

The Current Rule of Law Challenges within the EU

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Address at the Annual Conference of the Law Society of Ireland The Current Rule of Law Challenges within the EU

The Mediterranean, as all of you know, has daily become a place of salvation or a place of death for thousands of migrants who want nothing less than the opportunity to tip the edge of Europe and beg to come ashore.

The political machinery spurred on by images of death set against a jarring backdrop of beauty and of sunshine has provided some immediate responses to this tragedy.

While immediate rescue efforts are dramatic and necessary, there are human rights challenges, and potential human tragedies, relating to how those refugees who make it to our shores are treated. How are they treated while their applications to remain in Europe are processed? How are they treated if it is decided to return them to their home countries? Does the Rule of Law in the EU protect these most vulnerable people in these situations?

Before seeking answers to these questions, let me make two points.

Let me first of all underline that a characteristic of the EU is that it is expressly founded on the Rule of Law. The EU institutions can be required to justify, on the basis of law, why they take action. Further, mechanisms to review these actions, such as judicial review by the EU courts, do exist. Rules and procedures exist so that the EU institutions can hold Member States to account for not applying EU law properly. However, as we will see, these mechanisms are not necessarily comprehensive or certain.

Let me also make a comment on what I understand to be the nature and purpose of law. For me, apart from in certain limited circumstances, the law should not be some form of detailed recipe as to how we should act. Rather, the law should provide us, particularly as regards the protection of fundamental rights, with the ultimate backstop to our behavior.

Public bodies and the political actors that work in and with them have a broad margin of discretion when deciding upon policy. There are many options which could, for example, be taken in dealing with the crisis in the Mediterranean. However, whatever policy is chosen, it must be subject to an assessment and control as to whether it complies with the law, especially



when that law seeks to protect fundamental rights.

When I refer to Rule of Law, as an Ombudsman, I also include the need to respect of principles of good administration which, while not necessarily constituting positive law, should bind public authorities as to how they act.

As regards the deep underlying purpose of the Rule of Law, separate from its immediate effects of ensuring that rights and obligations are respected and enforced, and its effect of delimiting the power of the State, I underline that the Rule of Law is an essential component of a democratic state. Its presence legitimises the State and defines it. Its absence often signals that we are in an autocracy, an oligarchy or even a dictatorship. Weak Rule of Law at least signals that we are in an ineffective, even dysfunctional State.

So, what of the Rule of Law in the EU, in particular as it relates to the protection of fundamental rights? As regards substantive fundamental rights, we comfort ourselves that it all looks rosy. The EU has enshrined into law the Charter of Fundamental Rights, though has not yet acceded to the European Convention on Human Rights as required under the Lisbon Treaty.

We declare in the Charter that rights such as the right to human dignity is inviolable and that it must be respected and protected. We declare that everyone has the right to life. We declare, in the preambles to the Charter, that enjoyment of the rights entails responsibilities and duties with regard to other persons, to the human community.

One would expect, given those substantive rules, we would also have in place effective measures to ensure that the tragedies such as the ones occurring in the Mediterranean are, to the best of our ability, dealt with in accordance with fundamental rights?

But the reality is often otherwise? Why?

One reason is that it is often not entirely clear who has competence to deal with a particular issue. An EU institution or Agency? If so, which one? A Member State? Various Member States? A combination of the aforementioned? It is in that context, sometimes, far too easy to fudge the issue of who has the moral and legal responsibility to act. It's as if a hundred people are watching a man drown, each one expecting that another will jump in to save him. In the end, no one jumps, and the man drowns.

Another complexity is that the answer to the question of who is competent is often - we all are - at least for specific aspects of the same situation. I will illustrate this point when I talk about how the Ombudsman dealt with the returns policy of Frontex, the EU agency that coordinates and finances joint return operations by air of illegal immigrants in cooperation with Member States.

Aside from the issue of competence blur, there is a question of whether there are specific procedural mechanisms in place at the supra-state level to ensure that the policies that are indeed put in place comply with the legal standards, in particular the legal standards relating to the protection of fundamental rights.



