        |
| Initial training for lawyers . . . . .   | 19        |
| Cross Professional Initial Training Sessions. . . . .                                  | 20        |
| Digitalisation in Initial Training . . . . .   | 21        |
| <b>Closing Session (Plenary):</b>  |           |
| <b>Stories of National Success and the EU's Favourite Tale</b>                         | <b>23</b> |
| Snowballing: Presentations of the Conclusions of the Workshops. . . . .                | 23        |
| Best Practices Presentation . . . . .  | 24        |
| Closing Keynote Speech: The EU Story. . . . .  | 24        |
| Closing of the Conference . . . . .  | 25        |
| <b>ANNEX I: List of Speakers and Workshop Leaders</b>                                  | <b>26</b> |
| <b>ANNEX II: Action Points for Training Providers to Consider</b>                      | <b>28</b> |
| <b>ANNEX III: Speeches</b>   | <b>32</b> |
| Peter CSONKA . . . . .   | 32        |
| Nathalie RORET . . . . .   | 34        |
| Tamara ĆAPETA. . . . .   | 37        |
| Lauren BLATIERE. . . . .   | 42        |
| Aileen DONNELLY . . . . .  | 48        |
| José de SOUSA LAMEIRA. . . . .   | 63        |

# DAY ONE

## Plenary I: A European Reflex for Judicial Training

“Compliance with the rule of law is an important part of EU integration,” said **Nathalie Roret, Director of the École Nationale de la Magistrature (ENM)**<sup>1</sup>. Opening the two-day conference in Bordeaux, Ms Roret was in no doubt that a focus on the rule of law and the training of EU justice professionals was needed more than ever.

“Judicial training is so central to the idea of creating Europe,” said the director. But many legal professionals are not even aware of EU law, she said, adding that the ENM has an essential role to play here.

Some weeks ago, said Ms Roret, the ENM launched a new cycle of “European judicial studies.” This was the first of 12 events expected to be organised by the School under the French EU Presidency. The studies are part of ENM work to train judges, prosecutors and lawyers around Europe, “to create a genuine European reflex.”

The “diversity in the backgrounds” of justice professionals across 27 EU Member States can be “a great strength and asset” for Europe and the rule of law, she said. “We need to think of ways the European dimension can be enhanced” in legal training, she explained. An EU law “is not a law we can pick and choose. It is part of our common future.”

**Peter Csonka, Deputy Director Criminal Justice, Directorate General for Justice and Consumers, at the European Commission**, agreed that Europe is “a community of law.” But, citing recent events in Poland and Hungary, he added that the rule of law was now “being tested by some Member States,” making it more important than ever to protect and promote the European judicial training strategy.

The [European judicial training strategy for 2021-24](#)<sup>2</sup> urges each justice profession to use “all digital tools available,” said the deputy director. The Coronavirus pandemic gave reason to be optimistic about this shift to a digital system, he added. The pandemic had “a profound impact on training,” he explained, forcing most activities to move online. But training levels were at a record high during the pandemic. In total, said Mr Csonka, over 320,000 justice professionals around the EU received training in 2020 – a more than 319% increase over nine years.

Mr Csonka added that he saw the need to increase awareness of EU law – particularly among young professionals. This could mean asking training providers to offer more exchange opportunities, to help young professionals “understand EU law and start their careers with that understanding.”

Mr Csonka said a lot remained to be done to “modernise justice systems and digitalise them as much as possible.” He presented to the audience as a very concrete outcome of the conference “[the panorama on judicial initial training](#)”<sup>3</sup> – on the [European e-Justice Portal](#)<sup>4</sup> of the European Commission. The panorama provides information on judicial initial training schemes for judges, prosecutors and lawyers in all Member States. “This should contribute to the successful implementation of the European judicial training strategy and help properly design EU support for those training objectives,” Mr Csonka concluded.

He was supported by **Didier Reynders, Commissioner for Justice at the European Commission**, speaking to the conference in a video message. The European judicial training strategy should ensure that newly appointed justice professionals “are well prepared to play a role as European professionals,

(1) <https://www.enm.justice.fr/>

(2) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020DC0713>

(3) [https://e-justice.europa.eu/123/EN/national\\_training\\_systems](https://e-justice.europa.eu/123/EN/national_training_systems)

(4) <https://e-justice.europa.eu/>

and contribute significantly to upholding the rule of law,” he explained. He said he was convinced of the importance of providing some training in EU law as early as possible in a professional’s legal career.

Also speaking in a video message, **Éric Dupond-Moretti, Garde des Sceaux, Minister of Justice for France**, was the fourth speaker to agree both that the EU was built around the rule of law and that, for justice professionals, “training at EU level is absolutely essential.” He said there were signs the legal profession was moving in the right direction. In 1990, said the minister, most legal professionals in Europe had never participated in EU legal training. Now “more than half” have, he said.

**Marküs Brückner, Judge and Secretary General of the European Judicial Training Network (EJTN)<sup>5</sup>**, said that, while the rule of law is a shared EU value, the initial training of justice professionals differs widely between EU Member States. The number of variables to be considered, multiplied by 27 Member States, runs into the hundreds, he said, giving a concise overview of some differences. In most Member States, initial training is mandatory before taking up a professional appointment. In several Member States a central school is responsible for legal training, while in some this is decentralised. Often there is an entry competition for taking up training, but not in all Member States. The length of training programmes ranges from one to four years, depending on the country. The methodology used is also “very diverse,” he added. “Everyone has a different system. Not all countries have a final exam, with some preferring to assess continuously. Everyone has a mix of training on the job and theoretical training,” he explained. But in the end, he said, “this is how it should be for training.” On the one hand trainees “get the knowledge”, on the other they have to “apply this in practice.”

**James MacGuill, President of the Council of Bars and Law Societies of Europe (CCBE)<sup>6</sup>**, presenting the panorama of initial training for lawyers in the EU, said the CCBE was in favour of “the protection of standards” for training across different countries. In particular, he said the independence of the bar was a “vital” legal protection. “Outside the EU that’s not always the case.” He added that it was “a tragedy and a disgrace” that justice training was under-resourced in Europe. He warned that any attempt to simplify justice systems through the use of algorithms would be a problem for both judges and other justice practitioners. Experience in the US shows algorithms encourage decisions that are “very unjust, very racial,” he said. “It is a wise, well-trained judge that knows the rules and knows the exceptions.”

Closing the first plenary session of the first day, Mr MacGuill said “We believe in the rule of law. The rule of law can only be achieved through access to justice. And access to justice can only be achieved through well trained, strong justice professionals.”



### **Key Messages:**

- The rule of law is an essential cornerstone of the EU and should be supported by training;
- There is a need to enhance the EU dimension in initial training;
- Early access to EU law courses is needed for trainee legal professionals;
- Cross-border exchange programmes should be used to improve awareness of EU law and the European remit of justice professionals;
- Digitalisation can foster good EU legal training;
- Diverse national training programmes require targeted actions to achieve the common objectives of the European judicial training strategy for 2021-2024.

(5) <https://www.ejtn.eu/>

(6) <https://www.ccbe.eu/>



## Plenary II: Talking about the Rule of Law

A second plenary session to prepare the ground for in-depth workshops saw three expert speakers setting out the different aspects of the much-debated concept of rule of law.

**Lauren Blatiere, Professor at the Angers University in France**, gave a clear account of the rule of law itself, and how this came to be so central to the EU identity.

Back in 1951, when the Treaty of the European Coal and Steel Community was signed in Paris, the idea of the “rule of law” was not mentioned at all. The six founding countries, Belgium, France, Italy, the Federal Republic of Germany, Luxembourg and the Netherlands, at that stage imagined the rule of law would remain an exclusive national competence, Ms Blatiere said. There was “no unanimous consensus” on what the term meant or why it would be a shared priority, she explained.

The first mention of the rule of law at EU level came “quite late,” said the professor, in the 1992 Maastricht Treaty. This was a “quite limited” reference in the preamble to the treaty, saying that Member States would uphold principles including the rule of law. The 1997 Treaty of Amsterdam then turned to defining the concept. At this stage, the rule of law was “no longer vague” but became an EU principle. Among the conditions of EU membership, the Treaty said, was the respect for the rule of law.

At this stage EU Member States were preparing for the membership of countries from eastern Europe. These new members had a very different political, historic and economic background than older EU Member States. Ahead of this “massive” enlargement there was therefore a need to agree on shared values to be respected by all members, and to clearly set these out in legislation.

The 2001 Nice Treaty made it possible to recommend sanctions on a Member State where there was a “clear risk” of a serious breach of the rule of law. The Lisbon Treaty in 2007 took this a step further. The rule of law was no longer a principle but became a “value... It was an essential aspect of the EU.”

But countries are now finding it difficult to use the treaties to sanction Poland and Hungary for their apparent breach of the rule of law, she said. The judicial route offered by the Court of Justice of the EU then becomes “the only real possibility” for enforcing the rule of law, Ms Blatiere concluded.

**José de Sousa Lameira, Judge and Vice-President of the Superior Council of the Magistracy, Portugal**, looked further into the role played by courts – and in particular, by judges – in upholding this rule of law. “Nobody challenges the idea that the recruitment of judges is crucial to the rule of law,” he said. “The way a judge is appointed reflects their place in a sovereign body.”

In Portugal for instance, said Mr de Sousa Lameira, a judge is not a senior civil servant, as may be the case elsewhere, but a member of an autonomous civil body. But whatever training process is preferred by Member States, “it is not possible to imagine a free democratic society if we don’t have an independent judiciary.”

This means keeping the recruitment of judges independent of state and government, he said. “Not only recruitment but also promotion must escape government influence,” he explained. There are two recruitment systems used around the EU, said Mr de Sousa Lameira, which he termed “the bureaucratic and the professional.”

In Portugal, the bureaucratic system is preferred. This means “recruitment by an independent body, with the collaboration of a high council for the judiciary, through a series of tests. Despite some objections, this is in line with the concept of an independent judiciary. This does not mean it cannot be improved, but the basis of the structure should not be challenged.”

Like James MacGuill in the opening plenary, Mr de Sousa Lameira warned against relying on algorithms for justice. "It is essential to educate judges in the way algorithms are developed and the risks associated with their use," he explained. "Justice can't be handed down by machines. It must be made by humans."

Concluding the first morning of speeches, **Aileen Donnelly, Judge at the Court of Appeals and Chairperson of the Judicial Studies Board in Ireland**, agreed with both earlier speakers on the importance of courts, when it comes to upholding the rule of law. "The right of access to the courts is an indispensable cornerstone of a state governed by rule of law," she said.

But she said this depended equally on the independence of judges and on access to courts. "A system where a judge appears to be independent can mask problems with the rule of law," Ms Donnelly said. The independence of judges is not for instance always appreciated by the public or the media, she said.

As an example of the "extreme pressure" under which judges must at times operate to uphold their independence and the rule of law, she cited an instance in February 2022 when a judge dismissed a case against a man who was arrested at a traffic check point early in the Coronavirus pandemic. Laws restricting non-essential travel had not come into effect at the time of his arrest, although the risks to public health were widely accepted. Ms Donnelly quoted the judge saying "This Covid pandemic is exceptional but the rule of law is not."

She said that, although Ireland does well in terms of people's perception of the independence of judge's, a 2011 change to the rules which allowed judges' pay to be reduced had been passed "without any real debate." Ms Donnelly said "we need to remember that the public are looking at us. Every time we make a decision."

"We need to step back and look at what judges do," said Donnelly. "They hold governments to account. Sometimes they make decisions which are very unpopular. But they are protecting fundamental rights."

•••••  
**Key messages:**

- The rule of law has been an EU Treaty principle or value since 1992, but remains hard to enforce;
- National breaches of the rule of law cannot be sanctioned without the Court of Justice of the European Union;
- The recruitment and training of judges has to be independent of government influence;
- The value of the independence of judges has to be more widely appreciated by the public.





## Day One Workshops

### Workshop 1:

#### Judicial Independence and Impartiality, Guarantees of the Rule of Law



##### Workshop leaders

*Daniel Ludet, Honorary Counsellor at the Court of cassation, Former Director of the École nationale de la magistrature (ENM), President of the College of Conduct of Magistrates of the Judicial Order, France*

*Gerard Tangenberg, Judge, President of the Court of Appeal 's-Hertogenbosch, former director of the Training and Study Centre for the Judiciary (SSR), Netherlands*



##### Summary of talks

Independence and impartiality safeguard the rule of law both for people and for judges, but they must not be taken for granted. Judges can for instance come under attack from the media, and also indirectly from public opinion. The initial training of judges includes an overview of information and techniques that will allow a judgment to be reached. The problem, found in all countries, is that a judge does not magically become independent and impartial the day he or she takes office. But the qualities of independence and impartiality are assumed to be present, as they allow judges to avoid external influence.

Examples given by participants at this workshop included countries where corruption is rife and the notion of bravery comes into play, and countries where political groups can appoint judges, which can be a barrier to independence. Participants agreed that judges must nonetheless apply “the rule of law” without fear of the consequences.<sup>7</sup> “This is what we ask of them, but it is difficult. We cannot blame judges for backing down,” said one. In France, the status of a judge is protected and so it is not difficult to be brave. The situation is obviously very different in other countries.

There were several references to Article 6.1 of the European Convention on Human Rights: “Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.” This means that people have a right to expect independence and impartiality, and judges have a duty to uphold this expectation, which must form part of initial training.



##### Action points

Training should be **interactive**, to include specific knowledge, exchanges and discussions between trainee judges, and feedback from trainers.

**Court internships** can help young judges to learn through observation and imitation, as seen already for instance in France.

Initial training must treat **independence and impartiality** as matters to be taught and learned, rather than as something natural and innate.

(7) See discussed Justice Breyer remarks on ways to preserve the rule of law delivered at the mock trial of the Barons forcing Magna Carta from King John Lackland in 1215, <https://youtu.be/8MU7tK6HM3Q> (1h.19'-1h.22')

Training programmes covering the independence of judges must include both **theory** and **practice**.

There is a need for a **mechanisms to guarantee the independence** of judicial professionals, especially judges. This means several issues regarding independence must be considered as part of initial training. These issues include looking at who decides on the appointment of judges, as well as who decides on promotions, salaries, and resources allocated to the courts.

Training programmes should also discuss if and how **security of tenure** (*inamovibilité*) can be guaranteed.

**Exchanges** between Member States and **best practice** sharing are important for training future judges about the purpose of their independence and impartiality.

## Workshop 2:

### Application of the Charter of Fundamental Rights of the European Union

.....

#### Workshop leaders

*Mikołaj Pietrzak, Dean of the Warsaw Bar Association, Poland*

*Gabriel Toggenburg, Policy Coordinator for the EU Charter of Fundamental Rights at the European Union Agency for Fundamental Rights (FRA)*

.....

#### Summary of talks

Participants at this workshop considered how to improve initial training in and the understanding of the Charter of Fundamental Rights of the European Union. The Charter was noted to have made several legal advances possible, because it is supra-national and gives access to rights directly linked with European citizenship. The Charter also, the workshop heard, made it possible to enlarge the field of action of the European Court of Human Rights.

Although EU Institutions and Member States are legally obliged to promote the implementation and teaching of the Charter of Fundamental Rights of the European Union, it is still at times unclear how to do this in practice. The application therefore often depends on individual understanding and on national constitutions. The question for the judge is then how to decide whether the Charter should apply to any given situation. In several cases Member States have refuted the application of EU law.

.....

#### Action points

There is an urgent need to consider **education** around EU Member States. Universities actually often offer too few **courses in EU law**, and these are in many cases optional.

The Charter of Fundamental Rights should then be made an **self-standing and practical** part of legal training, to avoid becoming lost in European law training courses.

Courses should teach the **practical application of the Charter**, as well as theoretical cases, to end the current situation in which young graduates have no experience in this key area.

Training courses on EU law and the Charter should also be **harmonised across legal professions**, rather than judges generally receiving more training than other professionals, as is often the case today.

**Preliminary ruling questions** and the European Charter of Fundamental Rights should be essential issues for initial training in EU Member States.

**Language skills** should also be considered. English has become the reference language to which everyone must relate in their learning of European law. A minimum level of English is therefore a prerequisite to be able to understand and execute the Charter correctly.

**Harmonisation of the European university system**, particularly of courses taught in the context of initial training for legal professionals, seems necessary. Today, all students are not equal, because of the diversity of teaching standards and courses.

The teaching and understanding of EU law are not governed by **supranational standards**, meaning that its application has to be based on the national context. This gap between national and supranational situations must be closed, to favour a consistent implementation of the Charter.

Several initiatives are now emerging to **centralise and communicate** information about EU law in a uniform way across EU Member States. These initiatives aim to give meaning to European law for all professionals, in particular students and could serve as a reference to facilitate the use of the European Charter.

## Workshop 3:

### What Judicial Control of The Law Within the Rule of Law?

.....

#### Workshop leaders

*Juan Martinez, Moya, Senior Judge, Member of the Spanish General Council of the Judiciary, Spain*  
*Céline Marilly, Advocate General Referee at the Court of Cassation, France*

.....

#### Summary of talks

Recent crises, both the Coronavirus pandemic and the threat of terrorism, have highlighted the role courts play in consolidating the rule of law, workshop participants said. This shows the need for awareness of and training in the tools likely to guarantee respect for fundamental rights and freedoms.

Constitutional review processes vary in each country, participants heard. In France, the role is devolved to the Constitutional Council. Since a reform in 2008, it is possible for a litigant to raise a “priority question of constitutionality”. The judge may consider these questions and say whether they are serious or not. For this, he or she must have a knowledge of constitutional law. The French judge has therefore become the assessor of international commitments. There are 2 types of review: abstract, regarding the law in general, or concrete, regarding the application of the law in a particular case. The judge must check that the infringements of rights and freedoms are not disproportionate.

Judicial cooperation in civil and criminal matters is contributing to not only the monitoring and application of the rules, but through it, to a better understanding of legal instruments. In Spain, the international cooperation networks of the General Council of the Judiciary and its alerts on issues of European Union law to the judicial professionals are excellent examples.

Direct judicial communications between judges from different jurisdictions on a specific case to discuss issues such as *lis pendens*, jurisdiction, applicable law, etc., integrate a dialogue valuable not only for cooperation but also for the correct application of the law. As example will be the operability at EU level of the Article 86 of the Regulation 2019/1111 (applicable from 1 August 2022)<sup>8</sup>.

(8) Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction; Article 86 on Cooperation and communication between courts; <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019R1111>



### Action points

**Guidance on basic standards and principles** should be developed to create a **common judicial culture**. This would give Member States a common knowledge base to use in initial training courses, to which they could add national particularities.

Gaps in understanding between different **generations of judges** should be addressed through **continued education** programmes.

**Cultural differences** between Member States, regarding judges and the legal systems, could be addressed through European **exchange** programmes.

**Sharing experience and learnings**, in particular regarding proportionality, would help Member States to design and study programmes based on best practice.

There should be greater awareness of different national approaches to reviewing the **compatibility of constitutional law with the European Convention on Human Rights**, or other international treaty, and the challenges this can pose for consistent EU legal training. In France, for instance, a review takes place once a case comes to court, making the French judge the assessor. In Belgium, as a differing example, compatibility with EU law is given precedence over the Belgian constitution.

The assessment of constitutional and international questions is often absent from **initial training courses**, or too short to be effective. This should be addressed for instance in consultation with Spain, which has experts in the area of constitutional review to help access this knowledge of European law in practice.

## Workshop 4:

### The Judicial Dialogue Between National Courts and European Courts



#### Workshop leader

***Benoît Chamouard**, Magistrate, Deputy Director of Human Rights, Ministry of Europe and Foreign Affairs, France*



#### Summary of talks

Members of this workshop discussed how training could improve conversation with and understanding between national and European courts. On the national side, talks covered both national supreme courts and national lower courts. European courts included the Court of Justice of the EU (CJEU) and the European Court of Human Rights (ECHR). Participants separated into groups according to their profession within the judiciary, with lawyers and judges discussing training needs separately before all regrouping.

The group of judges found that, amongst various future magistrates across Member States, most agreed training about the European courts was inadequate – and in some cases non-existent. In France, the training is limited. In Italy, it lasts just one week. In Bulgaria training is very limited and, in most cases, focused on the theory, rather than the application, of European law by the courts. A group of lawyers from Croatia, Italy, Estonia and France said that the main problem identified was a lack of information on how to communicate with European courts.

Overall, national courts were said to not have enough information, courage or personnel to deal with national problems in EU circles. Understanding of the European courts was found to be much greater in newer EU Member States, perhaps because these countries recently learnt all of EU law in one go, whilst information has worn out over time in older Member States. This led to questions of how better to promote a shared European culture.



## Action points

There is a need for **information materials on how to communicate with European courts**, and what the rules are around this. This should include details of the correct people to contact and the format to use in communications.

**Materials must be suitable for use by very small teams.** For instance in **Croatia**, at the most junior level judiciary staff don't know how to communicate with the European Commission or have the courage to attempt this. In another case only one woman in a law firm had any knowledge of European courts.

**National courts must be clearer about needs** for training that could be resolved at an EU level.

Materials should also explain the interplay between European and national courts, and how these promote **shared values**. A French judge warned that some people in France felt they had lost their identity as French people, in the face of EU law and EU court rulings.

In Estonia, **handbooks** about the European courts and institutions have been successfully drafted for use at the municipal level and could be used as part of the guidance for this communication initiative.

Good quality information is needed to ensure the quality of work judges can do. This could begin with **informal discussions** with the EU institutions. Rather than trying to understand everything about EU law and the courts, a national judge could instead follow training to obtain an overarching understanding, so he or she could then better focus resources to deal with a problem.

**Top-down training of magistrates**, with oversight from the CJEU, would be a positive development.

**Internships and trips** to courts in other EU countries are also needed to foster understanding.

**Easy to use materials** are needed for members of the judiciary, to help them learn quickly what the relevant case law is and where that information can be found.

