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**Aplikace Listiny základních práv EU: Článek
47 v kontextu reformy soudnictví v Polsku**

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**Application of the EU Charter of
Fundamental Rights: Article 47 in the Context of
Judicial Reform in Poland**

Master's Thesis

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Introduction

In late 2015, the Polish right-wing party Prawo i Sprawiedliwość (PiS) came into power and has since launched a series of judicial reforms to reorganize the justice system and remove the vestiges of the undemocratic past. However, these reforms quickly came to the attention of the European Commission for allegedly undermining the independence of the national judiciary. The Commission has opened four formal infringement procedures against Poland under Article 258 of the TEU to date. In December 2017, the Commission even issued a reasoned proposal to the Council to adopt a decision under Article 7(1) TEU due to a ‘clear risk of a serious breach of the rule of law.’¹ In addition, a series of requests for preliminary rulings under Article 267 TFEU have been made by several Polish courts. More than 57 applications were then made to the ECtHR between 2018 and 2021 against Poland concerning these reforms.² In 2021, the European Commission observed that during the last five years, the general public's perception of the independence of the judiciary has steadily decreased, and the tension surrounding the public debate on the judiciary has, on the other hand, increased.³

Stemming from the constitutional traditions common to the Member States and Articles 6 and 13 of the ECHR is the general principle of effective judicial protection, which is of fundamental importance in the EU legal order. This principle encompasses several rights but the central one is the right to an effective remedy and to a fair trial, as enshrined in Article 47 of the Charter. The key components of this right are, among others, a tribunal established by law, requirements of independence and impartiality, the effectiveness of the remedy provided, a fair and public hearing, and the binding nature of a judgment. The requirement of independence and impartiality is most threatened due to the Polish reforms.

This thesis sets two objectives. Firstly, to describe how the Court of Justice went from being a mere standby leaving the national justice system solely in the hands of the Member States to actively intervening in the organisation of judicial systems aiming to safeguard the values fundamental to the EU. In this context, it will also present the judicial review of Polish national rules from the perspective of independence. Secondly, to examine what role Article 47 of the Charter has been assigned in this regard and to what extent, if any, its applicability has been

¹ European Commission. *2020 Rule of Law Report, Country Chapter on the rule of law situation in Poland*, 2020 2

² Judgement of 8 November 2021, *Dolińska-Ficek and Ozimek v. Poland*, ECLI:CE:ECHR:2021:1108JUD004986819 – Press Release

³ European Commission. *2021 Rule of Law Report, Country Chapter on the rule of law situation in Poland*, 2020

affected by this recent development in the Court's case-law. In this context, the text also examines other implications for the right of Article 47 of the Charter arising from the case-law development.

The actual text of the thesis is divided into three main parts. The first part briefly describes how the doctrine of fundamental rights has developed in the European Community. From an economic union, where human rights protection was absent, to a unique integration project based on the values of human rights protection and the rule of law. This evolution is also reflected in recognizing and strengthening the principle of effective judicial protection. Hence, the three most important cases that have shaped the content of this principle are presented. This analysis is then followed by a brief introduction to the Charter and Article 47 thereof, which codifies one of the rights recognised under the principle of effective judicial protection.

Part 2 then presents an overview of Polish judicial reforms that have negatively transformed the national justice system to the extent that they have come to the attention of the European Commission and the Court of Justice. These include, in particular, the new retirement age for judges and the disciplinary regime. Changes to the composition of the Constitutional Tribunal and the National Council of the Judiciary are also presented, as these institutions are central to guaranteeing the independence of the judicial system in Poland. Since these changes undermine the independence of the national judiciary, this part goes on to also explain the Court's reaction. In particular, it describes how the Court justified its involvement and found jurisdiction to rule on procedural rules for the organisation and functioning of national judicial systems.

The final part first introduces the Court's assessment of the reformed rules in terms of their ability to ensure and protect the requirements of independence. Secondly, in relation to Article 47 of the Charter, it discusses the relationship between that Article and Article 19(1) TEU and whether the latter's applicability can be a trigger for the applicability of the former. Subsequently, other possible consequences of the newly introduced interpretation of Article 19(1) TEU are explored, in particular, whether it has in any way affected the protection of the right enshrined in Article 47 of the Charter in the context of, inter alia, the primacy mechanisms of EU law and preliminary references.

Poland's rule of law crisis is a current issue, and thus, the political and legal situation is constantly evolving. The primary method used in researching the topic is a study of the case-law of the Court of Justice and the ECtHR and the commentaries of legal experts, especially from Poland, as they can offer a broader perspective due to their deep knowledge of EU and national law.

The debate over the Polish crisis is of great importance, as it represents a turning point in the enforcement of the rule of law in the EU. In this respect, it may seem that Article 47 of the

Charter has been put on the back burner and plays a secondary role in this development. However, this provision is of great importance as an interpretative tool. Moreover, given the threat to the right enshrined therein, the case-law development is also crucial for its protection.

1. Effective Judicial Protection

After the atrocities of World War II, European States committed themselves to cooperate and create more efficient systems of human rights protection mainly through different international agreements and organizations. These efforts had to naturally project also in the foundation of the European Economic Community. Although the Community aimed to bring about economic integration, fundamental rights have always been one of the grounds for European integration since any integration could go only so far until it hit the wall of human rights protection.

In 1957, the Treaty establishing the European Economic Community was signed. Even though the Treaty reflected primarily the intention of strengthening the economic cooperation, human rights protection, though indirectly, entered the scene as well.⁴ The Court of Justice had first avoided adjudicating on fundamental rights as the EEC was by design an economic community but changed its position in the mid-1960s and the beginning of 1970s when it issued several rulings reflecting upon those rights. The pivotal cases indicating the future direction of not only human rights protection, but the Community law as whole, were undoubtedly *Van Gend en Loos*⁵ (principle of direct effect) and *Costa v ENEL*⁶ (principle of primacy of Community law). These cases opened the possibility for the Court to interpret human rights. From there on, the development of fundamental right protection in the Community has been mainly the result of the Court's case law.⁷ Initially, the protection of fundamental rights was built on and referred to general principles of law. Later, the Court would base these principles on the extended interpretation of free movement, the integration based on different values and national constitutional traditions, and on the preliminary references that provide normative results to be applied by national courts.⁸

⁴ In its Preamble, the signatory Member States declare they are 'pooling their resources to preserve and strengthen peace and liberty', affirming the 'improvement of the living and working conditions' and 'reducing the differences existing between various regions'. Additionally, the Treaty itself then enshrined the principle of equal treatment for men and women.

⁵ Judgement of 5 February 1963, *Van Gend en Loos v. Administratie der Belastingen*, C-26/62, ECLI:FEU:C:1963:1

⁶ Judgement of 15 July 1964, *Costa v. E.N.E.L.*, C-6/64, EU:C:1964:66

⁷ TOMÁŠEK, Michal, Vladimír TÝČ, David PETRLÍK, et al. *Právo Evropské unie*. 3. aktualizované vydání. Praha: Leges, 2021. Student (Leges), pp. 340-341. ISBN 978-80-7502-491-6

⁸ TRIDIMAS, Takis. Fundamental Rights, General Principles of EU Law, and the Charter. *Cambridge Yearbook of European Legal Studies* [online]. 2014, 16, pp. 362-363. ISSN 1528-8870, DOI: 10.1017/S1528887000002676

1.1 Fundamental Rights as General Principles of Community Law

General principles are general and flexible provisions that are considered to be the ‘backbone of the system of sources.’ Their functions are several, but most importantly they unify the legislative system of Union, preserve its homogeneity, and ensure consistent interpretation of law and serve to fill in the gaps within the legal system. Moreover, they are used as sources of legality of Union institutions’ and Member States’ acts.⁹ In Union law general principles share the status of unwritten legal sources (Article 6(3) TEU) as the primary law contains neither their definition nor a list of them. According to Article 19(1) TEU, the exclusive interpreter of the Treaties and, therefore, of general principles, is the Court of Justice. The Court’s function, in this regard, is to identify those principles and define their structural elements and limits.¹⁰ For the examination of the general principles of Union law, the Court considered national principles common to the Member States, the interpretation of rights based on international sources, and analysis of substantive provisions of the EU primary and secondary law. In the words of Advocate General Mazák, ‘[b]y formulating general principles of Community law [...] the Court has actually added flesh to the bones of Community law, which otherwise – being a legal order based of framework treaty – would have remained a mere skeleton of rules, not quite constituting a proper legal ‘order’.’¹¹ The doctrine of fundamental rights soon became the general principle through whose lenses the Court of Justice would interpret provisions of the Community law and the measures taken by Community institutions.

In *Stauder*¹² national court has referred to the Court of Justice a preliminary question concerning Article 4 of the Commission Decision No 69/71 EEC on measures to allow certain categories of consumers to buy butter at a reduced price. This case revolved mainly around the interpretation of the Decision’s text given the different national versions and if, in this case, the German version, which at core deviated from the other versions, was compatible with the general principles of Community law. The Court ruled on uniform application, and uniform interpretation of decisions addressed to all Member States¹³ and noted that the interpreted provision could not be ‘capable of prejudicing the fundamental human rights enshrined in the general principles of

⁹ AMALFITANO, Chiara. *General Principles of EU Law and the Protection of Fundamental Rights* [online]. Edward Elgar Publishing, 2018, p. 24. ISBN 9781786439437, DOI: 10.4337/9781786439437

¹⁰ *Ibid.* 17-19

¹¹ C-411/05 *Palacios de la Villa v Cortefiel Servicios SA* [2007] ECLI:EU:C:2007:106, Opinion of AG Mazák para 85

¹² Judgement of 12 November 1969, *Stauder v. Stadt Ulm*, C-29/69, EU:C:1969:57

¹³ *Ibid.* para 3

Community law and protected by the Court'¹⁴. This way the Court of Justice for the first time acknowledged fundamental rights as general principles of Union law.

Further development was made in *Internationale Handelsgesellschaft*¹⁵, where the Court of Justice firmly stated that 'respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice' and the 'protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community'¹⁶. Additionally, in *Nold*¹⁷ the Court not only confirmed that fundamental rights are indeed 'an integral part of the general principles protected by the Court', but also outlined the sources wherefrom '[i]n safeguarding these rights, the Court is bound to draw inspiration', namely 'constitutional traditions common to the Member States' and 'international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories'.¹⁸ The Court of Justice later made clear that those sources are only meant as a source of inspiration. In *Hauer*¹⁹, the Court refused to judge measures of the Community by applying national legislation or national constitutional law. The Court only referred to its settled case law, *Internationale Handelsgesellschaft* and *Nold*, repeating the principle that fundamental rights are an integral part of the Community protected by the Court, and constitutional traditions common to the Member States and international treaties for the protection of human rights are its sources of inspiration.²⁰ As for sources in the form of international treaties protecting human rights, the ECHR was for the first time explicitly referred to by the Court two years later in *Rutili* judgment.²¹

The recognition of the general principles had a so-called 'bottom-up effect', i.e., a principle common in the national constitutional traditions was 'elevated to European constitutional heritage'. On the same note, its recognition by the Court of Justice opened doors to a 'top-down effect', meaning that through imposing these principles, the Court of Justice unified the level of protection of fundamental rights in all Member States.²²

¹⁴ TOMÁŠEK, TÝČ, PETRLÍK, et al., op. cit. 7, p. 341; *Stauder v. Stadt Ulm*, C-29/69, op. cit. 12, para 7

¹⁵ Judgement of 17 December 1970, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, C-11/70, ECLI:EU:C:1970:114

¹⁶ *Ibid.* para 4

¹⁷ Judgement of 14 May 1974, *Nold KG v Commission*, C-4/73, ECLI:EU:C:1974:51

¹⁸ *Ibid.* para 13

¹⁹ Judgement of 13 December 1979, *Hauer v Land Rheinland-Pfalz*, C-44/79, ECLI:EU:C:1979:290

²⁰ *Ibid.* para 14-15; as the Court points out, it was also recognized by the joint declaration of the European Parliament, the Council and the Commission of 5 April 1977 (Official Journal C 103, 1977)

²¹ Judgement of 28 October 1975, *Rutili v Ministre de l'intérieur*, C-36/75, ECLI:EU:C:1975:137 para 32

²² AMALFITANO, op. cit. 9, pp. 24-25

1.2. The General Principle of Effective Judicial Protection

As the Court of Justice had found the protection of fundamental rights to be an integral part of the Community legal order, jurisprudence could recognise and examine concrete principles and their elements, in particular effective judicial protection. This principle is inherent to the concept of the rule of law²³ and therefore must be complied with by every state which claims to respect this concept. Within the Union law, this principle has always enjoyed the status of a constitutive element, even when, in the pre-Charter era, the principle was not expressly recognised in primary or secondary law. Tridimas explains this phenomenon as the inevitable result of the Union turning into new form of governance which has dismantled the ‘state’s monopoly in granting rights.’²⁴ Ravo attributes this also to three other factors – the principle of effective judicial protection is the basis for reviewing the legality of EU law and national law implementing it, and is a source of interpretation thereof, and this principle binds EU institutions as well as Member States and their national courts in order to protect rights derived from the Union law.²⁵

The roots of the general principle of effective judicial protection are to be found at the very beginnings of the Court’s jurisprudence. The factual starting point was *Van Gend en Loos*. By articulating the principle of the direct effect, the Court indicated the creation of rights of individuals at supra-national level, meaning, *inter alia*, the strengthening of the role of the judiciary. That, however, to function, requires and presupposes the recognition of the right to judicial protection. In fact, even the principle of primacy of the Union law, as formulated in *Costa v E.N.E.L.*, could not stand the test, because, as Tridimas points out, unless individuals have the access to justice, the supremacy of Community (Union) norms cannot be enforced due to lack of legitimacy.²⁶ Therefore, as the Community started to transform from an economic union to a new and unique form of governance, the Community jurisprudence had to follow and react to the need of ensuring judicial protection of individuals.

The following cases illustrate how the Court of Justice enshrined in its case law the principle of judicial protection which will later be *inter alia* Article 47 of the Charter.

²³ The rule of law as understood by the Council of Europe (European Commission for Democracy through Law (Venice Commission), 2016 para 15): ‘the notion of the Rule of Law requires a system of certain and foreseeable law, where everyone has the right to be treated by all decision-makers with dignity, equality and rationality and in accordance with the laws, and to have the opportunity to challenge decisions before independent and impartial courts through fair procedures’; C-222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECLI:EU:C:1986:44, Opinion of AG Darmon para 3

²⁴ TRIDIMAS, op. cit. 8, p. 364

²⁵ RAVO, Linda Maria. The role of the Principle of Effective Judicial Protection in the EU and its Impact on National Jurisdictions. In: *Sources of Law and Legal Protection* [online]. Triestine Lecture; 1, EUT Edizioni Università di Trieste, 2012, pp. 103,106

²⁶ TRIDIMAS, op. cit. 8, p. 364

1.2.1. The Principle of Judicial Protection

What turned out to be the cornerstone of the future Article 47 of the Charter, was the *Johnston*²⁷ case. Mrs. Johnston, whose employment contract at the Royal Ulster Constabulary (RUC) in the United Kingdom was not renewed solely on the grounds for her sex, claimed that this was contrary to the Council Directive 76/207/EEC²⁸ and as result suffered discrimination. The measure taken by the RUC had been grounded on a protection of public order, and indeed the Directive provides that different treatment of sexes is not unlawful if done ‘for the purposes of safeguarding national security or of protecting public safety or public order.’²⁹ However, the national legislation also deprived Mrs. Johnston of any judicial review of the legality of the measure taken due to it falling under the exception. The national court referred the matter to the Court of Justice for a preliminary ruling.

In its judgment, the Court recognised within Article 6 of the Council Directive 76/207/EEC³⁰ the principle of effective judicial control. Explaining in paragraph 18 of the judgment that the requirement of judicial control is ‘a general principle of law which underlines the constitutional traditions common to the Member States’. Moreover, the requirement is also laid down in Articles 6 and 13 of the ECHR, to which the Court reminded that according to its own settled case law and the Joint Declaration of 5 April 1977³¹, ‘the principle on which [the ECHR] is based must be taken into consideration in Community law’.³² The Court concluded, that ‘[i]t is for the Member States to ensure effective judicial control as regards compliance with the applicable provisions of Community law and of national legislation intended to give effect to the right for which the directive provides’.³³ Therefore, if there is a fundamental right of an individual that could be derived from EU law, the individual should be awarded judicial protection of that right.³⁴ Having this in mind, the Court ruled that individuals ‘must have an effective judicial

²⁷ Judgement of 15 May 1986, *Johnston v Chief Constable of the Royal Ulster Constabulary*, C-222/84, ECLI:EU:C:1986:206

²⁸ Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions

²⁹ *Ibid.* Article 53

³⁰ *Ibid.* Article 6 ‘Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment within the meaning of Articles 3, 4 and 5 to pursue their claims by judicial process after possible recourse to other authorities.’

³¹ Joint Declaration of 5 April 1977 of the European Parliament, Council and Commission

³² *Johnston v Chief Constable of the Royal Ulster Constabulary*, C-222/84, op. cit. 27, para 18

³³ *Ibid.* para 19

³⁴ RAVO, op. cit. 25, p. 104

remedy' to rely upon 'against a Member State which has not ensured that [the Directive] is fully implemented in its internal legal order'.³⁵

In *Johnston*, the requirement of effective judicial protection was still linked to this Directive, or to Article 6 thereof. However, the recognition that a provision of Directive might reflect a general principle of law opened doors for the application of this principle also in other areas of Union law, especially where not explicitly codified.³⁶ That happened two years later in *Heylens*³⁷.

Criminal proceedings were lead against a Belgian football trainer working in France for not complying with French Law requiring trainers to operate only either under French trainer diploma or diploma accredited as an equivalent. When presenting his Belgian diploma to the competent authority, it was rejected by decision against which the defendant had no specific legal remedy. The national court referred a preliminary question to the Court of Justice, asking if this lack of legal remedy could 'constitute a restriction on freedom of movement for workers as defined in Articles 48 to 51 of the EEC Treaty'³⁸. The question concerned directly provisions of primary law, since no directive was applicable to this case. In this regard, the Court in paragraph 14 said, '[s]ince free access to employment is a fundamental right which the Treaty confers individually on each worker in the Community, the existence of a remedy of a judicial nature against any decision of a national authority [...] is essential in order to secure for the individual effective protection of his right' and referred to paragraph 18 of *Johnston*.³⁹ This was a big step because, for *Johnston*, the principle of effective judicial protection was ingrained in a provision of secondary law. However, in *Heylens*, a similar provision was lacking, and so the Court directly tied this principle to a fundamental right conferred on an individual by primary law.

The third shaping case was *Borelli*⁴⁰. Oleificio Borelli SpA brought an action to the Court for the annulment of the European Commission's decision to grant the applicant aid from the European Agricultural Guidance and Guarantee Fund. Borelli's application was not admitted by the Commission in view of unfavourable opinion issued by the competent national authority. In this judgment, the Court confirmed that even as part of Community decision-making process,

³⁵ *Johnston v Chief Constable of the Royal Ulster Constabulary*, C-222/84, op. cit. 27, para 1 of Ruling

³⁶ PRECHAL, Sacha. The Court of Justice and Effective Judicial Protection: What Has the Charter Changed?. In PAULUSSEN, Christophe, Tamara TAKACS, Vesna LAZIĆ and Ben VAN ROMPUY, ed. *Fundamental Rights in International and European Law* [online]. The Hague: T.M.C. Asser Press, 2016, 2016-11-05, p. 144. ISBN 978-94-6265-086-2, DOI: 10.1007/978-94-6265-088-6_7

³⁷ Judgements of 15 October 1987, *Unectef v Heylens*, C-222/86, ECLI:EU:C:1987:44

³⁸ *Ibid.* para 5; Article 48 granted individuals the freedom of movement for workers; Article 51 ordered the Council to adopt social security measures that are 'necessary to provide freedom of movement for workers'

³⁹ *Unectef v Heylens*, C-222/86, op. cit. 37, para 14

⁴⁰ Judgement of 3 December 1992, *Oleificio Borelli v Commission*, C-97/91, ECLI:EU:C:1992:491

measure taken by national authority must be subject to judicial review.⁴¹ The Court also referred to paragraph 18 of *Johnston* and paragraph 14 of *Heylens*, summarising that ‘the requirement of judicial protection of any decisions of a national authority reflects a general principle of Community law stemming from the constitutional traditions common to the Member States and has been enshrined in Article 6 and 13 of the [ECHR]’⁴².