Putting in place effective mechanisms to ensure the protection of rights is a particular challenge at a supra-state level. The powers that the EU has are attributed powers, in other words powers that the Member States have chosen to grant to the EU. Whereas States, democratic states, are reasonably comfortable in creating strong internal mechanisms to allow for the control of their own behavior, there are often unwilling to grant supranational control bodies such strong powers, especially where the exercise of such control powers impacts upon their own actions or vital interests.

An example of this is the right of the Commission to bring infringement proceedings against Member States when the Commission considers that these Member States have not complied with their obligations under EU law. The Commission does, sometimes in difficult and important cases, use this mechanism in an effort to ensure that Member States comply with their obligations under EU law such as when, last September, the Commission opened infringement proceedings against the Czech Republic relating to its policy of discriminating against Roma school children. Roma children in the Czech Republic are 27 times more likely to be placed in schools for mentally disabled children than non-Roma pupils. Since exclusion of any group from mainstream education, whether because of disability or ethnicity, breaches human rights standards, it is important that the Commission take such cases. So, should we be happy? Well, we would be, provided that such steps are likely to change, in a reasonable time-frame, the reality on the ground. Provided such steps, in a reasonable time frame, open all school gates to all children in the Czech Republic. Sadly, I am not so confident.

It is true that if the Czech Republic does not change its current policies, the Commission may lodge an infringement case with the EU's Court of Justice. However, the ruling of the Court of Justice in such a case would not be binding on the Czech Republic. It could simply ignore it. At most, the Commission could, eventually, take a second case to court asking the Court to impose financial penalties on the Czech Republic. Many years down the line, the court might then issue a fine. However, what the EU Court cannot do, is to require, as a national court could do, the national authorities in the Czech Republic to change their behavior. It can order no injunctive relief. Its rulings are not directly binding on the national authorities. In theory, a Member State could even choose to pay the fine and ignore the ruling. An individual child, standing at the school gate in the Czech Republic, may find that the process I have described above will not open that school gate for them.

By way of comparison, let me take you back to the days of school segregation in the United States of the 1950s and 1960s, when black children were effectively denied the right to attend the school of their choice. In the 50s, the US Supreme Court had ruled, in *Brown v. Board of Education*, that laws allowing segregation on the basis of race were unconstitutional. In the 60s, in *Swann v. Board of Education*, it had the opportunity to look at the issue of bussing children to schools (school bussing systems were suspected of being an indirect means of maintaining segregation). The Supreme Court, in *Swann*, mandated a particular bussing policy. That ruling was also directly enforceable vis-à-vis the local authorities in southern US States.

Rulings by the EU Court of Justice in infringement cases have no such executive force.



Of course there is, since the entry into force of the Lisbon Treaty, the option to invoke Article 7 of the Treaty, which states that serious human rights breaches can result in countries losing their voting rights in the EU Council of Ministers.

However, how effective is that possibility at ensuring the rule of law? Well, it all depends upon whether the EU is really serious about using the option provided for under Article 7.

The proof of the pudding is, of course, in the eating. The EU has not used the Article 7 route to date. However, the EU's resolve in this regard is currently being tested with the on-going case of Hungary. On 28 April, Hungarian Prime Minister Orbán raised the possibility of the death penalty being reintroduced in Hungary. On 30 April, President Juncker urged Hungarian Prime Minister Viktor Orbán to make clear he has no intention of reintroducing the death penalty in his country. Otherwise, he said, "there will be a fight". A Commission spokesperson later hinted that Hungary risked losing its voting rights in the Union if it went ahead with the plans. The Commission, in the following days, softened the rhetoric somewhat, stating that if no solution is found within the established framework, Article 7 will always remain as a "last resort" to ensure compliance with EU values. . If these threats to introduce the death penalty, in contravention of human rights rules, become reality, we may see how serious the EU really is as regards really defending the rule of law vis-à-vis its Member States.

Now, as I have said at the beginning, law is a backstop. Rule of law implies that, eventually, the law will be applied.

In his last State of the Union speech in 2014, the then Commission President, Barroso described the Commission's options as regards human rights abuses in Hungary as being "limited", given that it could only launch a classic infringement procedure or go for "the nuclear bomb" of Article 7. One might wonder, does describing Article 7 as "the nuclear bomb option" imply that Article 7 option could never actually be used?