These materials must be specific to **different sets of case law and procedures**, for instance in cases about money laundering or about violence towards women.

| TRAINING NEEDS  | LEARNING OUTCOMES  | SUBSTANCE   | FORMAT  | GOOD PRACTICES   |
|---|--|---|---|--|
| Learn how to find information (legal information)   | Capacity to find the legal information   | Learn how to search on the institutional websites and legal data bases: Curia, Hudoc (Help platform) and on e-Justice Commentaries (joint handbooks ECHR-FRA) | Webinar for the outlines<br>Workshops (case studies)<br>(short) Study visit                           | Training by young trainers<br>Embedding European (EU + ECHR) training material in the national trainings         |
| Learn how to find practical information   | Capacity to find the contact points and referees in court and in one's ministry of justice | Learn how to find the national or local contact points of the main networks   | Directories<br>Meetings with the contact points<br>Newsletters  |  |
| How to ask fruitfully the preliminary question to CJEU?   | Capacity to ask the preliminary ruling   | Identify the scope of the EU law<br>Train to use the tools in order to phrase the preliminary question and the form on Curia                                  | EU fundamentals<br>EU law: scope and interpretation (Cilfit case)<br>Case studies                     | To have a contact point in court or in one's ministry of justice to check the phrasing of the preliminary ruling |
| Pre-requisite: knowledge of the European institutional environment and of the European mechanisms | Capacity to master how does what and how   | General knowledge on the European courts and role of national judges  | Study visits<br>Short paper version outlines<br>Networking<br>Long term internships or secondments    |  |
| To have the European reflex   | Capacity to approach without fear the European dimension of legal cases and situations     |   | Superior Court Network<br>Meetings with peers to exchange<br>Encourage compulsory continuous training | Embedding European (EU + ECHR) training material in the national trainings                                       |
| To dare asking the question to the CJEU   |  |   | Creation of contact points at the CJEU<br>Study visits  |  |



## Workshop 5:

### The Rule of Law Training Versus Training on Ethics, Mismatch of the Concepts

.....

#### Workshop leaders

*Filippo Donati, President of the European Network of Councils for the Judiciary (ENCJ), Professor of constitutional law, a lay member of the Consiglio Superiore della Magistratura, Italy*

*Gianluca Grasso, Judge, Coordinator of the international sector, Superior School of the Magistracy (SSM), Italy*

.....

#### Summary of talks

Ethical training for judges is difficult, because a judge's ethics are not only based on merit and capabilities, but also on their personal skills and sensibilities. Members of this workshop said judges must be made accountable to gain society's trust and must fulfil their role in service and in private life.

They must act lawfully, have a good attitude towards others, be respectful of lawyers and clerks, have no bias, and show an impartiality that can be seen by the public. Every judge has a duty to make sure their life reflects the law. He or she must also be able to cope with the stress of specific cases and workload. Participants in the workshop were reminded however that ethical standards are among the common attributes of judges and lawyers, established for decades.

The mission of the European Network of Councils for the Judiciary (ENCJ) is the reinforcement of independent, accountable judiciaries in the EU, to guarantee citizens' access to fair, independent, and impartial courts. Ethics and the Rule of Law go together, because ethics must reinforce the Rule of Law. The ENCJ acknowledges the importance of judicial ethics and has addressed the subject in the ENCJ Judicial Ethics Report 2009-2010 on the definition of principles of ethic applicable to the judiciary<sup>9</sup>.

.....

#### Action points

**Vocational training** should be used as an opportunity to reflect on principles. This means honouring and defending the profession and administration of justice, to the benefit of both the judicial profession and citizens.

The **independence of justice professionals** must be promoted through training, alongside the resolution of fair legal cases.

Guidance is needed on **judicial ethics and the use of social media**, particularly regarding posting information online. This relatively new problem means training should help justice professionals understand the risk to ethics of posting something harmful online.

A better awareness of the delicate balance between rights, responsibilities and ethics is also needed when it comes to **using new technology in a judicial context**.

An awareness of differences between national rules on **links between the courts and political parties** around Member States should also be fostered at EU level. A Spanish speaker commented that in Spain it is forbidden for judges to belong to a political party, while a Dutch participant said that in the Netherlands many judges are members of political parties.

(9) <https://www.encj.eu/images/stories/pdf/ethics/judicialethicsdeontologiefinal.pdf>

# DAY TWO



## Day Two Workshops

### Workshop 1:

#### Judicial Initial Training



#### Workshop leader

*Jos de Vos, Vice Director and senior advisor on judicial training, IGO, Belgium*



#### Summary of talks

Participants at this workshop were asked to focus their discussions on judicial training courses already offered around the EU. Group members described training courses that are part of the initial curriculum for candidate prosecutors and for candidate judges, explaining why these should be recommended to trainers from other countries. The groups also looked at existing training on ethics, conflicts of interests and integrity, which they found was very important for the trainees' development but inadequately discussed in many countries.

A perfect knowledge of national law was said to be essential to making any decisions, but at the same time a national judge is also an EU judge and needs a certain level of EU knowledge. Judges therefore need to be aware that they are part of an international community. Every national judge must know that they are checked on international commitments in front of EU courts.



#### Action points

**Mock trials** are essential and should be part of training programmes for judges. They are an opportunity for the trainee judge to learn not only about his or her future role, but also temporarily to change roles and learn about the defendant and prosecutor's position.

**Court visits** should help trainees learn through an active briefing before the court session and a discussion after, during which he or she can ask technical and procedural questions. This should be in addition to the "passive" experience of learning by observing the court as a spectator.

**Prison visits** can also be helpful, allowing trainee justice professionals to understand the impact legal decisions have on the private life of a person sent to prison.

More work must be done to encourage the use of a **common EU language**. This should include taking part in exchange programmes between Member States to create a genuine judicial community at EU level.

**Legal research** is an area where cooperation between trainees should be encouraged. Trainees can answer questions from other trainees and make an in-depth **memorandum**, to be used by courts in preparing decisions. This teaches trainees to work together and look at topics in-depth.

## Workshop 2:

### Initial training for lawyers

.....

#### Workshop leader

*Eva Indruchova, Head of the International Department of the Czech Bar Association, Czechia*

.....

#### Summary of talks

Workshop participants discussed how to boost the EU dimension of initial training for lawyers, across a broad range of EU countries. Young trainees simply do not see the importance of EU law, one speaker said. It is not compulsory on many legal courses, nor is it encouraged by national politicians. With a heavy workload and tight schedules, young lawyers are happy to drop the EU law option.

It is very important to attract a more diverse range of students to legal training, participants said. Currently, EU courses tend to attract only students with an international background, most likely those who also followed an Erasmus university exchange programme. Making some EU courses mandatory could help to avoid this problem and attract “the average lawyer.” One speaker concluded talks by suggesting that while the European Parliament is empty for three weeks every month, it should be used to host meetings of young lawyers from around the EU.

.....

#### Action points

Theoretical EU law should be taught very **early on in training courses** to raise awareness and interest.

**Mandatory EU law training** could also be introduced, with supervision by national bar associations.

**EU funding** would certainly help to encourage training in EU law. In particular, it would ease **cross-border exchanges** for trainees, as these are too expensive to be organised by a national bar. In addition, cross-border exchanges of trainers could be introduced as an effective tool to share best practices and exchange experience.

A **common certificate** in EU training would also help national bars and universities. Students often fear losing credits by following a cross-border training course which is then not recognised in other countries.

**Minimum standards and definitions of EU initial training** should be created. This would create a general understanding of what has been learned and promote international recognition of qualifications.

The **benefits of including an EU dimension** in the initial training of justice professionals must be better explained at national, bar and university level, and not appear to be forced down from the EU level.

**Training opportunities abroad** should certainly be EU funded even though the Coronavirus pandemic has shown that **online** courses can be an alternative to training abroad, when funds are not available.

The European Training Platform (ETP)<sup>10</sup> on the European e-Justice Portal could be further developed as a source of EU training materials; it would be beneficial to set up a network of trainers and a list of contact points and institutions responsible for the initial training.

(10) <https://e-justice.europa.eu/european-training-platform/>

## Workshop 3:

### Cross Professional Initial Training Sessions

.....

#### Workshop leader

*Petros Alikakos, Judge of the Court of First Instance, Greece*

.....

#### Summary of talks

This workshop discussed ways to improve training between different justice professions. For judges, prosecutors and lawyers alike, the practice of initial inter-professional training and the need for common ongoing training was found to be crucial. If the various actors in the administration of justice better understood one another, the justice system would function more accurately, more transparently, and more quickly, participants said. This common legal culture would make it possible in particular to overcome existing inter-professional suspicions, as well as to engage in constructive dialogue and effective collaboration for the good of justice and of society as a whole<sup>11</sup>.

A suggestion was made that the issue of joint training for judges and lawyers could take into consideration the Darrois Committee's work in France. This committee was set up in March 2009 to propose reforms of the legal profession; it proposed the "school of legal professionals" (École des professionnels du droit). At such school, trainee judges, lawyers, notaries, and clerks would be enrolled. Exams would be nationwide. During the school's annual curriculum, students would follow the direction they wish, based on specific selection criteria. Indeed, if the model of the "school of legal professionals" was adopted, the conduct of joint recruitment procedures for judges and lawyers couldn't be precluded. Such a system partly exists already in Germany for instance.

The creation of a common code of ethics with written rules, in the form of the 2002 Bangalore Principles of Judicial Conduct, was welcomed. At an EU level, training courses were said to have for reference both common codes of soft law for the Council of Europe and the EU, and a code of ethics for judges and prosecutors of the EU. Many obstacles to initial interprofessional training were however identified. Speakers said care must be taken not to try and resolve matters behind closed doors, at the same time as understanding that professional secrecy has to be maintained.

"The existence of common legal principles and ethical values for all professionals involved in the legal process is essential to the proper administration of justice. (...) Where necessary common training for judges, prosecutors and lawyers on issues of common interest, can contribute in achieving high quality justice. (...) This joint training can make it possible to create the basis for a common legal culture"<sup>12</sup>

Joint training among judges, prosecutors, and lawyers is recommended for better mutual understanding among these professionals<sup>13</sup>.

.....

#### Action points

A **common code of ethics** could be developed, building on common ground between legal professions. Differences would however necessarily apply, depending on the profession. A lawyer cannot for instance be neutral because he or she has to consider the client's interest.

(11) See Petros Alikakos, Joint Initial and continuous training for judges and lawyers in the framework of the Council of Europe and according to the Greek legal order, Journal of the IOJT, 2015, p. 115.

(12) The Statement of Bordeaux of 2009, being the common-ground of opinion No. 12 of the Consultative Council of European Judges and No. 4 of the Consultative Council of European Prosecutors; (<https://rm.coe.int/1680747391>).

(13) Opinion No. 4 (par. 29) of the Consultative Council of European Judges; <https://rm.coe.int/1680747d37.m/>

**Initial interprofessional** training should be encouraged to improve understanding between the various protagonists of justice and create a common ground conducive to justice. This means for instance a lawyer would know how to write a court order, while a judge or a prosecutor would understand the conditions under which conclusions are drawn up.

The notion of a fair trial is crucial to a state of law, which is why **joint training** with a mixed groups of trainers is useful for considering different opinions on the same subject.

**Digitalisation** is needed for more efficient training management, in areas including ethics, soft skills and communication, as well as for the study of practical cases and fictitious trials.

## Workshop 4:

### Digitalisation in Initial Training

.....

#### Workshop leader

*Simone Cuomo, Secretary General of the Council of Bars and Law Societies of Europe (CCBE)*

.....

#### Summary of talks

The workshop looked at several aspects of digitalisation in initial training, including the integration of digital tools into initial training courses, and the digital transformation of the judiciary and legal practice as an important subject in initial training. Digital training tools are already used in most countries, but the level of preparedness and progress varies greatly. The main question for all is how to move from classical training methods to an increased use of digital training tools, participants heard. Many obstacles remain, however. Levels of digital literacy vary between individuals, institutions and countries.

Training in the digitalisation of justice is now essential. It needs to be part of initial training for all justice professions. Essential topics to be addressed in this regard are for example, the use of new technologies in criminal investigations, analysis of digital evidence and digital forensics, authentication of files, risks and ethical aspects when using AI tools, legal issues that might arise (such as the admissibility of digital evidence when the authenticity cannot be ensured), electronic court proceedings (such as e-identification, e-filing, e-service of documents, and remote court hearings). Moreover, it needs to be understood that digitalisation is not the answer to everything. Some things cannot be digitalised and require human interaction. These include witness statements and body language. In a judiciary context, it is important to ensure that digitalisation treats all participants in a trial equally, avoiding creating a disadvantage for any side.

.....

#### Action points

A **code of conduct** for online training could be developed by training schools to guarantee the quality of digital training tools.

Streamlined, shared information for online training would help to make training more attractive, as well as making it easier to incorporate for instance **videos, legal games and simulations**.

**'Train the trainer' initiatives** are needed for digital courses, because the online trainer also has to be an entertainer for the students.

Students should be encouraged to help resolve **technical problems**, leaving the trainer free to focus on content.

Basic **housekeeping rules**, such as no background noise, are needed for online courses and conversation, as experienced during a switch to online communication in the Coronavirus pandemic.

Digitalisation in initial training also requires proper funding, meaning a long-term commitment of **financial and human resources**.

Training also needs to address the use of **e-justice tools** and the importance of **interoperability** between the various systems across borders.

**Digital skills of trainers** are essential, as well as the involvement of specific **experts** in certain topics, such as court staff dealing with e-justice procedures, digital forensic experts, and IT experts. When IT experts are involved, they need to be trained on how to teach about IT in a way persons without IT skills can follow.



# Closing Session (Plenary): Stories of National Success and the EU's Favourite Tale

## Snowballing: Presentations of the Conclusions of the Workshops

The day two workshops were conducted using the “snowball” method<sup>14</sup>. Unlike the traditional speakers and interventions format used on day one, the snowball method allows smaller groups and ideas to converge over the course of a workshop. This means several small groups form for a first round of talks, merging into progressively fewer but larger groups to share ideas and find common point.

Opening the closing plenary session of this second and final day, **Benoît Chamouard, Magistrate, and Deputy Director of Human Rights at the Ministry of Europe and Foreign Affairs in France**, was pleased with the outcome of the snowball workshops. “We predicted it would be a bit chaotic, but it didn't look that way,” he said. Instead, the format had clearly fostered a lot of interest, agreement and disagreement.

The four leaders of the four “snowball” workshops then recapped the conclusions of their sessions.

## Judicial Initial Training

**Jos de Vos, Vice Director and senior advisor on judicial training at IGO, Belgium**, recalled a recurrent conference finding: that in many Member States there simply “isn't basic training in EU law.” He stressed the conclusion, reported by members of his workshop, that both national and EU prosecutors need to know how national and EU laws fit in with their decision, and which is needed when. “They need to be familiar with the principle of proportionality,” he explained.

## Initial training for lawyers

**Eva Indruchova, Head of the International Department of the Czech Bar Association, Czechia**, said her workshop had found it was “of course” important to study EU law, “but it is equally important to have EU law as part of all other aspects of the law, for instance criminal law”. Above all, she said the workshop found justice training “has to start with good quality training at university level. University level training is very important. We must not miss that.”

## Cross Professional Initial Training Sessions

Workshop leader **Petros Alikakos, Judge of the Court of First Instance, Greece**, reflected on his group's findings regarding the ideal trainer for EU justice training. “It's better to have a mixed group of trainers, to show different opinions on the same topic,” he said.

## Digitalisation in Initial Training

**Simone Cuomo, Secretary General of the Council of Bars and Law Societies of Europe (CCBE)** and leader of the last workshop at the conference, touched on the “digital transformation” facing judicial training today. “This needs to be part of initial training,” he said, even though the use of digital tools is not the same for every legal profession.

Mr Chamouard concluded the snowball reporting session by saying that this digital transformation and the need for digital skills was the major change from previous conferences. The trainee judges, prosecutors, lawyers and other legal professionals of today are “people born into a digital world,” he explained. A shift

(14) See page 28 of the EJTN Handbook on Judicial Training Methodology in Europe; [https://www.ejtn.eu/MRDDocuments/EJTN\\_JTM\\_Handbook\\_2016\\_EN.pdf](https://www.ejtn.eu/MRDDocuments/EJTN_JTM_Handbook_2016_EN.pdf).

to online exchanges is “going to push judges, researchers and lawyers to boost their digital skills. The European Commission also needs to boost this, including with financial support.” “I call on the Commission to drive this impetus at an EU level,” concluded the magistrate.

## Best Practices Presentation

Speakers from Finland, Bulgaria and Slovenia then gave a snapshot of initial training in their own countries, as examples for other training providers and Member States to consider.

**Minna Koskinen, Judge at the Finnish Court of Appeal**, pointed to Finland’s “assessor’s training programme” for junior judges. Under this programme, trainees have a fixed three-year position as assessors. After two of these they may serve as a judge in a lower court. Trainees spend about 70% of their time training on the job, with the rest spent in a combination of assignments, self-assessment, and being tutored. At the end of the programme they have a portfolio to show the development of their skills and may use the title “judicially trained.”

**Nina Yaneva, Prosecutor at the National Institute of Justice (NIJ) in Bulgaria**, looked at the permanent training of candidates for junior prosecutor positions in Bulgaria. A nine-month programme aims to develop skills through interactive training, led by a justice professional, who may be a judge, prosecutor or investigating magistrate. Under this programme “EU law training is essential for the trainees’ understanding of both EU law and the rule of law,” she said. “A very serious part of the exams is based on EU law.” During the pandemic most training moved online, for instance using Zoom to carry out mock trials. “I do believe we have the right formula for our common future,” concluded Ms Yaneva.

**Alenka Košorok Humar, Director of the Slovenian Bar Academy**, said she hoped there would eventually be a recognised EU initial training programme for justice professionals. For now however European training for Slovenian Bar members was carried out on a voluntary basis. The training includes up to date monitoring of case law. “We are highly aware of the European dimension of initial legal training and the rule of law,” said Ms Humar. As of 2021, she said initial training of lawyers at the two main Slovenian universities organised with the bar academy had a “special focus on the EU law dimension.” She added that “In the future I strongly believe we will further strengthen our cooperation with Slovenian education. We are stronger together.”

## Closing Keynote Speech: The EU Story

**Tamara Čapeta, Advocate General at the Court of Justice of the European Union**, said the rule of law was the story chosen to unite the EU. “Humans were able to organise into societies because of the stories that tie them together,” she explained. “Rule of law was not chosen by chance. It is necessary for a society that treats all people as equals. That guarantees freedom, for as long as freedom does not infringe on the freedom of others.”

But “to keep a story alive, it is necessary to narrate it. The story of the rule of law was there in the EU project for a long time but has been dormant for a while. Now the story tellers have awoken because some people forgot the story or were unaware of it.”

In this sense, she said recent events in Poland and Hungary could almost be seen as “fortunate” because they remind us why the rule of law matters, by showing what happens in societies that neglect it.

She said the rule of law was relevant in the courts of Member States across the EU. Judges “from Ireland to Malta entered into dialogue with the Court of Justice of the EU to clarify the value of the rule of law.”

Including the rule of law in the training of judges, said Ms Čapeta, is “a guarantee that the story chosen by the EU will live, and that the rule of law will once again tomorrow become the most important story to know and to tell.”



## Closing of the Conference

**Wojciech Postulski, Policy officer at the Directorate-General for Justice and Consumers of the European Commission**, said the event, with all its speeches and workshops, would “help the European Commission to better direct the support to judicial training in the Member States.” **Elie Renard, Deputy Director at the National School for the Judiciary (ENM)**, added “I believe this conference has helped us to understand that the rule of law is at the heart of the EU project. The onus is on us as legal professionals to make sure it stays alive.”



# ANNEX I:

## List of Speakers and Workshop Leaders

.....

### Speakers

**Nathalie Roret**, Director of the French National School for the Judiciary (ENM)

**Peter Csonka**, Deputy Director Criminal Justice, Directorate-General for Justice and Consumers, European Commission

**Didier Reynders**, Commissioner for Justice, European Commission

**Eric Dupond-Moretti**, Garde des Sceaux, France

**Marküs Brückner**, Judge, Secretary General of the European Judicial Training Network (EJTN)

**James Macguill**, President of the Council of Bars and Law Societies of Europe (CCBE)

**Lauren Blatiere**, Professor at the Angers University, France

**Aileen Donnelly**, Judge at the Court of Appeals, Chairperson of the Judicial Studies Board, Ireland

**José de Sousa Lameira**, Judge, Vice-President of the Superior Council of the Magistracy, Portugal

**Benoît Chamouard**, Magistrate, Deputy Director of Human Rights, Ministry of Europe and Foreign Affairs, France

**Minna Koskinen**, Judge of the Court of Appeal, Finland

**Nina Yaneva**, Prosecutor, National Institute of Justice (NIJ), Bulgaria

**Alenka Košorok Humar**, Director of the Slovenian Bar Academy, Slovenia

**Tamara Čapeta**, Advocate General at the Court of Justice of the European Union (CJEU)

.....