These three cases recognised the principle of effective judicial protection as being of fundamental importance in the Community legal order. In *Johnston*, the Court for the first time recognised judicial control to be a general principle of the Community law stemming from the constitutional traditions common to Member States and from Articles 6 and 13 of the ECHR. Later *Heylens* applied this general principle also on provisions of primary law, where no direct mention of judicial review was made. In *Borelli*, the Court confirmed the so far development.

1.2.2. The Effect and Contents of the Principle of Effective Judicial Protection

The principle of effective judicial protection has both a vertical and horizontal dimension – binding to EU institutions as well as to Member States.⁴³ In its nature, this principle navigates proceeding before the EU institutions and before national institutions with the visions to ensure fulfilment of obligations and individual rights arising from Union law. This way the principle is capable of effecting and forming national procedural rules, as well as setting requirements upon national courts.⁴⁴

The content of the principle of effective judicial protection has been developed by the Court throughout the time. The Court would use for reference principles common to the constitutional orders of the Member States and the ECHR as interpreted by the ECtHR.⁴⁵ Overall, the general principle of effective judicial protection is perceived as an umbrella principle. It comprises various core elements, such as ‘access to justice’⁴⁶, including the right to judicial review and access to an effective remedy with reasonable time-limits⁴⁷; the right to a fair trial and the principles of due

⁴¹ *Ibid.* para 13

⁴² *Ibid.* para 14

⁴³ In *Kadi I*, the Court reminded that ‘the Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the EC Treaty.’ – Judgement of 3 September 2008, *Kadi and Al Barakaat International Foundation v Council and Commission*, C-402/05P, ECLI:EU:C:2008:461(*Kadi I*) para 284

⁴⁴ RAVO, op. cit. 25, p. 111

⁴⁵ *Ibid.* 104

⁴⁶ Examples given in notes n. 46 to 52 are those provided by Ravo in RAVO, op. cit. 25, p. 105; e.g., Judgement of 11 September 2003, *Safalero*, C-13/01, ECLI:EU:C:2003:447

⁴⁷ e.g., Judgement of 29 October 2009, *Pontin*, C-63/08, ECLI:EU:C:2009:666

process⁴⁸, including the right to reasonable length of proceedings⁴⁹; the right to defence⁵⁰, including the right to evidence⁵¹ and the right to be represented⁵².⁵³ Throughout the time, these core elements of the general principle made their way firstly into secondary Union law through interpretation⁵⁴, and later acquired status of written primary Union law via codification in the Charter.

1.3. Charter of Fundamental Rights of the European Union

As examined above, the general principle of effective judicial protection is deemed to be one of the central principles in the Union law as it serves as the source of legitimacy of Union norms. This principle covers several rights, some of them now affirmed in the Charter. This chapter aims to briefly introduce the Charter and its application.

The Charter was first introduced as a legally non-binding document but later, on December 1st, 2009, entered into force with the legal status of primary law. This was a significant step for further European integration, as it has placed the protection of fundamental rights at the heart of the EU legal structure, representing ‘the very identity of the EU.’⁵⁵

The Charter is a separate document with the same legal value as the Founding Treaties (gaining primary law status by reference), as some states feared its incorporation into the text of Founding Treaties would give the EU state-like features. Yet, many scholars have seen this as weakening the position of the Charter.⁵⁶ Whichever side to take, the Charter is Union’s normative

⁴⁸ e.g., Judgement of 26 June 2007, *Ordre des barreaux francophones and germanophone and Others*, C-305/05, ECLI:EU:C:2007:383

⁴⁹ e.g., Judgement of 17 December 1998, *Baustahlgewebe v Commission*, C-185/95 P, ECLI:EU:C:1998:608

⁵⁰ e.g., Judgement of 2 October 2003, *Corus UK v Commission*, C-199/99 P, ECLI:EU:C:2004:5321

⁵¹ e.g., Judgement of 16 March 2000, *Compagnie Maritime Belge Transport and Others v Commission*, C-395/96 P, ECLI:EU:C:2000:132

⁵² e.g., Judgement of 28 March 2000, *Krombach*, C-7/98, ECLI:EU:C:2000:164

⁵³ RAVO, op. cit. 25, p. 105; PRECHAL, op. cit. 36, p. 149

⁵⁴ The instruments of secondary law are interpreted in the light of general principles. For example, case C-300/11 - Reference for a preliminary ruling concerning the Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. This Directive, a secondary law document, sets the requirement of persons having access to judicial and, if appropriate, administrative procedures to appeal to against decisions taken by the host Member State (Articles 30(2) and 31). The preliminary question concerned the interpretation of the said Directive in the light of the general principle of effective judicial protection.; PRECHAL, op. cit. 36, p. 145

⁵⁵ Court of Justice of the European Union, *Opinion 2/13 pursuant to Article 218(11) TFEU*, ECLI:EU:C:2014:2454 para 169; AMALFITANO, op. cit. 9, pp. 12

⁵⁶ The Czech Constitutional Court (in Pl.ÚS 19/08 Lisbon I, para 190) dismissed this objection, arguing that the Charter ‘is raised to the level of primary law by reference’ and that ‘is nothing unusual’ and ‘certainly nothing inconsistent with the constitutional order of the Czech Republic’ reminding that ‘it is a possible legislative method, also used in domestic law’. To which the Court disclosed as an example Article 112(1) of the Constitution of the Czech Republic; BLANKE, Hermann-Josef and Stelio MANGIAMELI, ed. *The European Union after*

catalogue of rights and principles previously set forth by the Court of Justice. As mentioned above, for a long time the European Union citizens' legal rights and freedoms have been protected mostly by judge-made law – either through the interpretation of the ECHR by the ECtHR or recognition of fundamental rights and freedoms by the Court of Justice.⁵⁷ The introduction of the Charter truly allowed to refocus 'from 'mere' legality to fundamental rights protection and constitutionality'.⁵⁸ Through the Charter, Member States declare that 'the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity' and 'on the principles of democracy and the rule of law,' stressing the need to strengthen the protection of fundamental rights by making them more visible.⁵⁹

1.3.1. Contents and Interpretation

Since becoming legally binding, the Charter has been the primary point of reference in the Court's case law. However, as Tridimas suggests that does not mean 'fundamental rights are exhausted in the Charter'.⁶⁰ He argues that the Article 6(3) Charter is an independent source of rights, as follows for example from the *Festersen* case, where the Court held that right which is not codified in the Charter but is guaranteed by ECHR, is still recognised by the EU law.⁶¹

According to the Charter Preamble in conjunction with Article 6 TEU , the Charter enshrines rights and principles 'as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights.'⁶² That being said, the Charter consists of 54 Articles and is divided into preamble and seven parts (titles): Title I) Dignity (Articles 1 – 5), Title II) Freedoms (Articles 6 – 19), Title III) Equality (Articles 20 – 26), Title IV) Solidarity (Articles 27 – 38), Title V) Citizen's Rights (Articles 39 – 46), Title VI) Justice (Articles 47 – 50) and Title VII) General provisions Governing the Interpretation and Application of the Charter (Articles 51

Lisbon [online]. Berlin, Heidelberg: Springer Berlin Heidelberg, 2012, p. 167. ISBN 978-3-642-19506-8, DOI: 10.1007/978-3-642-19507-5

⁵⁷ BLANKE, op. cit. 56, p. 159

⁵⁸ BOBEK, Michal. Fundamental Rights and Fundamental Values in the Old and New Europe. In DOUGLAS-SCOTT, Sionaidh and Nicholas HATZIS. *Research Handbook on EU Law and Human Rights* [online]. Edward Elgar Publishing, 2017, p. 323. ISBN 9781782546405, DOI: 10.4337/9781782546405

⁵⁹ Preamble to the Charter, recitals 2,4

⁶⁰ TRIDIMAS, op. cit. 8, p. 377

⁶¹ *Ibid.* 378; Judgement of 25 January 2007, *Festersen*, C-370/05, ECLI:EU:C:2007:59 para 36

⁶² Preamble to the Charter, recital 5

– 54). Attached to this document are Explanations to which, when examining the contents of the Charter, due regard must be given as they are a ‘valuable tool of interpretation intended to clarify the provisions of the Charter’, even though they do not have the status of law.⁶³

As evident, the rights recognised in the Charter to a certain extent corresponds with rights guaranteed by the ECHR.⁶⁴ In regards to the Charter’s interpretation, in so far as the Charter contains rights corresponding to rights guaranteed by the ECHR, the meaning and scope of those rights is determined by the text of the Convention, its Protocols and the case law of the ECtHR and the Court.⁶⁵ Also, since the Charter offers extended protection of rights, the level of protection guaranteed by the ECHR is considered to be the minimal standard. The relationship between the Charter and the ECHR is, thus, rather complimentary.⁶⁶ In addition, as mentioned, another source for the Charter are constitutional traditions common to the Member States and so Charter Articles must be interpreted in harmony with them as well.⁶⁷ Moreover, no provision of the Charter may be interpreted as restricting or adversely affecting human rights and fundamental freedoms recognised by Union law, by international agreements to which the Union or all Member States are party or by the constitutions of the Member States.⁶⁸ By committing not to restrict or adversely affect rights and freedoms, the level of protection afforded by the general principle of effective judicial protection, as recognised by the court, still sustains.⁶⁹

1.3.2. Application

Personal scope of the Charter is quite broad, most rights are granted to ‘everyone’, some only to EU citizens (e.g., rights in Title V Citizen’s rights), some to non-citizens (e.g., right to asylum) and others to specific persons (e.g., people with disabilities).⁷⁰ Personal scope in relation to obligated entities is given by Article 51(1), which states that the ‘provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.’

⁶³ Article 52(7) Charter; Preamble to Explanations

⁶⁴ Unlike the Charter, the ECHR is a civil and political rights document and therefore does not contain socio-economic rights. Nevertheless, the ECtHR does not exclude their protection under the ECHR and has heard a number of cases on these matters.

⁶⁵ Article 52(3) of the Charter; Explanations to Article 52(3) Charter

⁶⁶ This could be also seen in the obligation for the EU to accede to the ECHR (Article 6(2) TEU)

⁶⁷ Article 52(4) Charter

⁶⁸ Article 53 Charter

⁶⁹ TOMÁŠEK, TÝČ, PETRLÍK, et al., op. cit. 7, p. 349; TRIDIMAS, op. cit. 8, p. 378

⁷⁰ European Parliament. *Fact Sheets on the European Union – The Charter of Fundamental Rights*, 2017

The Charter is, therefore, addressed to the EU institutions, bodies, offices, and agencies⁷¹, in relation to whom requires compliance with the principle of subsidiarity⁷². The second addressee are the Member States – their central authorities as well as regional or local bodies, or the public organisations.⁷³

The provision of Article 51(1) also defines the material scope. The Charter applies to the EU institutions, bodies, offices, and agencies in all their activities, but to Member States only when they implement Union law. The test of applicability is quite clear in relation to the EU institutions, bodies, offices, and agencies. What, however, raises several questions is the applicability to Member States, specifically – what exactly does ‘when they are implementing Union law’ mean?⁷⁴ The Explanations upheld the Court’s settled case that the ‘requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law’⁷⁵. Later in *Karlsson*⁷⁶ the Court stated, ‘it should be remembered that the requirements flowing from the projection of fundamental rights in the Community legal order are also binding on Member States when they implement Community rules.’⁷⁷ This, however, rises question to whether the terms ‘acting in the scope of Union law’ and ‘implementing Union law’ overlap. Restrictive interpretation suggested that the Charter could apply only when ‘a Member State acts as a servant of the Union’. Extensive interpretation on the other hand viewed in as ‘a situation in which national legislation falls within the scope of EU law.’⁷⁸ Matters were set straight subsequently when the Court confirmed its previous case law and held that ‘the concept of implementation provided for in Article 51 [...] confirms the case-law of the Court as to applicability of fundamental rights of the European Union as general principles of the EU law developed before the Charter entered into force [...] according to which the requirement to respect fundamental rights guaranteed in the legal order of the European Union is binding on the Member States only when they are acting within the scope of EU law.’⁷⁹ The scope of the EU legal system thus also determines the material scope of the Charter. Together with the expansion of Union policies, the scope of application of the Charter expands as well. The Charter itself, however,

⁷¹ i.e., authorities set up by the Treaties or by secondary legislation (Explanations to Article 51)

⁷² Article 5(3) TEU

⁷³ Explanations to Article 51; TOMÁŠEK, TÝČ, PETRLÍK, et al., op. cit. 7, p. 347

⁷⁴ PRECHAL, op. cit. 36, p. 146

⁷⁵ Explanations to Article 51, ref. to judgment of 13 July 1989, Case 5/88 Wachauf [1989] ECR 2609; judgment of 18 June 1991, Case C-260/89 ERT [1991] ECR I-2925; judgment of 18 December 1997, Case C-309/96 Annibaldi [1997] ECR I-7493

⁷⁶ Judgement of 13 April 2000, *Karlsson and Others*, C-292/97, ECLI:EU:C:2000:202

⁷⁷ *Ibid.* para 37

⁷⁸ C-108/10 *Scattolon* [2011] ECLI:EU:C:2011:211, Opinion of AG Bot para 117

⁷⁹ Judgement of 10 July 2014, *Julian Hernández and Others*, C-198/13, ECLI:EU:C:2014:2055 para 33, reference to *Åkerberg Fransson*, C-617/10, op. cit. 82, para 18

cannot ‘extend the field of application of Union law’ or ‘establish any new power or task for the Union,’ neither it can modify those powers and tasks.⁸⁰ This guarantees the principle of conferral as set in Article 5(2) TEU.

To conclude, the Charter is applicable on the Member States when they are implementing the Union law, i.e., when acting within the scope of Union law.⁸¹ Applicability of EU law, therefore, ‘entails applicability of the fundamental rights guaranteed by the Charter’.⁸² However, ‘the mere fact that a national measure comes within an area in which the Union has powers to act cannot bring the measure within the scope of EU law and, therefore, cannot render the Charter applicable’.⁸³ Prechal summarises that, since the provisions of the Charter cannot in themselves trigger their own application, it is necessary to establish whether there is an EU provision applicable in the case at hand other than the Charter provision invoked.⁸⁴ In practice, this means that for Article 47 of the Charter to be activated, another provision of Union law must be applicable.

1.4. Article 47 Charter – Right to an Effective Remedy and to a Fair Trial

The principle of effective judicial protection encompasses variety of different rights, such as right to judicial review, to effective remedy, to a fair trial and right to defence. With the creation of the EU Charter, this umbrella principle has been codified and divided into three provisions: Article 41 *Right to good administration*⁸⁵, Article 47 *Right to an effective remedy and to a fair trial*, and Article 48(2) *Right of defence*.⁸⁶ The chapter presents the contents of Article 47 in more detail as this provision is the most relevant in connection to the right to judicial protection.

1.4.1. Contents and Limitations

In compliance with the rules on Charter interpretation, the standard of an effective remedy and a fair trial, is determined by the jurisprudence of the Court of Justice of the EU and by the

⁸⁰ Article 51(2); TOMÁŠEK, TÝČ, PETRLÍK, et al., op. cit. 7, p. 347

⁸¹ Also indicated in previous Opinion of AG Bot in C-108/10 *Scattolon*, op.cit. 78, paras 118-119

⁸² Judgement of 7 May 2013, *Åkerberg Fransson*, C-617/10, ECLI:EU:C:2013:280 para 21

⁸³ *Julian Hernández and Others*, C-198/13, op. cit. 79, para 36

⁸⁴ PRECHAL, op. cit. 36, p. 146

⁸⁵ This provision is found in Title V, Citizens' rights, and is based on the existence of EU as a body governed by the rule of law. The right to good administration includes rights related to EU administrative law and is therefore found in Title V instead of Title VI. The right to an effective remedy in Article 47 is, however, an important aspect of the right to good administration.

⁸⁶ PRECHAL, op. cit. 36, p. 143

jurisprudence of the ECtHR. Besides, Member States have wide margin of competence in organising their own judiciary systems. Each Member State has its own legal culture and experience which inevitably leads to differences in judicial structures and interpretation of rights. The Charter in connection with the TEU and the Court's jurisprudence⁸⁷ however sets certain limits and standards which must be met.⁸⁸ Although the interpretation is shaped by international instruments and constitutional traditions of Member States, once the fundamental right is recognised and guaranteed by the EU, it acquires its own content and a separate identity and substance.⁸⁹

Article 47 holds many rights which are of procedural nature, namely right to effective remedy, before an independent and impartial tribunal previously established by law, hearing should be fair and public and managed within a reasonable time. Within the procedure an individual should have the possibility of being advised, defended, and represented, and if needed in the form of legal aid. Paragraph (1) of Article 47 states that '[e]veryone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.' The conditions are to be found in the following paragraph (2) – 'Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.'

According to Explanations, the first paragraph is based on Article 13 ECHR *Right to an effective remedy*⁹⁰ and the second paragraph to Article 6(1) ECHR *Right to a fair trial*⁹¹. Charter, in addition to the regulation in ECHR, extends the protection and explicitly mentions remedy before a tribunal (court). In fact, this fundamental concept was already recognised in *Johnston* and to this day stands that 'all persons have the right to obtain an effective remedy in a competent court

⁸⁷ The Court of Justice 'has jurisdiction to deduce from provisions of EU law the criteria that the referring Court may or must apply within the framework of EU law' Judgement of 8 March 2011, *Lesoochránárske zoskupenie*, C-240/09, ECLI:EU:C:2011:125 para 64

⁸⁸ PIĄTEK, Wojciech. The right to an effective remedy in European law: significance, content and interaction. *China-EU Law Journal* [online]. 2019, 6(3-4), p. 170. ISSN 1868-5153, DOI: 10.1007/s12689-019-00086-3

⁸⁹ C-69/10 *Samba Diouf* [2011] ECLI:EU:C:2011:102, Opinion of AG Cruz Villalón para 39; GUTMAN, Kathleen. The Essence of the Fundamental Right to an Effective Remedy and to a Fair Trial in the Case-Law of the Court of Justice of the European Union: The Best Is Yet to Come? *German Law Journal* [online]. 2019, 20(6), p. 888. ISSN 2071-8322, DOI: 10.1017/glj.2019.67

⁹⁰ Article 13 ECHR 'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.'

