Judicial Independence in the European Union

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I am honored to participate in this grand celebration of the ideal and practice of the rule of law across the globe. I am grateful to the organizers for inviting me to be here and, in doing so, acknowledging the role of the institution I represent – the Constitutional Court of Portugal – in the affirmation and implementation of the rule of law within its jurisdiction. This year we celebrate the 40th anniversary of the creation of the Court and, largely for that very same reason, four decades of constitutional democracy – that noble yet fragile alliance between popular rule and the rule of law − in my home country. Let us take this occasion to hope that the alliance endures, indeed expands to further parts of the world, in spite of the alarming threats looming over it.

Our Chair for this afternoon's panel, Professor Shimon Shetreet, thought it would be interesting if I shared with you some thoughts on the ECJ Judgment of 27 February 2018, usually labelled −given its unpronounceable actual name – as the 'Portuguese Judges' case. I acquiesced without demur.

The judgment originated in a preliminary ruling request by the Supreme Administrative Court of Portugal, concerning the temporary reduction in the amount of remuneration paid to the members of the Court of Auditors. The reduction did not specifically target these judges. It was part of a general measure aimed at the top holders of political office and the higher echelons of the public sector, as well as their staff, itself an element of a broad package of austerity measures undertaken in the wake of the sovereign debt crisis that led the Portuguese Government in 2011 to enter into a three-year bailout agreement with the so-called 'Troika' – comprising the International Monetary Fund, the European Comission, and the European Central Bank –, a deal which involved mandatory requirements for reducing the budget deficit.

One would reasonably expect the case brought before the ECJ to concern any of a number of possible issues regarding the relationship between the pay reduction and EU Law, namely the mandatory or optional nature of the former in light of the agreement with the Troika; the status of that agreement (the 'Memorandum of Understanding') within EU Law; its compatibility with the CFREU; and so forth. These would undoubdtedly be issues of EU

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Law. But these were not the issues at stake in the case. The question posed to the judges in Luxembourg was whether the reduction in the remuneration of the members of the judiciary violated the principle of the rule of law, the guarantee of judicial independence, the requirement of effective legal protection, and even the right to a fair trial, enshrined in a variety of primary European legal instruments. In light of this, it would have been perfectly reasonable for the ECJ to have ruled the preliminary reference inadmissible, on the grounds that it did not concern an issue of EU law; after all, the European standards invoked by the referring Court are meant to govern the interpretation and control the validity either of EU norms or domestic norms adopted to implement EU law. Yet the salary-reduction measures, as the referring Court framed them, did not – at least not straightforwardly − fall into any of these categories.

They did do indirectly though, according to the ECJ. The judgment states that 'Article 19 of TEU (…) 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'. 'Member States are to provide remedies suficient to ensure effective judicial protection for individual parties in the fields covered by EU law'. 'It follows – the Court argued −that every Member State must ensure that the bodies which, as courts and tribunals within the meaning of EU law, come whithin its judicial system in the fields covered by that law, meet the requirements of effective judicial protection'. That was true, the Court established, of the Court of Auditors, whose jurisdiction extends to matters involving the use of EU financial resources.

Now, for a court or tribunal to provide effective protection, it must be independent. What does that mean? It means – and I quote from the judgment – '[t]hat the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchichal constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions'. Moreover, 'the receipt by those members of a level of remuneration commensurate with the importance of the functions they carry out constitutes a guarantee essential to judicial independence'. This is line with standard accounts of judicial independence in the scholarly literature and international reports, which emphasize that one of its external dimensions is the sufficiency, transparency, reliability, and stability of the income earned on the job.

Bringing these criteria to bear on the case at hand, the Court concluded, effortlessly and unsurprisingly, that the salary-reduction measures at stake in the proceedings did not undermine judicial independence. It offered two reasons to that effect. First, the measures were general in scope, applying to all top holders of political office and the higher echelons of the public sector, as well as their staff; the judiciary – namely the members of the Court of Auditors – was not specifically targetted. Second, the measures were temporary in nature, lasting only as long as the financial emergency which dictated them, and had indeed been completely reversed by the time the proceedings were initated. The outcome, we may say, was a forgone conclusion – no one in his or her right mind would think that there really was a serious issue of judicial independence at stake in this case.

What makes this case obviously important, however, is not what was decided but what was established in the process of deciding it: that the independence of domestic courts is a unwavering concern of EU law, such that all legislation affecting it must be measured against the standards set by the judges in Luxembourg. This doctrine enabled the European Comission to sue Poland for enacting legislation that compromises the independence of its judiciary and has made it possible for judges in Member-States where the rule of law is at risk to rely on the procedure for preliminary reference to enlist the support of their European counterparts. That is a good part of what makes the 'Portuguese Judges' case, despite the relative insigificance of the matter on which it formally ruled, one of the most important and consequential decisions of the ECJ in the past decade.

Yet the judgment transcends even that context, for it constitutes, quite apart from the large issues of the rule of law and judicial independence lurking in its background, a striking example of how a court can use a seemingly routine case to permanently expand its reach. A historical paralell suggests itself. It is hard to keep in mind the dull minutia of *Marbury v. Madison*: a dispute concerning the right of an individual appointed to a minor judicial office by a lame-duck President to the delivery of the comission which had been witheld from him by the newly sworn-in Secretary of State. Even the context of the dispute tends to fade from memory: the nasty political rivalry between two of the most illustrious statesmen of the early American Republic – John Adams and Thomas Jefferson –, drawing into their cockfight the most remarkable among their liegemen – James Madison and John Marshall. But every freshman knows what the case stands for in U.S. constitutional law to this very day: the proposition that judges have the power to strike down legislation they find unconstitutional. The implications of the 'Portuguese Judges' case will perhaps not be as lasting and far-reaching as this, but they will no doubt vastly exceed what meets the untrained eye.