### Workshop leaders

**Daniel Ludet**, Honorary Counsellor at the Court of cassation, Former Director of the French National School for the Judiciary, President of the College of Conduct of Magistrates of the Judicial Order, France

**Gerard Tangenberg**, Judge, President of the Court of Appeal 's-Hertogenbosch, former director of the Training and Study Centre for the Judiciary (SSR), Netherlands

**Mikołaj Pietrzak**, Dean of the Warsaw Bar Association, Poland

**Gabriel Toggenburg**, Policy Coordinator for the EU Charter of Fundamental Rights at the European Union Agency for Fundamental Rights (FRA)

**Juan Martinez Moya**, Judge, Member of the General Council of the Judiciary, Head of the General Inspectorate of Justice, Spain

**Céline Marilly**, Advocate General Referee at the Court of Cassation, France

**Benoît Chamouard**, Magistrate, Deputy Director of Human Rights, Ministry of Europe and Foreign Affairs, France

**Filippo Donati**, *President of the European Network of Councils for the Judiciary (ENCJ), Professor of constitutional law, a lay-member of the Consiglio Superiore della Magistratura, Italy*

**Gianluca Grasso**, *Judge, Coordinator of the international sector, Superior School of the Magistracy (SSM), Italy*

**Jos de Vos**, *Vice Director and senior advisor on judicial training, IGO, Belgium*

**Eva Indruchova**, *Head of the International Department of the Czech Bar Association, Czechia*

**Petros Alikakos**, *Judge of the Court of First Instance, Greece*

**Simone Cuomo**, *Secretary General of the Council of Bars and Law Societies of Europe (CCBE)*



# ANNEX II:

## Action Points for Training Providers to Consider

### DAY ONE

#### Workshop 1: Judicial Independence and Impartiality, Guarantees of the Rule of Law

- Interactive training activities to include specific knowledge, exchanges and discussions between trainee judges and feedback from trainers.
- Court internships to help young judges learn through observation and imitation.
- Independence and impartiality to be taught and learned.
- Teaching both theory and practice of judicial independence.
- Mechanisms to guarantee the independence of judicial professionals, especially judges, as part of initial training.
- Consider how security of tenure (*inamovibilité*) can be guaranteed.
- Exchanges between Member States and best practice sharing to teach future judges about the purpose of their independence and impartiality.

#### Workshop 2: Application of the Charter of Fundamental Rights of the European Union

- Be aware that universities often offer too few courses in EU law, and these are in many cases optional.
- Harmonisation of the European university system for courses taught in the context of initial training for legal professionals.
- The Charter of Fundamental Rights to be an integral and practical part of legal training.
- Teach the practical application of the Charter as well as theoretical cases.
- Harmonise training courses in EU law and the Charter across legal professions.
- Include preliminary ruling questions about the Charter in training programmes.
- Promote a minimum level of English language skills as a prerequisite to understand and execute the Charter.
- Close gaps between national and supranational standards to favour a consistent implementation of the Charter.
- Use emerging initiatives to centralise and communicate information about EU law in a uniform way across Member States to facilitate the use of the Charter.

### **Workshop 3: What Judicial Control of the Law Within the Rule of Law?**

- Guidance on basic standards and principles to create a common European judicial culture.
- Continued education programmes to address gaps in understanding between different generations of judges.
- European exchange programmes to address cultural differences between Member States regarding judges and the legal systems.
- Shared experience and learnings, in particular regarding proportionality, to help Member States to design and study programmes based on best practice.
- Awareness of different national approaches to reviewing the compatibility of constitutional law with the European Convention on Human Rights, or other international treaty, and the challenges this can pose for consistent EU legal training.
- Assessment of constitutional and international questions in initial training courses.

### **Workshop 4: The Judicial Dialogue Between National Courts and European Courts**

- Information materials on how to communicate with European courts, and what the rules are around this, including details of who to contact and the format to use in communications.
- Materials to be suitable for use by very small teams.
- National courts to be clearer about needs for training that could be resolved at an EU level.
- Materials to explain the interplay between European and national courts, and how these promote shared values.
- Handbooks about the European courts and institutions for use at the local level.
- Informal discussions with the EU institutions to ensure the quality of work judges can do.
- Top-down training of magistrates with oversight from the CJEU.
- Internships and trips to courts in other EU countries to foster understanding.
- Easy to use materials for members of the judiciary to help them learn quickly what the relevant case law is and where that information can be found.
- Materials specific to different sets of case law and procedure.

### **Workshop 5: The Rule of Law Training Versus Training on Ethics, Mismatch of the Concepts**

- Vocational training as an opportunity to reflect on principles.
- The independence of justice professionals promoted through training.
- Guidance on judicial ethics and the use of social media, particularly regarding posting information online.
- Better awareness of the delicate balance between rights, responsibilities and ethics when it comes to using new technology in a judicial context.
- Awareness of differences between national rules on links between the courts and political parties around Member States at EU level.

# DAY TWO

## Workshop 1: Judicial Initial Training

- Mock trials as part of initial training programmes for judges.
- Court visits to help trainees learn through active and passive sessions.
- Prison visits to help trainees understand the impact legal decisions have on the private life of a person sent to prison.
- A common EU language to create a genuine judicial community at EU level.
- Legal research to encourage cooperation between trainees.

## Workshop 2: Initial training for lawyers

- Theoretical EU law taught very early in training courses to raise awareness and interest.
- Mandatory EU law training with supervision by national bar associations.
- EU funding to encourage training in EU law and ease cross-border exchanges for trainees.
- Cross-border exchanges of trainers could be introduced as an effective tool to share best practices and exchange experience.
- Common certificate in EU training to help recognition of cross-border training.
- Minimum standards and definitions of EU initial training.
- Explain benefits of including an EU dimension in the initial training of justice professional.
- Training opportunities abroad and online.
- The European Training Platform (ETP)<sup>15</sup> on the European e-Justice Portal to be a source of EU training materials and include a list of contact points and institutions responsible for the initial training.

## Workshop 3: Cross Professional Initial Training Sessions

- A common code of ethics, building on common ground between legal professions.
- Initial interprofessional training to improve understanding between the various protagonists of justice and create a common ground conducive to justice.
- Joint training with a mixed groups of trainers sharing different opinions on the same subject.
- Digitalisation for more efficient training management.

---

(15) <https://e-justice.europa.eu/european-training-platform/>

## Workshop 4: Digitalisation in Initial Training

- Code of conduct for online training to guarantee the quality of digital training tools.
- Streamlined, shared information for online training to make training more attractive, incorporating videos, legal games and simulations.
- ‘Train the trainer’ initiatives for digital courses, with online trainer as entertainer for students.
- Encourage students to help resolve technical problems, leaving the trainer free to focus on content.
- Basic housekeeping rules for online courses and communication.
- Long-term commitment of financial and human resources.
- Training to address the use of e-justice tools and the importance of interoperability between the various systems across borders.
- Digital skills of trainers are essential.
- Need to involve specific experts in certain topics, such as court staff dealing with e-justice procedures, digital forensic experts, and IT experts, who are trained on how to teach about IT in a way persons without IT skills can follow.

# ANNEX III:

## Speeches

**Peter CSONKA,**  
**Deputy Director Criminal Justice, Directorate-General for Justice**  
**and Consumers, European Commission**

**European Judicial Training Strategic objectives on initial training and the rule of law**

*"Check against delivery"*

Dear distinguish guests, der colleagues, it is my pleasure to present to you the objectives of the new European judicial training strategy on initial training and the rule of law as well as the newly launched panorama on initial training on the European e-Justice Portal.

.....

### **The European judicial training strategy 2021-2024**

However, before I go into details, I would like to use this opportunity firstly to remind you of the main aspects of the European judicial training strategy. The new European judicial training strategy for 2021-2024 was adopted in December 2020 as a part of a package to modernise justice systems in the EU. The package confirmed that training of justice professionals on EU law is essential for modernising justice systems and remains a priority for the Commission.

**Training** should help justice professionals, including judges, prosecutors and lawyers, to be **fit for the digitalisation of justice** and prepare them for the challenges they are facing today and will be facing in the future. After the successful implementation of the European training strategy for 2011-2020, the new strategy sets new ambitious quantitative and qualitative objectives to boost training of justice professionals on EU law. This includes **new operational objectives tailored to the needs of each justice profession to be reached yearly by 2024**. With the new quantitative and qualitative objectives, we aim at further increasing participation in training and to balance it more among the different Member States and justice professions. We also wish to encourage a broader use of modern training methodologies that promote effective training activities of high quality. This is especially needed in today's online and hybrid context. We therefore urge training providers to put all the digital tools available to support virtual training to the full use.

.....

### **The European judicial training report 2021**

These main ideas were just confirmed by the **2021 statistical report on European judicial training** published by DG Justice last December. The report covers the year 2020 and measures the participation of the targeted justice professionals in judicial training on EU law. It also helps us to monitor the implementation of the new quantitative and qualitative objectives set by the European judicial training strategy.

The report clearly shows that the COVID-19 pandemic has challenged the training institutions a lot. Training activities had to be cancelled, postponed or quickly transferred into quality online training activities. Nevertheless, the total number of justice professionals in EU law judicial training marks **a new record – more than 320 000 justice professionals** received training on EU law in 2020. This is notably due to the increase in EU law training for lawyers and the shift of training activities of some Member States to online training schemes, such as the HELP Programme by the Council of Europe. Between the adoption of the first strategy in 2011 and 2020, the number of justice professionals taking part in training on EU law increased **by 319%**. Meaning that over **1.5 million justice professionals** took part in such training activities.



However, a closer look at the statistics for 2020 reveals a substantial decrease in the number of justice professionals trained on EU law for most Member States and professions especially for judges, prosecutors and bailiffs' training. This means that the level of participation in training still differs considerably across Member States and among justice professions. The latest statistics show on the one hand that **more still needs to be done**, that **ambitious training initiatives are needed** for most justice professions and that **it is possible**. On the other hand, it shows that those training providers who quickly reacted to the new circumstances could keep the level of justice professionals trained or even increase it; such as, for example, Italy for lawyers, and Estonia and the Netherlands for judges and prosecutors. Moreover, the report confirms that the new operational objectives are realistic and can be reached.

For this, we need the commitment of everyone involved. This is why I am very pleased to welcome so many participants to this important conference.



### *Initial training of justice professionals*

Besides the operational objectives, the strategy sets a special focus on the training of young professionals and on the training on the rule of law. Commissioner Reynders just reminded us of the importance of these two topics in his message. Indeed, we need to boost judicial training for young professionals. It is essential that the new practitioners understand their role as EU practitioners from the start of their career. That is why they should be given a grounding in the EU legal system and legal culture already in the course of their initial training. This should help them to have a clear understanding of the role of EU law in national legal systems, the rule of law *acquis* and their role as European justice practitioners. We therefore need to make sure that sufficient time is devoted to good-quality training in EU law, fundamental rights, the rule of law, 'judgecraft' and language skills in initial training.

The strategy therefore **firstly** calls on training providers to ensure that every initial training curriculum includes sufficient modules on EU law. These can be either embedded in national law training or standalone where relevant.

**Secondly**, the training curricula should also focus on the EU *acquis* on the rule of law, on the EU Charter of Fundamental Rights and also on 'judgecraft' as standard components of the initial training offer.

**Thirdly**, young professionals should be encouraged to participate in cross-border exchanges. Meetings and exchanges between young professionals from other European countries are an excellent way to promote mutual trust between each other, a corner stone of the cross-border judicial cooperation. Training providers should provide for every future or newly appointed judge and prosecutor to take part in a cross-border exchange in the course of their initial training. The EJTN's AIAKOS exchanges should therefore be made a standard component of the initial training offer for young judges and prosecutors.

**Lastly**, we also need legal language courses to be systematically part of the initial training for all professions.



### *The rule of law*

As Commissioner Reynders so rightly pointed out, judicial training is essential to promote a common rule of law culture. To promote this common rule of law culture, we should already start with our young professionals to make them aware of the important role they play in this context. Initial training should help secure the effective judicial protection, the cornerstone of the rule of law. This is why this conference is so important.

The objectives regarding initial training and the rule of law are ambitious. But we will reach them together. How we will do so is what we will be discussing today and tomorrow.

**Nathalie RORET,**  
**Directrice de l'École nationale de la magistrature**

**European Judicial Training Conference**

**« INITIAL TRAINING OF JUSTICE, PROFESSIONALS SERVING THE RULE OF LAW »  
Bordeaux, 22-23 February 2022**

**« LA FORMATION INITIALE DES PROFESSIONNELS DE LA JUSTICE AU SERVICE DE  
L'ÉTAT DE DROIT »  
Bordeaux, 22-23 février 2022**

Monsieur le directeur général adjoint de la justice pénale, [Peter Csonka]

Monsieur le secrétaire général du Réseau européen de formation judiciaire, [Markus Brückner], Monsieur le président du Conseil des barreaux européens, [James Macguill]

Madame la Bâtonnière, Mesdames et messieurs,

J'ai l'honneur et le plaisir d'ouvrir la conférence intitulée « Formation initiale des professionnels de la justice au service de l'État de droit » proposée dans le cadre de la Présidence française de l'Union européenne conjointement par la Commission européenne et l'École nationale de la magistrature.

L'État de droit : voilà un sujet qui résonne avec l'histoire de la ville de Bordeaux qui nous accueille aujourd'hui dans l'un de ses amphithéâtres ; c'est en effet, Montesquieu, magistrat au parlement de Bordeaux et philosophe, qui énonça dans son ouvrage *L'esprit des lois* les principes de la séparation des pouvoirs qui garantissent le bon fonctionnement de nos démocraties et d'un État dans lequel le droit s'impose à tous, y compris à l'État lui-même, dans lequel il existe une hiérarchie des normes et une justice indépendante.

En Europe, c'est plutôt récemment que l'État de droit est devenu une priorité, même si le droit occupe une place importante dans la construction européenne depuis son origine : l'Union européenne a en effet développé, depuis une dizaine d'années environ, une action de développement et de renforcement de l'État droit ; cette action est basée sur

les institutions de l'Union, les outils de suivi et de sanctions, la jurisprudence du droit de l'Union, et la coopération étroite avec le Conseil de l'Europe.

Désormais, le respect de l'État de droit fait partie de l'intégration européenne.



Cette conférence est un événement important d'abord en terme d'agenda.

C'est la première fois que la France préside le Conseil de l'Union européenne depuis l'adoption du traité de Lisbonne.

À l'époque, l'Europe sortait par le haut d'une crise sans précédent avec l'échec des referendums organisés en France et aux Pays Bas. Elle a pourtant réussi à avancer en intégrant notamment la Charte des droits fondamentaux dans le droit obligatoire de l'Union. Et rappelons-le, c'est aussi à l'occasion de ce traité que la primauté du droit européen a été rappelée.

À l'heure où ce principe est remis en cause par certains de nos voisins européens, à l'heure où l'Europe apparaît fragile, comme l'a constaté le Président de la république, Emmanuel Macron dans son discours devant le Parlement européen le 19 janvier dernier,

Nous ne devons pas oublier l'histoire et tout le chemin parcouru par ce beau projet européen, notre projet européen, celui que nous avons voulu réaliser « à petits pas » après une période de guerre tragique.

Nous avons suivi ensemble ce chemin traversé de doutes et d'évidences.

Rappelons-nous que nous étions 6 à y croire au début. Nous sommes 27 aujourd'hui à partager une histoire et un engagement communs.

« *L'Europe se fera dans les crises et elle sera la somme des solutions apportées à ces crises* » prédisait Jean Monnet. Et c'est plus que jamais ensemble que nous devons surmonter ces crises.



L'École nationale de la magistrature est résolument engagée au soutien de la construction européenne depuis sa création. Contribuer à la création d'un espace judiciaire commun en Europe, c'est l'un des objectifs de la stratégie internationale dont s'est dotée l'École en 2018. L'investissement prioritaire en Europe y est clairement affirmé.

L'ENM a, en effet, un rôle essentiel à jouer tant la formation judiciaire est au cœur du défi européen.

Car les juristes européens ne sont pas encore, pas assez vite, pas suffisamment sensibilisés au droit de l'Union européenne. Ils ignorent parfois jusqu'à l'existence des outils mis à leur disposition par l'Union. Ces lacunes fragilisent la construction européenne.

La formation judiciaire a, au contraire, vocation à renforcer les acteurs de la justice, à les rendre plus forts, plus compétents, à leur permettre de maîtriser le droit de l'Union européenne qui n'est pas un droit facultatif dont nous pourrions nous exonérer. Il s'impose au titre de la hiérarchie des normes, et nous avons tous la responsabilité et le devoir de l'appliquer, il fait partie de notre culture juridique commune.

C'est dans cet esprit que, malgré la crise sanitaire, nous avons poursuivi notre action au sein du Réseau européen de formation judiciaire, dont l'ENM est un membre fondateur. Les auditeurs de justice et les magistrats français peuvent ainsi continuer à bénéficier des échanges et des formations sur le droit de l'Union européenne organisés par le Réseau, outre les sessions proposées classiquement par l'École sur le droit et la jurisprudence européenne. Je salue les membres de ce réseau qui sont présents aujourd'hui, nos amis, nos partenaires, avec lesquels nous travaillons quasi-quotidiennement au service d'une Europe de la Justice.

C'est aussi avec le concours de ce Réseau aujourd'hui incontournable sur la scène européenne que nous accueillons régulièrement des magistrats européens dans nos formations en présence ou à distance, dans une proportion qui a même augmenté en 2021.

Nous avons d'ailleurs lancé il y a quelques semaines notre nouveau cycle d'études judiciaires européennes, le premier des 12 événements labellisés par la Présidence française de l'Union européenne et qui seront portés par notre Ecole d'ici au 30 juin 2022.

Avec ce cycle, nous avons l'ambition de former ensemble des magistrats et des avocats de toute l'Europe, et de créer un véritable réflexe européen au sein de la communauté judiciaire.

Car au-delà des formations sur le droit de l'Union européenne qui irriguent la scolarité des auditeurs de justice ou la formation continue des magistrats français, la formation judiciaire doit également nous permettre de consolider une base commune fondée sur l'État de droit et l'indépendance de la Justice. C'est le fondement même de l'engagement européen. Créer cette dimension, cette communauté qui transcende les frontières nationales et qui a besoin de matérialiser un lien entre ses membres.

Et ce lien doit pouvoir se tisser entre les acteurs de la justice le plus tôt possible, dès le début de leur carrière.

Tel est le sens de cet événement, l'un des 12 labellisés « Présidence française du Conseil de l'Union européenne » portés par l'École nationale de la magistrature, sur les 18 événements organisés par le ministère de la Justice français : réfléchir ensemble aux moyens, aux méthodes permettant d'intégrer davantage encore les réflexes de défense de l'État de droit.

Elle va nous réunir pendant une journée et demi : magistrats, élèves magistrats, avocats et élèves-avocats, notaires, huissiers, d'une trentaine de nationalités différentes. Cette diversité des origines professionnelles et géographiques des intervenants et des participants est une richesse et un atout incontestables pour nourrir notre réflexion.

Le programme qui vous est proposé combinera des temps pléniers et des ateliers en sous-groupes au sein desquels vous pourrez activement prendre part à la réflexion et mêmes à des propositions sur les objectifs, les acquis de la formation, son contenu et son format.

Il est également prévu de réfléchir aux moyens par lesquels la dimension européenne de la formation initiale des magistrats et des avocats peut être renforcée.

Cette conférence a été élaborée grâce à une étroite collaboration entre la Commission européenne, et l'École nationale de la magistrature : les équipes de la Commission et de l'ENM ont travaillé ensemble de bout en bout pour construire cet événement et je les en remercie sincèrement.

Ils ont sollicité des intervenants de haut niveau, français et européens, universitaires, magistrats et avocats pour animer et nous accompagner dans une réflexion qui se veut tourner, in fine, vers la pratique, et que je remercie très chaleureusement.

Je tiens à remercier, enfin, les participants, parmi lesquels nos partenaires - le Réseau européen de formation judiciaire, la délégation des barreaux européens... - d'être venus nombreux à Bordeaux.

En 2022, plus que jamais, l'École nationale de la magistrature place ainsi son action sous le sceau de la coopération et des échanges européens, avec l'exigence de chaque instant de faire sienne la déclaration historique de Louise WEISS, lors de la toute première session du Parlement européen le 17 juillet 1979 à Strasbourg « l'Europe ne retrouvera son rayonnement qu'en rallumant les phares de la conscience, de la vie et du droit ».

Je cède la parole à Monsieur le directeur adjoint de la justice pénale à la Commission européenne.

*Seul le prononcé fait foi.*

**Tamara ČAPETA<sup>16</sup>,**  
**Advocate General at the Court of Justice of the European Union**

**The Rule of Law in the EU of Tomorrow**

**Speech for the Conference organised by the Ecole nationale de la magistrature (ENM), the European Commission and the French Presidency**

**'Initial Training of Justice Professionals Serving the Rule of Law'  
Bordeaux, 22-23 February 2022**

•••••

***I. Introduction***

In his seminal work, 'Sapiens – A brief history of humankind', the historian Yuval Noah Harari explained that humans were able to organise into societies because of the stories that tied them together and organised their mutual relations. The story that Europeans chose with a view to organise their commonly built society in the framework of the European Union is the one in which a society is founded on the rule of law. The rule of law was not chosen as the organisational principle of the European Union by chance, but on purpose. It was seen as a necessary condition for a society which treats all its participants as equal, respecting their dignity and allowing their personal freedom, as long as it does not endanger the equally valuable freedom of others.

The story involving the rule of law as its core value was not the only possible story. However, that is the one that the founders of the European Union have chosen. Being part of the European Union, therefore, entails the acceptance of that story. Given that the rule of law, as envisaged in the Treaties (Article 2 TEU) is closely linked to other values and serves their achievement in practice (the other values being human dignity, freedom, protection of fundamental human and minority rights and equality), it is obvious that the rule of law is not a value neutral principle. In the EU framework, it enables integration based on liberal democracy.

To keep a story alive, it is necessary to narrate it, again and again, and to discuss its meaning. The story was always there in the EU project, but it lay dormant for some time. That is not so any more. The storytellers have awoken because some participants of the society have forgotten the story, or misunderstood its meaning and value.

In a way, the unwanted developments taking place in certain Member States, such as Hungary and Poland, could be seen as fortunate, as they forced us into discussing the more concrete contours of the rule of law. That will, hopefully, keep the story alive. Optimists always manage to find something good in otherwise bad developments.