⁹¹ Article 6(1) ECHR 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.'

against measure they consider to be contrary to' the rights and freedoms protected by the Union law⁹². Under the remedy, judicial review 'must be able to cover the legality of the reasons for the contested decision' for what the Court 'may require the competent authority to notify its reasons.'⁹³

Rights enshrined in Article 47, resp. their exercise, may also be restricted. Such limitations, however, must be provided for by law and must respect the essence of that right. Under the strict condition that such limits 'may be made only if they are necessary', and 'meet objectives of general interest' or 'the need to protect the rights and freedoms of others.' All while complying with the principle of proportionality (Article 5(4) TEU) and with the standards detailed in the ECHR.⁹⁴ The restrictions shall 'correspond to objectives of general interest pursued by the [Union]' and not create a 'disproportionate and unreasonable interference' which could undermine 'the very substance' of rights in Article 47.⁹⁵

1.4.2. Tribunal Established by Law

The case-law of the ECtHR and the Court of Justice has clarified certain key terms and requirements of the right to an effective remedy and to a fair trial. The preliminary requirement of the right to an effective remedy and to a fair trial, as can be read from both Article 6(1) ECHR and Article 47 Charter, is 'tribunal established by law'. Tribunal, or 'competent court', is 'an extraordinary public authority competent to adjudicate civil, criminal and administrative cases.'⁹⁶ When establishing whether a body is considered a tribunal, the Court would look for factors such as whether the body is established by law, has compulsory jurisdiction, is permanent and independent, applies the rule of law, and provides *inter partes* procedure.⁹⁷

The requirement of establishment by law means that the composition of the court and its jurisdiction 'must be regulated beforehand by legal provisions'⁹⁸ which should set out the substantive and procedural criteria for judicial appointments, and these rules must be

⁹² *Johnston v Chief Constable of the Royal Ulster Constabulary*, C-222/84, op. cit. 27, para 19

⁹³ *Unectef v Heylens*, C-222/86, op. cit. 37, para 15; The existence of a judicial remedy and the duty to state reasons, are, however, limited to final decisions (*Ibid.* para 16)

⁹⁴ Article 52(1) Charter; Explanations to Article 52(3)

⁹⁵ *Karlsson and Others*, C-292/97, op. cit. 76, para 45; more in GUTMAN, op. cit. 89

⁹⁶ PIĄTEK, op. cit. 88, p. 165

⁹⁷ Judgement of 30 May 2002, *Schmid*, C-516/99, ECLI:EU:C:2002:313 para 34

⁹⁸ Judgement of 23 January 2018, *FV v Council*, T-639/16 P, ECLI:EU:T:2018:22 paras 68,74

unconditionally complied with. The national provisions thus relate not only to the legal basis for the existence of the court itself, but also to the composition of the bench in particular cases.⁹⁹

Defining whether a court or tribunal is established by law is crucial. Only if the body fulfils the condition of establishment by law can the other requirements be examined as well. Hence, if the body in question lacks this attribute, it rules out any further examination of the other components.¹⁰⁰

1.4.3. Independence and Impartiality

If the body passes the establishment test, the Court may proceed to investigate whether the body complies with other requirements, such as independence and impartiality. The concept of independence has two aspects, external and internal. External ‘entails that the body is protected against external intervention or pressure liable to jeopardise the independent judgment.’¹⁰¹ Internal aspect, on the other hand, is ‘linked to impartiality and seeks to ensure a level playing field for the parties to the proceedings.’¹⁰² Impartiality ‘requires objectivity [...] and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law’.¹⁰³ Thus ‘in order to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it,’ procedural rules ‘particularly as regards the composition of the body and the appointment, length of service and the grounds for abstention, rejection and dismissal of its members’ are required.¹⁰⁴

1.4.4. Effectiveness of a Remedy

Another component of the rights of Article 47 is effectiveness of a remedy, which means that the remedy must not be illusory. Generally, in absence of EU rules governing the matter, it is for the Member States ‘to lay down the detailed procedural rules governing actions for

⁹⁹ Judgement of 15 July 2021, *Commission v Poland (Disciplinary regime for judges)*, C-791/19, ECLI:EU:C:2021:595 para 168; Judgement of 9 July 2009, *Ilatovskiy v. Russia*, ECLI:CE:ECHR:2009:0709JUD000694504 para 36

¹⁰⁰ FILIPEK, Paweł. *Only a Court Established by Law Can Be an Independent Court: The ECJ's Independence Test as an Incomplete Tool to Assess the Lawfulness of Domestic Courts* [online]. Verfassungsblog, 2020. Available at: <https://verfassungsblog.de/only-a-court-established-by-law-can-be-an-independent-court/>, DOI: 10.17176/20200123-181754-0

¹⁰¹ Judgement of 31 January 2013, *D. and A.*, C-175/11, ECLI:EU:C:2013:45 para 96

¹⁰² *Ibid.* para 96

¹⁰³ Judgement of 19 September 2006, *Wilson*, C-506/04, ECLI:EU:C:2006:587 para 52

¹⁰⁴ *D. and A.*, C-175/11, op. cit. 101, para 97; *FV v Council*, T-639/16 P, op. cit. 98, para 75

safeguarding rights which individuals derive from EU law'. Member States are in that matter 'responsible for ensuring that those rights are effectively protected in each case and [...] for ensuring compliance with the right to an effective remedy and to a fair hearing'.¹⁰⁵ Effective, in this case, refers to the capability of the procedural rules set to ensure effective protection to prevent 'the alleged violation or its constitution', or to provide 'adequate redress for any violation that had already occurred.'¹⁰⁶ Consequently, effectiveness is tightly linked to the possibility of acquiring legal aid. As stated in paragraph (3) – 'Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.' In this regard, national law should provide clear procedural rules governing legal aid to avoid any uncertainty which could potentially violate legally aided individuals' right of access to court.¹⁰⁷

1.4.5 Other Attributes

Following with the fair and public hearing. This factor ultimately comprises the principle of equality of arms and the right of access to a court. So that each party is 'afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.'¹⁰⁸

The final yet crucial requirement is the of a binding judgment, without which the right to an effective remedy would be completely void. As the ECtHR ruled the 'power to give a binding decision which may not be altered by a non-judicial authority to the detriment of an individual party is inherent in the very notion of a "tribunal".'¹⁰⁹

1.5. Conclusion of Part 1

Protection of fundamental rights was not included in the original founding treaties. It was only the formulation of general principles by the Court of Justice that made it possible to create a 'proper legal order' for the Community. With this recognition, the Court has not only acknowledged the protection of human rights as an integral part of the Community legal order but has also identified the sources from which it can draw inspiration in ensuring this protection – the

¹⁰⁵ *Lesoochránárske zoskupenie*, C-240/09, op. cit. 87, para 65

¹⁰⁶ Judgement of 26 October 2000, *Kudła v. Poland*, ECLI:CE:ECHR:2000:1026JUD003021096 para 158; see also Only a Court Established by Law Can Be an Independent Court (n.100)

¹⁰⁷ Judgement of 14 September 2010, *Subicka v. Poland*, ECLI:CE:ECHR:2010:0914JUD002934206 para 47

¹⁰⁸ Judgement of 30 June 2016, *Toma*, C-205/15, ECLI:EU:C:2016:499 para 47

¹⁰⁹ Judgement of 19 April 1994, *Van De Hurk v. The Netherlands*, ECLI:CE:ECHR:1994:0419JUD001603490 para 45

constitutional traditions common to the Member States and the international treaties protecting human rights, in particular the ECHR. Following this development, the Court could examine singular principles, such as effective judicial protection. In its jurisprudence, the Court proclaimed judicial protection to reflect a general principle of Community (Union) law.

As the European Community slowly evolved into a quasi-federal union, the doctrine of fundamental rights gained importance in parallel. Until it too reached codification. The initially legally non-binding document, after lengthy negotiations, came into force in 2009 as part of the Treaty of Lisbon. The Charter of Fundamental Rights of the EU is bill of rights containing 50 articles with substantive rights and principles and holds the legal value of a primary source of EU law. Article 47 is based on Articles 6 and 13 ECHR. The Court thus interprets this provision in accordance with not only its own settled case-law but also that of the ECtHR. Although now are the contents of the general principle of effective judicial protection enshrined *inter alia* in Article 47, the principle itself has not become redundant. The scope of Article 47 might differ from that of the unwritten principle. Moreover, the level of protection might differ as well. Since as examined above, the principle of effective judicial protection encompasses wide variety of rights and principles linked to judicial protection, not limited solely to the content of Article 47. Subsequently, the principle is there to fill in possible gaps which might occur in individual cases where the applicability of concrete Charter provisions would be uncertain.¹¹⁰

¹¹⁰ PRECHAL, *op. cit.* 36, pp. 147-148

2. Judicial Reforms in Poland

The second part of this thesis presents the main changes to the Polish judiciary, why these reforms are considered controversial, and what rule of law protection mechanisms are available. The following section describes the journey of the Court of Justice from avoiding ruling on the national rules governing the national justice system to finding jurisdiction to review those rules in light of the principle of judicial independence.

2.1. PiS Reforms

The Polish judiciary underwent the most significant reforms already in the 1980s. However, the implemented reforms were mostly solutions and institutions taken from the West, such as the Constitutional Tribunal (1982) or the National Council of the Judiciary (1989, hereinafter as ‘the KRS’), adapted to match the socialist state. After the fall of the communistic regime, these reforms were considered sufficient, and the organization of courts remained the same. Very soon, however, the need for further reforms arose, as it became clear that these 1980s reforms, while they had somehow transferred the organization of the judiciary, had done very little for the actual rule of law. However, in the wake of the Constitution’s adoption in 1997, the steps taken to democratise the judiciary were almost none. Attention was paid mainly to the status of the legislature and the executive. Moreover, the image of and confidence in the judiciary further declined as the public learned of more communist crimes associated with the functioning of the judiciary. Thus, many political agendas have included promises of judicial reforms over the years. Most of those proposals revolved around changing the mechanism for selection of judges to the Constitutional Tribunal, making the selection of KRS’s members more transparent, and reforming the disciplinary liability of judges as its lack of effectiveness translates into a lack of public trust to prevent serious concerns such as the infringements of dignity and seriousness of judge’s office.¹¹¹ Following the 2015 Parliamentary elections, the Law and Justice Party (PiS) took over power, made judiciary reform one of its priorities and succeeded in pushing forward several amendments. These reforms have been executed through more than 30 laws, affecting the entire justice system – the Constitutional Tribunal, both ordinary and administrative judiciary, the KRS,

¹¹¹ The Warsaw Institute Review. *The context and meaning of judicial reforms in Poland after 2015* [online]. The Warsaw Institute Review, 2021. Available at: <https://warsawinstitute.org/context-meaning-judicial-reforms-poland-2015/>, last accessed 8 March 2022

the prosecution service, and the National School of Judiciary. The reforms widely altered the Polish justice system enabling the executive and legislative branches to interfere in judicial powers, the composition of the judiciary, and its administration politically.¹¹² However, it should be noted that the political reality in Poland has been quite complex for years, irrespective of the recent autocratic tendencies of PiS, and it is only now that the depth of the rule of law decline is coming to light.

The following paragraphs provide an overview of reforms that have so far come to the Commission's and Court's attention.

2.1.1. Constitutional Tribunal

The transformation of the Polish judiciary began already around the 2015 elections with the selection of the Constitutional Tribunal's judges. The Constitution provides that the Constitutional Tribunal is composed of 15 judges chosen individually by the Sejm for a term of nine years (only one term) from amongst legal professionals.¹¹³ After Andrzej Duda's (PiS) victory in the presidential elections in the spring of 2015, which signalled a shift in the voter preferences, the then leading party, the Civic Platform (PO), decided to take steps to maintain its future influence, as it became clear the upcoming Sejm elections were unlikely to be theirs to win. Before the end of the term of the "old" Sejm, the mandate of five judges of the Constitutional Tribunal expired. It used to be customary that if a judge's mandate expired around the turn of the term of the "old" and "new" Sejm, and the appointed judge would have already started to serve in the term of the "new" Sejm, the "old" Sejm would refrain from selecting the new judge. Despite this custom, the Sejm, headed by the PO, decided to select these judges. Three of the judges' terms expired before the new Sejm was sworn in, and therefore the PO decided to choose their successors. However, the President refused to swear them in, and, as a result, the newly elected Sejm found the previous selection ineffective and decided to select these judges itself.¹¹⁴

¹¹² 2020 Rule of Law Report, op. cit. 1, p. 2; European Commission. *Reasoned Proposal in Accordance with Article 7(1) of the Treaty on European Union Regarding the Rule of Law in Poland*, 2017

¹¹³ Article 194 Constitution of the Republic of Poland

¹¹⁴ The Warsaw Institute Review, op. cit. 111

2.1.2. National Council of the Judiciary (KRS)

The next key player in the Polish judiciary system is the KRS. Under the Constitution, the KRS is a body that safeguards the independence of the courts and judges through cooperation between the legislative, executive, and judicial branches and, to this end, exercises many competences, particularly concerning the composition of courts and tribunals.¹¹⁵ The KRS is composed of 23 judges from different courts selected by different authorities to ensure maximum independence. However, since the communistic era, the KRS has been frequently referred to as the ‘democratic façade’ of the judiciary. For years, representatives of political circles and judges have called for changes and warned that without proper KRS reform, any general judicial reform is almost impossible. The critiques aimed mainly at the lack of a clear and transparent mechanism for selecting members.¹¹⁶ Since, in principle, only an independent body can secure the independence of other bodies, the selection of members of such a body must be carried out in a way that avoids, from the outset, any influence on the candidates and any bias between candidates from different courts and tribunals.

The composition of the KRS is following. The first group is the *ex officio* members – the First President of the Supreme Court, the Minister of Justice, the President of the Supreme Administrative Court, and an individual appointed by the President of the Republic. The second group comprises judicial members – 15 judges chosen from amongst the judges of the Supreme Court, ordinary courts, administrative courts, and military courts. The third group then consists representatives of the legislature – 4 members chosen by the Sejm from amongst its Deputies, plus the Senate chooses two members from amongst its Senators. Members are elected for a four-year term, and the selection process is specified by statute.¹¹⁷ The selection process of the *ex officio* and the legislature representatives’ members is already specified in the Constitution. Hence the selection of judicial members is the only remaining process to be provided for by a statute. These judicial members used to be selected by the judges of the respective courts. The 2017/2018 reform of the Law on the KRS changed this mechanism, and candidates for judges are now proposed either by a group of 25 judges or 2,000 citizens, with the only condition for candidacy being that

¹¹⁵ Articles 186,187 Constitution, Preamble Constitution; Under Article 186 Constitution one of the competences that proves the significance of the KRS is the possibility to make application to the Constitutional Tribunal regarding the conformity of normative acts to the Constitution ‘to the extent to which they relate to the independence of courts and judges.’

¹¹⁶ The Warsaw Institute Review, *op. cit.* 111

¹¹⁷ Articles 187(1)-(4) Constitution

they must be judges. The actual selection is then left to the discretion of the Sejm, which must consider the need for representation of different types and levels of courts.¹¹⁸

Some may argue that these changes have made the selection process more democratic. After all, the KRS is not purely a judicial body but serves to connect the three branches, and the selected members are still chosen from among the judges.¹¹⁹ Therefore, the new mechanism could better reflect the objectives of the KRS, i.e., the cooperation between all branches of power. However, the Sejm now elects 21 members of the KRS instead of just 6, which creates an apparent disproportion and susceptibility to the ruling party's politics.¹²⁰ This change in the selection mechanism had signalled far-reaching personnel changes, which were about to come also in other bodies relating to the judiciary.

The significance of the KRS is most notable in the selection process of the candidates for the position of judge. Whenever a new judge is about to be appointed, the KRS adopts a position on the candidates' suitability for the post and draws up a list of recommended candidates. For this assessment, the KRS considers the candidate's qualifications, professional experience, and the opinion of the general assembly of the relevant court. The absence of any documents required is not an obstacle to drawing up the candidate list.¹²¹ Then for each vacant judge post, the KRS issues a resolution picking the most suitable candidate.¹²² The applicant may appeal to the Supreme Court the KRS's resolution issued if he or she suspects illegality of the resolution.¹²³ If the candidate applied for a post at the Supreme Court, he or she might bring an action before the Supreme Administrative Court. However, the action cannot be based 'on a plea alleging an inadequate evaluation of whether the candidates fulfilled the criteria taken into account' to issue a decision. After the appeal has been lodged, if no other candidate challenges the resolution, it shall enter into force for candidates who have not appealed, in the extent of the decision to submit a proposal for the appointment and the decision not to submit the original proposal.¹²⁴ This appointment

¹¹⁸ Articles 11a(2), 9a Law on the KRS

¹¹⁹ Moreover, the candidates are proposed either by a group of judges or the citizens, which suggest the process to be even more democratic and transparent.; The Warsaw Institute Review, op. cit. 111

¹²⁰ In comparison, previously, four members represented the executive, fifteen members the judiciary and six the legislature. Now the count shifted to 4 for the executive (two of them judges) and factually 21 for the legislature (15 of them judges).; The Warsaw Institute Review, op. cit. 111

¹²¹ Articles 34,35 (1),(2),(3) Law on the KRS

¹²² Article 37(1) Law on the KRS

¹²³ Article 44(1) Law on the KRS

¹²⁴ Articles 44 (1a),(1b) Law on the KRS

mechanism was examined by the Court of Justice of the EU in *A.B. and Others*¹²⁵. The provisions governing the appeal have been since repealed.¹²⁶

2.1.3. Retirement

The New Law on the Supreme Court lowered the retirement age from 70 years to 65 years.¹²⁷ To continue to carry out his or her duties, the judge may submit to the First President of the Supreme Court a declaration expressing a will to continue. The First President then submits the declaration to the President of the Republic, who may grant authorisation to continue carrying out the judge's duties. Prior to that, the President must consult the KRS. The KRS is obliged to issue a non-binding opinion.¹²⁸ Based on the information and the opinion provided, the President may grant the authorisation for three years.¹²⁹ Throughout the whole procedure, the judge requesting an extension remains in office. This amendment, however, used to apply also to judges appointed before the entry into force of the amended Law.¹³⁰ Furthermore, these rules would also affect the First President of the Supreme Court, whose term of six years the Constitution guarantees.¹³¹ The Court of Justice of the EU addressed the matter in the *C-619/18* infringement proceeding.¹³² The provisions applying the changes to already serving judges have been since

¹²⁵Judgement of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court)*, C-824/18, ECLI:EU:C:2021:153; The KRS issued to the President a negative resolution on the proposals for the appointment of two candidates to the Criminal Chamber of the Supreme Court, and of other three candidates to the Civil Chamber of the same court. By the same resolution presented proposals for appointment of other candidates to those positions. The rejected candidates lodged appeals before the Supreme Administrative Court asking it to order the suspension of the execution of those proposals. The referring court made a preliminary request for the Court to rule on whether the national rules on the appointment procedure of judge candidate comply with the Union law, i.e., Article 19(1) TEU in connection with Article 2 TEU and Article 47 Charter. The Court ruled that Article 19(1) TEU must be interpreted as precluding provisions under which a judge lodges an appeal against a KRS decision, but that body puts forward another applicant and that decision becomes final. Furthermore, precluding appeal provisions based on the allegation of 'incorrect assessment' of the candidate's fulfilment of the statutory criteria. In line with the principle of the primacy of EU law, the referring court is to disapply the provisions of national law. (paras 33,34,166)

¹²⁶ the current version of the Law on the KRS as of November 2019

¹²⁷ Article 37 (1),(2) New Law on the Supreme Court; note: The New Law on the Supreme Court applies also to the Supreme Administrative Court to the extent matters are not regulated by the Law on the Supreme Administrative Court. (Article 49 Law on the system of administrative court)

¹²⁸ Article 37 (1a),(1b) New Law on the Supreme Court

¹²⁹ Article 37(3),(4) New Law on the Supreme Court; Previously, submission for extension used to be only submitted to the First President of the Supreme Court and then if fulfilling the requirements could carry out their duties until the age of 72 (Article 30 of the 2002 Supreme Court Law);

¹³⁰ Article 111(1),(1a) New Law on the Supreme Court

¹³¹ Article 183(3) Constitution

¹³² Judgement of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, ECLI:EU:C:2019:531; In this infringement case, the Commission put forward two complaints. Firstly, the New Law on the Supreme Court provided the lowered retirement age to apply to judges who were appointed before the Law's entry into force. The Commission requested this to be breach the principle of judicial independence and of irremovability of judges. Secondly, the Law granted the President of the Republic the discretion to extend terms of office of judges of the Supreme Court beyond the new retirement age. Hence, the Commission claimed this to be an

repealed as part of the Court's orders execution, and, currently, the retirement age of the Supreme Court judges is 65 years for judges appointed after the entry into force of the amendments.¹³³

The ordinary courts also did not avoid the lowering of the retirement age. The amended Law on the ordinary courts has lowered the retirement age for ordinary court judges from the general age of 67 to 60 for women and 65 for men. Before reaching the statutory age, a judge may submit a declaration to the Minister of Justice expressing his or her wish to continue in office until the age of 70. For the duration of the process, the judge in question would remain in post until the Minister's decision.¹³⁴ The Court of Justice addressed this in *C-192/18* infringement case.¹³⁵ As for today, the provisions have been amended, and the retirement age is 65 years for both male and female judges. If the judge wishes to continue to carry out his or her duties as a judge, he or she may submit to the KRS a declaration expressing a will to hold the post even after reaching the statutory retirement age.¹³⁶

