FIDE 2021

XXIX FIDE CONGRESS

The Hague, 3 – 6 November 2021

Opening Ceremony on 4 November 2021

Constitutional Relationships between Legal Orders and Courts within the European Union

by Koen Lenaerts[1]

President Wissels,

President van der Woude,

Executive Vice-President Timmermans,

Excellencies,

Dear colleagues,

Ladies and Gentlemen,

It is a great honour to address you at the opening ceremony of this 29th FIDE congress, and I am particularly pleased to be here in such eminent company.

I am very grateful to President Wissels, in particular, and to all the other organisers of FIDE for having made this event happen in spite of all the difficulties that they have faced. I would also like to thank our Court

[1] President of the Court of Justice of the European Union and Professor of European Union Law, Leuven University. All opinions expressed herein are personal to the author.

interpreters for being here since without them this congress would not be possible.

FIDE is a real success story. It provides a unique forum for bringing together practitioners, judges and academics from all over Europe and beyond to discuss EU law. We have all looked forward to this year's congress with particular anticipation, given that it had to be postponed due to the unprecedented Covid-19 pandemic. So I am glad that we are all here – physically present – to discuss where EU law currently stands and what lies ahead. Our host city, The Hague, with its renowned judicial and legal traditions and institutions, provides the perfect venue for our discussions in the coming days.

***

I would like to share with you today some thoughts concerning the role of the Court of Justice of the European Union and the position of EU law in general, in light of the challenges that we currently face.

The authority of the Court of Justice has been challenged in various Member States, as has the primacy of EU law, not only by politicians and the press, but also before and even *by* national courts, including certain constitutional courts. This is an extremely serious situation and it leaves the Union at a constitutional crossroads. I believe it is no exaggeration to say that its foundations as a Union based on the rule of law are under threat and that the very survival of the European project in its current form is at stake.

That being so, I would like us for a moment to take a step back and to remind ourselves what the role of the courts is in a democratic society, and more particularly in a Union such as ours.

As guardians of the rule of law, courts guarantee that both public authorities and private citizens respect the rules of the game. When required, they must uphold the rights of the few against the will of the many, even if that means delivering unpopular rulings. Courts must deliver their judgments without fear nor favour.

Formally, the power of courts is grounded in a basic text, be it a Constitution or a Treaty. However, it is ultimately a society's commitment to the rule of law, democracy and fundamental rights that gives force to that document and thus to judicial decisions. Without respect for those values, a Constitution or a Treaty is no more than a piece of paper.

Therefore, individuals must be convinced – and must constantly be reminded – that in order for them to enjoy liberty and justice, judicial decisions must be respected, in particular by the losing party. It is therefore to be welcomed when government officials state publicly that, although they may not agree with the outcome of a particular case, it is their duty to respect the ruling and to enforce it. By contrast, when public officials state that courts are biased because they did not rule in their favour, when they criticize judges personally or fail to react when

the press call them enemies of the people, they undermine the rule of law.

The same damaging consequences may ensue when courts themselves no longer respect each other and replace dialogue with open confrontation. That is particularly true in the EU, whose legal order is based on cooperation between the Court of Justice and national courts, as well as amongst national courts themselves.

In order for that cooperative system to operate properly, both the Court of Justice and national courts must respect the division of jurisdiction laid down in the Treaties. Like any legal system, the Union's legal order can only function if it is clear who has the last word in declaring what the law is. Thus, in accordance with Article 19 TEU, as well as the requirements of uniformity and equality before the law, the Court of Justice must have the last word in saying *what EU law is*, just as national constitutional courts have the last word when interpreting their own constitutions. Moreover, the primacy of EU law, as interpreted by the Court of Justice, must be respected wherever it applies since, in the absence of uniform application of that law, it could no longer fulfil its unifying role as the law common to the Member States.

It is also important to emphasise in this context that, as the Court of Justice made clear in *Wightman*,[2] membership of the European Union is voluntary. It is based on a democratic and sovereign choice made by

[2] CJEU, Wightman and Others, judgment of 10 December 2018, case no. C-621/18, EU:C:2018:999.

each Member State to join the Union and to accept the rights and obligations inherent in membership. Member State sovereignty is pooled, not relinquished. While I sincerely hope that no Member State will ever again feel the need to exercise its rights under Article 50 TEU, the fact that those rights exist reinforces the legitimacy of EU law. For as long as a Member State remains in union with its European partners under the EU Treaties, all of its public authorities – including its highest courts – must respect the primacy of the law created by those Treaties, as interpreted by the Court of Justice. Failure to do so undermines the equality of Member States under Union law and contradicts the democratic and sovereign choice made by the Member State in question, under its own constitutional law, to join the Union and to remain within it.