Discussions about the rule of law are necessary in all parts of our societies – in schools, newspapers, cultural events and also, importantly, among judges and other legal professionals. That is why this event was indeed important. The lessons learnt at the sessions of this conference will be transformed into useful guidelines for the education of future judges and lawyers. That will, even more importantly, create a forum for constant discussion of the rule of law. It is important to seize this moment to establish the European judicial community, as we have heard yesterday at the dinner cocktail speech by Mr Renard.

---

(16) All opinions expressed are personal to the author.



## II. The rule of law as a judicially applicable value

Judges are at the same time subject to the rule of law and the guarantors of this value. As we have heard from several speakers in the opening session yesterday, access to justice and effective judicial protection are cornerstones of the rule of law. For judges to provide and defend the rule of law, this principle has to be judicially applicable.

I am, therefore, going to ask the question: Is the rule of law a judicially applicable value?

The President of the Court of Justice has, in one of his speeches last year,<sup>17</sup> explained the rule of law by comparison to an electricity distribution system. At first, electricity is created as high voltage. This is the concept of the rule of law as a broadly understood value. Transformers then distribute the electricity to different branches. This is comparable to the principles that are based on the value of the rule of law. They include the principles requiring a transparent, accountable, democratic and pluralistic law-making process, the principle of legal certainty, the prohibition of arbitrary executive powers, and effective judicial protection, including access to justice, by independent and impartial courts. Those principles were to a larger or lesser extent interpreted in the case-law of the Court. The electricity is, in the end, streamlined into cities or private households, and to the particular users there: laundry machines, toasters, or streetlights. Similarly, the principles based on the rule of law turn, on a more concrete level, into legal rules: rules about legislative and administrative processes, rules about the jurisdiction of different branches of power, rules guiding the adoption of the normative texts, rules shielding judges from political influence or rules about conditions to access the courts, to name just a few.

It was disputed that the rule of law, especially at its value level and the level of its principles, is to be applied by judges, as it is too vague. This, however, showed not to be true. At all its levels, including at the more abstract level of a value, the rule of law is a judicially cognisable and applicable principle. That was clearly confirmed by the Court of Justice, sitting as the Full Court, in judgments delivered last week,<sup>18</sup> which upheld the validity of the Conditionality Regulation (as it is colloquially called). To quote the Court, it held that:

‘Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which, (...), are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States.’<sup>19</sup>

On that basis, the Court rejected Hungary’s and Poland’s arguments that the Conditionality Regulation does not live up to the standard of legal certainty, itself being one facet of the rule of law value.

The Court also rejected the argument that the rule of law can only be defended through the political mechanism of Article 7 TEU (of which we have heard more in the lecture of Professor Blatiere yesterday). Quite to the contrary, its respect may be, and has to be, subject to judicial proceedings. In fact, as most of you are familiar with, the rule of law has already been the subject of infringement proceedings as well as of preliminary rulings. In a number of recent judgments initiated by the Commission, not only against Poland, the Court had the opportunity to clarify certain aspects of the rule of law relating to effective judicial protection and particularly the requirement of judicial the independence.

The other important procedural route, which demonstrates that the rule of law is judicially relevant also in front of the Member States’ courts, is the preliminary reference procedure. Judges across the EU,

(17) Concluding remarks by Mr Koen Lenaerts, President of the Court of Justice of the European Union at the Conference “EUUnited in diversity: between common constitutional traditions and national identities” Riga, 2-3 September 2021.

(18) Case C-156/21 *Hungary v Parliament and Council*, EU:C:2022:97; Case C-157/21 *Poland v Parliament and Council*, EU:C:2022:98.

(19) Case C-156/21 *Hungary v Parliament and Council*, EU:C:2022:97, paragraph 232.

from Ireland (in cases such as *LM*,<sup>20</sup> as we have heard yesterday from Aileen Donnelly) to Malta (in the case *Repubblika*<sup>21</sup>) entered into dialogue with the Court of Justice in order to clarify the meaning of the value of the rule of law and its component principles and rules. Most importantly, judges in Poland or Romania, turned to the Court of Justice, aware that the backsliding in the rule of law in their respective countries might prevent them from properly performing their duties as judges, in conformity with EU law. I am referring to cases such as *A.K.*<sup>22</sup> and *A.B.*<sup>23</sup> referred by Polish judges, and the cases *Euro Box*<sup>24</sup> and *RS*,<sup>25</sup> decided by the Court only yesterday, which were initiated by Romanian judges. Those cases are signals that the rule of law is understood by national judges as a value applicable to disputes they are invited to resolve.

There is no doubt, therefore, that the rule of law and its components are judicially cognisable concepts. That requires all European judges to educate themselves and form their own opinion on this concept. When I use the term European judges, I do not only have in mind my colleagues from the Luxembourg Court. As was clear since as far back as 1963 and the judgment in *Van Gend en Loos*,<sup>26</sup> and as was powerfully confirmed a few years ago in the *Portuguese judges* case,<sup>27</sup> all national judges share with the Court of Justice the task to ensure that the Law (with a capital L) is respected within the EU legal order.

That task is performed in the mutual cooperation of all European judges. Cooperation can take the form of informal discussions as was the case at this Conference or as happens within many other activities supported by the European Judicial Network. It may also happen through more formalised mechanisms, especially through the preliminary ruling procedure.

### ••••• III. The interpretation of EU law

This dialogue of judges, to which one of the workshops at this Conference was devoted (and skilfully managed by Mr Chamouard, and at which I had the pleasure of participating), is an important tool for an inclusive and informed interpretation of EU law.

I would like to pause for a moment at the question of interpretation of EU law.

The preliminary ruling procedure is often described as a mechanism that enables the Court of Justice to interpret EU law and national judges to apply it. This description is, to my mind, misleading. The preliminary ruling procedure, as envisaged under the Treaties, indeed gives the last word about the meaning of EU law to the Court of Justice. However, that meaning is not formed by the Court of Justice alone, but in a dialogue with many other stakeholders in the EU legal order – such as national governments, companies and individuals, parties to proceedings at national courts and their lawyers, and other EU institutions. Through the mechanism of preliminary rulings, all national courts share with the Court of Justice the task of interpreting EU law. They are, at the same time, the sole guarantors that EU law will be applied in practice.

The discussions about this jurisdictional delimitation based on the difference between interpretation and application was reopened by several opinions<sup>28</sup> of one of my colleagues whose mandate at the

(20) Case C-216/18 *Minister for Justice and Equality (Failures of the judicial system)*, EU:C:2018:586.

(21) Case C-896/19 *Repubblika*, EU:C:2021:311.

(22) Case C-585/18, C-624/18 and C-625/18 *AK and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, ECLI:EU:C:2019:982.

(23) Case C-824/18 *A.B. and Others (Appointment of judges to the Supreme Court – Appeals)*, EU:C:2021:153.

(24) Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 *Euro Box Promotion and Others* (EU:C:2021:1034).

(25) Case C-430/21 *RS (Effect of the decisions of a constitutional court)* (ECLI:EU:C:2022:99).

(26) Case C-26/62 *Van Gend en Loos* (EU:C:1963:1.)

(27) Case C-64/16 *Associação Sindical dos Juizes Portugueses* (EU:C:2018:117).

(28) Opinions of A.G. Bobek in Case C-923/19, *Van Ameyde España*, EU:C:2021:125 ; and in Case C-561/19, *Consorzio Italian Management et Catania Multiservizi*, EU:C:2021:291.

Court has in the meantime come to an end, AG Michal Bobek. The judgment in the case *Conzortio Italian Management*,<sup>29</sup> sometimes referred to as *CILFIT 2*, even if interpreted by many as confirmation of the obligations of last instance courts to refer, introduced a novelty – an obligation for national judges to provide reasons for their decision not to refer, if they have so decided. That requirement demonstrates that national judges are invited and expected to interpret EU law, and only if they have doubts that their colleagues in other courts, in the same or other Member States, could come to different conclusions about the meaning of EU law, should they turn to the Court of Justice.

•••••

#### IV. Uniformity, diversity and the rule of law

Preliminary rulings coupled with the primacy of EU law serves the purpose that EU law remains ‘common law’ throughout the EU, across all the Member States and in front of all national courts. Primacy ensures such uniformity by insisting on the application of EU law even when a contrary national rule exists in a particular domestic system. At the same time, primacy also ensures equality among Member States. That was clearly recalled by the Court of Justice in yesterday’s RS judgment.<sup>30</sup> The RS case came to the Court as a reference for a preliminary ruling submitted by a Romanian court. That court wanted, in a case in which it was deciding, to leave disappplied a Romanian law, which it considered to be contrary to EU law. However, the judge was prevented from doing so on the basis of the earlier constitutional court decision according to which judges had to apply domestic laws which that Court found to be constitutional. That was mandated with the threat of disciplinary procedure and sanctions. The Court of Justice, sitting as the Grand Chamber, found the rule established by the Romanian Constitutional Court inconsistent with the principle of primacy. It found at the same time that the threat of sanctions for applying EU law and for communicating for that purpose with the Court of Justice in the preliminary ruling procedure, runs counter to the essence of the rule of law. It deprives subjects of law of the effective judicial protection of their EU-based rights and endangers the independence of judges.

Whereas the rule of law, which for the sake of uniformity and equality among the Member States requires the primacy of EU law, *has* to be respected, it does not, however, require total uniformity. Divergences that would accommodate differences of participating states and their legal cultures are tolerated and possible. I will give you as an example the discussion which we had yesterday at lunchtime. I have learned that in some legal systems, in France and in the Netherlands, for instance, judges can be members of political parties. Other systems, such as Greece or Croatia, prohibit this. Can we find a uniform solution, without prohibiting judges’ membership in political parties at the EU level? Probably not. However, is that at all necessary? If, within their own legal cultures, judges cannot and do not come under influence and pressure of their party colleagues, if they do not implement party programs in their decisions and if their party membership does not create the appearance in the eyes of public that these judges are not independent, the rule of law, as understood by the EU legal system, is safeguarded. Core elements of the principle of judicial independence, as interpreted by the Court of Justice, are respected.

However, none of the participating legal orders can claim that their national identity does not require the respect of the rule of law. As the Court explained in its judgments of last week relating to validity of the Conditionality Regulation, which I have already mentioned, the rule of law is not only a mere condition for acquiring membership in the European Union. It is its organisational principle, to be respected at all times and by all branches of government.

---

(29) Judgment in Case C-561/19 *Conorzio Italian Management et Catania Multiservizi*, EU:C:2021:799.

(30) Case C-430/21 *RS (Effect of the decisions of a constitutional court)*, ECLI:EU:C:2022:99, paragraph 55.



Courts, for their part, need to pay respect to the rule of law in all their activities - when they interpret legal rules in order to solve disputes and when they control other branches of government through different mechanisms of judicial review. One important aspect of the concept of the rule of law is that the rules of the system also bind a democratically elected majority. Controlling whether parliaments and executives abide by the rules, especially those that are considered fundamental, is the task of the courts. That task can be performed only if judges are independent from the bodies which they are invited to control. Three workshops of the conference discussed those important issues embodied in the concept of the rule of law – judicial independence, mechanisms and methods of judicial review and the relatively complex grid of fundamental rights guaranteed within the EU legal order.

I was unfortunately not able to follow all of the workshops, as they took place at the same time. From the program and the description of the topics, I could read that the workshops did not shy away from discussing controversial issues relating to these principles. Such open discussion is indeed the only way to clarify and resolve contradictions, which sometimes occur between different principles involved in the concept of the rule of law. However, openly recognising practical problems and conflicts in principles does not in itself cast doubt about the judicial applicability of the rule of law. On the contrary, it enhances its importance. Disagreements about the meaning] are inherent part of free and pluralistic societies. Once judges internalise the rule of law as a value inherent in the system, once it become a part of their professional ethics (another interesting topic discussed at this conference), the conflicts will be resolved in a way that fits the story, or to use Dworkin's words, in a way that fits the political morality of the system. All such mismatches could be put together in one puzzle by rule of law-conform interpretation. An interpretation of which the artificial intelligence mentioned yesterday by Mr. MacGuill is not (or not yet, in any case) capable. Only human judges can undertake such a task. Such judges are, to answer the question posed by Mr de Sousa Lameira yesterday, judges of the future that we need.

Values, even if not easily explained or prone to simple definitions, could and should be internalised by judges. What I have in mind is similar to what Lord Goff, a member of what was then the UK House of Lords, expressed when talking about the boundary between the interpretation of law and the intrusion of judges into a legislative role: "... although I am well aware of the existence of the boundary, I am never quite sure where to find it. Its position seems to vary from case to case". In the same way, judges need to be aware of the value of the rule of law. Even if individual judges might give different interpretations to principles and rules resulting from the rule of law, that does not affect the value itself.

#### **IV. Conclusion**

To finish, without even purporting to be able to put in numbers the information per capita that I tried to communicate, as was admirably done yesterday by Mr Bruckner, I will conclude with the following thoughts. Inclusion of the rule of law in the education of judges and other legal professionals is a guarantee that the story chosen by the Europeans to guide and organise their common project will live. The rule of law in the EU of tomorrow will, therefore, become once again the most important story to know and to tell.

**Lauren BLATIERE,**

**Professeure de droit public, CJB - UPRES EA n°4337, Université d'Angers**

### **L'État de droit en Europe : histoire et perspectives**

Retranscription de l'intervention prononcée le 22 février 2022.

Je tiens d'abord à exprimer mes sincères remerciements aux organisatrices et aux organisateurs de cette journée et tout le plaisir qui est le mien d'y participer.

Pour entrer dans le vif du sujet, évoquer l'État de droit en droit de l'Union européenne peut peut-être sembler naturel aujourd'hui, mais tel n'est pas le cas. A tout le moins, tel n'a pas *toujours* été le cas.

D'une part, si à l'origine de la construction communautaire l'objectif politique est de pacifier le continent européen après deux guerres mondiales, les Communautés européennes se traduisent concrètement, dans un premier temps, par une coopération sur des questions économiques et techniques. A ce stade de l'histoire, le droit communautaire ne se prononce pas sur la question de l'État de droit.

D'autre part, au même moment, est créé le Conseil de l'Europe, organisation européenne expressément tournée vers la protection des droits fondamentaux, de la démocratie et de l'*État de droit*. On a alors pu imaginer que ces questions demeureraient dans le champ du Conseil de l'Europe et qu'elles seraient exclues du champ du droit communautaire.

L'avenir a incontestablement démenti cette impression. Cela étant, avant d'approfondir l'étude de l'État de droit en droit de l'Union européenne, il est nécessaire d'essayer de définir ce qu'est l'État de droit. La difficulté est sérieuse car il n'y a pas de définition unanime. Selon les systèmes juridiques que vous étudiez, les sources juridiques ou doctrinales que vous consultez, l'approche retenue de l'État de droit ne sera pas toujours la même. Qui plus est, il s'agit d'une terminologie française, résultat d'une traduction de termes étrangers : le *Rechtsstaat* Allemand et la *Rule of Law* anglo-saxonne. Or, ces trois concepts ne sont pas parfaitement identiques.

Malgré ce, deux aspects de l'État de droit ressortent bien souvent et semblent faire l'objet d'un consensus. Tout d'abord, un aspect formel, qui est présent dès l'origine dans les trois concepts. Un État de droit est alors entendu comme un État qui se soumet au droit, sous contrôle de juridictions indépendantes et impartiales. Un aspect matériel, ensuite, qui est présent dès l'origine dans le concept de *Rule of Law* mais qui n'apparaîtra dans celui d'État de droit et de *Rechtsstaat* qu'après la seconde guerre mondiale : un État de droit est un État qui ne se soumet pas à n'importe quel droit, mais à un droit respectueux des droits fondamentaux.

De ces quelques propos, ressort également que l'État de droit est véritablement le fruit de l'histoire des États d'Europe de l'Ouest. Tel n'est pas le cas des États d'Europe de l'Est, ce qui explique en partie les difficultés que l'on rencontre aujourd'hui, à savoir les violations systémiques de l'État de droit par, notamment, la Hongrie et la Pologne, et qui, j'en suis certaine, seront évoquées dans les conférences ultérieures.

Quoi qu'il en soit, l'État de droit a bien fait l'objet d'une consécration progressive en droit de l'Union européenne. De surcroît, de cette consécration résulte une jurisprudence protectrice de la Cour de justice de l'Union européenne. Autrement dit, l'État de droit a donné lieu à des développements importants en droit de l'Union européenne, tant dans les textes que dans la jurisprudence.

## I. La consécration de l'État de droit en droit de l'Union européenne

Cette consécration est double, en ce qu'à la consécration de l'État de droit en droit primaire, en tant que principe puis valeur, a été associé un mécanisme permettant de sanctionner un État membre violant ladite valeur.

.....

### A. L'apparition de l'État de droit dans le droit primaire

L'apparition de l'État de droit en droit primaire est tardive, puisqu'il n'est pas mentionné dans les traités fondateurs au cours des premières décennies de fonctionnement des Communautés européennes. Ce silence s'explique peut-être par le fait que les Communautés étaient alors tournées vers une coopération technique, de telle sorte qu'une référence à l'État de droit a pu sembler non pertinente aux rédacteurs des traités. Non sans lien, les États fondateurs n'étaient peut-être pas prêts à se lier sur une question si sensible que celle de l'État de droit dès le commencement de la construction communautaire. Le temps n'était-il peut-être pas *encore* venu.

Une première étape est franchie avec le traité de Maastricht, signé en 1992. Cette étape est cependant d'une importance relative. En effet, l'État de droit est alors inscrit dans le préambule du traité sur l'Union européenne, les États membres y rappelant simplement leur attachement. L'État de droit est également inscrit au titre des objectifs de deux politiques extérieures de l'Union : la politique de développement (article 130 U, paragraphe 2, TCE) et la politique étrangère et de sécurité commune (article J.1, paragraphe 2, TUE). A ce stade, l'État de droit occupe donc une place bien mesurée. Il s'agit soit d'un simple engagement pris par les États membres dans le préambule du traité, sans davantage de précisions, soit d'un simple objectif de deux politiques extérieures de l'Union (objectif dont on connaît les résultats limités, encore aujourd'hui).

La véritable évolution ne viendra que plus tard, avec traité d'Amsterdam, signé en 1997 et entré en vigueur en 1999. A compter de cette date, l'article 6 du traité sur l'Union européenne affirme pour la toute première fois que « *L'Union est fondée sur les principes de la liberté, de la démocratie, du respect des droits de l'homme et des libertés fondamentales, ainsi que de l'État de droit, principes qui sont communs aux États membres* ». Il s'agit donc d'une étape importante. L'État de droit quitte la catégorie des engagements politiques flous ou des simples objectifs pour devenir un véritable principe, reconnu juridiquement et s'imposant aux États membres, comme à l'Union elle-même. Par ailleurs, avec le traité d'Amsterdam, est également modifié l'article 49 TUE, soit l'article qui organise l'adhésion de nouveaux États membres. Avec cette modification, le droit primaire indique expressément que le respect de l'État de droit est une condition à l'adhésion de nouveaux États membres.

Pourquoi une telle montée en puissance de l'État de droit à cette date, en tant que principe de l'Union et en tant que critère d'adhésion de nouveaux États membres ? Les raisons sont multiples, mais deux peuvent être citées. La première renvoie à ce que j'évoquais il y a quelques instants : à la date de l'élaboration du traité d'Amsterdam, les États membres sont finalement prêts à approfondir davantage la construction communautaire, en se liant toujours plus sur des questions plus sensibles, plus politiques que techniques. D'où, notamment, la consécration de l'État de droit en tant que principe de l'Union. La deuxième raison réside sans doute dans le fait qu'à la date de l'élaboration du traité d'Amsterdam, l'Union préparait l'adhésion massive des États d'Europe de l'Est, anciens satellites de l'URSS. Or, on mesurait l'écart existant entre les États membres de l'Union et ces États candidats à l'adhésion. Il est donc apparu essentiel de consacrer pour la première fois le socle de l'Union européenne, cette base essentielle qui doit être partagée par tous pour permettre à l'Union européenne de fonctionner et d'avancer.

Finalement, le traité de Lisbonne, signé en 2007 et entré en vigueur en 2009, a opéré une évolution sémantique, en s'inspirant ici du traité établissant une Constitution pour l'Europe, signé en 2004 mais finalement jamais entré en vigueur. Depuis le traité de Lisbonne, l'État de droit n'est plus un principe sur lequel l'Union est fondée, mais une valeur. Le passage de principe à valeur continue d'interroger juridiquement (d'autant plus que, à la lecture du préambule de la Charte des droits fondamentaux de l'Union européenne, entrée en vigueur avec le traité de Lisbonne, l'État de droit n'est pas une valeur mais... un principe !). Quoi qu'il en soit, politiquement, la référence aux valeurs de l'Union marque sans doute la volonté de définir le socle philosophique de l'Union, ce qui est au cœur de son identité. L'inclusion de l'État de droit au titre des valeurs de l'Union, à l'article 2 TUE, démontre donc l'importance de ce dernier. Par ailleurs, loin de se contenter de consacrer l'État de droit en tant que valeur, le droit de l'Union a également prévu un mécanisme permettant de sanctionner un État membre qui le violerait.

.....

### **B. Les sanctions pour violation de l'État de droit par un État membre**

C'est le traité d'Amsterdam, à nouveau, qui a pris soin de doter l'Union d'une base légale lui permettant de sanctionner politiquement un État membre violant l'État de droit. Cette base légale se trouve à l'article 7 TUE.

Si l'on s'intéresse uniquement aux aspects les plus importants (autrement dit, je ne peux réaliser ici une étude exhaustive), plusieurs questions surgissent. *Tout d'abord, en quoi consiste la sanction prévue à l'article 7 TUE ?* Principalement en une privation du droit de vote de l'État concerné au Conseil de l'Union européenne. L'État se trouve alors dans l'impossibilité de participer pleinement à une institution centrale de l'Union, institution qui joue notamment un rôle très important dans l'adoption du droit dérivé. La sanction n'est donc pas symbolique et elle a pu être qualifiée d'arme nucléaire.