2.1.4. Disciplinary regime

The Disciplinary Chamber, which falls within the Supreme Court structure, was established, and is governed by the New Law on the Supreme Court.¹³⁷ This chamber enjoys

infringement of Poland's obligation to comply with second subparagraph of Article 19(1) TEU read in conjunction with Article 47 of the Charter. The Court upheld the action in its entirety. (paras 32,33, 126)

¹³³ current Article 37(1),(5) New Law on the Supreme Court - The only exception available is for female judges, who may retire at the age of 60.; Transitional provision of Article 111 has also been mostly repealed, however, if the judge wishes to retire after the entry of the Law into force, he or she may submit a statement to the President of the Republic. (current Article 111(2) New Law on the Supreme Court)

¹³⁴ Article 69(1),(1b),(3) Law on the ordinary courts

¹³⁵ Judgement of 5 November 2019, *Commission v Poland (Independence of ordinary courts)*, C-192/18, ECLI:EU:C:2019:294; The Commission requested the Court of Justice to declare that a) by regulating different retirement age for male and female judges and public prosecutors Poland failed to fulfil its obligations under Article 157 TFEU and Directive 2006/54/EC¹³⁵, and b) by lowering the retirement age of judges of the ordinary courts and by granting the Minister of Justice the right to authorise age period extension, Poland has failed to fulfil obligations under second subparagraph of Article 19(1) TEU in conjunction with Article 47 Charter.; Second complaint – alleged infringement of Article 19(1) TEU in conjunction in conjunction with Article 47 Charter. The Commission claimed that the concept of effective legal protection (laid down in second subparagraph of Article 19(1) TEU) 'must in fact be interpreted while having regard to the content of Article 47 of the Charter and, in particular, to the guarantees inherent in the right [...] to an effective remedy' so that the provision of Article 19(1) TEU entails that 'the preservation of the independence of the ordinary Polish courts, which are entrusted, inter alia, with the task of interpreting and applying EU law, must be guaranteed.' The Court upheld Commission's action in its entirety. (paras 1,85,88,136)

¹³⁶ current Article 69(1) Law on the ordinary courts

¹³⁷ Article 3(5) New Law on the Supreme Court; This law also created another new chamber, the Extraordinary Review and Public Affairs Chamber, whose independence was the object of a proceeding before the ECtHR in case *Dolinska-Ficek and Ozimek v. Poland*. Judges Dolinska-Ficek and Ozimek had been subjected to a proceeding before the Extraordinary Review and Public Affairs Chamber but due to the controversies surrounding the KRS, they brought an action before the ECtHR claiming violation of Article 6 ECHR. The ECtHR, indeed, found the chamber to lack impartiality and independence because its members are appointed by the President of the Republic on the recommendation of the KRS, making the chamber highly influenced by the executive and legislature. Therefore, due

considerable autonomy. For instance, the President of the Supreme Court, who directs the chamber's work, has been awarded competencies also granted to the First President of the Supreme Court, such as submitting observations to the competent authorities regarding irregularities or deficiencies found in the law and requesting their removal to ensure the effectiveness of the disciplinary procedures. The President of the Supreme Court also has powers similar to those of the Minister for Public Finances, allowing the implementation of the chamber's budget.¹³⁸ The jurisdiction of the Disciplinary Chamber includes (1) disciplinary cases of the Supreme Court judges, disciplinary cases examined by the Supreme Court about disciplinary proceedings under the Law on the ordinary courts and other laws; (1a) authorisation to prosecute or detain judges, prosecutors, and others.; (2) proceedings in the field of labour law and social security involving a judge of the Supreme Court; (3) proceedings concerning the mandatory retirement of a judge of the Supreme Court.¹³⁹ If the Supreme Court detects an obvious violation of the law when examining a case, the Supreme Court first informs the concerned judge or group of judges of its findings and the possibility of submitting explanations in writing. Then the Supreme Court issues the finding of an error to the relevant court and may file a request for a disciplinary case to be examined.¹⁴⁰

Generally, '[a] judge shall be liable to disciplinary action for professional misconduct, including obvious and gross violations of the law and compromising the dignity of the office (disciplinary offences).'¹⁴¹ In specific cases, the Minister of Justice may appoint a Disciplinary Officer of the Minister of Justice to conduct a case exclusively. The Disciplinary Officer then initiates investigative or disciplinary proceedings or joins ongoing proceedings at the request of the Minister of Justice. Moreover, in cases where the offence has the characteristics of an intentional crime punishable by criminal prosecution, the appointed Disciplinary Officer may appoint in their position another judge or public prosecutor to perform the judge's duties.¹⁴² If the accused judge cannot participate in the proceedings for health reasons, he or she may request the appointment of a defence counsel. Additionally, in expectational cases, if the judge fails to submit the said application due to circumstances beyond his or her control, the disciplinary tribunal or its president may appoint the defence counsel regardless. The appointment of the counsel does not

to the lacking independence and impartiality the applicants' right to a fair hearing (Article 6 § 1 ECHR) have been violated.; *Dolińska-Ficek and Ozimek v. Poland*, op. cit. 2

¹³⁸ Article 20, Article 6(1),(2), Article 7(3),(4) New Law on the Supreme Court

¹³⁹ Article 27 New Law on the Supreme Court

¹⁴⁰ Article 97(1),(3) New Law on the Supreme Court

¹⁴¹ Article 107(1) Law on the ordinary courts

¹⁴² Article 112b(1)-(3),(5) Law on the ordinary courts

have a suspensory effect.¹⁴³ The proceeding shall be conducted despite the justified absence of the accused judge or their defence counsel unless it is contrary to the interest of the disciplinary proceeding.¹⁴⁴

The Disciplinary Chamber and the disciplinary regime were subject to preliminary request cases *A.K. and Others*¹⁴⁵, and the most recent infringement case *C-791/19*¹⁴⁶. The chamber will most likely be abolished as recently, the President of the Republic submitted a draft amendment of the New Law on the Supreme Court proposing the Disciplinary Chamber's abolition.¹⁴⁷

2.1.5. Conclusion

The whole reform process began with the selection of five judges of the Constitutional Court, which in principle was not reform as such, but it was undoubtedly a turning point indicating future developments. With the constitutional custom broken both by the former leading party and the current leading party arose the question of whether those newly selected judges of the Constitutional Tribunal were appointed in accordance with the Constitution and the constitutional customs. The next significant reform was the amendment of the selection mechanism of the KRS members. The KRS, with all its competence, is undisputedly the most influential body of the judiciary. While the members were previously selected by all three branches of power, the selection mechanism has now been altered to favour the legislature. Moreover, the term of members serving before the amended law entered into force has also been shortened, thereby

¹⁴³ Articles 113, 113a Law on the ordinary courts

¹⁴⁴ Article 115a(3) Law on the ordinary courts

¹⁴⁵ Judgement of 19 November 2019, *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, ECLI:EU:C:2019:982; The Supreme Court made three requests for a preliminary ruling concerning action brought to it by one judge of the Supreme Administrative Court and two judges of the Supreme Court. All these judges had reached the age of 65 before the entry into force of the New Law on the Supreme Court. The judges claimed this to be an infringement of the second subparagraph of Article 19(1) TEU, Article 47 Charter and of Directive 2000/78. The actions were brought before the Supreme Court since the Disciplinary Chamber had not been yet formed. The referring Court asked, 'whether Article 9(1) of Directive 2000/78 and Article 47 of the Charter require it to disapply the provisions of national law which reserve jurisdiction to hear and rule on such actions to a chamber which has not yet been formed.'¹⁴⁵ Furthermore, the referring Court voiced its concerns that 'in the light of, inter alia, the circumstances in which the new judges of the Disciplinary Chamber will be appointed, serious doubts arise as to whether that chamber and its members will provide sufficient guarantees of independence and impartiality. (para 40)

¹⁴⁶ *Commission v Poland (Disciplinary regime for judges)*, C-791/19, op. cit. 99; In this infringement proceeding, the Commission claimed that by failing to guarantee independence and impartiality of the Disciplinary Chamber, by allowing the content of judicial decision to be classified as a disciplinary offence, by failing to examine the cases within reasonable time, by allowing the cases to be heard in the absence of the accused or his or her defence counsel, and by conferring on the President of the Disciplinary Chamber the discretionary power to designate a disciplinary tribunal, Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU. The Court upheld this action in its entirety (para 1, Ruling point 1)

¹⁴⁷ *Polsatnewspl. Prezydent: składam projekt zmiany ustawy o Sądzie Najwyższym* [online]. Polsatnews, 2022. Available at: <https://www.polsatnews.pl/wiadomosc/2022-02-03/prezydent-skladam-projekt-zmiany-ustawy-o-sadzie-najwyzszym/>, last accessed 3 February 2022

removing a significant number of members and replacing them with those chosen by the Sejm. The subsequent reforms lowered the retirement age for judges of the general courts and the Supreme Court. Again, a highly controversial move, as these provisions also applied to already serving Supreme Court judges. Moreover, it also affected the First President of the Supreme Court, whose term of office is fixed by the Constitution. In addition, state authorities - the Minister of Justice and the President of the Republic - were granted the power to extend the term of office of the retiring judges. The disciplinary regime also could not escape transformation. To make the disciplinary regime more efficient, a new chamber of the Supreme Court has been established. The chamber members are selected by the President of the Republic, based on the KRS's opinion. The Disciplinary Chamber now has jurisdiction over disciplinary cases where the legal definition of the disciplinary offence is vague and allows for an extensive interpretation.

Combination of all these reforms indicates that the goal thereof was inter alia personnel changes. The execution of the reforms then showed how abrupt these personnel changes in crucial judicial institutions were. As a result, the Polish judiciary is more than ever vulnerable to the influence of the executive and the legislature.

2.2. Finding Jurisdiction

The implemented reforms proved to undermine the national judiciary's independence and possibly pose a systematic threat to the rule of law. These concerns have been shared by the Commission, which has already launched four formal infringement procedures against Poland, and other EU bodies, such as the FRA, which has reported a significant increase in challenges in the area of justice in some Member States, incl. Poland.¹⁴⁸ The EU had to find an effective rule of law protection mechanism to enforce compliance with its objectives.

2.2.1. Rule of Law Mechanisms

The rule of law is 'one of the founding principles stemming from the common constitutional traditions of all the Member States' and 'one of the main values upon which the Union is based'. This concept has been projected in the Preamble of the TEU, the Charter, and enshrined in Article 2 TEU. Respect for the rule of law is a precondition to becoming an EU

¹⁴⁸ European Agency for Fundamental Rights. *Fundamental Rights Report*, 2020, p. 17

member under Article 49 TEU.¹⁴⁹ In order to allow an area without internal borders, each Member State of the Union must recognize and share a set of common values (Article 2 TEU) and recognize that the other Member States share it with them. This idea is reflected in the principle of mutual trust, which is the fundamental basis of the EU, implying that all Member States are ‘complying with EU law and particularly with the fundamental rights recognised by EU law.’¹⁵⁰ Overall, the principle of mutual trust is a leading force in inter-members relations as it allows the Member States to presume that fundamental rights are observed by the other as well. As a result, a Member State does not need to check whether another Member State observes rights guaranteed by the Union law. It simply presumes so.¹⁵¹ Therefore, in the justice area, the Member States are directly required to presume that other Member States observe individuals’ rights of judicial protection, and that the State’s judicial system is ‘in principle, well designed and equipped to protect citizens against any threat to the rule of law.’¹⁵² Any departure from this principle could seriously undermine the European legal order.

The protection of the rule of law is thus essential to the very existence of the European project. The EU, the holder of the Nobel Peace Prize, has been the flagship of efforts for democracy, peace, and human rights protection. Indeed, only sound European democracies can accede to this Union.¹⁵³ However, does the Union have effective mechanisms to prevent undermining of the rule of law post-accession?

The current mechanisms in place are the following. Prevention and promotion are ensured through the European rule of law mechanism (annual monitoring cycle), EU Justice Scoreboard (comparable data on the independence of national justice systems), European Semester, Cooperation and Verification mechanisms, funding and support for civil society, networks and projects, and technical and financial support for the Member States to carry out structural reforms. If, in concrete cases, those are found ineffective, the response mechanisms come in place – infringements, rule of law framework, Article 7 TEU, and budgetary conditionality.¹⁵⁴ Two of

¹⁴⁹ European Commission. *A new EU Framework to strengthen the Rule of Law*, 2014, p. 2

¹⁵⁰ *Opinion 2/13*, op. cit. 55, paras 168,191

¹⁵¹ *Ibid.* para 192

¹⁵² *A new EU Framework to strengthen the Rule of Law*, op. cit. 149, p. 2

¹⁵³ European movement international. *The Rule of Law* [online]. European Movement International, 2021. Available at: <https://europeanmovement.eu/the-rule-of-law/>, last accessed 8 March 2022

¹⁵⁴ European Commission. *Rule of Law Worksheet*, 2020

those mechanisms, the rule of law cycle¹⁵⁵ and the so-called ‘conditionality regulation’¹⁵⁶, have been adopted as a response to the crisis in Poland and a few other Member States.

The current EU legal framework does not offer any mechanism to expel a Member State from the Union. The utmost opinion is the suspension of certain membership rights, including voting rights, of the Member State concerned under Article 7 TEU. However, the Commission’s attempt to activate the mechanism of Article 7 TEU as response to the Polish rule of law crisis has failed.¹⁵⁷ Why? The mechanism in Article 7 TEU is political. The Council makes the final decision, and the Council acts not only as the navigator of the EU’s general direction and strategy, but its members also advocate for the interests of their countries. The provision is thus highly confrontational, and, as Kochenov points out, it goes against the idea of the internal market.¹⁵⁸ The Member States’ representatives are politicians and more likely to defend and promote national interests. In relation to inter-state relations and economies, they may end up sabotaging themselves. Sanctions imposed on one Member State will consequently affect also the other. Activating this mechanism can also negatively influence the relationship between the EU and the sanctioned Member State’s citizens.

Kochenov offers four strategies to enforce compliance with the rule of law.¹⁵⁹ The first is ‘cutting the funds.’ This strategy is currently worked with through the Conditionality Regulation. The European Parliament has adopted a resolution calling on the Commission to act and apply the Rule of Law Conditionality Mechanism.¹⁶⁰ However, the timing of the strategy’s activation could not be worse. Due to the war in Ukraine, Poland faces a possible security threat, and a massive

¹⁵⁵ European Parliament. *Resolution of 7 October 2020 on the establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights*, 2020; The EP acknowledged ‘the rise and entrenchment of autocratic and illiberal tendencies’ in several Member States as well as the inability to take any effective steps to tackle this rule of law violations. Especially showing its disappointment in the inability to activate the mechanism in Article 7 TEU. The cycle would consist of different stages: monitoring, impact assessment, recommendations, and their implementation. The outcome of monitoring should be a set of recommendations, issued specifically for each Member State, and the obligation to implement them. If not implemented, concrete Union measures, such as Article 7 TEU, infringement proceedings, budgetary conditionality, should be imposed. (points 2-6)

¹⁵⁶ Regulation (EU, Euroatom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.; In the case of breach of the principles of the rule of law in the Member States, the Commission may adopt measures for the protection of the Union budget, such as suspensions of payments or audits and financial corrections. Unsurprisingly, in response Poland and Hungary brought actions before the Court seeking the annulment of this Regulation. (C-156/2021, C-157/2021) The Court has dismissed the action brought. (Court of Justice of the European Union, Press Release No 28/22, 16 February 2022)

¹⁵⁷ *Reasoned Proposal in Accordance with Article 7(1) of the Treaty on European Union Regarding the Rule of Law in Poland*, op. cit. 112

¹⁵⁸ KOCHENOV, Dmitry. Article 7: A Commentary on a Much Talked-About ‘Dead’ Provision. In VON BOGDANDY, Armin, Piotr BOGDANOWICZ, et al., ed. *Defending Checks and Balances in EU Member States* [online]. Berlin, Heidelberg: Springer Berlin Heidelberg, 2021, 2021-01-06, pp. 130, 131. Beiträge zum ausländischen öffentlichen Recht und Völkerrecht. ISBN 978-3-662-62316-9, DOI: 10.1007/978-3-662-62317-6_6

¹⁵⁹ *Ibid.* 145-148

¹⁶⁰ *Resolution of 7 October 2020 on the establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights*, op. cit. 155

immigration crisis, which also brings enormous costs. The second scenario is political pressure outside the Treaty framework. The author himself questions the legitimacy of such actions, and as mentioned previously, there would have to be the political will of other Member States. Number three is political conditionality, meaning that if the Member State wants to become closely integrated, it must fulfil certain requirements. These options sound promising, but their actual enforcement and outcomes are unclear. Can they pressure a systematic change of politics in the Member State? Most likely not. Although, the funds' conditionality may be a big motivator.

The final scenario presented is the one following the present trend – 'gradual adaptation of the infringement proceedings to the need of the current context'¹⁶¹ based on Article 258 TFEU – implicating that the Commission is using the infringement procedure to actively interfere in national matters which may affect Union matters as well. This final strategy based on judicial intervention is the one currently pressed.

2.2.2. From *Floresu* to *ASJP*

What at first sight might have appeared to be a solid network to precede any rule of law errors has proven to be wholly insufficient considering current events. From the beginning, some scholars called for the political mechanisms to be accompanied by the intervention of the Court of Justice.¹⁶² Following the first infringement proceedings on Poland's judicial reforms, where Poland had refused to comply with the Commission's conditions, the Commission referred these matters to the Court of Justice. In addition, as the Polish judges themselves considered the reforms and their objectives controversial, they made several requests for preliminary rulings. Therefore, the Court of Justice had no other choice but to intervene.

Attacks on the rule of law consist mainly of attempts to jeopardise the independence of the judiciary by means of reforms of national judicial systems.¹⁶³ However, the organization and operation of the national judiciary is exclusively a domestic matter, and the Union has no competence in that matter. So how to justify interference with national rules in the field of national judiciary?

¹⁶¹ KOCHENOV, op. cit. 158, p. 146

¹⁶² BONELLI, Matteo and Monica CLAES. Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary. *European Constitutional Law Review* [online]. 2018, 14(3), p. 640. ISSN 1574-0196, DOI: 10.1017/S1574019618000330

¹⁶³ *Resolution of 7 October 2020 on the establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights*, op. cit. 155, point 8

In the past, the Court had avoided ruling on national rules on the organisation and operation of the national judiciary as they fall within the Member State's exclusive competence.¹⁶⁴ However, to protect the rule of law, the Court decided to change its approach. Best illustrated by the transition from *Florescu*¹⁶⁵ to *Associação Sindical dos Juizes Portugueses*¹⁶⁶ (hereinafter as 'ASJP'). The *Florescu* case, just like later *ASJP*, concerned the remuneration of judges. Romania adopted a national law to overcome the financial crisis that reduced staff costs, including a pension reform. The referring court built its reference primarily on evaluating the right to receive a contributory pension and set the questions mainly as to whether Article 6 TEU and provisions of the Charter, inter alia Article 47, preclude the national measures taken. The Court found the Charter to be applicable since the national rules at stake are implementing the Memorandum of Understanding¹⁶⁷ and therefore implementing the EU law in the sense of Article 51(1) Charter.¹⁶⁸ The Court was thus able to assess the national measures in light of the Charter provisions and whether the measures do not violate the judges' rights derived from the Charter. The Court concluded the national measures were not defective, and the EU law provisions shall not be interpreted as precluding the national measures in question.¹⁶⁹

The same approach was expected in the Portuguese *ASJP* case – the Court would take the opportunity to clarify the legal nature of the Memorandums of Understanding and the austerity aspect attached to it and, in that respect, the applicability of the Charter. However, in the end, the austerity aspect was ignored, and the Court instead took the opportunity of developing its views on the European judiciary independence. As mentioned above, until then, the Court had avoided ruling on the organisation of national judiciaries, so it had to find a way to make the case admissible and have jurisdiction to decide it.