Having said all that, and leaving Article 7 aside, I should not be understood as implying that infringement proceedings against Member States have no effects whatsoever. In fact, the effectiveness of infringement proceedings, and also indeed preliminary reference procedures where ruling are made by the European Court of Justice in response to questions from national courts, is very much dependent on the compliance culture of the Member State; is the Member State a willing participant in the EU project, with a clear and deep understanding of the need to comply with EU law? The effectiveness of infringement proceedings is also dependent on the state of the Rule of Law at national level. If Rule of Law prevails at national level, we would expect that national courts can and should base their rulings on the rulings of the EU courts. As rulings by national courts do have executive effects, the end result would be that EU law, which includes EU fundamental rights law, does get applied on the ground. In sum, the existence of a certain minimum level of rule of law creates a positive spiral continuously reinforces and extends the rule of law.

I have talked to you about the rule of law as it manifests itself in the relationship between the EU



and Member States. What of the Rule of Law as regards the actions of the EU institutions.

All EU institutions, bodies, offices and agencies are subject to the jurisdiction of the EU courts. It was not always so. Prior to the Lisbon Treaty the EU courts only had jurisdiction over European Community institutions and bodies, thus excluding from the Courts' competence the European Council, and agencies such as Eurojust and Europol. Thankfully, that gap in the system has now been plugged.

However, the fact that all EU institutions, bodies, offices and agencies are now subject to the jurisdiction of the EU courts does not mean that they are a comprehensive guarantor as regards the rule of law. The reason this is the case is because the right of individuals to access EU courts can, as we shall see, be very limited.

The Courts can, of course, in specific circumstances, be very effective in terms of protecting individuals' rights. The Kadi ruling is a useful example.

Yasin Abdullah Ezzedine al-Qadi, or if you permit me, simply Mr Kadi, is a Saudi Arabian multi-millionaire with close ties to the Saudi royal family. In 1999 and 2000, the UN imposed sanctions on Mr Kadi as he was suspected to be connected to al-Qaeda. His assets in the United States were frozen. The EU also applied sanctions to Mr Kadi based on the fact that the UN had imposed sanctions on him. In response to these measures, his lawyers brought two successful lawsuits to the European Court of Justice.

The cases sought to strike a balance between the need to combat international terrorism and the protection of fundamental rights and freedoms of suspected terrorists. The fundamental rights at stake were Mr Kadi's right to be heard before a measure adversely affecting him was taken and his right to effective judicial protection. In sum, no evidence justifying the restrictive measures imposed on Mr Kadi had been communicated to Mr Kadi before his assets were frozen by the EU. Mr Kadi was thus not put in a position to challenge the measures imposed upon him.

The end result was that the EU courts overturned the decisions freezing his assets. In doing so, the Court insisted that the EU institutions, when faced with the need to ensure the protection of fundamental rights, are subject to a strict standard of review. This strict standard of review not only covered the procedural aspects of EU obligations, i.e. the obligation to transmit reasons for listing and to allow the targeted individual an opportunity to be heard, but also extended to a substantive review of the reasons offered, i.e. whether these are sufficiently detailed and specific, whether they rest on a solid factual basis, and generally whether the reasons offered, or at least one of them, were substantiated. The extensive review was required, according to the Court, not just because it was indispensable to ensure a fair balance between the maintenance of international peace and security and the protection of fundamental rights and freedoms, but all the more so because the procedures at UN level, including, by the way, the UN Office of the Ombudsperson, still did not provide the guarantees of effective judicial protection.



Now, there are a number of details worth pointing out which distinguish the case of Mr Kadi, a Saudi multi-millionaire, from the cases of the thousands of poor migrants who seek to cross the Mediterranean in flimsy boats, apart from the fact that he had the money to defend his rights in court.

First, Mr Kadi was the direct named subject of a specific act of an EU institution. This made him directly and individually concerned by that act. One of the conditions for going to the EU courts is that you are directly and individually concerned by an act of an EU institution, body, office or agency. The nameless and countless migrants whose lives are at risk crossing the Mediterranean would not meet this formal and strictly applied legal test.