*Ensuite, comment parvenir à une telle sanction ?* Malheureusement, après une procédure lourde et vouée à l'échec. En effet, si le vote de la sanction en tant que tel est fait le Conseil de l'Union à la majorité qualifiée, il suppose qu'en amont, le Conseil européen, qui réunit les chefs d'État ou de gouvernements des États membres, ait constaté à l'unanimité « l'existence d'une violation grave et persistante de [l'État de droit] par un État membre ». Or, l'unanimité ici recherchée ne sera probablement jamais atteinte, même si elle exclut bien logiquement la participation de l'État concerné. Il y aura toujours des considérations politiques pour empêcher au moins un autre État membre de voter en faveur de ce constat.

Le traité de Nice, signé en 2001, est venu porter l'Union sur le chemin de la prévention des atteintes à l'État de droit dans les États membres. Modifiant l'article 7 TUE, ce traité a permis au Conseil de l'Union de constater « qu'il existe un risque clair de violation grave [de l'État de droit] par un État membre ». *Ce constat doit être fait à la majorité des 4/5<sup>ème</sup>* et il permet au Conseil de formuler des recommandations à l'État concerné.

Cette évolution n'a cependant porté aucun fruit puisque les atteintes à l'État de droit dans les États membres se sont multipliées et ont pris des proportions particulièrement inquiétantes dans au moins deux États membres. En Hongrie, tout d'abord, le Premier ministre Viktor ORBAN mène depuis 2010 une politique qui menace, et je reprends ici les propos du Parlement européen, « notamment [,] la liberté d'expression, la liberté académique, les droits fondamentaux des migrants (...à, la liberté de réunion et d'association, les activités des organisations de la société civile, (...), les droits des personnes appartenant aux minorités(...), les droits sociaux, le fonctionnement du système constitutionnel, l'indépendance du pouvoir judiciaire et d'autres institutions, sans oublier les nombreuses allégations inquiétantes de corruption et de conflits d'intérêts » (point 2 de la Résolution du Parlement européen du 17 mai 2017

sur la situation en Hongrie): La Pologne, quant à elle, inquiète depuis les élections présidentielles et législatives de 2015 qui ont conduit à l'arrivée au pouvoir du parti conservateur Droit et justice. La Pologne a notamment adopté, depuis cette date, une série de lois portant atteinte à l'indépendance des juridictions ordinaires et constitutionnelles.

Dans ce contexte, particulièrement grave, l'Union a continué, dans un premier temps, à essayer de solutionner la crise par une réponse politique. C'est ainsi qu'a notamment été élaboré par la Commission européenne un nouveau cadre de l'Union européenne pour renforcer l'état de droit en 2014 (COM/2014/0158 final). Là encore, l'idée pour moi n'est pas de rentrer dans les détails, mais de souligner que toute la logique de ce nouveau cadre repose sur l'instauration d'un dialogue, d'abord confidentiel, puis public, avec l'État membre où existe « une situation de menace systémique envers l'état de droit ». L'espoir est que ce dialogue permette d'aboutir à un rétablissement de la situation, avant même que l'article 7 TUE ne soit activé.

Néanmoins, la mise en œuvre de ce nouveau cadre à l'encontre de la Pologne a prouvé sa totale inefficacité, la situation s'y étant dégradée. Finalement, l'article 7 TUE a enfin été activé, sur demande de la Commission, mais cette activation a eu lieu fin 2017 et le Conseil de l'Union ne s'est toujours pas prononcé sur la question. De la même façon, l'article 7 TUE a été activé à l'encontre de la Hongrie en septembre 2018, sur demande du Parlement européen cette fois-ci, et le Conseil ne s'est également toujours pas prononcé. Partant, si l'État de droit est bien une valeur de l'Union, il ne faut, je crois, atteindre aucun secours d'éventuelles sanctions politiques qui pourraient être infligées à un État membre le violant de façon systémique.

L'Union européenne a dernièrement pensé une nouvelle stratégie consistant à protéger l'État de droit en conditionnant le versement des aides de l'Union au respect de l'État de droit. L'idée est que tout État membre violant l'État de droit pourra se voir priver des aides financières de l'Union. C'était, du moins, l'idée initialement défendue par le Parlement européen. Finalement, après des débats très compliqués, la solution obtenue se révèle limitée (Règlement 2020/2092 du Parlement européen et du Conseil du 16 décembre 2020 relatif à un régime général de conditionnalité pour la protection du budget de l'Union). En schématisant, le versement des aides de l'Union n'aura pas lieu s'il s'avère qu'un État viole l'État de droit *de telle sorte que cela porte atteinte aux budget de l'Union*. Il y aurait bien plus à dire sur ce règlement, mais l'on peut souligner qu'il a immédiatement fait l'objet de deux recours en annulation introduits par la Hongrie et la Pologne devant la Cour de justice de l'Union européenne, recours qui ont été rejetés par l'assemblée plénière de la Cour le 16 février 2022 (aff. C-156/21 et aff. C-157/21).

Face à un tel constat, il ne nous reste qu'à espérer que la jurisprudence de la Cour de justice est parvenue à de meilleurs résultats.

## II. La protection accordée par la Cour de justice de l'Union européenne

Si la jurisprudence la plus récente est particulièrement intéressante, la jurisprudence initiale de la Cour de justice n'est pas dénuée de tout intérêt.

.....

### A. la jurisprudence initiale

Alors que l'État de droit est invoqué par les parties depuis les années 1960, la Cour de justice ne l'a intégré à ses motifs qu'à la fin des années 1990 (CJCE, 4 février 1999, *Köllensperger et Atzwanger*, aff. C-103/97). A cette date, les formules employées révèlent que la Cour présume le respect de l'État de droit par un État membre ou, pour le dire autrement, qu'elle n'a aucun soupçon de violation de l'État de droit. Ce dernier est alors rapidement mentionné, au détour d'une phrase, comme accessoire très relatif du raisonnement de la Cour.

Est-ce à dire que la jurisprudence de la Cour de justice était alors totalement déconnectée des considérations liées à l'État de droit ? Une réponse négative s'impose. Tout d'abord, à cette époque, l'État de droit est déjà une source d'inspiration pour la Cour de justice qui affirme que la Communauté européenne est... une « *Communauté de droit* ». Elle le fait pour la première fois dans le célèbre arrêt *Les Verts / Parlement* de 1986 (aff. C-294/83). De cet arrêt, et de la jurisprudence ultérieure, il ressort que la Communauté de droit est une Communauté soumise au droit, sous contrôle de juridictions indépendantes et impartiales, dans le respect des droits fondamentaux. En somme, la Cour de justice a consacré l'existence d'une Communauté de droit qui est clairement influencée par le concept d'État de droit. Logiquement, depuis l'arrêt *E et F* de 2010 (aff. C-550/09), la Cour se réfère à l'« *Union de droit* », la Communauté ayant disparu.

Par ailleurs, sans se référer expressément à l'État de droit, la Cour de justice œuvrait déjà, par le biais d'une jurisprudence très audacieuse, en faveur de la protection de ce dernier, puisqu'elle œuvrait en faveur du respect des droits fondamentaux, par les États membres et par la Communauté européenne. Autrement dit, elle protégeait très activement, sans le dire, le volet matériel de l'État de droit. Je fais ici écho à toute la saga jurisprudentielle ayant permis à la Cour de protéger les droits fondamentaux en tant que principe généraux du droit (pour la jurisprudence de principe : CJCE, 12 novembre 1969, *Stauder*, aff. C-29/69 ; CJCE, 17 décembre 1970, *Internationale Handelsgesellschaft*, aff. C-11/70 et CJCE, 14 mai 1974, *Nold*, aff. C-4/73). Ce faisant, la Cour œuvrait déjà en faveur de la protection de l'État de droit.

Ce premier temps de la jurisprudence est donc loin d'être dénué de tout intérêt pour la question qui nous intéresse. La Cour est cependant allée plus loin au cours des dernières années.

## ••••• **B. Une protection considérablement enrichie**

En février 2018, la Cour de justice a, pour la première fois, développé une argumentation ferme et pédagogique quant aux exigences inhérentes à l'État de droit, dans une affaire portugaise où le respect de l'État de droit ne faisait aucun doute. Dans un contexte marqué par des violations graves de l'État de droit par certains États membres et par le constat de l'inefficacité absolue des sanctions politiques, la Cour a donc saisi la première affaire qui s'y prêtait pour énoncer clairement ce qui doit être fait par un État membre pour que ce dernier se conforme à l'État de droit, valeur de l'Union européenne. Cette affaire est l'affaire dite « des juges portugais », tranchée par la Grande chambre le 27 février 2018 (aff. C-64/16). Cet arrêt a été le point de départ d'une jurisprudence particulière riche, qui a par la suite été composée d'affaires portant directement sur la situation polonaise, soit à l'occasion de recours en manquement introduit par la Commission européenne contre la Pologne, soit à l'occasion de renvois préjudiciels transmis en masse (près de 40 !) par les juridictions polonaises.

Il m'est ici impossible d'évoquer toutes les affaires concernées, mais il est indispensable de s'arrêter sur leurs principaux apports. En ce que ces affaires concernent la Pologne, vous verrez qu'elles se concentrent surtout sur le volet formel de l'État de droit, à savoir le droit à un tribunal indépendant et impartial.

Au-delà de formulations de principes, particulièrement fortes, la Cour a consacré des solutions importantes. La Cour a ainsi affirmé, pour la première fois, que la valeur de l'État de droit est « *concrétisée* » par l'article 19, §1, al. 2 TUE, selon lequel « *Les États membres établissent les voies de recours nécessaires pour assurer une protection juridictionnelle effective dans les domaines couverts par le droit de l'Union* ». Cette affirmation emporte des conséquences importantes pour plusieurs raisons. D'abord, il ressort des arrêts de la Cour que l'article 19 TUE est potentiellement applicable à toute juridiction susceptible de connaître de questions relatives au droit de l'Union, sans que l'on ne porte d'intérêt à l'applicabilité du droit de l'Union dans le litige en cause. Cela revient à étendre la protection de l'article 19 TUE a, potentiellement,

la totalité des juridictions des États membres, ce qui confère à cet article un champ d'application sans doute plus étendu que celui de l'article 47 de la Charte des droits fondamentaux (Droit à un recours effectif et à accéder à un tribunal impartial). Ensuite, l'article 19 TUE a été reconnu comme étant d'effet direct, et peut donc être directement invoqué par ceux qui subissent une atteinte à leur droit à un tribunal indépendant et impartial, y compris les juges eux-mêmes. Autrement dit, l'article 19 TUE est devenu une arme juridique importante pour lutter contre les dérives de l'État de droit portant atteinte à l'indépendance et à l'impartialité des juridictions. Cela ressort notamment de l'affaire des juges portugais précédemment évoquée, ainsi que de l'affaire *AB* tranchée par la Cour le 12 mars 2021 (C-824/18).

Non sans lien avec ce qui vient d'être dit, la Cour a également affirmé qu'un État membre doit disposer et maintenir une législation garantissant l'indépendance et l'impartialité de ses juridictions. Partant, une réforme judiciaire nationale peut faire l'objet d'un examen à la lumière du droit de l'Union européenne, notamment des articles 2 et 19 du TUE ou de l'article 47 de la Charte des droits fondamentaux. Là encore, cette solution a été consacrée dans l'affaire des juges portugais, ainsi que, notamment, dans deux arrêts *Commission contre Pologne* rendus par la Cour le 5 novembre 2019 (C-192/18) et le 24 juin 2019 (C-619/18). La Cour a ainsi pu affirmer qu'une législation qui impose le départ à la retraite de juges ordinaires ou constitutionnels, de façon discriminatoire et pour des finalités douteuses est contraire à l'État de droit. Il en va de même d'une législation qui organise le régime disciplinaire des juges par un organe non impartial et indépendant, sans possibilité de recours devant une juridiction indépendante et impartiale, et qui expose les juges à des sanctions au titre du contenu de leurs décisions, potentiellement uniquement pour avoir appliqué le droit de l'Union ou opéré un renvoi préjudiciel (voir en ce sens, notamment, une nouvelle affaire *Commission / Pologne*, du 15 juillet 2021, aff. C-791/19).

Néanmoins, les violations systémiques de l'État de droit n'entraînent pas *automatiquement* la suspension de la coopération judiciaire dans le cadre du mandat d'arrêt européen. Seule une mise en œuvre aboutie de l'article 7 TUE pourrait entraîner le refus automatique des mandats d'arrêt européen émis par les juridictions de cet État. En l'état, un juge ne peut donner une réponse négative à un mandat d'arrêt européen émis par une telle juridiction que s'il établit, après un examen minutieux et exigeant, incluant notamment une étude de la situation spécifique de la personne concernée par le mandat, de l'infraction pour laquelle elle est poursuivie et du contexte factuel, qu'il y a un « *risque réel de violation (...) du contenu essentiel du droit fondamental à un procès équitable* » (solution consacrée dans l'affaire *LM* du 25 juillet 2018, aff. C-216/18 PPU)<sup>31</sup>.

Si cette jurisprudence revêt une importance cardinale, elle présente une faiblesse, de taille : dans bien des affaires, la Pologne a ignoré les arrêts de la Cour ou les mesures provisoires ordonnées, ce qui a notamment amené la Cour à prononcé une astreinte d'un million d'euros par jour de retard dans l'exécution d'une ordonnance précédemment rendue (astreinte prononcée dans l'ordonnance du 27 octobre 2021, aff. C-204/21). Là encore, l'efficacité d'une telle astreinte reste malheureusement discutable...

Je vous remercie.

---

(31) Le jour même où cette intervention était prononcée dans le cadre de la formation initiale, la Cour a également consacré la possibilité de s'opposer à un mandat d'arrêt européen lorsque, « *dans le cadre d'un mandat d'arrêt européen émis aux fins de l'exécution d'une peine ou d'une mesure de sûreté privatives de liberté, (...) si [l'autorité judiciaire d'exécution] constate qu'il existe, dans les circonstances particulières de l'affaire, des motifs sérieux et avérés de croire que, compte tenu notamment des éléments fournis par ladite personne et relatifs à la composition de la formation de jugement ayant connu de son affaire pénale ou à toute autre circonstance pertinente pour l'appréciation de l'indépendance et de l'impartialité de cette formation, le droit fondamental de la même personne à un procès équitable devant un tribunal indépendant et impartial, établi préalablement par la loi, consacré à l'article 47, deuxième alinéa, de la charte des droits fondamentaux de l'Union européenne, a été violé* » (CJUE, Gde ch., 22 février 2022, *Openbaar Ministerie (Tribunal établi par la loi dans l'État membre d'émission)*, aff. jointes C-562/21 PPU et C-563/21 PPU).

**Aileen DONNELLY,**  
**Court of Appeal Ireland, Chairperson of the Judicial Studies Committee, Ireland**  
**The rule of law, a concept in crisis?**



*The Four Courts Bombardment (1922) ©RTE Stills Library*

*“The right of access to the courts is an indispensable cornerstone of a State governed by the rule of law”*

Mr. Justice Fennelly, formerly an Advocate General at the Court of Justice, giving the decision of the Supreme Court of Ireland in the case of *Mallak v. Minister for Justice, Equality and Law Reform*.<sup>32</sup>

1. What use however, is access to the courts if the courts themselves no longer appear to be subject to, or a cornerstone of, the rule of law?

Where does that leave a litigant, who willingly or unwillingly, finds themselves before such a court?

Is that the crisis that the title of this lecture speaks of?

Is it not so much a crisis in the concept of the rule of law but in the foundational stone of the edifice that is the rule of law?

2. I will approach this talk on the basis that the courts are an integral part of the rule of law and when there is a crisis in the courts, the rule of law itself is at risk. I will be focusing on some current challenges faced by justice professionals in their daily work both from a substantive perspective of the rule of law as well as the legal and institutional framework in which they operate. I will do this from a triple perspective:  
(1) the application of national law and national constitution, (2) the use of the cross border judicial cooperation instruments, and, (3) the direct application of EU law including the dialog between the national and European courts. I have chosen to address the role of an individual judge as an important actor in upholding the rule of law in all judicial systems rather than focusing on whether judicial systems are compliant.
3. I will address those topics as follows:

<sup>(32)</sup> [2012] IESC 59, [2012] 3 IR 297.



## Introductory comments on the phrase “Rule of Law”

### Application of National Law and National Constitution

- (i) General remarks
- (ii) Ireland and the rule of law
- (iii) The importance of the judge as an independent actor in the rule of law
- (iv) An early Irish example of extreme pressure on a judge
- (v) The pressure of decision making in extreme circumstances

#### Cross-border judicial co-operation

- (i) General remarks
  - (ii) Specific example of the European arrest warrant procedure
- #### Direct Application of EU law and dialog between national and European courts
- (i) EAW rulings and difficulties at the level of implementation
  - (ii) Primacy of EU Law

## Conclusion



### *Introductory comments on the phrase “Rule of Law”*

4. The origins, development and meaning of the rule of law have been the subject of much commentary in recent decades by the legal and socio-political academy as well as by judges speaking ex cathedra in addition to their judicial decisions. It is not the purpose of this lecture to add further to the understanding of the concept. It is necessary to say that I will approach rule of law as incorporating more than the view that a person may not be punished unless in accordance with law, that society is to be ruled by law and that governments are subject to law. As we will all agree it includes broader concepts such as accessible, intelligible and predictable laws, an absence of arbitrariness, equal application of law, adequate protection of human rights and accessible courts for the resolution of disputes.<sup>33</sup> Central to all of this is an independent judiciary; access to the courts is only meaningful if those are courts comprised of an independent judiciary.
5. Looking at it from a pan European perspective, we see the phrase “rule of law” find its way into the Statute of the Council of Europe adopted in 1949 by ten states of which Ireland was one. The phrase is also to be found in the preamble to the European Convention on Human Rights. In the body of the Convention, the phrases “in accordance with the law” or “prescribed by law” appear in many of the Articles dealing with substantive rights. As we all are aware the European Union is “...is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non- discrimination, tolerance, justice, solidarity and equality between women and men prevail” (Article 2 Treaty on European Union (“TEU”)).

---

(33) In the common law world, these broader concepts are among what are often described as The Bingham Principles. (See Tom Bingham, *The Rule of Law* (Penguin, 2010)). In constitutional democracies, like Ireland, an independent judiciary, constitutionally mandated protection of fundamental rights in accordance with law and judicial review of legislation, institutionalise the concept of the rule of law.



## Application of National Law and National Constitutions

### General Comments

6. We are all from different countries; we have different constitutions, different legal systems and systems of government, legislative and judicial organisation. Our understanding as lawyers and judges as to how the rule of law is interpreted and applied may differ.<sup>34</sup> At present however, we, as judges in an EU Member State, operate within a judicial system that provides remedies sufficient to ensure effective legal protection in the fields covered by Union Law.<sup>35</sup> Accordingly, as the Court of Justice said in *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas*,<sup>36</sup> Article 19 “gives concrete expression to the value of the rule of law stated in Article 2 TEU” and therefore, “entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals”.<sup>37</sup> The Court of Justice went on to say: “*The very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law.*”<sup>38</sup>
7. One of our functions as judges is to ensure effective judicial review. This is part of the essence of the rule of law. To be effective at judicial review, there must be a separation of judicial power from the other branches of government and in that context the judiciary must be both functionally and institutionally independent. That is a basic norm and is the platform on which the individual judge must operate. This talk is not about whether a given system is or is not functionally and institutionally independent but more about the process of the judge, seeking at the level of the individual, to abide by independence and impartiality.
8. Sometimes the appearance of functional and institutional independence of the judiciary can mask real problems for the rule of law. By appearance, I mean a constitutional bedrock respecting the independence of the judiciary and without overt attacks on the rule of law by methods such as changing legislation or packing courts with clearly political appointments. Rule of law requires inter alia, accessible courts for the resolution of disputes as well as law that adequately protects human rights. Problems with the accessibility of courts can impinge on the rule of law therefore.
9. Those problems can arise because of a lack of concrete supports for the judiciary. There can be inadequate resources because there are inadequate numbers of judges, inadequate court support staff, inadequate physical infrastructure of buildings and inadequate IT and other technical support. There can be inadequate training and supports to deal with increasingly complex cases and legal issues. All those factors contribute to less than perfect justice which can affect the rule of law in a myriad of ways. Delays in dealing with cases can result in inadequate protection of fundamental rights, increasing pressures in terms of workload may lead to errors by even the most conscientious of judges and the more the justice system is not seen to be working the more public confidence is undermined in the rule of law itself. Even when broadly supported by functional and institutional independence, judges can have pressures placed upon them by the extreme nature of the case at hand, by the expectations of colleagues and, increasingly, by public criticism in both mainstream media<sup>39</sup> or on social media.<sup>40</sup>

(34) For an interesting discussion on how the concept of “Rechtsstaat” in the German language version of the Treaty may not have been a synonym of “rule of law” as understood in the United Kingdom, see Van Geven “*Scandals, Political Accountability and the Rule of Law, Counting Heads?*” in Mads Andenas and Duncan Fairgrieve, (eds), *Tom Bingham and the Transformation of the Law, A Liber Amicorum* (Oxford University Press, 2009).

(35) Article 19 TEU.

(36) (*Case C-64/16*), EU:C:2018:117.

(37) *ibid* at para. 32.

(38) *ibid* at para. 36.

(39) An example is the “Enemies of the People” headline in the UK Daily Mail, showing the pictures of the three “out of touch judges who defied 17.4m Brexit voters and could trigger constitutional crisis”. The wider effect on the rule of law at a functional level was highlighted by the initial inaction of the UK Lord Chancellor (the political Minister responsible for the judiciary) to respond to these headlines.

(40) Of course, criticism of judgments is an entirely legitimate exercise of free speech. It is where that crosses into highly dangerous rhetoric aimed personally at a judge instead of at the reasoning of the judge, that a risk to the rule of law emerges. This is particularly so where public representatives endorse or amplify those damaging personal criticisms.