Portuguese legislature temporarily reduced the remuneration of specific groups of officeholders and employees performing duties in the public sector, including judges. These measures were taken as part of the efforts to reduce the State's excessive deficit and fulfil the obligations agreed on in the Memorandum of Understanding concluded between Portugal and the Commission. The Associação Sindical dos Juizes Portugueses, acting on behalf of the members of the Court of Auditors, brought an action before the Portuguese Supreme Administrative Court

¹⁶⁴ e.g., Judgement of 6 November 2012, *Commission v. Hungary*, C-286/12, ECLI:EU:C:2012:687, Order of the Court of 26 June 2014, *Sindicato Nacional dos Profissionais de Seguros e Afins*, C-264/12, ECLI:EU:C:2014:2036

¹⁶⁵ Judgement of 13 June 2017, *Florescu and Others*, C-258/14, ECLI:EU:C:2017:448

¹⁶⁶ Judgement of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, ECLI:EU:C:2018:117

¹⁶⁷ Romania and the then European Community signed the Memorandum of Understanding providing financial assistance for Member States not part of the Eurozone. The Court found Memorandums of Understanding to be EU acts.

¹⁶⁸ *Florescu and Others*, C-258/14, op. cit. 165, para 48

¹⁶⁹ BONELLI, CLAES, op. cit. 162, pp. 626-629; *Florescu and Others*, C-258/14, op. cit. 165, para 60

seeking the annulment of those measures and the re-payment of those withheld salaries, arguing that the salary reduction infringes the principle of judicial independence enshrined in Portuguese Constitution and EU law – the second subparagraph of Article 19(1) TEU and Article 47 Charter.¹⁷⁰ The reference for preliminary ruling thus concerned the interpretation of Article 19 TEU and Article 47 Charter.

The referring court, the Portuguese Supreme Administrative Court, put out enough reasons for the Court of Justice to find the case procedurally admissible.¹⁷¹ More difficult was finding and justifying the Court's jurisdiction to rule on the independence of national courts. The referring court helped with this and prepared the ideal substance upon which the Court could establish its jurisdiction. According to the referring court, under the second subparagraph of Article 19(1) TEU, the national courts ensure the effective judicial protection of the rights stemming from the EU legal order. Therefore, those national courts must implement the protection following the principles of independence and impartiality laid down in Article 47 of the Charter.¹⁷² The Court of Justice sensed its chance and decided to build the case on interpreting the second subparagraph of Article 19(1) TEU. The provision reads, 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.'

First and foremost, the Court had to determine the material scope of this provision. The Court made a clear distinction between the material scope of the second subparagraph of Article 19(1) TEU and Article 51(1) Charter. Article 19(1) TEU relates to 'the fields covered by Union law, irrespective of whether the Member States are implementing Union law, within the meaning of Article 51(1) of the Charter.'¹⁷³ According to the Court, the material scope of Article 19(1) TEU is broader than that of Article 51(1) Charter, meaning a matter may fall under 'the fields covered by EU law' but not under 'implementing EU law'.¹⁷⁴ As a result, for a national court or tribunal to fall within 'the fields covered by EU law' and thereby be subject to the second subparagraph of Article 19(1) TEU, it is sufficient that the national court or tribunal may potentially rule on the application or interpretation of EU law.¹⁷⁵ This way, the Member States have certain obligations under Article 19(1) TEU irrespective of whether they are implementing EU law or not. This way, the judgement has significantly extended the Court's jurisdiction.

¹⁷⁰ *Associação Sindical dos Juizes Portugueses*, C-64/16, op. cit. 166, paras 11-15

¹⁷¹ *Ibid.* para 21

¹⁷² *Ibid.* para 16

¹⁷³ *Ibid.* para 29

¹⁷⁴ BONELLI, CLAES, op. cit. 162, p. 632

¹⁷⁵ *Associação Sindical dos Juizes Portugueses*, C-64/16, op. cit. 166, para 40; BONELLI, CLAES, op. cit. 162, pp. 630,631

The next step involved linking the principle of effective legal protection in Article 19(1) TEU with the requirement of judicial independence. Article 19(1) TEU refers to the concept of effective legal protection but, unlike Article 47 Charter, does not explicitly mention judicial independence. Hence, the Court used three ‘building blocks’ to justify the application of this TEU provision. The first building block was the values of Article 2 TEU and the principle of mutual trust.¹⁷⁶ The second one was Article 47 Charter. Lastly, the third block, preliminary ruling under Article 267 TFEU.

The Court first reflected on the values of Article 2 TEU, especially the rule of law. Mutual trust between the Member States is based on the fundamental premise that Member States share a set of common values (Article 2 TEU). This principle is essential, particularly between the national courts of the Member States. In the EU, individual parties have the right to challenge in court the legality of any decision or other national measure applying EU law to them.¹⁷⁷ In that regard, Article 19 TEU ‘gives concrete expression to the value of the rule of law’ and as such ‘entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice of the European Union but also to national courts and tribunals.’¹⁷⁸ With this interpretation, the Court created the concept of the European judiciary, constituted of the Court of Justice and the national courts. In cooperation with each other, they fulfil the duty to which they have been jointly entrusted, namely, ensuring the law is respected in the interpretation and application of the Treaties, and the judicial protection of individuals is maintained.¹⁷⁹ Member States are therefore obliged, inter alia, by virtue of the principle of sincere cooperation (Article 4(3) TEU), to ensure the application of and compliance with EU law and to establish ‘a system of legal remedies and procedures to ensure effective judicial review in these fields.’¹⁸⁰

Article 47 Charter was the second block. Not only because this provision explicitly mentions the requirement of independence, but also, as AG Bot says, because ‘the Charter now occupies a central place in the system of protection of fundamental rights in the Union, it must [...] constitute the reference legislation each time the Court is called upon to rule on the compliance with an EU measure or a national provision with the fundamental rights protected by the Charter.’¹⁸¹ The Court repeated that the principle of effective judicial protection, referred to in the second subparagraph of Article 19(1) TEU, is a general principle of EU law stemming from

¹⁷⁶ *Associação Sindical dos Juizes Portugueses*, C-64/16, op. cit. 166, para 30

¹⁷⁷ *Ibid.* para 30,31

¹⁷⁸ *Ibid.* paras 32

¹⁷⁹ *Ibid.* para 33; BONELLI, CLAES, op. cit. 162, pp. 632,633

¹⁸⁰ *Associação Sindical dos Juizes Portugueses*, C-64/16, op. cit. 166, para 34

¹⁸¹ C-108/10 *Scattolon*, Opinion of AG Bot, op. cit. 78, para 108

the constitutional traditions common to the Member States and enshrined in Articles 6 and 13 ECHR, and which is now reaffirmed by Article 47 Charter.¹⁸² In order to ensure effective judicial protection, Member States are obliged to ensure that their national bodies, which, as ‘courts or tribunals’ within the meaning of EU law, are part of the judicial system in areas covered by EU law, comply with the requirement of independence. Maintaining such bodies’ independence ‘is essential, as confirmed by the second subparagraph of Article 47 of the Charter, which refers to the access to an ‘independent’ tribunal as one of the requirements linked to the fundamental right to an effective remedy.’¹⁸³ In short, the Court found the principle of effective judicial protection to be contained in both Article 19(1) TEU and Article 47 Charter, as they stem from the same sources. The requirement of independence is essential to ensure this protection, and by establishing a link between those two provisions, the Court was able to use the concept of independence, as confirmed by Article 47.

The final ‘building’ provision was the preliminary ruling of Article 267 TFEU. This mechanism sets up a dialogue between national courts and the Court and secures consistency and uniformity in the interpretation of Union law. Using this provision, the Court had to rely purely on the case-law regarding this provision because the requirement of independence is not explicitly imposed by EU law. According to the settled case-law, the preliminary ruling mechanism ‘may be activated only by a body responsible for applying EU law which satisfies, inter alia, that criterion of independence.’¹⁸⁴ However, the reference to Article 267 TFEU may be rather tricky, since a review of the case-law on this matter shows that the Court of Justice usually seeks to broaden the access to the preliminary ruling procedure and is therefore not entirely strict when examining the independence of the referring body.¹⁸⁵ On the other hand, the concept of Article 267 TFEU serves a specific purpose. The Court of Justice desires more national bodies to be able to request an interpretation of EU law. So, naturally, the independence review must be looser.¹⁸⁶ Nonetheless, this case-law shows that the concept of the independence of national courts from an institutional perspective is used.

¹⁸² *Associação Sindical dos Juizes Portugueses*, C-64/16, op. cit. 166, para 35; ‘There is a ‘constitutional passerelle’ between the second subparagraph of Article 19(1) TEU and Article 47 of the Charter and the case-law concerning them inevitably intersects, given that those provisions share common legal sources. Thus, the rights covered by each are bound to overlap, and the second subparagraph of Article 19(1) TEU includes, but is not limited to, the obligation to have independent and impartial courts.’ C-791/19 *Commission v Poland (Disciplinary regime for judges)* [2021] ECLI:EU:C:2021:366, Opinion AG Tanchev para 69

¹⁸³ *Associação Sindical dos Juizes Portugueses*, C-64/16, op. cit. 166, paras 37, 41

¹⁸⁴ *Ibid.* paras 43-45

¹⁸⁵ e.g., Judgement of 21 March 2000, *Gabalfrija and Others*, C-110/98, ECLI:EU:C:2000:145; BONELLI, CLAES, op. cit. 162, p. 638

¹⁸⁶ BONELLI, CLAES, op. cit. 162, pp. 638, 639

In conclusion, under the second subparagraph of Article 19(1) TEU, the Member States, in order to ensure effective judicial protection, are obliged to secure the judicial independence of its ‘courts or tribunals’ within the meaning of EU law, which may be called to rule on the interpretation or application of the Union law.

2.2.3. Treaty on the EU or the EU Charter

Why choose to base the competence to review national procedural rules on the justice system on the TEU and not the Charter when judicial independence is explicitly mentioned only in the latter?

Some scholars argue that the Charter may be a more effective instrument to enforce the rule of law against the Member States.¹⁸⁷ The only requirement would be a renewed interpretation of Article 51(1) Charter. To allow for a broader interpretation of the Charter, the Court of Justice would have to deal with it, not the Commission. The Commission generally avoids referring to the Charter, possibly due to the strong political incentive that the Commission may be trying to expand the EU competences unjustifiably.¹⁸⁸ The new interpretation would make the Charter applicable even to purely domestic matters, i.e., even beyond the one Article 19(1) TEU enjoys now. The national courts would thus safeguard the protection of fundamental rights. However, such protection requires independent courts. The Polish problem lies in dismantling institutional independence, and thus even with broader applicability of the Charter, another mechanism would have to be developed to target the threats to the system. Nevertheless, the drafters of the Charter intended the applicability to be limited, and the scope provided in Article 51(1) Charter currently prevents the application of the Charter in relation to the Polish reforms.¹⁸⁹ Developing such an impactful expansion of the EU’s competences, presented above, which would not be done through primary law amendments, would possibly mean crossing the red line of the majority of the Member States.

¹⁸⁷ JAKAB, op. cit. 188; KOCHENOV, MORIJN op. cit. 319; DE VRIES, op. cit. 195

¹⁸⁸ JAKAB, András, Carlos CLOSA a Dimitry KOCHENOV. The EU Charter of Fundamental Rights as the Most Promising Way of Enforcing the Rule of Law against EU Member States. CLOSA, Carlos and Dimitry KOCHENOV, ed. *Reinforcing Rule of Law Oversight in the European Union* [online]. Cambridge: Cambridge University Press, 2016, p. 198. ISBN 9781316258774, DOI: 10.1017/CBO9781316258774.011

¹⁸⁹ SPIEKER, Luke Dimitrios. *Commission v Poland – A Stepping Stone Towards a Strong “Union of Values”?* [online]. Verfassungsblog, 2019. Available at: <https://verfassungsblog.de/commission-v-poland-a-stepping-stone-towards-a-strong-union-of-values/>, DOI: 10.17176/20190708-143659-0, last accessed 29 March 2022

The Court, however, did not even consider the application of the Charter and instead turned to the TEU. Which raises the question of whether the *ASJP* judgment is about the Portuguese judiciary or perhaps the Polish one. Was it designed to fit specifically Poland?

The rule of law crisis, defined mainly by jeopardizing judicial independence, is not a trend exclusive to Poland. Autocratic tendencies are also in the other Member States, most visibly in Hungary. If the EU wants to maintain internal order, it must address these threats. Additionally, the EU has a certain obligation toward its citizens to safeguard the protection of their rights. At this point, Poland is just the Member State that most visibly and abruptly revealed its undemocratic intentions.¹⁹⁰ The Portugal *ASJP* case was probably just the scapegoat that the Court of Justice used to develop its powers and justify the intervention.

The Court had to find a strategy that would be effective and, at the same time, cautious. What suggests the most that the Court could have tailored the case-law to fit Poland is the omission of the Charter. In this regard, the Court most likely wanted to avoid any detailed discussion on the scope of the Charter. Firstly, the Court's interpretation of Article 51(1) Charter may still be perceived as somewhat controversial. Especially where such interpretation may lead to the Court impinging on retained competences or interfering with the fundamental characteristics of the state, or when the Court may find itself in competition with constitutional courts. Secondly, because of Poland's unwillingness to accept that specific national measures may fall within the scope of Union law. Therefore, to avoid relying on the Charter and receive potentially even more severe criticism, the Court had to find a 'safer' source of the principle of judicial independence through the interpretation of the Treaties and found it in the second subparagraph of Article 19(1) TEU.¹⁹¹

2.2.4. Activist Move from the Court of Justice?

The application and interpretation of the second subparagraph of Article 19(1) TEU are of constitutional importance. The Court of Justice has found a Treaty provision that allows it to evaluate national legislation on the national justice system.¹⁹² As well as confirmed that the infringement procedure 'can also serve to address questions of fundamental importance' and is not

¹⁹⁰ Judgements K 03/21 and K 6/21 of the Constitutional Tribunal revealed those intentions. The Constitutional Tribunal does not even try to disguise the political influence.

¹⁹¹ BONELLI, CLAES, op. cit. 162, pp. 626-629

¹⁹² TABOROWSKI, Maciej. *CJEU Opens the Door for the Commission to Reconsider Charges against Poland* [online]. Verfassungsblog, 2018. Available at: <https://verfassungsblog.de/cjeu-opens-the-door-for-the-commission-to-reconsider-charges-against-poland/>, DOI: 10.17176/20180313-203040, last accessed 29 March 2022

limited to concrete violations.¹⁹³ But what about the principle of conferral? Is the Court not interfering with it?

Since *Van Gen en Loos* the Court has been engaged in judicial activism. A telling example is the development of the protection of the fundamental rights under EU law¹⁹⁴ when the Court found a link between economic freedoms, general principles of law, and fundamental rights.¹⁹⁵ The Court is known to take over the role of an expander. The process of trigger and creep is, in a way, inherent to the EU project as the economic nature of the integration almost naturally leads to an interaction between the general principles of law and the EU law.¹⁹⁶

Part 2.2.3. presented the idea of enforcing the Charter instead of the TEU. In that relation, Jakab offered a strategy that the Court could take to broaden the application of the Charter. The expanding interpretation would be made to protect fundamental rights, i.e., a fundamental value of Article 2 TEU. The case-law development then should be done in a ruling but without finding the violation of the Charter within the newly established interpretation.¹⁹⁷ This almost exact strategy was used in *ASJP*. The Court established a new broad interpretation of Article 19(1) TEU built on Article 2 TEU (but on the rule of law), Article 47 Charter and Article 267 TFEU, but did not find Portugal to violate the obligation.

The judicial rule of law protection mechanism is the least political one and can arguably offer the needed legitimacy to the steps taken. Since, all the less severe tools have failed and the political branch, either of the EU or the Member States, seems to be reluctant to take any firm steps, the Court's intervention is the last resort capable of bringing an actual change.¹⁹⁸

¹⁹³ BOGDANOWICZ, Piotr and Maciej TABOROWSKI. How to Save a Supreme Court in a Rule of Law Crisis: the Polish Experience. *European Constitutional Law Review* [online]. 2020, 16, p. 326. DOI: 10.1017/S1574019620000115

¹⁹⁴ Eg. Judgement of 22 November 2005, *Mangold*, C-144/04, ECLI:EU:C:2005:709; Judgement of 19 January 2010, *Kücükdeveci*, C-555/07, ECLI:EU:C:2010:21

¹⁹⁵ DE VRIES, Sybe A. The Charter of Fundamental Rights and the EU's 'creeping' competences: does the Charter have a centrifugal effect for fundamental rights in the EU?. In DOUGLAS-SCOTT, Sionaidh and Nicholas HATZIS. *Research Handbook on EU Law and Human Rights* [online]. Edward Elgar Publishing, 2017, p. 71. ISBN 9781782546405, DOI: 10.4337/9781782546405

¹⁹⁶ *Ibid.* 97,98

¹⁹⁷ JAKAB, op. cit. 188, pp. 202,203

¹⁹⁸ KOCHENOV, op. cit. 158, p. 146

2.3. Poland before the Court of Justice

The previous section hinted that the Court could have tried to tailor the *ASJP* judgement to fit Poland because it refused to enforce the Charter. It can be assumed that with this judgment, the Court wanted to send a clear signal to Warsaw that it was ready to review national rules that could undermine the independence of the European judiciary. The following paragraphs examine why the Charter's application could be a no-go for Poland, and how the actual cases were presented before the Court of Justice.

2.3.1. Application of the Charter in Poland

Before continuing with the newly developed case law, it is worth looking first at the application of the Charter in Poland as it is a politically sensitive topic. The United Kingdom, followed by Poland, insisted on a Protocol on the application of the EU Charter that would introduce exemptions from 'the operation of specific provisions of the Charter' for these states.¹⁹⁹ As a result, Protocol No 30 on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom has been introduced as part of the Lisbon Treaty. The status of this Protocol has been the object of numerous academic and political discussions. Especially questionable is its Article 1(1), which states that it 'does not extend the ability of the [CJEU], or any court or tribunal of Poland [...], to find that the laws, regulations or administrative provisions, practices or action of Poland [...] are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.'

Three main approaches emerged. Some professionals view the Protocol as an opt-out, excluding the application of the Charter in Poland.²⁰⁰ To others, the Protocol limits the Charter in its normative nature.²⁰¹ Most scholars, however, perceive the Protocol as a mere clarification of the Charter's provisions.²⁰² This last approach is also consistent with the declarations in the

¹⁹⁹ 10th indent Protocol No 30 on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom

²⁰⁰ For example, Jirásek considered the Protocol to be a general ban to the applicability of the Charter in Poland. If the Court were to overcome this, direct application of the Charter would, in his view, still infringe the Protocol.; JIRÁSEK, Jan. Application of the Charter of Fundamental Rights of the EU in the United Kingdom and Poland according to the Lisbon Treaty. *Europeanization of the National Law, The Lisbon Treaty and Some Other Legal Issues* Sborník příspěvků z konference Cofola 2008 konané na PrF MU 13 – 1452008. 2018

²⁰¹ Kastelik-Smaza refers to the opinion of the Polish Legislative Council from 2008 (RL-0303–8/08); KASTELIK-SMAZA, Agnieszka. The application of the Charter of Fundamental Rights of the EU in Poland. *AUC IURIDICA* [online]. 2019, 2018(4), p. 104. ISSN 2336-6478, DOI: 10.14712/23366478.2018.37

²⁰² E.g., C-489/10 *Bonda* [2011] ECLI:EU:C:2011:845, Opinion of AG Kokott para 23

Preamble of the Protocol.²⁰³ In fact, Poland objected to the Charter and acceded to this Protocol for political reasons. Especially fearing the consequences of certain provisions that may touch upon sensitive issues such as LGBT rights and abortion.²⁰⁴ Otherwise, the Polish Declaration No 62 would paradoxically undermine any use of the Protocol as it reaffirms Poland's respect for 'social and labour rights, as established by European Union law, and in particular those affirmed in Title IV of the [Charter].'²⁰⁵

The Court addressed the application issue in *N.S. and Others*²⁰⁶ judgment, where it stated that the provision of Article 1(1), read in conjunction with the Preamble to the Protocol, 'does not call into question the applicability of the Charter in [...] Poland.' The Court clarified that pursuant to the Protocol's Preamble, the Charter must be applied and interpreted by the Polish courts strictly according to the explanations referred to in Article 6 TEU.²⁰⁷ While the Charter reaffirms rights, freedoms, and principles recognised in the EU, it does not create new ones.²⁰⁸ Under those circumstances, the Court concludes that Article 1(1) merely clarifies the scope of Article 51 Charter and does not purport to exempt Poland from complying with the provisions of the Charter or prevent the national courts from ensuring compliance with those provisions.²⁰⁹

Polish national courts overall accept this position. Ordinary and administrative courts frequently use the Charter alongside the ECHR to support the interpretation of Polish law. The national cases mainly concern Article 41, as the right to good administration is absent in the Constitution, and Article 47. If the reference to the Charter and the relevant case law is insufficient, this is also because the binding nature of the Charter is still relatively new.²¹⁰ Over the years, there have also been a few exceptions to this general approach. One of them is the Polish Supreme Court's judgment of 12 July 2017²¹¹, in which the court stated that although the Charter has an interpretative effect, Protocol No. 30 limits the scope of the Charter. However, apart from a few exceptions, the judicial approach remains unified.²¹²

²⁰³ 8th and 9th indent Protocol No 30: Poland wishes 'to clarify certain aspects of the application of the Charter', 'clarifying the application of the Charter in relation to the law and administrative action of Poland [...] and of its justiciability within Poland.'

