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The Importance of Being Earnest: On Frank Words and Missed Opportunities in the CJEU's A.B. Judgment

(doi: 10.1439/100842)

Quaderni costituzionali (ISSN 0392-6664)
Fascicolo 2, giugno 2021

Ente di afferenza:
Università di Bologna (unibo)

Note dall'Europa

Dall'Unione europea

«The Importance of Being Earnest»: On Frank Words and Missed Opportunities in the CJEU's *A.B.* Judgment

di *Luke Dimitrios Spieker*

For almost three years, the Court of Justice has been faced with not ceasing waves of cases concerning the protection of judicial independence, the rule of law and more broadly the Union's common values. Due to a lack of responses on the political plane, the Court of Justice has become the principal forum to defend Eu values in the Member States. In a line of seminal cases, starting from the Court's decision in *Associação Sindical dos Juízes Portugueses* (C-64/16) and *L.M.* (C-216/18 PPU), the CJEU provided a forceful response especially to the ongoing attacks on the Polish judiciary (see A. von Bogdandy *et al.*, *Un possibile «momento costituzionale» per lo Stato di diritto europeo: i confini invalicabili*, in *Quaderni costituzionali*, 4, 2018, 855; on this growing body of case law, see e.g. N. Canzian, *Il principio europeo di indipendenza dei giudici: il caso polacco*, in *Quaderni costituzionali*, 2, 2020, 2, 465).

The Grand Chamber's recent ruling in *A.B.*, decided on 2 March 2021 (C-824/18), is the next stone in the jurisprudential edifice. The case emerged from a rather complex procedural background: several candidates for judicial appointments at the besieged Supreme Court challenged a resolution by the Polish National Council of the Judiciary (KRS) rejecting their nomination before the Supreme Administrative Court (SAC). The latter expressed doubts whether the system of remedies against such resolutions complied with the requirements of judicial independence under Eu law and referred the case to Luxembourg. The Polish government – eager to bar the involvement of both courts – simply amended the respective legislation depriving the SAC of its jurisdiction, discontinuing all pending appeals and removing any possibility to appeal such KRS resolution in the future.

The Court of Justice ruled that if the referring court were to find that these amendments violated Articles 2 and 19(1)(2) TEU or Article 267 TFEU read together with Article 4(3) TEU (which is very likely), it had to resume its jurisdiction and apply the formerly repealed provisions. Further, the Court noted that the former system of remedies was likely to violate Articles 2 and 19(1)(2) TEU. While leaving the final determination in both issues to the referring court, the CJEU did not shy away from revealing its own opinion. Indeed, the Court stepped up its rhetoric by finding frank responses not only to the ongoing attacks on the rule of law in Poland but, interestingly, also to recent contestations of primacy. This remarkable frankness, however, is only one facet of *A.B*. At the same time, the Court has – yet again – missed the opportunity to provide some important doctrinal clarifications with regard to its rule of law related jurisprudence.

Starting with the latter, the Court decided to base its assessment on Article 19(1)(2) TEU, which contains a Member State obligation to provide effective judicial protection in the fields covered by Eu law. Although the respective Polish measures do not come under the scope of the Charter (§ 89), they nonetheless fall into the broader scope of Article 19(1)(2) TEU. Already in its seminal *ASJP* judgment, the Court noted that Article 19(1)(2) TEU applies «irrespective» of whether the scope of the Charter under Article 51(1) is triggered (§ 29). From a doctrinal standpoint, however, any difference in scope between Article 19 TEU and the Charter seems odd. As Koen Lenaerts formulated so famously: «Just as an object defines the contours of its shadow, the scope of Eu law determines that of the Charter» (K. Lenaerts and J.A. Guttièrez-Fons, *The Place of the Charter in the EU Constitutional Edifice*, in S. Peers, T. Hervey, J. Kenner and A. Ward (eds.), *The EU Charter of Fundamental Rights: A Commentary*, Hart, 2014, 1559, 1567).

If the Charter follows the scope of Union law like a shadow, should the Charter not reach as far as Article 19(1)(2) TEU does? This view is supported by the Court's stance in *Åkerberg Fransson*: «situations cannot exist which are covered [...] by European Union law without those fundamental rights being applicable» (C-617/10, § 21). Even if the shadow of Eu law has begun to develop a certain penumbra in the Court's case law, one thing has remained crystal clear: the Charter applies when Eu law creates «specific obligations» for the Member States (see only *Siragusa*, C-206/13, §§ 26-27). There is no doubt that Article 19(1)(2) TEU creates such specific obligations to guarantee an independent judiciary. In this sense, Article 19(1)(2) TEU could be understood as defining the scope of Union law within the meaning of Article 51 CFR. In light of its extremely broad scope, this interpretation would entail an enormous extension of the Charter's applicability, which was probably neither the drafters' nor the judges' intention. Eventually, the Court will have to make a decision: either it will have to further attenuate *Åkerberg Fransson* and accept that there might be many diverging and different scopes in Eu law; or it might opt for expanding the Charter's application in national court proceedings. To put it bluntly: either the Court sacrifices *Åkerberg Fransson* or it puts Article 51(1) CFR at risk. It cannot have it both ways.