## Ireland and the Rule of Law

10. It is not possible for me to address how in each country the application of national law and the national constitution may be affected by a crisis in the application of the rule of law. Each of our countries has its own tale to tell and indeed each country can point to stages in its history where the rule of law has not been observed; flagrantly, egregiously and infamously broken in certain cases.
11. Coming from a country with reasonably good scores on perception of independence in the 2021 EU Justice Scoreboard<sup>41</sup> and on the ENCJ Report on Independence, Accountability and Quality of the Judiciary, I can only report that at a level of institutional independence, the Irish judiciary, does reasonably well. We have constitutional protections which secure our independence at a functional level and also that leaves to the judiciary the decision as to whether laws that have been passed are in compliance with the Constitution. An excellent judicial summary is contained in the decision of *State (Burke) v Lennon and Attorney General*<sup>42</sup> where Gavan Duffy J. in the High Court gave a wonderful exposition of what we would now term the rule of law when he described the 1937 Constitution. Paraphrasing him does not do justice to the lucid manner in which he set out how the architects of the Constitutions had sought to protect fundamental rights.<sup>43</sup> These included characterising the State as democratic, enshrining a tri-partite separation of powers, prohibiting laws from being enacted which were repugnant to the Constitution and conferring jurisdiction to the High Court (and on appeal the Supreme Court) to declare such law invalid, to provide for justice to be administered in public courts established by law, to provide for trial in due course of law and only permit deprivation of liberty in accordance with law. He also mentioned how the legislature or the executive branch of government could not disregard the Constitution save in any emergency short of war or armed rebellion (but even then there were rules as to when and how that could be invoked). Specifically dealing with the issue before him he said that there was no express provision permitting the Government to intern people without trial.
12. All is not entirely rosy in the Irish rule of law garden however. A constitutional amendment, voted in by a large majority of the voters in 2011, removes the prohibition against reduction of judicial remuneration. This was passed at a time of huge austerity in Ireland. The Constitution now provides that judges' remuneration can be reduced where reductions are made to the remuneration of "persons belonging to the classes of persons whose remuneration is paid out of public money and such law states that those reductions are in the public interest."<sup>44</sup> There is no independent mechanism for fixing judicial pay. Mr. Paul Gallagher, Senior Counsel (and the present Attorney General) critiqued this amendment in an excellent article in 2018.<sup>45</sup> He discusses how the previous provision of the Constitution was widely regarded as conferring a benefit on the judiciary when it was for the purpose of reinforcing independence for the benefit of the public. He records how there was a lack of meaningful discussion in the public discourse about independence of the judiciary and the rule of law. In his view there was no serious attempt by government or political actors or the media to explain to the public the purpose of the long-standing constitutional protection; the protection itself was usually dismissed with a simple assertion that judges are independent. This led to a diminution in the status of the judiciary not least because an important constitutional protection could simply be set aside. He considered it could also have other unintended consequences such as reducing the attractiveness of the judiciary to highly qualified candidates at a time when law was becoming more and more complex. Mr. Gallagher said the fact that such an important constitutional protection could be swept aside because of perceived public demand without considerable and considered justification also affected the rule of law because it made other constitutional protections vulnerable to populist demands.

(41) On other areas such as efficiency of justice and case loads, Ireland does less well or simply does not have the data for proper analysis.

(42) [1940] IR 136.

(43) *ibid*, page 144 *et seq*.

(44) Article 35.3.3°.

(45) Paul Gallagher, "Challenges to the Rule of Law in 21st Century Ireland" [2018] 41(1) Dublin University Law Journal 1-31. Mr. Gallagher also addressed the risk to the rule of law where the role of the judiciary in the area of judicial appointments was at risk of being diminished. The proposed amendments to the appointments process have now been significantly amended but no legislation has been finalised.

13. In my view, this example of a constitutional referendum demonstrates that it is extremely difficult to connect with the public about how the rule of law is important to each member of society. How do you communicate that what appears a privilege for a small group is actually of fundamental importance to individual rights? I think that is a challenge that must be addressed. Independence of the judiciary is of systemic importance in any democracy and the judiciary must work at communicating that its importance is external to the interests of any individual judge. We can reiterate it when appropriate in our judgments, but it may be also necessary for senior judicial figures to communicate directly with government or occasionally with the public.
14. This brings me to another challenge in Ireland to the rule of law. We simply do not have enough judges. We have, it is fair to say, increased the number of judges over the last decade or so. In 2013 we had another constitutional referendum to establish the Court of Appeal as our Supreme Court was simply swamped with appeals. The Court was established in October 2014 with 10 judges in total and that was increased to 16 judges in 2019.<sup>46</sup> There have been increases in the number of judges in the High Court, but the President of that Court has said publicly the numbers are inadequate.<sup>47</sup> So too have other Court Presidents. The District Court judges have communicated their message by cooperating with a journalist writing an article in The Irish Times newspaper entitled “Inside Ireland’s District Courts”.<sup>48</sup> The journalist recorded interviews with a number of judges of the District Court about all aspects of work including the number of cases dealt with and the pressures of trying to hear and decide so many cases. The District Court deal with the vast majority of cases which come to the Irish Courts and therefore for public this is the court they are most likely to encounter.

## The importance of the Judge as an independent actor

15. Many of us operate in jurisdictions where the judiciary have the requisite functional or institutional independence. Notwithstanding that, I think it is important to recognise that each individual judge plays a vital role in the rule of law. Every day we make decisions in which we are being asked to rule on compliance with the law by State actors, be they the government, ministers, lower tribunals or courts, police officers and officials of all types. Sometimes we will hold against the State and sometimes with the State. We resolve disputes between neighbours, between employers and employees and between private citizens whose interactions have somehow lead them into confrontation. We decide on and vindicate rights by our presence on the bench.
16. That we are seen to be upholding the rule of law may not be self-executing. What we perceive as self-evident may not always be so to the public whose interests we serve. It is important that in our judgments, and indeed our wider actions, to understand that what we do and say may lead to perceptions that the judiciary are not independent. We are bound by our own versions of the Bangalore Principles of Judicial Conduct to behave with integrity and propriety both in carrying out our duties and in our personal lives. The Preamble to those Principles recite that they are complementary to the UN Principles on the Independence of the Judiciary. Many of the principles reflect the importance of judicial independence and its close relative which is public confidence in the judiciary. Therefore, the language we use in judgments and how we conduct ourselves both on and off the bench, can affect how the public view our independence which in turn can have a destabilising effect on the rule of law. We willingly take on those duties when we become judges and we must promote the independence of the judiciary as individuals. I am mindful here that individual responsibility has its limits; for example, it cannot be the fault of an individual judge if pressure of work prohibits the performance of judicial

---

(46) There is an extra ordinary judge at present because of the part secondment of one judge to The Law Reform Commission.

(47) For example, Dublin Solicitors Bar Association, The Parchment “The Pandemic President” [2021] (88), President Mary Irvine is recorded as saying she was speechless when she heard that 5 new judges were to be appointed because “to make a real difference we need 17.”

(48) 22<sup>nd</sup> January 2022. Unfortunately, this article is only available behind a paywall.

duties with the speed which the public may like. Communicating the reason for any delay may be an important part of ensuring that appropriate attention is directed towards the root cause of problems in the courts.

17. Particular difficulties may arise where emergency powers are being challenged before courts. These can be difficult factually and legally because of the safety or security risks involved and also because of derogation provisions which provide for certain exemptions from “ordinary laws”. Great care and scrutiny are necessary to ensure that the rule of law is upheld.

## An early Irish example of extreme pressure on a judge

18. The photograph I am using was taken in 1922 and I have chosen it to demonstrate an example of extreme pressure on a judge where the life of a party to proceedings was at stake. We can all hope that we never find ourselves in these circumstances, but I think there are still some lessons to be learned.
19. The year 1922, exactly one hundred years ago, in Ireland was a particularly difficult and dangerous time. A War of Independence against the United Kingdom had been fought and at the end of 1921 an Irish delegation had entered into a Treaty with the UK Government which was to formalise the partition of the island of Ireland. Division over the Treaty started immediately, but the Dáil, the Irish parliament, voted in favour of ratification in January 1922. That was the start of the Civil War, which by its very nature was bitter. The early headquarters of the Anti-Treatyites was the Four Courts building, the centre of the administration of judicial power in Ireland. I will not go into the details save to say that much of the complex of buildings lay in ruins and the courts had to move elsewhere.<sup>49</sup>
20. In November of that year Erskine Childers, a noted author, a veteran of the struggle for independence and a member of the Irish Treaty delegation to London in 1921, was arrested for being in possession, without authority, of an automatic pistol.<sup>50</sup> He was sentenced to death for this offence by a military tribunal of the Irish Provisional Government. His application for release under habeas corpus was made on the basis that there was no “law” giving a legal basis for the Military Tribunal as it had only been passed by a Resolution of the Dáil; this did not amount to legislation as it was not an Act of Parliament. The application was made to a judge, Sir Charles O’Connor MR. This judge had previously granted habeas corpus to a man arrested by British forces on the same type of charge as Childers where arguments of a similar nature were made.<sup>51</sup> The judge in the earlier case rejected the British forces argument that the law that had been passed by the Westminster parliament in 1920 called the Restoration of Order in Ireland Act, to “quell” the war of independence meant that in a state of war there was no limitation of the prerogative of the Crown to set up military tribunals as it saw fit and without being subject to other legal requirements.
21. O’Connor MR gave his judgment after hearing 4 days of argument in a building which was surrounded by troops of the Irish Provisional Government to protect against an attack by Anti-Treatyites, something to which he alluded in the judgment. He gave his judgment *ex tempore*, meaning he did not reserve it for later consideration. His deep personal distress at what was happening in the country was evident in his judgment. A flavour of his judgment is apparent in the following excerpts:

*“I am sitting here in this temporary makeshift for a Court of Justice. Why? Because one of the noblest buildings in this country, which was erected for the accommodation of the King’s Courts and was the home of justice for more than a hundred years, is now a mass of crumbling ruins, the work of revolutionaries, who proclaim themselves the soldiers of an Irish Republic”*

(49) What constituted the courts was disputed in that era. Republican courts (Dáil Courts) had been set up and operated during the War of Independence but the Provisional Government chose to continue with the existing court structures. See Bláthna Ruane, “The Challenges of Creating a New Judiciary 1922-1924” in Eoin Carolan (ed), *Judicial Power in Ireland* (Institute of Public Administration, 2018).

(50) An irony of the tragedy that unfolded was that the pistol had been given to him by his former comrade Michael Collins, who was now one of the leaders of the Free State Army.

(51) *Egan v. Macready and Ors.* [1921] 1 IR 265.

*“This is the condition of affairs which confronts me when I come to deal with this case, and I have first to ask myself is this state of things to be allowed to continue, and on whom devolves the duty of re-establishing peace and order, and saving the country from utter destruction? Plainly this duty falls upon the Government—whatever that Government may be—whether it be merely provisional or finally constituted. Whatever character it bears, the salvation of the country depends upon it.”*

22. There was only one way the case was going:

*“For the purpose of suppressing this rebellion and restoring order, the Provisional Government has been obliged to employ its army. Force must be met by force, and violence by violence; and once an army is set in motion—once a state of war has been established—the rough and ready methods of warfare must be adopted, and take the place of the precise and orderly methods of civil government. The ordinary law is silenced by the sound of the pistol-shot and the bomb. Inter arma silent leges is a maxim two thousand years old, and has come down to us from the Romans. Suprema lex, salus populi must be the guiding principle when the civil law has failed. Force then becomes the only remedy, and those to whom the task is committed must be the sole judges how it should be exercised.”*

23. These are fairly shocking conclusions to modern eyes as they strike at the very heart of the rule of law. O’Connor MR also refused a stay pending appeal even in circumstances where the very issue was to be heard the following week in respect of other applications. Erskine Childers was executed the following day before an appeal could be heard. His son later became President of Ireland.

24. What I find interesting about the case is that what appears to be driving him does not seem to have been the fear of retaliation on him personally. Instead, he was heavily influenced, it would appear, by the extent of the destruction and devastation that the civil war had brought to Ireland. An interesting take on his dilemma comes from my judicial colleague Mr. Justice Gerard Hogan of the Irish Supreme Court (formerly Advocate General of the European Court of Justice). Judge Hogan notes that O’Connor’s sudden resignation from the Irish Supreme Court in 1925 was brought about by some sort of mental breakdown on his part and that of his wife “as a result of what he had come to believe was his failure of nerve in the Childers case.”<sup>52</sup> In the article, Judge Hogan poses the question that perhaps O’Connor was haunted by his pragmatic response. He posits that if the point raised by Childers was correct, a key part of the Provisional Government’s armoury in the course of the civil war would have been lost, leading potentially to the use of extrajudicial methods by Government forces to counter the Anti-Treaty forces’ lack of compunction in these matters and this could have led to the strangling of democratic institutions at birth.

## The pressure of decision making in extreme circumstances

25. Plainly that was a huge dilemma but surely trampling on the rule of law in the cause of the rule of law ought not to be countenanced by a judge, no matter how tempting it may be in the moment? We are all aware of the difference in protection of rights some of which are absolute and some of which, in certain well defined circumstances, may be interfered with. The Latin maxim “Fiat Justitia, ruat caelum” would appear apt<sup>53</sup> but even that phrase may be reductive of the complexities that judges may face in answering the questions posed to them. On one level the “ticking time bomb” and use of torture has a very simple answer; torture is prohibited. As the case of *Gäfgen v. Germany*<sup>54</sup> demonstrates even when it is accepted that torture is absolutely prohibited, how that prohibition may affect issues at a trial may not be quite as straightforward. Are there differences between threat of torture (amounting to inhuman and degrading treatment) and torture itself? Is a court process to be viewed as a whole and thus tainted as being the “fruit of” the prohibited conduct?

(52) Gerard Hogan, ‘Should judges be neutral?’ [2021] 72(1) Northern Ireland Legal Quarterly 63-90.

(53) Let justice be done though the heavens may fall.

(54) App. No. 22978/05, Grand Chamber, 1 June 2010. See also *A & Others v. Secretary of State for the Home Department (No. 2)* [2005] 3 WLR 1249, [2006] AC 221 on dealing with a risk that evidence might have been obtained through torture.

26. On the other hand, I think the Childers judgement is not so much an example of a judge teasing out the answer to a difficult question but instead gives an example of a judge losing perspective in that moment. It appears he was an otherwise fair and apparently good judge. The language he uses in his judgment demonstrates how those external pressures of the destruction of the country and even the building he had worked from were dominating his approach. It was not his personal security or safety that was at issue. I think it demonstrates how external societal pressures impact on the decisions of an individual judge's decision even where no direct repercussions are anticipated by that judge. In other words, our commitment to the rule of law, which is a given, may find itself under pressure from our own view of what the best outcome is for society as a whole. At some stage, though not in as extreme a situation as O'Connor MR, we may all find ourselves struggling with making the correct decision according to the rule of law.
27. I came across an interesting article in The Irish Times newspaper last month reporting on a judge dismissing criminal public order charges which had their origin in a traffic checkpoint set up by the Irish police, An Garda Síochána.<sup>55</sup>

*A case against a man who was stopped at a Garda (police) public health checkpoint had his case dismissed as there was no legislation in place at the time permitting such "public health checkpoints".*

## Judge dismisses case against man stopped at Covid checkpoint at start of pandemic

Garda had no statutory power to operate Covid checkpoints at the time, defence argued

© Thu, Jan 20, 2022, 17:04 | Updated: Thu, Jan 20, 2022, 17:05

28. The article records the solicitor for the defendant saying publicly afterwards: "This Covid pandemic is exceptional but the rule of law is not. Gardaí must adhere to the law."
29. Whether the decision of the District Court judge was right or wrong is not what I am concerned with here. What the case demonstrates is that even in emergency situations the rule of law must be taken seriously by the legal profession and the judiciary. The fact that this is a "rule of law" situation will be reflected in public discourse and it is important that judges are attuned to that. This is not a statement that judges must rule in a particular way; regardless of how they rule in a given case, it is the reason for the ruling and the language through which that ruling is communicated which is of the utmost importance.
30. No matter what circumstances we operate in therefore, judicial independence and adherence to the rule of law must be at the forefront of our approach to our daily tasks.

---

(55) Conor Gallagher, "Judge dismisses case against man stopped at Covid checkpoint at start of pandemic" (*The Irish Times*, 20 January 2022) <https://www.irishtimes.com/news/crime-and-law/judge-dismisses-case-against-man-stopped-at-covid-checkpoint-at-start-of-pandemic-1.4781691>.



## Use of Cross-Border Judicial Co-operation Instruments.

### General comments

31. Under Article 67 (1) Treaty on the Functioning of the European Union (“TFEU”): “The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States”. Article 67(4) states “The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters”. This Article can now be viewed as the foundation for the regulatory regimes which include cross-border judicial co-operation in criminal and civil matters.
32. The issues covered by these matters can often be politically sensitive, (e.g. immigration and crime) and the legal provisions are particularly complex.<sup>56</sup> A judge must have a knowledge and understanding of the principles underlying judicial co-operation as well as a more detailed knowledge of the particular legal provisions under which she is being asked to act.

### The specific example of the European arrest warrant procedure

33. Prior to the Lisbon Treaty the area of freedom, security and justice had been an integral part of the three pillar Treaty architecture. It was under the TEU that the Framework Decision on the European arrest warrant and surrender procedures between Member States was agreed. I will concentrate on this aspect of judicial co-operation as it has produced many judicial decisions calling into question how a crisis in the rule of law in one Member State can affect cross-border judicial co-operation.
34. That Framework Decision was “the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the “cornerstone” of judicial cooperation.”<sup>57</sup> There was to be a system of free movement of judicial decisions in criminal matters.
35. Cross-border judicial cooperation measures raise all sorts of issues in respect of the rule of law. Some issues arise because of national law and some because of a situation in another Member State.
36. Framework Decisions, of course, require to be implemented by national law. That of course can raise particularly difficult issues of rule of law, on the one hand there is an obligation to apply the principle of conforming interpretation to national law but a judge cannot go beyond an interpretation that the national law will actually bear because to do so would be to act *contra legem*, literally “against law.”<sup>58</sup> Directives must also be implemented by national law (or can be given direct effect in limited circumstances). An assessment of the extent to which national law permits the actions apparently required by EU law is of particular importance in these areas of judicial cooperation because they involve, usually, aspects of fundamental rights. Each judge must ask the fundamental question, is what I am doing permitted by law in the jurisdiction of which I am a judge?
37. All EU judicial cooperation is based upon the principle of mutual trust between Member States that the common values on which the European Union is founded (as stated in Article 2 TEU), will be recognised and therefore that the EU law that implements them will be respected.<sup>59</sup> We must presume, save in exceptional circumstances, that all other Member States will comply with their obligations.

(56) Occasionally the complexity of a particular case can be increased by unusual or inadequate translations of the documents underpinning the particular cross-border request. Often those translations are outside the direct control of the judiciary.

(57) 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision, at (6).

(58) *Pupino (Case C-105/03)*, EU:C:2005:386.

(59) See para. 35 of *LM (Case C-216/18 PPU)*, EU:C:2018:586).



38. There is by this stage a well-worn path to the door of the CJEU raising issues which in one way or another question if Member States have complied with fundamental obligations under the Treaty. No one can be surrendered to face inhuman and degrading treatment in another Member State and the CJEU has laid down, starting with the decision in *Aranyosi and Căldăraru*<sup>60</sup> the procedures to be followed prior to a judge refusing surrender on such a ground. Moving closer to the heart of the rule of law, the CJEU has over a series of cases, asserted with increasing vigour, the requirement that “a judicial authority” must be independent of the executive in order to be considered a judicial authority for the purpose of the Framework Decision.<sup>61</sup> These cases concerned police and prosecutors as judicial authorities, the former being held absolutely not to be a judicial authority, whereas the latter may be dependent on their particular institutional and functional independence.
39. Then at the very centre of the rule of law are those cases where the independence of the judiciary was challenged by a party to the case. It is not necessary to recite in any detail the finding in those cases but, as is well known, the CJEU set out in *Minister for Justice and Equality v LM*,<sup>62</sup> which concerned the evolving situation in Poland, that:

*“where the executing judicial authority, called upon to decide whether a person in respect of whom a European arrest warrant has been issued for the purposes of conducting a criminal prosecution is to be surrendered, has material, such as that set out in a reasoned proposal of the European Commission adopted pursuant to Article 7(1) TEU, indicating that there is a real risk of breach of the fundamental right to a fair trial guaranteed by the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union, on account of systemic or generalised deficiencies so far as concerns the independence of the issuing Member State’s judiciary, that authority must determine, specifically and precisely, whether, having regard to his personal situation, as well as to the nature of the offence for which he is being prosecuted and the factual context that form the basis of the European arrest warrant, and in the light of the information provided by the issuing Member State pursuant to Article 15(2) of Framework Decision 2002/584, as amended, there are substantial grounds for believing that that person will run such a risk if he is surrendered to that State.”*



### **The direct application of EU law including the dialog between the national and European courts.**

#### **EAW rulings and difficulties at the level of implementation**

40. I think it is a fair comment to say that national judges have not always found the distinctions between the two-step analysis required of them by the CJEU to be simple in concept or in practice. In the Supreme Court in *Minister for Justice and Equality v. Celmer*,<sup>63</sup> O’Donnell J. stated:

*“It should be said that the test posited in the judgment of the C.J.E.U. is not one that is easy to apply. Normally, it might be said that where systemic deficiencies of any kind are identified, it becomes unnecessary to identify the possibility of those deficiencies taking effect in an individual case. This is particularly so where the value concerns one that is essential to the functioning of the system of mutual trust. Indeed, it was this difficulty that led the trial judge to make the reference to the C.J.E.U. in the first place. It may also be questioned, at least in the abstract, whether once such systemic deficiencies have been found there is then room or need for further inquiry. It is not, however, for the national court to interrogate the logic of the reasoning of the C.J.E.U..”*

(60) Case C-404/15 and C-659/15 PPU, EU:C:2016:198.