²⁰⁴ These fears are best projected in Declaration 61 through which Poland declares that the Charter 'does not affect in any way the right of Member States to legislate in the sphere of public morality, family law, as well as the protection of human dignity and respect for human physical and moral integrity.'

²⁰⁵ Declaration No 62; The Protection of Fundamental Rights in Europe (n.56) pg 174,176; KASTELIK-SMAZA, op. cit. 201, pp. 103-105

²⁰⁶ Judgement of 21 December 2011, *N.S. and Others*, C-411/10, ECLI:EU:C:2011:865

²⁰⁷ *Ibid.* para 119; 3rd indent Protocol No 30

²⁰⁸ *Ibid.* para 119; 6th indent Protocol No 30

²⁰⁹ *Ibid.* para 120

²¹⁰ KASTELIK-SMAZA, op. cit. 201, pp. 106-108

²¹¹ II PK 199/16, LEX No. 2338033

²¹² KASTELIK-SMAZA, op. cit. 201, pp. 104,105

Notwithstanding the clarifying of Protocol No 30 and its usage by the national courts, the fact that Poland acceded to this document signals Poland's disregard towards the Charter. Indeed, as presented below, Poland has objected to its application in the numerous present cases. Among the Member States, Polish authorities belong to those opposing the idea of broadening the EU's competences and the principle of primacy of the EU law.²¹³

2.3.2. From Portugal to Poland

At the time of the Polish judgments, the Court's interpretation of Article 19(1) TEU in *ASJP* could be perceived as a settled case-law since references to it were made in cases such as *Achmea*²¹⁴ or *L.M.*²¹⁵. In 2017, following the unsuccessful Commission's reasoned opinions issued in the Polish cases concerning the retirement age reform of judges of the Supreme Court and of the ordinary courts, the Commission brought actions before the Court alleging Poland of infringing EU law.

Firstly, the Court had to establish its jurisdiction to decide these cases. As discussed above, the Court had already prepared the ground in *ASJP*. Therefore, in bringing the actions against Poland (*C-192/18* and *C-619/18*), the Commission used a similar strategy and referred to that case. The Commission contended that the second subparagraph of Article 19(1) TEU obliges Member States to establish a system of remedies that ensures effective judicial review in the fields covered by EU law. To fulfil this obligation, the Member State is obliged to ensure that 'the national bodies which may rule on questions relating to the application or interpretation of EU law comply with the requirements of judicial independence.' This requirement is part of the essence of the

²¹³ For example, when the German Federal Constitution Court issued Karlsruhe judgement, no one cheered it more than Poland.; Zeit.de. Last Stand for the Rule of Law? [online]. *Zeit Online*, 2021. Available at: https://www.zeit.de/politik/ausland/2021-08/judicial-reform-poland-abolition-separation-of-powers-rule-of-law-europe-eugh-english?utm_referrer=https%3A%2F%2Fwww.google.com%2F, last accessed 29 March 2022

²¹⁴ Judgement of 6 March 2018, *Achmea*, C-284/16, ECLI:EU:C:2018:158; In *Achmea*, the Court again mentioned the notion of European judiciary – The Court and the national courts have the obligation 'to ensure the full application of EU law in all Member States and to ensure the judicial protection of the right of individuals under that law.' (para 36)

²¹⁵ Judgement of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, ECLI:EU:C:2018:586; Referring to *ASJP*, the Court repeated that that the Article 19 TEU gives concrete expression to the rule of law; every Member State must ensure that national courts and tribunals must, in fields covered by EU law, meet the requirements of effective judicial protection; and that this requirement is one of those linked to the fundamental right to an effective remedy; only independent body may activate Art 267 TFEU mechanism. (paras 49-54); Only independent courts may be trusted by the EU citizens, the CJEU and other national courts, esp. in connection with the EAW. The principle of mutual trust was in the *ASJP* only briefly touched upon. While in *ASJP* the principle of mutual trust and the principle of sincere cooperation are mentioned only briefly, in the *L.M.* case, the Court delved deeper. It found that the EAW mechanism is based on the premiss that national courts meet the requirement of effective judicial protection, which includes inter alia the independence and impartiality of courts. (para 58); KASTELIK-SMAZA, op. cit. 201, p. 634

fundamental right to a fair trial, as derived in particular from Article 47 of the Charter.²¹⁶ In the *C-619/18* case, the Commission added that this requirement relates to how an individual case is handled and how the judicial system is organised as a whole.²¹⁷

Poland repeatedly argued that national rules relating to the organization and operation of the national justice system fall within the exclusive competence and the procedural autonomy of the Member States and not within EU law or EU's competences.²¹⁸ The general principles of Article 19(1) TEU and Article 47 Charter are applicable only in situations governed under Union law. Hence, Poland dismissed any review of the national rules on the judiciary in the light of Article 19(1) TEU and Article 47 Charter as that would excessively extend the scope of these provisions. It added that those provisions 'do not include any derogation from the principle of conferral.'²¹⁹ The Court agreed that the organisation and operation of the national justice system do fall within the exclusive competence of the Member States. However, in exercising this competence, Member States are obliged to comply with their obligations derived from EU law, particularly the second subparagraph of Article 19(1) TEU.²²⁰ By requiring the Member States to fulfil these obligations, the EU in no way claims or arrogates to itself the exercise of this competence.²²¹ One could, however, ask why the EU then did not require compliance with the requirement of independence in an institutional sense in the previous cases, such as *Commission v. Hungary* (C-286/12). On the other hand, the threat to the rule of law brought by the Polish reforms is greater than ever before, and only now is the EU making full use of its competences.

Poland also dismissed any application of the Charter because, in its view, the case lacked a situation where EU law was implemented within the meaning of Article 51(1) Charter. Furthermore, Poland referred to Protocol No 30, Article 6(1) TEU, and Article 51(2) Charter, reminding that the Charter does not extend the scope of application of EU law beyond EU's competences.²²² Regarding Protocol No 30, the Court repeated its conclusion in *N.S. and Others*. It held that the Protocol does not concern the second subparagraph of Article 19(1) TEU since the

²¹⁶ *Commission v Poland (Independence of ordinary courts)*, C-192/18, op. cit. 135 para 87; *Commission v Poland (Independence of the Supreme Court)*, C-619/18, op. cit. 132, para 34

²¹⁷ *Commission v Poland (Independence of the Supreme Court)*, C-619/18, op. cit. 132, paras 34,36

²¹⁸ *Commission v Poland (Independence of ordinary courts)*, C-192/18, op. cit. 135, para 93; *Commission v Poland (Independence of the Supreme Court)*, C-619/18, op. cit. 131, para 37; *Commission v Poland (Disciplinary regime for judges)*, C-791/19, op. cit. 99, para 49

²¹⁹ *C Commission v Poland (Independence of ordinary courts)*, C-192/18, op. cit. 135, para 93; *Commission v Poland (Independence of the Supreme Court)*, C-619/18, op. cit. 132, paras 38,39

²²⁰ *Commission v Poland (Independence of ordinary courts)*, C-192/18, op. cit. 135, para 102; *Associação Sindical dos Juizes Portugueses*, C-64/16, op. cit. 166, para 40; *Commission v Poland (Independence of the Supreme Court)*, C-619/18, op. cit. 132, para 52

²²¹ *Commission v Poland (Independence of the Supreme Court)*, C-619/18, op. cit. 132, para 52 75

²²² *Ibid.* para 41

Protocol neither questions the Charter's applicability nor does it exempt Poland from complying with the provisions thereof.²²³ That being said, in the present cases, the Court decided not to enforce the Charter, making this argument irrelevant.

Poland also argued that this case should be distinguished from *ASJP* because, unlike the Portuguese case, which concerned EU financial assistance, the Polish one is not related to EU law in any similar sense.²²⁴ The Court rejected this argument. In *ASJP*, the conclusion was reached on the basis that the national authority concerned, the Portuguese Court of Auditors, could rule on questions concerning the application or interpretation of EU law and therefore fell within the 'fields covered by EU law'.²²⁵ The Portuguese case was based on an assessment of whether the national courts still met the requirements for effective judicial protection even after the reforms' implantation, not on an assessment of those reforms, which were introduced as a result of an EU legal act.

Poland considered Article 19(1) TEU only provides for a general obligation to adopt necessary measures to ensure effective legal protection in the fields covered by EU law but does not confer on EU competences relating to the adoption of institutional rules for the national judiciary.²²⁶ The Court, however, repeated that Article 19(1) TEU 'gives concrete expression to the value of the rule of law affirmed in Article 2 TEU.' Under Article 19(1) TEU, national courts and the Court of Justice are responsible for ensuring the full application of EU law and for the judicial protection that individuals derive from EU law. In that regard, the Member States must 'provide remedies sufficient to ensure effective judicial protection for individuals in the fields covered by EU law' within the meaning of Article 47 Charter.²²⁷ The material scope of Article 19(1) TEU refers to the 'fields covered by Union law' irrespective of whether the Member States are implementing Union law within the meaning of Article 51(1) of the Charter.²²⁸

The assessment of the concrete measures introduced by the reforms in terms of independence is presented in Part 3.

²²³ *Ibid.* para 53; *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, op. cit. 145, para 85

²²⁴ *Commission v Poland (Independence of the Supreme Court)*, C-619/18, op. cit. 132, para 40

²²⁵ *Ibid.* para 51; *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, op. cit. 145, para 83

²²⁶ *Commission v Poland (Independence of the Supreme Court)*, C-619/18, op. cit. 132, para 41; *Commission v Poland (Independence of ordinary courts)*, C-192/18, op. cit. 135, para 94; *Commission v Poland (Disciplinary regime for judges)*, C-791/19, op. cit. 99, para 49

²²⁷ *Commission v Poland (Independence of ordinary courts)*, C-192/18, op. cit. 135, para 98,99; *Commission v Poland (Independence of the Supreme Court)*, C-619/18, op. cit. 132, paras 47,48,54

²²⁸ *Commission v Poland (Independence of ordinary courts)*, C-192/18, op. cit. 135, para 101; *Commission v Poland (Independence of the Supreme Court)*, C-619/18, op. cit. 132, para 50; *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, op. cit. 145, para 82

2.4. Conclusion of Part 2

Since the end of the communist era, the organization of the national judiciary in Poland has proven to be defective and dysfunctional and requiring extensive reorganizations. In this sense, the leading Sejm party, PiS, has only responded to years of calls for necessary reforms. What is, however, questionable, is the execution. The most significant reforms, in combination, aim at personnel changes in the judiciary and may thus negatively undermine the independence of the Polish and, consequently, the European judiciary, and thus threaten the rule of law in the EU. The mechanism of Article 7 TEU is meant to be the ultimate option to protect the rule of law, yet its nature factually prevents its imposition. Thus, if the EU wants to protect its fundamental values, it must forge another path. After numerous failed attempts to solve this matter through political mechanisms of the rule of law protection, incl. Article 7 TEU, the Court could not just stand by anymore.

ASJP was truly a landmark judgement for the protection of Article 2 TEU values. What at first glance seemed to be an austerity case, the Court turned into a rule of law one. Presumably, to secure future opportunities to have a say in the situation in Poland and the other Member States and send a clear signal to the Member States that the organization of the national judiciary is not exclusively a national matter. In *Unibet*²²⁹ the Court had already declared effective judicial protection as the general principle of Union law. However, only in *ASJP* the Court prudently identified this principle as established in the second subparagraph of Article 19(1) TEU, and not in the Charter.²³⁰ Probably for political and strategical reasons. The Court has also distinguished the material scope of Article 19(1) TEU and Article 47 Charter, thereby confirming that the scope of the former is much broader. Many legal scholars call this interpretation ‘bold’. Now, the fact that a national court can potentially apply or interpret EU law without having to be closely linked to a substantive area of EU law is sufficient to trigger the application of the second subparagraph of Article 19(1) TEU. The Court can thus rule on matters that would otherwise fall outside the scope of EU law.²³¹ Even if the Charter is not applicable, judicial independence is still primary law obligation which must be complied with.

According to the Court, one of the requirements to ensure effective judicial protection is judicial independence. To find this requirement of independence in Article 19(1) TEU, the Court

²²⁹ Judgement of 13 March 2007, *Unibet*, C-432/05, ECLI:EU:C:2007:163 para 37

²³⁰ TORRES PÉREZ, Aida. From Portugal to Poland: The Court of Justice of the European Union as watchdog of judicial independence. *Maastricht Journal of European and Comparative Law* [online]. 2020, 27(1), p. 108. ISSN 1023-263X, DOI: 10.1177/1023263X19892185

²³¹ BONELLI, CLAES, op. cit. 162, pp. 636,637

used three building blocks – Article 2 TEU, Article 47 Charter, and Article 267 TFEU. As a result, the requirement of independence is now recognized under the value of the rule of law (Articles 2²³² and 49 TEU), as a fundamental right (Article 47 Charter), as a requirement for the activation of the preliminary ruling mechanism (Article 267 TFEU)²³³, and as an enforceable primary law obligation in the fields covered by Union law (Article 19(1) TEU).²³⁴ In conclusion, ‘every Member State must ensure that the bodies which, as ‘courts or tribunals’ within the meaning of EU law, come within its judicial system in the fields covered by that law, meet the requirements of effective judicial protection,’ one of them being judicial independence.²³⁵

More or less, the same approach was adopted in the Polish infringement cases. The Court referred primarily to *ASJP*, only this time, it examined the value of the rule of law under Article 2 TEU in more detail and slightly changed the link between Article 19(1) TEU and Article 47 Charter. The relationship between Article 19(1) TEU and Article 47 Charter is explained in Part 3.

This intervention of the Court of Justice and the shift in its case-law may be labelled as judicial activism aiming to protect the rule of law in the EU through an expansive interpretation of Treaty provision.

²³² The new interpretation of Article 19(1) TEU also affects the previously unclear interpretation of Article 2 TEU. With the new interpretation its scope is extended beyond the scope of EU law as it encompasses values which must be always respected and observed by the Member States, regardless of the principle of conferral. For example, regarding the judicial cooperation in criminal matters and EAW – in order to apply mutual recognition based on mutual trust, Member States must respect fundamental rights (another Article 2 TEU common value) even when they are not implementing EU law.; RODRÍGUEZ, Martín. Poland Before the Court of Justice: Limitless or Limited Case Law on Art 19 TEU?. *European Papers – A Journal on Law and Integration* [online]. 2020, 5(1), p. 338. ISSN 2499-8249, DOI: 10.15166/2499-8249/351

²³³ Reference to Article 267 TFEU is sometimes perceived as quite tricky since reviewing the case-law on this matter shows that the Court for most part tried to broaden the access to the preliminary procedure and therefore not being exactly strict with assessing the referring body’s independence. (e.g., in cases such as *Gabalfa* C-110/98 or *Köllensperger and Atzwanger* C-103/97); BONELLI, CLAES, op. cit. 162, p. 638

²³⁴ BONELLI, CLAES, op. cit. 162, pp. 634,635

²³⁵ *Associação Sindical dos Juizes Portugueses*, C-64/16, op. cit. 166, para 37

3. Outcomes of the Polish Cases

The intervention of the Court of Justice means a breaking point in the Union policy as it indicates that the EU is willing to take an active role in the protection of the values of Article 2 TEU. The Court's response to the cases concerning the Polish rule of law crisis also shapes the conditions required by the EU to safeguard its primacy, unity, and democracy. The following chapters present the legal and factual outcomes of the newly developed case-law, especially in relation to Article 47 of the Charter.

3.1. Judicial Independence

This chapter looks closely at the requirement of independence, as understood by the Court, in the context of Polish judiciary reforms.

Both ordinary courts and the Supreme Court may be called upon to rule on the application or interpretation of EU law, and therefore as 'courts or tribunals' within the meaning of EU law, 'come within the Polish judicial system in the 'fields covered by Union law' under the meaning of the second subparagraph of Article 19(1) TEU' and thus 'must meet the requirements of effective judicial protection.'²³⁶ One of those requirements is judicial independence. The Member States have the primary law obligation to ensure effective judicial protection and the independence of national court ruling on the interpretation or application of EU law. The Court thus concluded that it might review the national measure and whether Poland has infringed the second subparagraph of Article 19(1) TEU and the requirement of independence arising therefrom.

The Court presented the concept of judicial independence as follows from the settled case-law. The Court repeated that the concept of independence has two aspects, internal and external. External as a protection against external interventions which might influence the decision taken, i.e., the court shall 'exercise its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever.'²³⁷ The internal aspect is then linked to impartiality and 'seeks to ensure that an equal distance is maintained from the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings.' Hence 'objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the

²³⁶ *Commission v Poland (Independence of ordinary courts)*, C-192/18, op. cit. 135, para 103,104; *Commission v Poland (Independence of the Supreme Court)*, C-619/18, op. cit. 132, para 56

²³⁷ *Commission v Poland (Independence of ordinary courts)*, C-192/18, op. cit. 135, para 109

rule of law' is required.²³⁸ Related to the principle of independence is the principle of separation of powers, which is characteristic of the rule of law and requires the judiciary's independence from the legislature and the executive.²³⁹

As already mentioned in Part 1, the substance of the second paragraph of Article 47 Charter, i.e., of the fundamental right to an effective remedy, is that everyone is entitled to a fair hearing by an independent and impartial tribunal.²⁴⁰ Interpretation of Article 47 Charter is borne out by the ECtHR's case-law.²⁴¹ According to which, Article 6(1) ECHR requires the national court to be independent of the executive, the legislature and the parties to the proceedings. To establish whether a court is independent, the ECtHR will consider, inter alia, 'the mode of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body at issue presents an appearance of independence.'²⁴² Concerning impartiality, the ECtHR introduced two tests – subjective and objective. The subjective test considers 'the personal convictions and behaviour of a particular judge [...] by examining whether the judge gave any indication of personal prejudice or bias in a given case.' The objective test then checks 'whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality.' In short, the objective test does not look at the conduct of a concrete judge but rather on the facts that may cast doubt as to his or her impartiality.²⁴³ Since the requirements of independence and objective impartiality are closely linked, they shall be examined jointly. When examining whether these requirements are being met in a concrete case, decisive is not the perspective of the parties to the proceeding, but rather whether such fear 'can be held to be objectively justified.'²⁴⁴

The principle of the separation of powers between the executive and the judiciary is also of great importance. However, the ECtHR has reiterated that neither Article 6 nor any other provision of the ECHR requires states to adopt a specific constitutional model governing the relations and interaction between the different branches of government. Nor does it require states to adhere to any theoretical constitutional concepts concerning the permissible limits of such

²³⁸ *Ibid.* para 110

²³⁹ *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, op. cit. 145, para 124

²⁴⁰ *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, op. cit. 145, para 119

²⁴¹ *Ibid.* paras 126-130

²⁴² *Ibid.* para 127

²⁴³ *Ibid.* para 128

²⁴⁴ *Ibid.* para 129,

interaction. The only relevant question in this regard is whether the ECHR's requirements have been met in the concrete case.²⁴⁵

Although the Court of Justice refers to the ECtHR's case-law, its overall approach is different from that of the ECtHR. The Commission brought the actions under Article 258 TFEU and asked the Court to assess the issue from an institutional perspective. Whereas whenever the ECtHR decides a case, it does so from the perspective of an individual.²⁴⁶ The Court and the ECtHR play different roles. Since ECHR is not directly applicable and supreme in some EU Member States, its legal position is different. While the Council of Europe enjoys better 'moral authority' in the fundamental rights sphere, the EU has far better enforcement mechanisms. Especially combined with the primacy of EU law, the EU may offer quicker and more robust protection of fundamental rights.²⁴⁷ Presently in the Polish cases, the Court of Justice has opened for the EU a way to review the justice system from a structural perspective. Unlike the ECtHR, the Court of Justice is not limited to violations in individual cases. The ECtHR may order to rectify specific national measures, but it does not have the same enforcement and monitoring possibilities as the EU.