Unfortunately, the Court somewhat glosses over this thorny issue. Instead of separating both provisions (with different scopes of application), the Court notes that Article 47 CFR

«must be duly taken into consideration» when interpreting Article 19(1)(2) TEU (§ 143). In this sense, the Court uses Article 47 CFR to inform the content of Article 19 TEU and vice versa. Even AG Tanchev, who had proposed a certain division of labor between both provisions, no longer defends that view (§ 90). Certainly, it seems difficult to differentiate between the content of both provisions. Yet, blurring the line between them increases the risks that Article 19(1)(2) TEU becomes a «Trojan horse» rendering Article 47 CFR relevant even in situations beyond the confines of the Charter (see e.g. A. Rasi, *Effetti indiretti della Carta dei diritti fondamentali?*, in *European Papers*, 2019, 615, 622; N. Lazzerini, *Inapplicabile, ma comunque rilevante?*, in AA.VV., *Temi e questioni di diritto dell'Unione europea. Scritti offerti a Claudia Morviducci*, Cacucci, 2019, 171, 178 ss., 182 ss.).

In contrast to these doctrinal uncertainties, the Court has become surprisingly blunt on the «political» dimensions of the case. On the one hand, it openly addressed the rule of law deficiencies in Poland under Articles 267 TFEU and 4(3) TEU as well as Articles 2 and 19(1)(2) TEU. With regard to the former, the Court embraces Article 267 TFEU read together with the principle of mutual loyalty enshrined in Article 4(3) TEU as a legal basis that precludes national measures specifically preventing the Court from rendering a preliminary ruling (§§ 94-95). There might very well be instances where amendments of national procedural or substantive law have the «*incidental* consequence» that the referring court loses its jurisdiction over the main proceedings. The line is crossed where this consequence is the «*specific* effect» (or rather: intention?) of the respective amendments. Although the CJEU leaves the final determination to the referring court, it provides overwhelming evidence that «Polish authorities have recently stepped up initiatives to curb references» (§ 100) and that these attempts have a «systematic nature» (§ 106). The Court mentions not only the threat of disciplinary procedures (§ 101) but also the Polish government's action before the Constitutional Tribunal seeking a declaration that Article 267 TFEU is unconstitutional as far as it enables preliminary references on the organisation of the Polish judiciary (§ 102). Especially with regard to the latter attempts, the Court's novel use of Article 267 TFEU in combination with Article 4(3) TEU presents a forceful response.

Further, the Court consolidates the already established basis of Articles 2 and 19(1)(2) TEU (on this, see e.g. A. von Bogdandy and L.D. Spieker, *I valori dell'Articolo 2 del TUE, la Reverse Solange e la responsabilità dei giudici nazionali*, in *Percorsi Costituzionali*, 2-3, 2018, 347, 368 ss.). When assessing the Polish amendments against these provisions, the Court notes that the absence of judicial review of appointments does not per se raise doubts with regard to judicial independence (§ 129). Yet, things are different when – as in the present case – there are reasons to believe that the body recommending candidates for judicial appointments is in itself not sufficiently independent from the political branches. In such a situation, the Court notes that judicial review becomes necessary to exclude any doubts as to the independence of the appointed judges (§ 136).

On the other hand, the Court openly addresses the consequences flowing from the primacy of Eu law in the specific case. According to the CJEU, the referring court has – in case it finds the amendments removing its jurisdiction to violate Eu law – to «continue to assume the jurisdiction» it previously held (§ 149). Two reasons might explain why

the Court provides such an extensive elaboration for this supposedly obvious conclusion. Doctrinally, this solution is not as straightforward as it might seem. Usually, primacy requires national courts only to set aside national measures that conflict with Eu law. In the present case, however, this negative effect leads to the creation of a «legal vacuum» (see M. Dougan, *Primacy and the Remedy of Disapplication*, in *Common Market Law Review*, 6, 2019, 1459, 1479 ss.; M. Leloup, *An Uncertain First Step in the Field of Judicial Self-Government*, in *European Constitutional Law Review*, 1, 2020, 145, 161). Setting aside the Polish amendments depriving the SAC of its jurisdiction does not fill the emerging vacuum and re-establish the former provisions conferring jurisdiction. In this sense, the Polish government is right when it argues that such a judgment, compelling the referring court to apply the provisions formerly in force, has a «normative» – or better: *positive* – effect (§ 78). This underexplored side of primacy has already been addressed in recent judgments but will still require more elaboration in the future (see e.g. *A.K.*, C-585/18, C-624/18 and C-625/18; *FMS*, C-924/19 PPU, §§ 143, 146).

On a political level, the Court's emphasis on primacy seems to respond to recent contestations especially by the *Bundesverfassungsgericht* in *PSPP* (see e.g. P. Faraguna, *Bundesverfassungsgericht contro tutti*, in *Quaderni costituzionali*, 2, 2020, 429). This doctrine has provided judges in Poland and Hungary, who are close to the governments' agenda, with munition to neutralise CJEU decisions aimed at safeguarding the Union's values (see e.g. S. Ninatti and O. Pollicino, *Identità costituzionale e (speciale) responsabilità delle Corti*, in *Quaderni costituzionali*, 1, 2020, 191). In this spirit, the Polish Supreme Court's disciplinary chamber held in an order of 23 September 2020 (II DO 52/20) that the CJEU's *A.K.* judgment cannot be considered binding in the Polish legal order. One can grasp the irritation and anger in AG Tanchev's opinion, who dedicates several paragraphs to the issue of primacy and the *PSPP* judgment (§§ 74-84). In this spirit, *A.B.* can be understood as a warning shot addressed to the captured parts of the Polish judiciary but also the BVerfG: «the effects of the principle of the primacy of Eu law are binding on all the bodies of a Member State, without, [...] constitutional provisions, being able to prevent that» (§ 148).

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Dal Consiglio d'Europa

Il Protocollo n. 15 e il lungo processo di ratifica dell'Italia: «molto rumore per nulla»?

di *Gabriella Saputelli*

Il 10 febbraio è stata pubblicata in *Gazzetta Ufficiale* la legge n. 11/2021 di autorizzazione alla ratifica ed esecuzione del Protocollo n. 15 volto a emendare la Convenzione