(61) See Aileen Donnelly and Mary Hastings, ‘Mutual Recognition of Public Prosecutors’ Decisions: A Critical Analysis in Light of the European Arrest Warrant’ in Gavin Barrett, Jean-Philippe Rageade, Diana Wallis and Heinz Weil (eds), *The Future of Legal Europe: Will We Trust in It?* (Springer, 2021) for case law concerning this topic, see *J.R. and Y.C. (Joined Cases C-566/19 PPU and C-626/19 PPU)*, EU:C:2019:1077; *LM (Case C- 216/18)*, EU:C:2018:117; *Poltorak (Case C-452/16 PPU)*, EU:C:2016:858; *Kovalkovas (Case C-477/16 PPU)*, EU:C:2016:861; *Minister for Justice and Equality v. P.F. (Case C-509/18)* EU:C:2019:457; *Minister for Justice and Equality v. O.G. and P.I. (Joined Cases C-508/18 and C-82/19 PPU)*; *N.J. (Case C-489/19 PPU)*, EU:C:2019:849.

(62) *LM (Case C-216/18 PPU)*, EU:C:2018:586; *L and P (Joined Cases C-354/20 PPU and C-412/20 PPU)*, EU:C:2020:1033.

(63) [2019] IESC 80; [2020] ILMR 121. This was the appeal from the High Court decision to extradite the person whose extradition was at issue in the *Minister for Justice and Equality v LM* reference.

41. Different legal ways of challenging surrender to Poland based upon the ongoing crisis have brought further referrals asking the CJEU to look at matters from different angles. The CJEU held, in two referrals from the Netherlands judiciary,<sup>64</sup> that where there is evidence of generalised or systemic deficiencies concerning the independence of the judiciary in the issuing State, the executing authority cannot deny the status of “issuing judicial authority” to the court in the issuing State and the executing judicial authority cannot presume that there are substantial grounds for believing that the person will, if surrendered, run a real risk of a breach of their fundamental right to a fair trial, without carrying out a specific and precise verification which takes account of, inter alia, their personal situation, the nature of the offence and the factual context in which the warrant was issued. The CJEU specifically said that the existence of the deficiencies does not necessarily affect every decision that the courts of that Member State may be led to adopt in each particular case.
42. Notwithstanding that decision of the CJEU, the Supreme Court of Ireland has again referred questions to the Court of Justice arising out of the changing situation in Poland.<sup>65</sup> What is in issue in that case is the right to an effective remedy as required by Article 47 of the Charter on Fundamental Rights of the European Union (“the Charter”) and Articles 6 and 13 of the European Convention on Human Rights (“the ECHR”). Reliance was placed by the appellants on the decision of the European Court of Human Rights (“ECtHR”) in the case of *Ástráðsson v. Iceland*;<sup>66</sup> that decision had been delivered days before the decision in *L and P* and obviously therefore not considered by the CJEU.
43. The Irish Supreme Court was concerned that in the case of Poland, based upon the way in which judges were allocated, the appellants could not say which judges would hear their cases. They could only rely on the systemic issues as to appointment of judges in Poland and not on a specific complaint as to the validity of the appointment of the specific judges likely to hear their cases. The Supreme Court was clear that the situation in Poland was even more troubling than it had been at the time of *The Minister for Justice and Equality v. LM* decision and in particular there were significant problems with the appointment of judges.
44. The Supreme Court referred the following questions to the Court of Justice:
- (1) Is it appropriate to apply the test set out in LM and affirmed in L and P where there is a real risk that the appellants will stand trial before courts which are not established by law?*
- (2) Is it appropriate to apply the test set out in LM and affirmed in L and P where a person seeking to challenge a request under an EAW cannot by reason of the fact that it is not possible at that point in time to establish the composition of the courts before which they will be tried by reason of the manner in which cases are randomly allocated?*
- (3) Does the absence of an effective remedy to challenge the validity of the appointment of judges in Poland, in circumstances where it is apparent that the appellants cannot at this point in time establish that the courts before which they will be tried will be composed of judges not validly appointed, amount to a breach of the essence of the right to a fair trial requiring the executing state to refuse the surrender of the appellants?”*

<sup>(64)</sup> *L and P (Joined Cases C-354/20 PPU and C-412/20 PPU)*, EU:C:2020:1033.

<sup>(65)</sup> *Orłowski v. Minister for Justice and Equality* [2021] IESC 46. Judgment delivered on 23rd July 2021.

<sup>(66)</sup> (App. No. 26374/18) judgment of 1 December, 2020.

45. There have been cases being taken against Poland to the ECtHR which concerned aspects of the reorganisation of the Polish judicial system.<sup>67</sup> Earlier this month the ECtHR gave a judgment in the case of *Advance Pharma sp. z o.o v. Poland*<sup>68</sup> in which the judges held unanimously that there had been a violation of Article 6.1 ECHR because the Civil Chamber of the Supreme Court, which had decided on its case had not been a “tribunal established by law”. This is a very detailed judgment and it recites in detail the history of the changes made since 2017. It referred to materials and assessments from international organisations and tribunals including the judgments of the Court of Justice. The Court applied the tests it had set down in the *Ástráðsson v. Iceland* case. In particular, the Court held that there was a very close interrelationship between the right to a Tribunal established by law and the guarantees of independence and impartiality. The Court held that there was a manifest violation of domestic law. It used very strong words in that case to condemn in particular, the executive and legislative interference in judicial proceedings, stating that those institutions had demonstrated “an attitude which can only be described as one of utter disregard for the authority, independence and role of the judiciary.”<sup>69</sup> In other words, mere constitutional safeguards as to the independence and impartiality of the judiciary do not suffice; “[t]hey must be effectively incorporated into everyday administration attitudes and practices”.<sup>70</sup>
46. Undoubtedly these are questions which raise grave issues concerning the rule of law; what is the place of fundamental rights such as the right to an effective remedy within a system that has systemic deficiencies? No expedited hearing was granted in that case. In the meantime, questions raising similar issues were again raised by the Dutch Court. The case of *X & Y v. Openbaar Ministerie*<sup>71</sup> was heard on the 16 November 2021 and Advocate General Rantos gave his opinion on the 16 December 2021. The decision of the Constitutional Court in Poland came out on the 7 October 2021 after the reference. That decision calls into question the application of fundamental EU principles regarding primacy of EU law and the role of the CJEU in the process of interpretation and application of the Treaty provisions. Advocate General Rantos said that the Constitutional Court judgment was a matter that had to be taken into account by an executing court.
47. At para. 69 of his opinion AG Rantos raises the spectre of “impunity for many criminal offences” thereby infringing the rights of victims and disavowing the professional practice of the judges in Poland who endeavor to utilize the mechanism of judicial cooperation provided for by EU law. This, he posits, would be the end result of a blanket refusal to surrender requested persons to Poland. In my view this is highlighting two aspects of the rule of law crisis in Poland that, to different degrees and extents, are implicit and occasionally explicit throughout the rule of law case law regarding the EAW system. These aspects are:
- 1) The vista of impunity from criminal prosecution by those sought for trial in Poland with all the attendant risks to the rights of others and to public confidence in the rule of law in Europe.
  - 2) How to respect the role of individual judges within the Polish system who strive to implement EU law despite the chaos around them.

---

(67) *Reczkowicz v. Poland* (App. No. 43447/19), judgment of 22nd July 2021 and *Dolińska-Ficek and Ozimek v. Poland* (App. No's. 49868/19 and 57511/19) judgment of 8th November 2021.

(68) (App. No. 1469/20) judgment of 3 February, 2022.

(69) n.37) at para. 333.

(70) n.37) at para. 332.

(71) Joined Cases C-562/21 PPU and C-563/21.

48. On one level the possibility of impunity from criminal offences may seem to be an external factor putting pressure on judges not to stop surrenders. If so, how does that square with the duty to apply the rule of law? On the other hand, however, the recitals to the Framework Decision can be said to “baked in” to the entire mechanism of EAW. Those Recitals refer to an aim of the Framework Decision as being to remove the complexity and potential for delay inherent in extradition matters and to replace it by a free movement of judicial decisions in criminal matters. Of course, what is also clear is that the Framework Decision is expressly stated to respect fundamental rights.
49. In relation to the second aspect, there may clearly come a time when even individual judges cannot be said to rescue a situation where independence has been upended and the position of individual judges on tribunals can no longer be challenged. I would comment, however, that the *Minister for Justice & Equality v. LM* line of case law does recognise the individual judge as an important actor even where there are systemic deficiencies concerning the independence of the judiciary.
50. Advocate General Rantos went on to express the view, (para. 72) that the Constitutional Court ruling could play a role, not in the absolute but in the analysis by the requested court of the concrete risks for a requested person, once surrendered of a breach of a right to a fair trial and the absence of a remedy by which to challenge the irregular appointment of judges. At para. 73 he does not rule out that executing courts may be required to refuse to execute EAWs in spite of the regrettable consequences of the suspension for the objective, specific to the EAW of combating the impunity of a requested person in one Member State for offences allegedly committed in another. The decision must be made in light of the criteria and “having regard to the developments in the situation relating to the judicial system of the issuing member state” as to whether the individual will run the risk of executive interference and an inability to have an effective judicial remedy. I think that last matter stresses how this is a dynamic situation and that there is a need to keep up to date on developments.
51. Obviously, as judges of Member States of the EU, we await the judgment of the Court with a great deal of interest. Even if the views of the Advocate General are followed, the implication of this ruling on cross-border co-operation across the wide spectrum remains to be seen.
52. Is it a risk to the uniform application of the rule of law throughout Member States to ask individual courts to rule on the concrete risk of an unfair trial to an individual based upon what appear to be issues that, at first glance, apply across the judicial spectrum in Poland? Is this one of those cases where the Court of Justice must give full guidance on the interpretation of European law that will leave no doubt as to how these measures, although general in nature, affect the concrete risk to the rights of all individuals requested by Poland? Apart from the possibility of inconsistent application of European law, there is also another risk to the rule of law if there is any lack of clarity in the answer. Individual judges may struggle to see how the rule of law is complied with if they are being asked to apply mutual trust to a situation where the systemic and generalised defects run to the very core of issues such as whether a tribunal had been established by law, where judicial independence is at stake and where the obligations of EU law including the writ of the CJEU have been ruled not to have primacy in Poland. It raises questions as to how it can be compatible with the rule of law to return a person to a system in which their liberty may be decided by a body which itself may not be in accordance with the rule of law particularly because there is no way to challenge the composition of that tribunal. Any decision that places a duty on judges to continue to execute judicial decisions on the basis that the principles of mutual trust and recognition in the light of all these other judicial findings will have to explain carefully and cogently the rationale behind that duty.

## Primacy of EU law

53. Ireland has not been beset by a conflict over supremacy between EU law and the Constitution. This is because of the way in which our entry into the EU was facilitated by an amendment to our Constitution.<sup>72</sup> That is not to say that the legal relationship between the two has been easy to decipher and apply. For example, it has necessitated a Constitutional referendum when amendments to the Treaties are proposed. This is necessary if acts done in furtherance of the amended Treaties are to be accorded the same protection from invalidation under the Constitution.
54. As we know, courts in some Member States have questioned whether EU law has supremacy over national constitutions. Naturally, weighty legal issues arise for determination where on its face there appears to be a fundamental conflict between a national Constitution and EU law. How those are worked out at a judicial level in Member States is not for me to comment upon. What I can comment on is that a collision between two legal systems with each claiming supremacy does not in an objective sense paint an ideal picture of the rule of law. The answer to resolving the dilemma, if there is a true dilemma to resolve, may lie outside the courts, but in the meantime, every member of the judiciary will have to tread cautiously in trying to resolve each individual issue as it arises before them in an individual case.
55. Similar issues arise in terms of the dialogue between the CJEU<sup>73</sup> and national courts. I think that there is a common theme in the references made to the CJEU after the *Minister for Justice and Equality v. LM* decision which is that national courts are seeking to understand how the rule of law crisis in Poland is to be assessed at an operational level in cross-border judicial co-operation. Perhaps the *X and Y v. Openbaar Ministerie* judgment will put to rest any of these questions.
56. Judges will be well aware that a decision which has the effect of calling a halt to extradition to Poland from other Member States (and possibly from Poland to other Member States) will be momentous. It will draw a huge reaction from all sections of society across the Union with undoubtedly many media and other sources decrying that there is now “impunity for criminals”. Individual judges called on to implement the rule of law in individual cases may face external pressures.

## ..... Conclusion

57. The courts are rightly said to be a cornerstone of the rule of law. On a daily basis, thousands of individual judges across Europe make decisions that reflect the operation of the rule of law in their jurisdiction. Each judge has a duty, no matter the jurisdiction in which they operate or the level of court in which they appear, to ensure that their decisions respect and reflect the independence that is given to the judiciary as an integral part of the rule of law. Within a judicial system stresses on the independence of the judiciary can arise from lack of resources, both in terms of personnel and infrastructure and from a diminution of their status. These factors can in turn contribute to the denial of access to the courts.
58. Judges are important individual actors in the rule of law. Not merely because of the decisions they take but how they take those decisions and how they explain them. Even conduct off the bench may have important consequences for the perception of judicial independence which itself undermines confidence in the rule of law. Judges may come under pressure from external events or even from colleagues. Judges cannot lose perspective because external events or consequences may be extreme.

(72) As the High Court (Carroll J) said in *Tate v. Minister for Social Welfare* [1995] 1 IR 418: “This section [s. 2 of the European Communities Act, 1972] is the conduit pipe through which community law became part of domestic law. The Constitution was amended to enable accession to the Community, the European Communities Act, 1972, was passed and the Treaty of Accession was agreed, and thereby the whole body of Community law, past, present and future was incorporated into domestic law. But community law did not thereby become constitutional law or statute law. It is still community law governed by community law but with domestic effect. And it is in that form that it is part of domestic law.”

(73) And of course between the European Court of Human Rights and courts of the State parties to the Convention.

59. The changes to the system of the administration of justice in Poland has precipitated a crisis in the courts of that country. That crisis has resulted in a huge amount of litigation before the Courts in Luxembourg and Strasbourg in which the meaning of European values of democracy and the rule of law have been dissected, analysed and applied. Each ruling appears to build on the earlier rulings. Those rulings raise implicitly or explicitly the spectre of impunity from criminal offences and that affect on the rule of law as well as the vital role in upholding the rule of law that individual judges may play even in a system which may have systemic deficiencies in the independence of the judiciary.
60. The ruling now awaited from the Court of Justice (X and Y v. Openbaar Ministerie) could have a very real effect on how the rule of law is to be operated at the coal face of cross-border judicial co-operation. Whatever the decision of the Court of Justice will be, judges across Europe will hope that it gives a clear indication of just how their own commitment to the rule of law as a value is to be respected when they are called upon to uphold both mutual trust and fundamental rights when the rule of law in another Member State is in such a crisis that the independence of its judiciary has called into question whether the courts can be said to be tribunals established by law.

## José de SOUSA LAMEIRA, Judge and Vice-President of the Superior Council of the Magistracy, Portugal

Bordeaux, 22 février 2022

.....

### 1. Chers Collègues

#### Mesdames et Messieurs

C'est avec un grand honneur et un grand plaisir que je participe à cette importante réunion organisée par la Commission Européenne, dans le cadre du thème de la *Formation Initiale des Professionnels de la Justice*.

La justice se retrouve depuis quelques années au centre d'un débat intense et, étant un visage très visible et symbolique de l'État, ses problèmes affectent et intéressent l'ensemble de la société.

Le recrutement et la formation initiale des futurs juges est un sujet de discussion pertinent non seulement au sein de la magistrature et des universitaires, mais également au sein de la communauté au sens large.

Je pense que personne ne le remet en cause, mais au contraire reconnaît, que le recrutement et la formation des juges sont des questions essentielles pour garantir l'état de droit dans une société démocratique.

.....

### 2. Recrutement, Formation et Indépendance

Discuter de la formation initiale des juges implique de lancer un débat: quel type de juge souhaite-t-on dans l'État démocratique actuel où le Pouvoir Judiciaire représenté par les juges, et par eux seuls, doit être indépendant par rapport aux autres.

Le mode de désignation des juges reflète dans une certaine mesure la conception du juge en tant que titulaire d'un organisme souverain.

Au Portugal, les juges ne sont pas de hauts fonctionnaires de l'administration, comme dans certains pays, mais les titulaires d'un organisme souverain.

La défense de l'indépendance des tribunaux, et par conséquent des juges eux-mêmes, commence par leur recrutement et leur formation.

Comme le mentionnait le Rapport 2020 sur l'État de Droit - Situation dans l'Union Européenne<sup>74</sup> - *"La méthode de nomination des juges est l'un des éléments susceptibles d'avoir une incidence sur l'indépendance de la justice et la perception de l'indépendance par le public"*.

L'indépendance des tribunaux et des juges constitue l'un des piliers de l'État de Droit.

L'indépendance des tribunaux et des juges si elle n'est pas un privilège, est, en effet, une exigence de l'État de Droit. Car c'est un moyen par les citoyens d'avoir la garantie que leurs droits sont exprimés de manière indépendante, équitable et impartiale par des juges qui le sont également.

Personne ne remet en cause le fait que l'indépendance des juges est le garant d'un processus impartial et qu'il n'est pas possible de concevoir une société libre et démocratique, dans laquelle les droits des citoyens seraient respectés, sans une justice indépendante.

---

(74) Communication de la Commission au Parlement Européen, au Conseil, au Comité Économique et Social Européen et au Comité des Régions – COM(2020)580 final; Rapport 2020 sur l'état de droit - La situation de l'état de droit dans l'Union européenne.

L'État de Droit sortira renforcé d'autant plus qu'il disposera d'un système judiciaire indépendant auquel les citoyens accordent de la valeur. Cela s'accomplit avec une justice rapide et efficace, en mesure de dire le droit et de l'appliquer en temps réel, administrée par des juges socialement reconnus et indépendants.

Ce besoin d'indépendance du Pouvoir Judiciaire et des Juges est ressenti par tous comme urgent et est commun à toutes les organisations internationales, cela se reflète par exemple dans plusieurs documents du Conseil Consultatif des Juges Européens<sup>75</sup>.

Pour atteindre cette indépendance, il est fondamental d'avoir une sélection et une formation de qualité, car personne ne remet en cause le fait que plus la formation et la préparation sont bonnes, plus la qualité du travail est élevée<sup>76</sup>.

Il est également important, pour obtenir l'indépendance souhaitée, de déterminer l'entité ou l'organisme qui doit procéder à la sélection et au recrutement des juges.

En ce qui concerne la responsabilité de la sélection et du recrutement, la préférence pour une autorité indépendante du gouvernement et de l'administration, qui serait chargée de contrôler et de superviser les systèmes d'accès et de sélection pour les carrières judiciaires, accepté par tous<sup>77</sup>.

Il convient de noter que non seulement le recrutement mais aussi la promotion dans la carrière doivent échapper au dictats du gouvernement et de l'administration, et suivre des critères objectifs.

Cela a été une exigence des organisations représentatives des juges.

---

(75) Carlos Gómez Ligüerre, in «*Juízes na Europa, formação, seleção, promoção e avaliação*», ed. Fundação Francisco Manuel dos Santos, p. 25, affirme :  
«*Les efforts des Nations Unies sur la garantie de l'indépendance de la justice ont conduit à l'approbation des «Principes de Bangalore sur la déontologie judiciaire», un ensemble de valeurs auxquelles les juges doivent adhérer et dont la réalisation doit être encouragée par les organes nationaux chargés de sélectionner et de diriger le pouvoir judiciaire. Le lien entre l'indépendance et la formation est souligné dans le principe numéro 6*», en indiquant que «6.3 - Le juge prendra des mesures raisonnables pour maintenir et améliorer ses connaissances, ses compétences et ses qualités personnelles nécessaires à une performance adéquate des fonctions judiciaires, en profitant à cette fin de la formation et des autres facilités qui seront mises à la disposition des juges, sous contrôle judiciaire.»

Également, dans le rapport no. 4 (2003) du Conseil Consultatif des Juges Européens (CCJE), cité dans l'ouvrage mentionné :

«3. Une formation élaborée, approfondie et diversifiée des juges sélectionnés à l'issue des études juridiques complètes, est indispensable pour que ceux-ci exercent leur métier de manière compétente.

4. Elle est aussi une garantie de leur indépendance et de leur impartialité, conformément aux exigences de la Convention de sauvegarde des Droits de l'Homme et des Libertés fondamentales.

5. Elle est enfin une condition nécessaire pour que la justice soit respectée et respectable. La confiance des citoyens en la justice sera renforcée si les juges ont des connaissances approfondies et diversifiées qui s'étendent au-delà des domaines de la technique juridique à des domaines de grand intérêt social, s'ils présentent des qualités professionnelles et personnelles et s'ils font preuve de compréhension leur permettant de traiter des affaires et d'être en contact avec toutes les personnes concernées de manière appropriée et ouverte. Une formation est donc indispensable pour que les juges exercent leurs fonctions judiciaires de manière objective, impartiale et avec professionnalisme, puis pour les protéger contre les influences indues.»

De même, la «*Magna Carta des Juges Européens*», du 17/11/2010, du Conseil Consultatif des Juges Européens met en évidence les garanties de l'indépendance judiciaire, le système de sélection et de nomination des juges, en soulignant que :

«(...) Les décisions sur la sélection, la nomination et la carrière doivent être fondées sur des critères objectifs et prises par l'instance chargée de garantir l'indépendance.»

(76) Cela est souligné par le Comité des Ministres du Conseil de l'Europe [Recommandation (94) 12 du Comité des Ministres Aux États Membres sur l'indépendance, l'efficacité et le rôle des juges] dans laquelle la sélection et la carrière des juges doivent être fondées sur le mérite, en tenant compte des qualifications, de l'intégrité, de la compétence et de l'efficacité.

