

The Rule of Law in Europe

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Dear Editor,

While there are many urgent and troubling issues one might choose to write about regarding European public law at present, I write to you today with a fairly modest plea. My plea is aimed at the European Court of Justice (ECJ) and implores its members to better respect the rule of law in their decision-making.

It is perhaps always dangerous to invoke such a contested concept as the rule of law in an argument. However, the Member States themselves, as drafters of the Treaties, made clear the commitment of the EU towards the rule of law. Article 2 of the Treaty on European Union (TEU) states:

The Union 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.

A number of meanings can be (and have been) attributed to the rule of law, ranging from a formalistic conception to requiring a full-blown commitment to human rights. At its most basic, perhaps, the rule of law might be regarded as a requirement of consistency that contrasts with arbitrary exercises of discretion. When directed towards the judiciary, the rule of law as consistency requires a coherent line of jurisprudence with some degree of predictability. Respect for the rule of law does not imply that it is illegitimate for judges to overrule earlier decisions. However, in such cases, judges ought to justify and explain the shift.

In the context of the EU the need to respect the rule of law takes on a new dimension. The decisions of the ECJ are binding across all twenty-eight Member States where it is the obligation of national judges and law-makers to interpret and apply those decisions. While, strictly speaking, the ECJ is not bound to follow its earlier decisions, its position within the EU legal order provides a strong argument why the ECJ should aim for consistency.

The ECJ has only very rarely expressly departed from its earlier decisions and the cases in which it has done so are ‘as few as they are celebrated’ (in the words of Advocate General La Pergola).¹ Such cases where the ECJ explicitly overruled its earlier decisions include *Roquette Frères*² (overturning *Hoechst*³), *Keck*,⁴ and *Metock*⁵ (overturning *Akrich*⁶). More frequently, the ECJ implicitly departs from earlier judgments such as from its decision in *Cinéthèque*⁷ to *ERT*⁸ and *Familiapress*.⁹ It is this latter instance that I want to pick up on and raise in the light

¹ Case C-262/96 *Sema Sürül v Bundesanstalt für Arbeit* [1999] ECR I-2685, Opinion of AG La Pergola.

² Case C-94/00 *Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes, and Commission of the European Communities* [2002] ECR I-9011.

³ Case C-46/87 *Hoechst v Commission* [1987] ECR 2859.

⁴ Case C-267/91 *Keck and Mithouard* [1993] ECR I-6097.

⁵ Case C-127/08 *Metock and Others* [2008] ECR I-6241.

⁶ Case C-108/01 *Akrich* [2003] ECR I-907.

⁷ Case C-60/84 *Cinéthèque v Fédération nationale des cinémas français* [1985] ECR 2605.

⁸ Case C-260/89 *ERT v DEP* [1991] ECR I-2925.

⁹ Case C-368/95 *Familiapress* [1997] ECR I-3689.

of two recent cases regarding access to social benefits for EU citizenship: *Dano*¹⁰ and *Alimanovic*.¹¹

In *Dano* the ECJ appears to depart its rulings in *Martínez Sala*¹² and *Trojani*,¹³ namely that migrant EU citizens, lawfully resident according to national law (but not EU law), are entitled to equal access to any social benefits regulated by EU law. The ECJ focused on the primary rights of Ms Martínez Sala and Mr Trojani to move and reside (Article 21 TFEU) and to non-discrimination on grounds of national (Article 18 TFEU). Ms Martínez Sala, as a Union citizen lawfully residing in the territory of another Member State, fell within the personal scope of the Treaty and was thus able to claim equal access to social benefits.¹⁴ Similarly, in *Trojani*, the ECJ held that while Member States ‘can make residence of an EU citizen conditional on his having sufficient resources, that does not mean that such a person cannot, during his lawful residence in the host Member State, benefit from the fundamental principle of equal treatment’.¹⁵

In *Dano*, however, the ECJ chose not to focus on the position of Ms Dano as an EU citizen lawfully resident in a host Member State. Instead, the ECJ focused its attention on whether Ms Dano had a right of residence under EU law (specifically Directive 2004/38, the Citizens’ Rights Directive).¹⁶ Ms Dano did not have a right of residence under Citizens’ Rights Direct as she lacked sufficient resources which meant she could not claim equal treatment with regard

¹⁰ Case C-133/33 *Dano* (ECJ, 11 November 2014).

¹¹ Case C-67/14 *Alimanovic* (ECJ, 15 September 2015).

¹² Case C-85/96 *Martínez Sala* [1998] ECR I-2691.

¹³ Case C-456/02 *Trojani* [2004] ECR I-7573.

¹⁴ *Martínez Sala* (n 12) para 61.

¹⁵ *Trojani* (n 13) para 40.

¹⁶ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the rights of citizens of the Union and their family member to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC, 75/34/EEC, 93/96/EEC [2004] OJ L 158/77.

to social assistance.¹⁷ The case clearly departs from the ECJ's earlier decisions, yet does not expressly say so or provide reasons as to why it is doing so. It might be that the entry into force of the Citizenship Directive signalled the need for a change, but the ECJ does not even go so far as to state this.

In *Alimanovic*, the ECJ again implicitly overruled its 2009 decision in *Vatsouras*.¹⁸ Article 24(2) of the Citizens' Rights Directive permits Member States to derogate from the right to equal treatment as regards jobseekers. In *Vatsouras*, the ECJ held, notwithstanding Article 24(2), that a jobseeker still falls within the scope of Article 45 TFEU on free movement of workers. A jobseeker could therefore still benefit from the right to equal treatment in Article 45 TFEU as regards 'a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State'.¹⁹ The ECJ did accept, however, that a Member State could choose to grant such an allowance only after it has been possible to establish a real link between the job-seeker and the labour market of that State.²⁰ In *Alimanovic*, however, the ECJ did not refer to Article 45 TFEU. Instead the ECJ narrows, almost to the point of extinction, this aspect of its decision in *Vatsouras*, holding simply that social assistance to jobseekers may be withheld under Article 24(2) of the Citizens' Directive.²¹

In both *Dano* and *Alimanovic* therefore, the ECJ implicitly overrules several earlier cases on the rights of EU citizens. Without explicitly declaring this, the ECJ leaves in doubt the status of the earlier decisions, complicating the position of national judges who have to make their way through the ECJ's case law. What is more, when the subject matter concerns the rights of

¹⁷ *Dano* (n 10) paras 81-82.

¹⁸ Case C-22/08 *Vatsouras* [2009] ECR I-4585.

¹⁹ *ibid*, paras 36-37.

²⁰ *ibid*, para 38.

²¹ *Alimanovic* (n 11) paras 57-58.

EU citizens, a decision to limit these rights warrants justification. In the absence of explanation, the ECJ leaves itself open to criticism for acting arbitrarily or political expediency. I therefore end, as I began, with a plea for greater respect for the rule of law in Europe.

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Emily Hancox