3.1.1. National rules on the organisation and operation of the national justice system

The concepts of independence and impartiality can be safeguarded only by procedural rules which 'are such to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it.' In particular rules concerning 'the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members.'²⁴⁸ The aim is the protection of judges from external interventions or pressure liable to jeopardise their independence. Therefore, the national rules on the organisation of the national justice system must be of such nature as 'to preclude not only any direct influence, in the form of instructions, but also types of influence which are more indirect and which are liable to have an effect on the decisions of the judges concerned.'²⁴⁹ The organization and functioning of the national judiciary are exclusively national matters. Therefore,

²⁴⁵ *Ibid.* para 130

²⁴⁶ CALLEWAERT, Johan. *Disciplinary regime applicable to Polish judges: judgment of the CJEU in the case of Commission v Poland* [online]. Prof Dr iur Johan Callewaert, 2021. Available at: <https://johan-callewaert.eu/disciplinary-regime-applicable-to-polish-judges-judgment-of-the-cjeu-in-the-case-of-commission-v-poland/>, last accessed 29 March 2022

²⁴⁷ JAKAB, op. cit. 188, pp. 199,200

²⁴⁸ *Commission v Poland (Independence of ordinary courts)*, C-192/18, op. cit. 135, para 111

²⁴⁹ *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, op. cit. 145, para 125

‘it is for the domestic legal system of every Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law.’ In addition, according to settled case-law, when there are no EU rules governing the matter, as in this case, the Member States are still ‘responsible for ensuring that, pursuant to Article 47 of the Charter, the right to effective judicial protection of those rights is effectively protected in every case.’²⁵⁰ Thus, national rules on the organisation of the national judiciary must be such as to comply with the requirements of effective judicial protection.

Before the *ASJP* judgment, the national courts had to provide remedies to guarantee the effectiveness of individuals' rights stemming from EU law. The domestic procedural rules on the national judiciary, its organisation and structure, and its ability to ensure the effectiveness of the judiciary used to be examined from the point of principles of equivalence and effectiveness. National procedural rules could not be ‘less favourable than those governing similar domestic situations’ (principle of equivalence) and could not ‘render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order’ (principle of effectiveness).²⁵¹ However, now that the content of the Member States' obligation is significantly extended, the examination is conducted from the point of the rule of law. With the principle of effective judicial protection being established in the second subparagraph of Article 19(1) TEU, the obligation under this provision includes the effectiveness of the remedies provided and that the courts themselves meet the basic prerequisites for effective judicial protection. Consequently, this has led to a significant expansion of the Court’s competences.²⁵²

When assessing the national rules and their compliance with the principle of independence, the Court applies, what Rodríguez calls, the ideal holistic approach. Ideal in the sense that the national rules safeguarding independence shall ‘be such as to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it.’ Then in case of an alleged violation of judicial independence, the Court holistically examines the rules and all their aspects, both legal and factual. Rodríguez argues that the significance of this approach is that the execution of the Court’s rulings then requires the Member State to amend a significant part of the system and not only replace

²⁵⁰ *Ibid.* para 115

²⁵¹ Judgement of 26 October 2006, *Mostaza Claro*, C-168/07, ECLI:EU:C:2006:675 para 24; TORRES PÉREZ, op. cit. 230, p. 108

²⁵² *Associação Sindical dos Juizes Portugueses*, C-64/16, op. cit. 166, para 37, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, op. cit. 132, para 55; ‘[E]very Member State must ensure that the bodies, as ,courts or tribunals’ within the meaning of EU law, come within its judicial system in the fields covered by that law, meet the requirements of effective judicial protection.’; TORRES PÉREZ, op. cit. 230, p. 108

concrete provision.²⁵³ That, however, proved itself not to be the case, for example, in *A.K. and Others*. Although amendments were made to the New Law on the Supreme Court repealing the provisions lowering the retirement age for the judges currently in service, those provisions were not repealed *ex tunc*. Therefore, the applicants in those proceedings had to seek a declaration that they never took retirement and remained lawfully in post.²⁵⁴ This case shows how Poland approaches Court's orders, simply changing provisions to comply with the Court's orders without the intention of rendering the compatibility of national law with EU law.²⁵⁵ Still, the ideal holistic approach has the potential to be highly effective as it allows the Court to undertake an overarching analysis of the national justice system.

National procedural rules on the organisation and operation of the national justice system are under the Member States' competence. However, the EU and its legal order require those rules to amount to a certain standard. They must maintain the independence of national courts and judges and thereby ensure effective judicial protection of individuals' rights derived from the Union law. The ever-repeated standard is that the national rules must be 'such to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it.'²⁵⁶ The procedural rules must be set out in a way as to protect judges from the possible temptation to succumb to external interference or pressure and thereby compromise their independence. Those rules must therefore preclude any direct influence, in the form of instructions, as well as more indirect influence, which could affect the decisions of the judges concerned.²⁵⁷ What matters is not only the *de jure* state but also the *de facto* situation. When assessing the appropriateness of the mechanisms adopted, the Court would examine the procedural rules and the substantive conditions. In that context, the national rules must be interpreted considering the interpretation given to them by the national courts.²⁵⁸

²⁵³ RODRÍGUEZ, op. cit. 232, pp. 335-337

²⁵⁴ The applicants had remained in the post as they waited for a decision on extending their terms. However, the extensions were not granted. Thus, during the period from reaching the retirement age to the issuance of the decision, those judges continued in office unlawfully.

²⁵⁵ *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, op. cit. 145, para 96

²⁵⁶ *Commission v Poland (Independence of ordinary courts)*, C-192/18, op. cit. 135, para 111

²⁵⁷ *Commission v Poland (Independence of ordinary courts)*, C-192/18, op. cit. 135, para 120, by analogy *Commission v Poland (Independence of the Supreme Court)*, C-619/18, op. cit. 132, para 112

²⁵⁸ *Commission v Poland (Disciplinary regime for judges)*, C-791/19, op. cit. 99, para 142

3.1.2. Principle of Irremovability of Judges

As presented in the chapter dedicated to the reforms introduced by PiS, the supposed real objective was personnel changes in the courts. One of the essential guarantees of judges' independence is the principle of irremovability of judges. According to the Court, this principle is of cardinal importance since it is one of the necessary safeguards to ensure judges are protected against any external interference or pressure.²⁵⁹ Essentially, this principle provides judges to remain in posts until they reach the obligatory retirement age or until their mandate expires. Exceptions to this rule are possible but must be justified by legitimate and compelling reasons and be subject to the principle of proportionality. Any dismissal of judges must be subject to due process, and judges may be dismissed if deemed unfit to perform their duties because of 'incapacity or a serious breach of their obligations.'²⁶⁰ An exception is, therefore, acceptable only if justified by a legitimate aim, is objective in terms of that aim, and 'is not such as to raise reasonable doubt in the minds of individuals as to the imperviousness of the courts concerned to external factors and their neutrality with respect to the interests before them.'²⁶¹ Hence, the legal rules governing any dismissal of judges, not only the disciplinary regime, must provide the necessary guarantees to prevent any risk of that dismissal regime being abused to control the content of judicial decisions politically.²⁶²

3.1.3. Lowering of the Statutory Retirement Age of Judges

The Member States retain the option to adopt employment policies applicable to judges, such as age limits. However, the policy adopted by Poland raised serious doubts as to whether the reform of the retirement age of the Supreme Court's currently serving judges was carried out in line with the objective of retirement age standardisation and not to exclude a group of judges of this court. This concern is linked primarily to the fact that, as noted in Chapter 1 of this Part, the reform also applied to judges appointed before the reformed Law came into force. Forcing judges to leave their posts prematurely may seriously violate the principle of irremovability. Moreover, the reduction of the retirement age was accompanied by the implementation of a new discretionary

²⁵⁹ *Commission v Poland (Independence of ordinary courts)*, C-192/18, op. cit. 135 paras 115, 112

²⁶⁰ *Ibid.* para 113

²⁶¹ *Ibid.* para 115

²⁶² *Ibid.* para 114

mechanism allowing the President of the Republic to decide on the extension of the shortened period of judicial service.²⁶³

The change in the retirement age of judges of the ordinary courts by itself does not affect judicial independence as those judges are not appointed for a fixed term until they reach the statutory retirement age. The Court, however, had to examine those provisions in light of the Article 157 TFEU and Directive 2006/54²⁶⁴ because of the different ages for female and male judges.

As mentioned, the retirement age reform was accompanied by the possibility of extending the term of office on request. Regarding the power to extend judicial service, the main concern was the absence of criteria to determine whether the extension should be granted and whether the reasons for such a decision should be contained. The only obligation imposed on the President was to consult the KRS, but without setting any time limit within which this should be done. The final opinion of the KRS was not binding and issued based on overly general criteria and, most significantly, without the possibility of judicial review.²⁶⁵ The Court admitted that an intervention in the form of an opinion of an ‘outside standing’ body, such as the KRS, can make the whole extension procedure more objective. However, the body issuing the opinion must be independent of the legislative and executive authorities and the authority requesting the opinion. Moreover, the deliverance of the opinion must be based on objective and relevant criteria and be adequately reasoned. Only then can it provide objective information to the authority to properly exercise the power entrusted to it.²⁶⁶

The Court also examined the mechanism of extension of ordinary courts judges' service, where this power is granted to the Minister of Justice. In this case, the national legislation did not provide any time limit for the Minister of Justice to issue an extension decision. Therefore, the period of issuance is also within the Minister's discretion. Moreover, since the judge remains in post throughout the whole procedure, i.e., from the request submission to the final decision issuance, the judge may be put into a long period of uncertainty.²⁶⁷

The statutory mechanisms allowing judges to carry out their duties beyond the obligatory retirement age, i.e., authorization by the Minister for Justice (ordinary courts) or by the President of the Republic (the Supreme Court), concern how the judges' careers progress and end. The Court

²⁶³ *Commission v Poland (Independence of the Supreme Court)*, C-619/18, op. cit. 132, paras 78, 81-83

²⁶⁴ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation

²⁶⁵ *Commission v Poland (Independence of the Supreme Court)*, C-619/18, op. cit. 132, paras 98-102

²⁶⁶ *Commission v Poland (Independence of the Supreme Court)*, C-619/18, op. cit. 132, paras 115-117

²⁶⁷ *Commission v Poland (Independence of ordinary courts)*, C-192/18, op. cit. 135, paras 123, 129

agrees that it is up for the Member States to decide whether to authorise such an extension. However, if the Member States decide to incorporate these mechanisms, they must ensure that the conditions and the procedure to which such an extension is subjected do not compromise the principle of judicial independence.²⁶⁸ Again, granting the Minister of Justice, or the President of the Republic, the power to grant an extension does not necessarily undermine judicial independence.²⁶⁹ In both cases, *C-192/18* and *C-619/18*, the Court did not find the national rules governing the extension mechanism satisfactory. It assessed the rules set in the laws to be ‘too vague and unverifiable’, the authorities are not required to state their reasons for their decisions, and those decisions cannot be subjected to judicial review.²⁷⁰ In conclusion, the power held by the Minister for Justice, or the President of the Republic, is ‘give rise to reasonable doubts, inter alia in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to any interests before them.’ Therefore, the power granted to those authorities ‘fails to comply with the principle of irremovability, which is inherent in judicial independence.’²⁷¹

Generally, employment policy objectives such as the retirement age standardisation of the public sector employees and the age limit for mandatorily ceasing certain activities may be regarded as legitimate.²⁷² In both cases, the Court disapproved of combining the measures taken, i.e., combining the lowering of the retirement age and the discretion vested in the Minister for Justice, respectively the President of the Republic, of granting or refusing an authorization for judges to continue to carry out their duties.²⁷³ The Court found that the combination of the 5-year reduction in the retirement age of serving judges and the possibility of extending their service by six years reinforces the impression that the real aim was to exclude a particular group of judges of the Supreme Court. This combination could thus significantly affect the composition of that court and its functional continuity and lead to a major restructuring of the composition of the Supreme Court, thereby casting doubt on the true nature of the reform and the objectives it pursues.²⁷⁴ In comparison, in the *ASJP*, the Court interpreted Article 19(1) TEU as meaning that the principle of judicial independence did not preclude national measures reducing the remuneration of judges.

²⁶⁸ *Ibid.* paras 117,118, by analogy *Commission v Poland (Independence of the Supreme Court)*, C-619/18, op. cit. 132, para 109,110

²⁶⁹ *Ibid.* para 119, by analogy *Commission v Poland (Independence of the Supreme Court)*, C-619/18, op. cit. 132, para 111

²⁷⁰ *Ibid.* paras 121,122; *Commission v Poland (Independence of the Supreme Court)*, C-619/18, op. cit. 132, paras 113,114

²⁷¹ *Commission v Poland (Independence of ordinary courts)*, C-192/18, op. cit. 135, paras 124,125; *Commission v Poland (Independence of the Supreme Court)*, C-619/18, op. cit. 132, paras 96,118

²⁷² *Commission v Poland (Independence of the Supreme Court)*, C-619/18, op. cit. 132, para 81

²⁷³ *Commission v Poland (Independence of ordinary courts)*, C-192/18, op. cit. 135, para 130

²⁷⁴ *Commission v Poland (Independence of the Supreme Court)*, C-619/18, op. cit. 132, paras 84-86

The Portuguese and Polish measures are in no way comparable. Temporary salary reduction measures do not have the same effects on the independence as the definitive lowering of the retirement age of serving judges, which results in the prematurely ending of the concerned judge's career.²⁷⁵

The Court concluded that Poland had not demonstrated that national measures constituted appropriate means for the retirement age unification. As well as had not presented any objective reason to why the extension of the service is subject to the discretionary decision of the President of the Republic to allow them to continue in their post when for other workers, the statutory retirement age is only optional.²⁷⁶ Therefore, the Court held the measure lowering the retirement age of judges in posts 'not justified by a legitimate objective' and undermining 'the principle of irremovability of judges, which is essential to their independence,' thus breaching the second subparagraph of Article 19(1) TEU.²⁷⁷

3.1.4. Disciplinary Regime

The disciplinary regime for judges is of great importance. Both the Court of Justice and the ECtHR are aware that whenever disciplinary proceedings are initiated, what is at stake is the public confidence in the functioning and independence of the judiciary. Such proceedings can also have severe consequences for the member of the judiciary concerned. Moreover, if judges were to face the risk of disciplinary proceedings before a disciplinary body whose independence is not guaranteed, their own independence could be at risk.²⁷⁸ The Court ruled on the disciplinary regime in Poland in preliminary ruling *A.K. and Others*²⁷⁹ and in the most recent infringement case, *C-791/19*.

Case *A.K. and Others* was a preliminary ruling request, and the applicants based their actions on, inter alia, Article 47 Charter in conjunction with Article 9 of Directive 2000/78,²⁸⁰ which reaffirms the right to an effective remedy. This conjunction made the matter in question fall under situations governed by EU law, and thus the applicants could legitimately claim their right

²⁷⁵ *Ibid.* paras 92,93

²⁷⁶ *Ibid.* para 90; The Court suggested, that according to its settled case-law, for the national provisions lowering the age limit ceasing the service of a judge to be in compliance with the principle of proportionality, these provisions must be accompanied with transitional measure to protect the legitimate expectations of the judges concerned. (para 91)

²⁷⁷ *Commission v Poland (Independence of the Supreme Court)*, C-619/18, op. cit. 132, paras 96,97

²⁷⁸ *Commission v Poland (Disciplinary regime for judges)*, C-791/19, op. cit. 99, para 82,83

²⁷⁹ *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, op. cit. 145

²⁸⁰ Directive 2000/78 – claiming infringement of the prohibition of discrimination in employment on the grounds of age due to their premature retirement

to effective judicial protection afforded by Article 47 of the Charter.²⁸¹ However, the Court based its ruling on Article 19(1) TEU.

Under the second paragraph of Article 19(1) TEU, the Member States must ‘ensure that the disciplinary regime applicable to judges of national courts which come within their judicial systems in the fields covered by EU law observe the principle of the independence of judges.’ This objective is achieved, among others, by guaranteeing that decisions issued in disciplinary proceedings are reviewed by a body that itself meets the requirements of independence.²⁸² As a part of the Supreme Court, the Disciplinary Chamber may be called upon to rule on questions relating to the application or interpretation of EU law and is thus a ‘court or tribunal’ within the meaning of EU law. Therefore, it must meet the requirements of effective judicial protection and thus ‘offer all the necessary guarantees as regards its independence and impartiality.’²⁸³

To comply with the requirement of independence, national rules governing specifically the disciplinary regime applicable to judges ‘must provide the necessary guarantees in order to prevent any risk of its being used as a system of political control of the content of judicial decisions.’ Those are, in particular, rules which define the forms of conduct amounting to disciplinary offences and the applicable penalties and which provide for the involvement of an independent body and a disciplinary procedure that fully safeguards the rights enshrined in Articles 47 and 48 of the Charter and allow a review of the disciplinary body’s decision.²⁸⁴

At the outset, the Court recalled under what circumstances the Disciplinary Chamber was created. Followed by a reminder that for the assessment of whether a judicial body, i.e., a court or tribunal within the meaning of EU law, meets the criteria of independence and impartiality, it is necessary to consider the broader context of the reforms adopted.²⁸⁵ The President of the Republic appoints the judges of the Disciplinary Chamber on a proposal from the KRS. The fact that the President appoints those judges does not necessarily amount to a relationship of subordination or doubts the judges’ impartiality.²⁸⁶ Moreover, the KRS, as a body empowered by the Constitution to safeguard the independence of the judiciary, may contribute to making the appointment of the judges’ more objective.’²⁸⁷ However, this body itself must be sufficiently independent of the legislature and executive and of the authority to which it delivers an appointment proposal.²⁸⁸

²⁸¹ *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, op. cit. 145, paras 79-81

²⁸² *Commission v Poland (Disciplinary regime for judges)*, C-791/19, op. cit. 99, para 80

²⁸³ *Commission v Poland (Independence of the Supreme Court)*, C-619/18, op. cit. 132, para 55

²⁸⁴ *Ibid.* para 61

²⁸⁵ *Commission v Poland (Disciplinary regime for judges)*, C-791/19, op. cit. 145, para 88

²⁸⁶ *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, op. cit. 145, para 133

²⁸⁷ *Commission v Poland (Independence of the Supreme Court)*, C-619/18, op. cit. 132, para 115

²⁸⁸ *Ibid.* para 116

Therefore, when deciding whether the judges selected by it meet ‘the requirements of independence and impartiality arising from Article 47 of the Charter,’ the independence of the KRS also comes into question.²⁸⁹ The Court examined numerous factors since the KRS underwent a series of reforms resulting in its complete reorganization. The reform of the KRS members' selection mechanism was combined with the shortening of the serving members' term of office, which led to significant changes in the composition of this body. Moreover, the reform took place simultaneously with the Supreme Court reform of lowering the retirement age of then serving judges. Therefore, as the KRS's members exchanged, the Supreme Court also had vacancies to fill.²⁹⁰ Given the above mentioned, the Court alerts that these may give rise to legitimate doubts about the independence of the KRS, which the Court itself described as questionable.²⁹¹