Dans son Rapport n.° 4 de 2003 (page 42 de la *op. cit.*) le Conseil Consultatif des Juges Européens a formulé plusieurs recommandations pour la formation initiale des juges, soulignant son importance, à savoir :

i. Que tous les candidats retenus aux fonctions judiciaires bénéficient ou acquièrent avant d'entrer en fonction des connaissances juridiques étendues dans les domaines du droit substantiel national et international ainsi que de la procédure.

ii. Que les programmes de formation plus spécifiques à l'exercice de la profession de juge soient déterminés par l'établissement en charge de la formation, les formateurs et les juges eux-mêmes.

iii. Que ces programmes théoriques et pratiques ne soient pas limités aux techniques du domaine purement juridique mais comportent également une formation à l'éthique ainsi qu'une ouverture sur d'autres domaines pertinents pour les activités judiciaires, par exemple la gestion des affaires et l'administration des tribunaux, les technologies de l'information, les langues étrangères, les sciences sociales et les modes alternatifs de solution des litiges.

iv. Que la formation soit pluraliste afin de garantir et renforcer l'ouverture d'esprit du juge.

. Qu'en fonction de l'existence et de la durée d'une expérience professionnelle antérieure, la formation ait une durée significative afin d'éviter son caractère purement formel.»

(77) La Commission de Venise, dans son rapport de 16/03/2010, comme le souligne Carlos Gómez Ligüerre (*op. cit.* pag. 44) :

«(...) développe la préférence de la Recommandation R(94)12 pour un conseil judiciaire indépendant chargé, entre autres, de contrôler et de superviser les systèmes d'accès, de sélection et de promotion dans la carrière judiciaire. (...) L'autorité compétente en matière de sélection et de carrière des juges doit être indépendante du gouvernement et de l'administration. (...) La sélection et la promotion selon des méthodes objectives ont fait l'objet d'une pétition de la part des magistrats dans des textes élaborés par des organes représentatifs des juges.»





### 3. Recrutement et Formation en Europe

Comme mentionné ci-dessus, le recrutement et la formation des juges est l'une des questions qui a suscité le plus de débats.

En Europe, on suit deux modèles de recrutement et de formation, appelés modèles bureaucratique et professionnel<sup>78</sup>.

Nous ne nous attarderons pas sur leurs différences et spécificités.

Le Portugal suit le dénommé "modèle bureaucratique", autant avec adaptations, qui est également adopté dans les pays qui lui sont culturellement proches, les pays du sud de l'Europe.

Comme les autres pays qui lui sont proches, au Portugal, le recrutement et la formation sont effectués par un organisme autonome — le Centre d'Études Judiciaires — avec la collaboration du Conseil Supérieur de la Magistrature, l'organisme de gestion et de discipline des juges.

Le recrutement se fait par le biais d'un système de tests.

Malgré certaines voix discordantes, le mode de désignation des juges actuellement en vigueur au Portugal correspond, à mon avis, à la conception que l'on se fait du juge et de ce que l'on attend de lui.

Cela ne signifie pas que le modèle actuel ne peut pas être amélioré et ne doit pas être ajusté. Toutefois le fondement de la structure de ce dernier est établi dans la loi et ses principes ne sont pas remise en cause.

Cependant, il est toujours possible d'améliorer le recrutement et la sélection des futurs juges, notamment en garantissant une évaluation équitable de la qualité des connaissances juridiques et culturelles du candidat, de sa capacité critique, d'argumentation, d'exposition et de sa capacité à appliquer le droit au cas d'espèce.

C'est dans le recrutement et la formation des magistrats que commence la défense de l'indépendance des tribunaux et, par conséquent, des juges eux-mêmes.

Cette indépendance découle d'un mode de nomination capable d'empêcher le fait que les juges (*maximum*, ceux des Hautes Cours) ne soient nommés conformément aux intérêts des autres pouvoirs de l'État.

La formation initiale des futurs juges devrait toujours tenir compte du fait que seule une solide formation juridique, éthique et conforme aux valeurs démocratiques, peut garantir la protection effective des droits de tous ceux qui recourent à la justice, ce qui constitue la véritable pierre angulaire de l'État de Droit.

Nous ne pouvons pas oublier que la manière dont les juges exercent leur fonction est fondamentale pour leur légitimation et donc pour la crédibilité et le prestige des tribunaux.

Ce rayonnement est essentiel pour que les citoyens se reconnaissent eux-mêmes dans les décisions que les juges sont appelés à rendre pour résoudre les conflits qui leur sont soumis.

(78) Carlos Gomes Liguerra; *op. cit.*, p. 47:

«Le premier, le modèle bureaucratique, est propre des pays de droit civil et la caractéristique la plus marquante est l'accès au pouvoir judiciaire, qui n'est rien de plus qu'un autre système d'accès à la fonction publique. (...) "Les juges sont recrutés après des épreuves écrites et orales, destinées à tester les connaissances institutionnelles des principales questions juridiques et s'adressant à des jeunes qui viennent de terminer leurs études universitaires. L'expérience professionnelle antérieure n'a que peu ou pas d'importance. La socialisation professionnelle se fait donc généralement au sein de l'organisation judiciaire. En d'autres termes, c'est là que les juges apprennent leur métier»  
«Le second, le modèle professionnel, est caractéristique des pays appartenant à la tradition de common law, "dans lesquels l'accès à la magistrature se fait par différentes voies, certaines sont même uniquement démocratiques, par élection populaire, et dans lesquels une approbation préalable dans les études de droit n'est pas requise, du moins pas pour occuper beaucoup des postes qui composent la magistrature commune»



#### 4. Évolution du Système de Recrutement et de Formation des Magistrats du Statut Judiciaire à nos jours

Avant 1975 (peu après la révolution des œillets du 25 avril 1974), le recrutement des juges se faisait par concours public au moyen d'épreuves écrites et orales.

Le Statut Judiciaire (Décret-loi n.° 44/278 du 14 avril 1962) définit les conditions générales d'admission et prévoit deux types de candidats au concours de recrutement des juges: les candidats obligatoires et les candidats volontaires. Les premiers étaient les Délégués du Procureur de la République, ils devaient figurer dans la moitié supérieure de la liste d'ancienneté de la 1<sup>ère</sup> classe avec une mention d'au moins "Bon".

En plus de ceux-ci, les diplômés en droit ayant obtenu un diplôme universitaire avec la mention "Bon avec distinction" et ayant un minimum de 7 ans d'expérience en tant que Délégué du Procureur, Inspecteur de la Police Judiciaire, Avocat et Juge Municipal, pouvaient postuler.

Les candidats admis devaient passer des épreuves écrites et orales.

Le système de recrutement était caractérisé par l'absence de formation initiale orientée spécifiquement vers les fonctions à exercer.

De 1975 à 1979, la continuité est restée la même en ce qui concerne l'obligation de passer par la magistrature debout avant de pouvoir accéder à la magistrature assise, mais le système de stages a été introduit en tant que système de recrutement dans la magistrature assise.

La loi définissait, comme condition d'admission au stage de juge, d'être "Déléguée du Procureur de la République" avec une qualification de service d'au moins «bon» ou d'avoir plus de 10 ans de service continu en tant qu'avocat. Plus tard, les conservateurs et les notaires avec un minimum de 10 ans de service sont devenus éligibles à la magistrature assise (Décret-loi n.° 714/75 du 20 décembre).

Le recrutement a commencé à se faire par un stage professionnel, condition indispensable à l'entrée en fonctions de juge ou de procureur.

Le stage se déroule en deux phases: une phase de formation initiale et une phase de formation complémentaire.

À la fin de la phase de stage, les stagiaires sont déclarés aptes ou inaptes par un jury.

Depuis 1979, la magistrature debout a cessé de constituer une étape préalable pour la magistrature assise.

L'autonomie du Parquet a été consacrée par des statuts, et des diplômés en droit qui stipule q'un stage dans l'une des juridictions étaient soumis aux mêmes conditions d'accès.

Le recrutement direct pour exercer la fonction de magistrat a été abandonné et un centre de formation exclusivement destiné aux magistrats - le Centre d'Études Judiciaires - a été créé.

Avec la création du Centre d'Études Judiciaires, en 1979, un nouveau modèle a été introduit dans le recrutement, la sélection et la formation des magistrats judiciaires, en institutionnalisant la formation des magistrats par le biais d'un corps de formateurs spécialisés.

Le modèle de formation initiale prévu par la loi qui a créé le Centre d'Études Judiciaires comprenait trois phases: une période d'activités théoriques et pratiques, un stage d'initiation et un stage de pré-affectation.

La formation initiale est devenue une condition d'entrée dans la magistrature, et les caractéristiques essentielles de ce nouveau modèle, bien qu'ayant subi des altérations au niveau, 1) des conditions d'admission; 2) de la définition du moment du choix d'une magistrature ou d'une autre; 3) de la limite d'âge minimale ou maximale pour l'admission; 4) de la durée de la phase théorique-pratique ou du stage; 5) du régime des tests d'aptitude, se sont maintenues au fil des ans.

Actuellement, l'admission à la formation initiale des magistrats s'effectue dans le cadre d'une procédure d'appel d'offre public<sup>79</sup>.

Le concours peut avoir pour but de pourvoir des postes vacants dans les magistratures debout et assise ou de pourvoir des postes de juges dans les tribunaux administratifs et fiscaux.

Pour être admissibles au concours, les candidats doivent:

Être citoyen portugais ou citoyen d'un État lusophone, avec une résidence permanente au Portugal, et auquel il est reconnu le droit d'exercer les fonctions de magistrat, dans les termes de la loi et dans des conditions de réciprocité.

Être titulaire d'un diplôme universitaire en droit ou d'un équivalent juridique.

Avoir les autres conditions générales requises pour être nommé à une fonction publique.

Il existe deux voies distinctes pour l'admission au concours et pour l'entrée au formation initiale, la "voie de la qualification académique" et la "voie de l'expérience professionnelle".

Pour pouvoir postuler par la "voie de la qualification académique", le candidat doit toujours être titulaire d'un master ou d'un doctorat, ou de son équivalent juridique. Toutefois, cette exigence est levée si le demandeur est titulaire d'un diplôme légale dans le cadre d'une organisation d'études antérieur à celui établi par le décret-loi no 74/2006 du 24 mars 2006 (cours antérieurs à la Déclaration de Bologne) ou équivalent juridique.

Pour pouvoir postuler à la «voie d'expérience professionnelle», le candidat doit également posséder une expérience professionnelle dans le domaine judiciaire ou dans d'autres domaines liés à l'exercice des fonctions de magistrat, et d'une durée effective d'au moins cinq ans.

Dans le cadre du processus de remplir des postes vacants au sein des magistratures debout et assise, un quota d'entrée de 25 % pour chaque voies d'admission est réservé à chacune d'entre elles.

Les méthodes utilisées pour sélectionner les candidats sont les suivantes:

Des tests de connaissances, comprenant une étape écrite et, ensuite, mais uniquement pour les candidats de la voie "qualification académique", une étape orale, toutes deux éliminatoires;

Évaluation des programmes d'études, uniquement pour les candidats admis par la voie de "l'expérience professionnelle", également éliminatoire, qui comprend une discussion sur le programme d'études et l'expérience professionnelle du candidat; une discussion sur des questions de droit, basée sur l'expérience du candidat.

Examen psychologique de sélection.

Les candidats ayant obtenu la mention «favorable» à l'examen de sélection psychologique sont retenus.

Les lauréats, selon l'ordre d'obtention de leur diplôme, ont le droit de suivre le cours théorique et pratique jusqu'à ce que le nombre total de postes vacants soit comblé..

Le classement se fait par ordre décroissant de la classification finale respective.

Les candidats aptes qui n'ont pas été qualifiés pour participer au cours théorique-pratique immédiatement, à défaut de postes vacants, sont dispensés de subir les épreuves du concours suivant, et sont ordonnés avec les candidats qui l'ont réussi.

La formation initiale des magistrats des tribunaux judiciaires comprend une formation théorique et pratique, organisée en deux cycles successifs, et un stage d'entrée.

---

(79) Article 6, paragraphe 1, de la Loi n° 2/2008, du 14 janvier 2008 .

Le premier cycle de la formation théorique et pratique se déroule au Centre d'Études Judiciaires, tout temps pouvant faire des stages intermédiaires de courte durée dans les tribunaux.

Il débute le 15 septembre suivant le concours d'entrée et se termine le 15 juillet de l'année suivante.

Le 2ème cycle de la formation théorique-pratique et le stage d'entrée se déroulent dans les tribunaux, dans le cadre de la magistrature choisi.

Elle débute le 1er septembre suivant la fin du premier cycle et se termine le 15 juillet de l'année suivante.

Les objectifs fondamentaux du cours de formation théorique et pratique sont d'apporter aux futurs juges le développement des qualités et l'acquisition de compétences techniques pour l'exercice de leur futures fonctions de juge dans les tribunaux judiciaires.

## ••••• 5. Formation – Indépendance – État de Droit

La relation entre la formation initiale et l'indépendance du pouvoir judiciaire, dans l'affirmation de l'État de droit, est claire et est un sujet de la plus haute importance.

La définition de la carrière de juge est un aspect crucial qui n'est pas souvent abordé, mais qui est d'une importance fondamentale pour garantir l'indépendance des tribunaux, notamment le processus de sélection des candidats aux futurs magistrats et le respect de critères de sélection rigoureux.

En Europe, en ce qui concerne le processus de sélection (comme c'est le cas pour le processus de promotion), il existe deux systèmes principaux: celui dans lequel la sélection est basée uniquement sur le mérite (note d'examen) et celui qui privilégie l'expérience professionnelle (évaluée par le curriculum).

Au Portugal, comme on l'a dit, il existe un système mixte avec deux voies d'admission distinctes: la «voie académique» et la «voie d'expérience professionnelle».

De cette façon, nous essayons de concilier les avantages et d'estomper les inconvénients signalés dans les deux systèmes.

Cette préoccupation consistant à concilier un processus de sélection endogène, en tant que processus exogène qui garantirait l'indépendance judiciaire et la reconnaissance externe des compétences des candidats, donne une plus grande ouverture à la société et donc une plus grande crédibilité au processus de sélection, qui se reflète, également, dans la composition du jury des examens constitués et qui peut être différencié en fonction de la voie d'admission, de la méthode de sélection à appliquer et des différentes étapes.

Le jury pour la phase écrite des épreuves de connaissances (voie academic) est composé d'au moins trois membres, (a) un juge ou, dans le cadre de concours pour pourvoir les postes vacants de juges dans les juridictions administratives et fiscales, un juge de cette juridiction; un Procureur de la République; C) Un juriste reconnu ou une personnalité reconnue dans d'autres domaines de la science et de la culture.

Le jury de la phase orale des épreuves de contrôle des connaissances et le jury qui évalue les *curriculum vitae* sont composés de cinq membres, dans le respect de la proportion suivante:

- a) deux magistrats, l'un étant un juge ou, dans les concours de pourvoi des postes vacants de juges des tribunaux administratifs et fiscaux, un juge de cette juridiction, et l'autre un magistrat du parquet;
- b) trois personnalités, à savoir des avocats, des personnes dont le mérite est reconnu dans le domaine juridique ou dans d'autres domaines de la science et de la culture, ou des représentants d'autres secteurs de la société civile.

Les juges qui composent le jury sont nommés par le Conseil Supérieur, les membres restants étant nommés par le Ministre de la Justice, sur proposition du Barreau, ou par le Directeur du Centre d'Études Judiciaires.

Il existe également deux domaines particulièrement importants dans le contexte de la formation initiale des magistrats et dans leur rapport avec le principe d'indépendance du pouvoir judiciaire. Il s'agit de l'organisation judiciaire et des technologies de l'information et de la communication, ces dernières étant l'aspect de la justice prédictive.

Au Portugal, avec la réforme de la carte judiciaire entrée en vigueur en 2014, et parallèlement à la forte réduction du nombre de districts judiciaires, une organisation à compétences administratives partagées a également été mise en place au niveau de chaque district, entre le juge-président, l'administrateur du district, le conseil de gestion et le conseil consultatif, dans le cadre d'une gestion par objectifs.

Compte tenu de cette nouvelle organisation judiciaire qui a modifié profondément le paradigme de l'administration des tribunaux au Portugal, il est clair que seule une formation solide et actualisée sur les compétences et le mode de fonctionnement de cette structure permettra aux auditeurs de justice, futurs juges, dans l'administration de la justice au nom du peuple, de comprendre les limites des fonctions administratives de gestion conférées aux organismes du district et la relation entre ces fonctions et l'exercice de la fonction souveraine de juger.

Dans le cadre de la formation en organisation judiciaire et en organisation de méthodes et gestion des processus, le rôle du Conseil Supérieur de la Magistrature et ses compétences pour suivre les performances des tribunaux judiciaires, avec l'adoption des mesures de gestion qu'il considère appropriées, est également mis en évidence.

La compréhension de la dialectique permanente parmi les «gestionnaires» actuels du Pouvoir Judiciaire s'avère fondamentale pour le maintien de l'indépendance du pouvoir judiciaire et, par conséquent, pour le renforcement de l'État de Droit Démocratique.

Cette compréhension dépend nécessairement de la teneur et du contenu de la formation sur l'organisation judiciaire et sur les méthodes d'organisation et de gestion du processus ainsi que des formateurs qui délivrent ce contenu, ce qui fait appel aux critères de sélection des ces derniers.

En ce qui concerne les technologies de l'information et de la communication, dans le domaine de la justice prédictive, il est essentiel d'éduquer les juges sur la manière dont les algorithmes sont développés et les risques associés à leur utilisation, ainsi que sur l'importance de structurer et de développer les bases de données des décisions jurisprudentielles.

Il est noté avec une préoccupation particulière la nécessité de maintenir l'analyse humaine du juge, critique et rigoureuse, des suggestions jurisprudentielles mises à disposition par des outils équipés d'intelligence artificielle<sup>80</sup>.

Une véritable société démocratique ne peut être atteinte que si nous disposons d'un système judiciaire indépendant sur le plan interne et externe.

En tant que Vice-Président du Conseil Supérieur de la Magistrature, je ne peux que réfléchir à la phase théorique et pratique des auditeurs ainsi qu'à celle des juges stagiaires, ces derniers étant déjà attachés au Conseil.

(80) Comme le remarque Conceição Gomes (in "Revue Critique des Sciences Sociales", no. spécial/2018): «La formation des acteurs judiciaires devrait être guidée par l'objectif stratégique consistant à créer une culture juridique fortement attachée à la qualité, à l'efficacité et à la transparence de la justice, ainsi qu'à son activisme démocratique, que ce soit dans la promotion des droits de l'homme et des droits fondamentaux, ou dans la lutte contre les formes graves de criminalité, en particulier la corruption. La question centrale est de savoir si les modèles de formation du droit et de la formation professionnelle sont susceptibles de répondre à cet objectif stratégique. La conclusion de la prédominance de la formation technocratique, formaliste et fermée à l'interdisciplinarité et aux innovations susceptibles de créer une telle culture judiciaire exige que la politique de formation soit placée au cœur des agendas stratégiques de la réforme de la justice.»

Or, tant les auditeurs dans les phases théorique et pratique que les juges stagiaires ont besoin des juges expérimentés et compétents pour leur fournir la formation nécessaire.

Qui est le mieux placé pour le faire, notamment pour nommer les juges formateurs? C'est, sans aucun doute, le Conseil Supérieur de la Magistrature, car il a la connaissance de la performance des juges et la compétence pour procéder à leur évaluation.

Sans sous estimer l'importance de la doctrine et du droit substantiel, l'application de la loi est l'essence même du pouvoir judiciaire.

D'autre part, et surtout, l'application de la loi exige une position indépendante des ceux qui "rendent la justice".

Il n'y a personne de mieux placé qu'un juge pour transmettre la culture de l'indépendance comme garantie d'une solution équitable.

De cette manière, il est également garanti que le Conseil susmentionné participe activement à la formation et au recrutement des juges.

•••••  
*Chers Collègues*

Il ne fait aucun doute que l'indépendance des tribunaux et des juges commence clairement par le recrutement et la formation, cela étant essentiel à l'existence même de l'État de Droit Démocratique, ami des droits, des libertés et des garanties des citoyens, la présence de juges véritablement indépendants.

Merci de votre attention et de votre patience.

## GETTING IN TOUCH WITH THE EU

### **In person**

All over the European Union there are hundreds of Europe Direct information centres. You can find the address of the centre nearest you at: [https://europa.eu/european-union/contact\\_en](https://europa.eu/european-union/contact_en)

### **On the phone or by email**

Europe Direct is a service that answers your questions about the European Union. You can contact this service:

- by freephone: 00 800 6 7 8 9 10 11 (certain operators may charge for these calls),
- at the following standard number: +32 22999696 or
- by email via: [https://europa.eu/european-union/contact\\_en](https://europa.eu/european-union/contact_en)

## FINDING INFORMATION ABOUT THE EU

### **Online**

Information about the European Union in all the official languages of the EU is available on the Europa website at: [https://europa.eu/european-union/index\\_en](https://europa.eu/european-union/index_en)

### **EU publications**

You can download or order free and priced EU publications at: <https://op.europa.eu/en/publications>.

Multiple copies of free publications may be obtained by contacting Europe Direct or your local information centre (see [https://europa.eu/european-union/contact\\_en](https://europa.eu/european-union/contact_en)).

### **EU law and related documents**

For access to legal information from the EU, including all EU law since 1952 in all the official language versions, go to EUR-Lex at: <http://eur-lex.europa.eu>

### **Open data from the EU**

The EU Open Data Portal (<http://data.europa.eu/euodp/en>) provides access to datasets from the EU. Data can be downloaded and reused for free, for both commercial and non-commercial purposes.