Second, in the Kadi case there was an act of an EU institution. In the case of the inaction in the Mediterranean that is putting the lives of people at risk, the problem is that there is no act which one could challenge in court. And yet that inaction can result in a far more serious risk to the most important fundamental right, the right to life

Third, when there is action to deal with the refugee crisis, such as the refugee returns actions of Member States and Frontex, the European Agency set up in 2004 to reinforce and streamline cooperation between national border authorities, it would be argued (it has in fact been argued) that, from a strictly legal perspective, the failures to respect fundamental rights relating to refugee returns result from actions of Member States and not the EU agency. If those arguments were accepted, and I stress I do not accept them, these actions would not fall within the competence of the EU Courts. They could only be dealt with by national courts.

I am working to plug some of the gaps here.

This is well illustrated by the inquiry I am currently conducting relating to the actions of Frontex. Indeed, earlier this week I made proposals to the EU agency Frontex on how to better ensure respect for the fundamental rights of migrants who are subject to forced returns from the EU to their countries of origin. You may know that Frontex coordinates and finances joint return operations by air in cooperation with Member States. Between 2006 and 2015, it coordinated 267 joint return flights, returning more than 13 000 people.

While the EU institutions and the Member States have wide discretion as regards how they design and implement an EU migration policy to deal with the influx of migrants from around the world, which may include a returns policy, any such policy must be subject to backstops, especially where the policy impacts on fundamental rights. In this context, everything has to be done to ensure respect for the human dignity of the individuals being returned.

In this context, this week, I have called on Frontex to ensure that families with children and pregnant women are seated separately from other returnees. I have also called on Frontex to promote common rules on the use of restraint, publish more information on joint return operations, including monitors' reports, and require the Member States to improve complaints procedures.



More generally, I noted that I continue to be unhappy with the refusal of Frontex to establish its own complaints mechanism. I also suggested several amendments to Frontex's Code of Conduct, including provisions on the use of coercive measures, timely medical examinations of returnees, and human rights training for escorts, with a focus on people with disabilities, women and children.

It is also worth noting that in the Frontex case I highlighted the fact that one of the priorities of the European Ombudsman is increased strategic cooperation between the members of the European Network of Ombudsman. Since monitoring of returns operations also falls within the jurisdiction of Member States, I invited feedback from my national Ombudsmen colleagues, who looked at the returns operations practices in their own Member States and submitted valuable contributions to my investigation as regards Frontex.

To what extent can such recommendations by an Ombudsman contribute to the Rule of Law? After all, Ombudsman recommendations are not-binding. Frontex could simply ignore what I suggest.

As I noted previously, in relation to infringement proceedings, while rulings in infringement cases are not binding on Member States, such rulings can be effective if there is a culture of compliance by the Member State. Likewise for an Ombudsman. An Ombudsman cannot operate, and cannot contribute to the Rule of Law, unless there is a culture of compliance within the institutions under the mandate of the Ombudsman. A willingness, even a desire, to play by the rules, so that when I point out that an institution has failed in some respect, it engages with me in good faith and seeks to address my concerns. In addition, I have a democratic mandate through my election by the European Parliament, and not as a member state or party nominee, but as an independent individual. And, happily, as was the case when I was Irish Ombudsman, the vast majority of my recommendations are accepted by the EU institutions.

To conclude, the experience of the Mediterranean deaths and the visible desperation of those clambering to be part of a prosperous Europe have exposed the frailties not just in our political architecture, in the willingness of all EU states to show solidarity as they seek solutions, but also in the architecture of our human rights conventions.

Many EU office walls, including my own are bedecked with framed copies of the Charter of Fundamental Rights and in these years when we remember the war dead and those murdered in the holocaust maybe we convince ourselves that all of those horrors, at least in Europe are behind us. But if you swap the images of the death camps for the images of blue skies and sunshine and young bodies drowning inches from the warm sand of Mediterranean beaches, and consider the 21st century horrors from which they are fleeing, we can see that for this generation, the human rights challenges of an at times indifferent world remain with us still.