European integration through the rule of law took seventy years to build. The Court of Justice is not the new kid on the block. The Treaties may have been amended on several occasions but the Court of Justice and the principles governing its jurisdiction are as old as the first post-war constitutional courts established in Europe. The Court of Justice has incorporated many constitutional traditions common to the Member States into the constitutional fabric of the EU, thereby ensuring that EU law and national constitutional laws are deeply intertwined. Moreover, in recent years, the Court of Justice itself has been called upon to deal with a considerable number of cases – some of which are still pending – that relate directly to those common

traditions, in particular the rule of law and solidarity at Union level. The Court of Justice and the constitutional courts of the Member States should be natural allies, not adversaries, in this context.

It is also important to stress that, in spite of the difficulties to which I have just alluded, the work of the Court of Justice in dealing with the cases that come before it, and in particular with the references for a preliminary ruling that it receives from Member State courts, continues smoothly and serenely. Over the past five years, the Court of Justice received a total of 2 768 such references. That number, which has continued to rise unabated – except for a small drop in 2020 at the height of the Covid-19 pandemic – reflects the highly successful cooperation that continues to take place between the vast majority of Member State courts and the Court of Justice within the framework of the preliminary ruling mechanism.

Those references reflect many of the societal issues with which the Member States are confronted, including questions relating to the pandemic itself. That is unsurprising, given how deeply embedded Union law has become within national legal systems. Moreover, national courts are also the ‘common law’ courts of the EU, called upon to apply Union law as the law of the land just like national law. It is true – and indeed it could and should not be otherwise – that most cases raising questions of EU law are dealt with directly by national courts without any need for the Court of Justice to be involved by means of the preliminary ruling mechanism. National courts thus play an

indispensable role in guaranteeing the faithful and uniform application of EU law.

That said, today's challenges concern not only *compliance* with judgments of the Court of Justice, but also *access* to the preliminary ruling procedure.

It follows from Article 267 TFEU that the preliminary ruling mechanism is open to any 'court or tribunal' of a Member State. In applying that criterion, the Court of Justice takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent.[3]

Thus, in the *Miasto Łowicz* judgment[4] of last year, the Court of Justice had to make it clear that national judges must not be exposed to disciplinary proceedings or measures for having submitted a reference to it. Were it otherwise, judges might be deterred from choosing to exercise their discretion to submit a request for a preliminary ruling to the Court of Justice or even to comply with their obligation to make such a reference.[5]

[3] See, for example, CJEU, Banco de Santander, judgment of 21 January 2020, case no. C-274/14, EU:C:2020:17, para. 51.

[4] CJEU, Miasto Łowicz and Prokurator Generalny, judgment of 26 March 2020, joined cases no. C-558/18 and no. C-563/18, EU:C:2020:234; see also press release no. 35/20.

[5] CJEU, Commission v Poland (Disciplinary regime applicable to judges), judgment of 15 July 2021, case no. C-791/19, EU:C:2021:596, para. 230; see also press release no. 130/20.

As regards that latter obligation, I would like to draw your attention to the judgment of 6 October of this year in *Consorzio Italian Management*,[6] the so called *CILFIT II* judgment, in which the Court of Justice confirmed, in substance, its case-law as to the three situations in which a national court of last instance is relieved of that obligation.

The Court emphasised, *inter alia*, that the mere fact that the national court in question has already submitted a reference for a preliminary ruling in the same proceedings does not alter that obligation.[7] It also recalled that a national court of last instance may refrain from making a reference if the correct interpretation of EU law is so obvious as to leave no scope for any reasonable doubt. However, before concluding that there is no such doubt, the national court of last instance must be convinced that the matter would be equally obvious to the other courts of last instance of the Member States and to the Court of Justice. Thus, where a national court of last instance is made aware of the existence of divergent lines of case-law – among the courts of a Member State or between the courts of different Member States – concerning the interpretation of a provision of EU law applicable to the dispute in the main proceedings, that court must be particularly vigilant in its assessment of whether or not there is any reasonable doubt as to the correct interpretation of that provision. In any case it must set out the

[6] CJEU, Consorzio Italian Management e Catania Multiservizi, judgment of 6 October 2021, case no. C-561/19, EU:C:2021:799; see also press release no. 175/21.

[7] *Ibid*., para. 59.

reasons why the correct interpretation of that provision does not give rise to such reasonable doubt before deciding not to refer.

On the substantive level, although Union law now has some impact on almost every field of human activity and must prevail wherever it is applicable, the Court of Justice fully recognizes that the limits on the scope of EU law must be respected, in accordance with the principle of conferral. To give one recent example: the Court of Justice held in June of last year in *TÜV Rheinland*[8] that EU law, as it currently stands, does not apply to territorial limits on civil liability insurance coverage.

Moreover, even where EU law *is* applicable, there is room for diversity.

Thus, in *Centraal Israëlitisch Consistorie van België*,[9] the Court of Justice emphasised that the EU legislature had intended to confer a broad discretion on the Member States in the context of the need to reconcile the protection of the welfare of animals and respect for the freedom to practice religion. The Court of Justice thus concluded that in an evolving societal and legislative context characterised by an increasing awareness of animal welfare, the Flemish legislature was entitled to adopt a decree requiring a reversible stunning procedure in the context of ritual animal slaughter.

[8] CJEU, TÜV Rheinland LGA Products and Allianz IARD, judgment of 11 June 2020, case no. C-581/18, EU:C:2020:453; see also press release no. 69/20.

[9] CJEU, Centraal Israëlitisch Consistorie van België and Others, judgment of 17 December 2020, case no. C-336/19, EU:C:2020:1031, paras 71, 79 and 81; see also press release no. 163/20.

Similarly, regarding unequal treatment on grounds of religion, the Court recalled in *WABE and Müller Handel*,[10] that when several fundamental rights and principles enshrined in the Treaties are in issue, the necessary proportionality assessment is to be carried out in accordance with the need to reconcile the requirements of the protection of the various rights and principles at issue, striking a fair balance between them. However, it found that the EU legislature *had not itself* struck such a balance between the freedom of religion and the legitimate aims that may be invoked in order to justify a difference in treatment, but had rather left that balancing exercise *to the Member States and their courts*.

In the context of the proportionality analysis, the Court moreover observed that, since EU law allows for the adoption of national provisions that are more favourable as regards equal treatment, a Member State *may* subject the justification of a difference in treatment indirectly based on religion or belief to higher standards of protection. Those higher standards may result from national provisions protecting freedom of thought, belief and religion, as a value to which modern democratic societies attach particular importance.

Both of those cases illustrate the respect paid by the Court of Justice to the national identity of the Member States, as provided for in Article 4(2) TEU, and to the diversity that accompanies it. Where, however,

[10] CJEU, WABE and MH Müller Handel, judgment of 15 July 2021, joined cases no. C-804/18 and no. C-341/19, EU:C:2021:594, paras 87-90; see also press release no. 128/21.

EU law itself lays down exhaustively the rules to be applied to a particular issue, those rules – as interpreted by the Court of Justice – must prevail over national law.

Thus, as was held recently in *Repubblika*,[11] national identity may not serve to justify a departure from the values of the Union set out in Article 2 TEU. Indeed, all Member States subscribed, when they joined the European Union, to the common values of respect for human dignity, freedom, democracy, equality, the rule of law and human rights, including the rights of those belonging to minorities.

As regards the rule of law, the Court of Justice has repeatedly been called upon to specify its content, especially in the context of the requirement of judicial independence, in the line of cases beginning with the Portuguese judges case in 2018.[12] The Court has consistently held that while the organisation of justice in the Member States is a national competence, all national courts which may be called upon to rule on questions of EU law must provide sufficient guarantees of independence and impartiality.[13] Thus, while the EU does not impose any particular model on the judicial systems of the Member States, it does lay down red lines. Respect for those red lines and for the rule of law in general is the foundation for mutual trust. The European project

[11] CJEU, Repubblika, judgment of 20 April 2021, case no. C-896/19, EU:C:2021:311.

[12] CJEU, Associação Sindical dos Juízes Portugueses, judgment of 27 February 2018, case no. C-64/16, EU:C:2018:117; see also press release no. 20/18.

[13] CJEU, Commission v Poland (Disciplinary regime applicable to judges), judgment of 15 July 2021, case no. C-791/19, see above footnote 5, paras 56 ss.

– and the solidarity among Member States that this project entails – depends on that trust.

***

I leave you with this final thought. The Court of Justice has been entrusted by the Member States with the task of deciding what the law is at EU level. The members and staff of the Court work extremely hard and constantly strive to produce rulings that are accurate, correct in law and just. I am very proud of them. However, a US Supreme Court Justice, Robert H. Jackson, once famously observed that ‘we are not final because we are infallible, but we are infallible only because we are final’. Indeed, in all legal systems jurisprudence ultimately rests on a final judicial decision, the *res judicata*. That is why all subjects of EU law, including the Member States and in particular their courts, must comply, immediately and in full, with judgments of the Court of Justice, thereby upholding the EU rule of law and the equality of Member States before that law.

Thank you.