Although the Court said that some factors might fall within the competence of a Member State and 'escape criticism' when considered together, in the light of the present situation, they may call into question the independence of the authority involved in the procedure for the appointment of judges, even if taken individually.²⁹²

The overall assessment of the independence and impartiality of the Disciplinary Chamber, or any other court is as follows: the referring court should consider whether the taken measures together ‘are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of the Disciplinary Chamber to external factors, and, in particular, to the direct or indirect influence of the legislature and the executive, and as to its neutrality with respect to the interests before it and, this, whether they may lead to that chamber not being seen to be independent or impartial with the consequences of prejudicing the trust which justice in a democratic society must inspire in subject of the law.’²⁹³

The requirement of independence and impartiality requires rules which prevent the disciplinary regime from being used as a tool of political control. Disciplinary liability of a judge should be limited to exceptional cases, and the rules should lay down the forms of conduct triggering disciplinary liability ‘in a manner that is sufficiently clear and precise.’ The definition of a disciplinary offence offered by the Law on the ordinary courts was found to not prevent the liability of judges from being triggered solely based on the content of their decision.²⁹⁴ Even though the Supreme Court has a settled case-law regarding the interpretation of Article 107 Law

²⁸⁹ *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, op. cit. 145, paras 136-139

²⁹⁰ *A.B. and Others (Appointment of judges to the Supreme Court)*, C-824/18, op. cit. 125, paras 122-127, 139

²⁹¹ *Commission v Poland (Disciplinary regime for judges)*, C-791/19, op. cit. 99, paras 104-110

²⁹² *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, op. cit. 145, para 142

²⁹³ *Ibid.* para 153; *Commission v Poland (Disciplinary regime for judges)*, C-791/19, op. cit. 99, para 86

²⁹⁴ *Commission v Poland (Disciplinary regime for judges)*, C-791/19, op. cit. 99, paras 139, 140

on the ordinary courts, those ruling were not issued by the Disciplinary Chamber but by a different chamber of that Court.²⁹⁵ The Polish disciplinary regime has the potential to impose political control over the judges' decisions. For example, an inherent part of the system of cooperation between the Court of Justice and the national courts is the system of preliminary ruling procedure. Therefore, a national provision that allows national judges to be exposed to disciplinary proceedings for referring to the Court of Justice cannot be permitted.²⁹⁶ Another example would be the opening of a disciplinary proceeding against a judge for requesting the Sejm to provide documents on the appointment of the current members of the KRS.²⁹⁷

The Court found that Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU by implementing these national measures. In addition, by restricting courts from submitting preliminary requests, the state has failed its obligations under Article 267 TFEU.²⁹⁸ The Court also ordered the suspension of the application of the national provisions governing the jurisdiction of the Disciplinary Chamber. However, due to failing to fulfil this obligation and not implementing any measures aimed at such suspension, the Court ordered Poland to pay a penalty of 1 million euros per day till the obligation will not be complied with.²⁹⁹

3.2. Application of Article 47 in the context of the Court of Justice case-law

This next chapter focuses on the outcomes of the Court's jurisprudence on the applicability of Article 47 Charter. Arguably, Article 47 Charter allowed the broad interpretation of the second subparagraph of Article 19(1) TEU in relation to national procedural rules governing the national justice system. The following sections discuss the relationship between these two primary law provisions, the principle of primacy of EU law, and other ambiguities created by the new interpretation.

²⁹⁵ *Ibid.* para 145

²⁹⁶ *Ibid.* paras 226,227

²⁹⁷ *Ibid.* para 151

²⁹⁸ *Ibid.* ruling points 1,2

²⁹⁹ Order of the Vice-President of the Court of 27 October 2021, *Commission v Poland*, C-204/21, ECLI:EU:C:2021:878

3.2.1. Relationship between Article 47 of the Charter and Article 19(1) of the TEU

Even though the Court of Justice has so far avoided enforcing the Charter, it frequently refers to Article 47 in connection to Article 19(1) TEU. The relationship between those provisions has evolved since *ASJP*.

AG Tachev agreed with Poland that these two provisions require separate assessments of their material scope.³⁰⁰ In *ASJP*, the Court acknowledged the relationship between Article 19(1) TEU and Article 47 Charter by stating that the principle of effective judicial protection of Article 19(1) TEU corresponds with the requirement of judicial independence under Article 47 Charter. However, the Court only used Article 47 Charter to confirm the conclusions drawn based on Article 19(1) TEU, since unless the Article 51(1) Charter is activated, a combined application of those provisions is impossible.³⁰¹

But when is Article 51(1) activated? Articles 51 to 54 are meant to specify the applicability of the Charter and safeguard that it does not extend EU competences in a way that would violate the principle of conferral.³⁰² However, the interpretation of those provisions is subject to numerous discussions. According to the settled case-law, Article 51(1) Charter limits the Charter's applicability to the Member States' actions to 'situations [...] within the scope of the European Union law'³⁰³. This concept excludes situations outside of EU competences³⁰⁴ and 'purely hypothetical links.'³⁰⁵ *Akerberg Fransson*³⁰⁶ indicates that the scope of the Charter follows the scope of EU law, which was confirmed in *Berlioz*³⁰⁷ – 'the fundamental rights guaranteed in the legal order of the [EU] are applicable in all situations governed by EU law and that the applicability of EU law entails applicability of the fundamental rights guaranteed by the Charter.'³⁰⁸ Therefore, if the applicability of EU law means the applicability of the Charter, then the applicability of Article 19(1) TEU could mean the applicability of Article 47 Charter. Thus, when a Member State

³⁰⁰ C-619/18 *Commission v Poland (Independence of the Supreme Court)* [2019] ECLI:EU:C:325, Opinion of AG Tachev para 54

³⁰¹ C-619/18 *Commission v Poland (Independence of the Supreme Court)*, Opinion of AG Tachev, op. cit. 300, para 55,56

³⁰² DE VRIES, op. cit. 195, p. 60

³⁰³ *Akerberg Fransson*, C-617/10, op. cit. 82, para 18

³⁰⁴ Judgement of 27 November 2012, *Pringle*, C-370/12, ECLI:EU:C:2012:756 paras 180,181

³⁰⁵ Judgement of 29 May 1997, *Kremzow*, C-299/95, ECLI:EU:C:1997:254 para 16; SPIEKER, Luke Dimitrios. *Defending Union Values in Judicial Proceedings. On How to Turn Article 2 TEU into a Judicially Applicable Provision*. In VON BOGDANDY, Armin, Piotr BOGDANOWICZ, et al., ed. *Defending Checks and Balances in EU Member States* [online]. Berlin, Heidelberg: Springer Berlin Heidelberg, 2021, 2021-01-06, pp. 237-268. Beiträge zum ausländischen öffentlichen Recht und Völkerrecht. ISBN 978-3-662-62316-9, DOI: 10.1007/978-3-662-62317-6_10

³⁰⁶ *Akerberg Fransson*, C-617/10, op. cit. 82, para 21

³⁰⁷ Judgement of 16 May 2017, *Berlioz Investment Fund*, C-682/15, ECLI:EU:C:2017:373

³⁰⁸ *Ibid.* para 49; BONELLI, CLAES, op. cit. 162, p. 630

is subject to the obligation of judicial independence enshrined in Article 19(1) TEU, it becomes a situation 'governed by EU law'.³⁰⁹

However, in *ASJP*, the Court distinguished between the scope of application of those provisions and recognized Article 19(1) TEU as applicable even if the Charter is not. AG Tanchev warned that 'contrary conclusion could undermine the current system of reviewing the compatibility of national measures with the Charter' and thus open the way for the misuse of Treaty provisions, such as Article 19(1) TEU, to circumvent the limits of the Charter's scope under Article 51(1). In the words of Tanchev, Article 19(1) TEU could be used as a 'subterfuge'.³¹⁰ Therefore, the provision should not be used as a trigger for the application of the provisions of the Charter. Instead, the relationship between Article 19(1) TEU and Article 47 Charter should be perceived as complimentary.³¹¹

In *ASJP* the Court uses Article 47 as a tool to interpret Article 19(1) TEU. In *C-619/18* and subsequent cases, the Court instead reinforces the link between these provisions in terms of the rights of individuals. Independence of courts is part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, and these rights are an essential guarantee that the rights derived from EU law are protected, and the core values of Article 2 TEU are safeguarded.³¹² By drawing a link between the rule of law of Article 2 TEU and Article 47 Charter, the obligation to provide remedies to ensure the protection of the rights of individuals derived from EU law now creates an obligation to ensure the independence of domestic courts. Therefore, as the contents of Article 47 Charter are now inserted into Article 19(1) TEU, the former provision has been given a new role. This could, however, again lead to the circumvention of the scope of application of the Charter. In this regard, Pérez suggests that the Court should have distinguished between Article 47 Charter, an individual right, and Article 19(1) TEU, institutional safeguard of independence. Article 19(1) TEU would then contain a structural principle linked to the rule of law, rather than a fundamental right, which would enshrine the Member States' obligation to guarantee the independence of the judiciary from an institutional perspective.³¹³

Following the premiss, the question is whether the contents of Article 47 Charter are protected by Article 19(1) TEU even if the Charter under Article 51(1) Charter is inapplicable.

³⁰⁹ According to settled case-law, EU fundamental rights are binding upon the Member States 'in all situations governed by EU law.' *Åkerberg Fransson*, C-617/10, op. cit. 82, para 19; TORRES PÉREZ, op. cit. 230, p. 116

³¹⁰ C-619/18 *Commission v Poland (Independence of the Supreme Court)*, Opinion of AG Tanchev, op. cit. 300, para 57

³¹¹ *Ibid.* para 58

³¹² *Commission v Poland (Independence of the Supreme Court)*, C-619/18, op. cit. 132, para 58; *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, op. cit. 145, para 120; TORRES PÉREZ, op. cit. 230, p. 111

³¹³ TORRES PÉREZ, op. cit. 230, p. 111

The case-law mentioned suggests that all the elements of Article 47 Charter can be considered relevant to interpreting the second subparagraph of Article 19(1) TEU in terms of judicial protection. Consequently, according to Pérez, Article 19(1) TEU could be a base for challenging rules that impair the independence of the judiciary from a structural point of view and any rules or acts that infringe the rights protected by Article 47 of the Charter.³¹⁴ Therefore, to prevent risky circumventions of the Charter's application, the content of Art 19(1) TEU should be limited to structural infringements of judiciary independence, while Article 47 Charter to an individual or concrete violations of the independence of judges.³¹⁵

The further developments reaffirmed that Article 19(1) TEU is unlikely to trigger the application of the Charter. For instance, *Repubblika*³¹⁶ concerned a request for a preliminary ruling concerning the interpretation of Article 19 TEU and Article 47 Charter. *Repubblika* sought a declaration that the Republic of Malta was in breach of those provisions of the Union in relation to the system of appointments to the judiciary. The judgment had a similar structure to *A.K. and Others* and *A.B. and Others*. Indeed, Article 19(1) TEU was found applicable as any national judicial body could potentially be asked to interpret or apply Union law. The applicant had not invoked a subjective right conferred on it by a provision of EU law, and therefore Article 47 Charter was found inapplicable. However, the Court said that Article 47 Charter must nevertheless be considered when interpreting Article 19(1) TEU.³¹⁷

By enforcing Article 19(1) TEU, the Court has strengthened the requirement of judicial independence even in areas where the Charter cannot reach due to the limits imposed by Article 51(1) Charter. Tanchev praised that by 'diminishing' Article 47 Charter in *ASJP*, the Court managed to advance the system of judicial protection and the core values of the EU (Article 2 TEU) because Article 19(1) TEU could be described as constituting 'an autonomous standard for ensuring that national measures meet the requirements of effective judicial protection, including judicial independence.'³¹⁸ Subsequently, Article 47 Charter was possibly awarded an added value, yet not clear which.³¹⁹

³¹⁴ *Ibid.* 111,112

³¹⁵ C-558/18 *Miasto Łowicz and Prokurator Generalny (Disciplinary regime concerning judges)* [2019] ECLI:EU:C:2019:775, Opinion of AG Tanchev para 125; *Commission v Poland (Independence of ordinary courts)*, C-192/18, op. cit. 135, paras 115-116; *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, op. cit. 145, paras 145-152

³¹⁶ Judgement of 20 April 2021, *Repubblika*, C-896/19, ECLI:EU:C:2021:311

³¹⁷ *Ibid.* para 45

³¹⁸ C-619/18 *Commission v Poland (Independence of the Supreme Court)*, Opinion of AG Tanchev, op. cit. 300, para 58

³¹⁹ KOCHENOV, Dimitry and John MORIJN. *Augmenting the Charter's Role in the Fight for the Rule of Law in the European Union: The Cases of Judicial Independence and Party Financing* [online]. Reconnect, 2020, pp. 12-14

3.2.2. Primacy

The principle of the primacy of EU law ‘requires all Member States to give full effect to the various EU provisions, and the law of the Member States may not undermine the effect accorded to those various provisions in the territory of those States.’ The national court is under the duty to give full effect to the provisions of EU law, i.e., to interpret national law in conformity with EU law. If that is not possible, the national Court has ‘the obligation to disapply any provision of national law which is contrary to a provision of EU law with direct effect in the case pending before it.’³²⁰ In *A.K. and Others*, the Court of Justice provided the national court with the instructions to assess the issue in question. It also reminded that the national court is required to disapply contrary provision of national law to ensure the protection of individuals and guarantee the full effectiveness of Article 47 Charter.³²¹ No matter whether the provision is of legislative or constitutional origin. Moreover, the national court would be required ‘to continue to assume the jurisdiction previously vested in it to hear disputes referred to it before those amendments were made.’³²² Concretely, in *A.K. and Others*, the independence of the disciplinary chamber was called into question, and the Court ruled that the national legislature had not created an independent court.³²³ As a result, if the national law grants jurisdiction to hear such cases on the infringement of rights arising from EU law to a court that does not meet the requirements of independence and impartiality, in order to ensure effective judicial protection, the referring court has an obligation to disapply those default provisions of national law. The case then may be determined by a court that would have jurisdiction and meets the requirement of independence and impartiality. In general, the court deciding would have the jurisdiction before the amending legislation enters into force.³²⁴ For *A.K. and others*, this would mean not exercising the statutory jurisdiction of the Disciplinary Chamber and referring the case to the Labour and Social Insurance Chamber, which had jurisdiction before the reform.

The primacy of EU law, however, can be a sensitive area, especially in Poland. Emanating from Article 91 Constitution is the binding character and priority of primary and secondary EU law over national law. On the other hand, according to Article 8(1), the Constitution ‘shall be the supreme law of the Republic of Poland,’ which the Polish Constitutional Tribunal has upheld in

³²⁰ *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, op. cit. 145, paras 158,159, 161

³²¹ *Ibid.* para 164

³²² *A.B. and Others (Appointment of judges to the Supreme Court)*, C-824/18, op. cit. 125, para 150

³²³ *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, op. cit. 145, para 149

³²⁴ *Ibid.* paras 165,166

its case law.³²⁵ Article 91(2) stipulates EU primary law's primacy over statutes, therefore, *a contrario* does not stipulate primacy over the Constitution. The Constitutional Tribunal held that 'Article 8(1) of the Constitution unequivocally guarantees that the Constitution is the 'supreme law of the Republic of Poland.'³²⁶ This supremacy of the Constitution is explained by the fact that the European integration stands on the principle of delegation of competences of state authorities onto the EU, i.e., the integration has its basis in the national constitutions.³²⁷ According to the Constitutional Tribunal, the Member States have the right to assess whether EU law-making bodies, when issuing an EU act, act 'within the scope of conferred competences and whether they exercised those competences in accordance with the principles of subsidiarity and proportionality.' Hence, legal acts issued outside this framework 'are not subject to the principle of primacy of Community law.'³²⁸

The review of the constitutionality of the Charter by the Constitutional Tribunal is allowed under Article 188(1) Constitution³²⁹. Article 8, read in conjunction with Article 188(1) and the Constitutional Tribunal's settled case-law, suggests that in the case of conflict between the protection of fundamental rights as guaranteed by the Constitution and by the Charter would lead to the Charter being put aside and the alleged supremacy of the Constitution would prevail.³³⁰ The scope of protection guaranteed by the Polish Constitution is generally consistent with the protection provided by the Charter. Article 47 of the Charter is well established in Articles 45 and 77 of the Constitution, and the standards of the right to an effective remedy in Poland have been developed in accordance with the case-law of the Court of Justice and the ECtHR.³³¹ Thus, the same level of protection should be afforded even if only the Constitution itself were applied, yet, the fulfilment of the right to an effective remedy differs in each Member State depending on the national legal tradition. In cases where otherwise applicable, putting the Charter aside could

³²⁵ E.g., Constitutional Tribunal, Judgement on the Treaty of Accession of 11 May 2005, K 18/04, Despite the proclamation of the Constitution to be the supreme law of Poland, the Court fully acknowledged EU law and said that in a case of conflict Poland can either suggest the change of EU law, amends its law, or leave the EU.; KASTELIK-SMAZA, op. cit. 201, p. 102

³²⁶ Examples presented in MUSZYŃSKI, op. cit. 327: judgement of 11 May 2005 on the Accession Treaty K 18/04 OTK ZU no. 5/1/2005 item 49, Judgments of 25 November 2010 on the Treaty of Lisbon K 32/09, OTK ZU no. 9/A/2010 item 108, Judgement of 16 November 2011 on EU secondary legislation SK 45/09, OTK ZU no. /9/A/2011 item 97

³²⁷ MUSZYŃSKI, Mariusz. The Review of EU Law by the Constitutional Tribunal in Poland. In Wydawnictwo Naukowe UKSW, *International Law and European Union in the Constitution*. 2020, pp. 102,108; note: Muszyński is one of the judges of the Constitutional Tribunal whose appointment has been found unlawful by the ECtHR.

³²⁸ The Review of EU Law by the Constitutional Tribunal in Poland, op. cit. 327, pp. 130,131

³²⁹ This provision allows the review of the so-called Integration Treaties, i.e., international agreements which 'delegate to an international organisation or international institutions the competence of organs of State authority in relation to certain matters.' (Article 90(1) Constitution)

³³⁰ KASTELIK-SMAZA, op. cit. 201, pp. 105,106

³³¹ *Ibid.* 102; PIĄTEK, op. cit. 88, pp. 173,174

undermine fundamental rights protection simply because the national standard could negatively differ from that on the Union level. In practice, however, the Constitutional Tribunal frequently refers to the EU law and the ECHR in its decisions. However, to this day, it has not ruled on the conformity of national law with the Charter despite numerous referrals by national courts or other applicants such as the Ombudsman.³³²

2.2.3. 'Puppet' Constitutional Tribunal

Nevertheless, some provisions of the EU's primary law have been reviewed under Article 188(1) Constitution, namely Article 1 TEU in conjunction with Article 4(3) TEU and Article 19(1) TEU. Polish Prime Minister Morawiecki submitted an application to the Constitutional Tribunal seeking to examine those TEU provisions in compliance with the Constitution. The Constitutional Tribunal unsurprisingly upheld the application and found those revised provisions incompatible with the Constitution. However, not only did the Constitutional Tribunal review the constitutional conformity of Article 19(1) TEU but also the case-law of the Court of Justice. This manoeuvre violates both EU law and Article 188(1) Constitution, which allows only review of international treaties and not of international courts' jurisdiction. In essence, the Constitutional Tribunal has said that the EU is not competent to review the organisation of the Polish judiciary, and therefore national courts are not allowed to disapply national rules that the Court has found incompatible with EU law. Moreover, it said that the Constitution provides all the necessary protection for the independence of the judiciary. In this way, the Constitutional Court thus gave the political authorities justification for not fulfilling Poland's obligation under Article 19(1) TEU.³³³ However, under Article 188(1) Constitution, the Constitutional Tribunal does not have the competence to allow state authorities to not comply with the orders of the Court of Justice. Moreover, by reviewing the procedure under Article 267 TFEU, the Constitutional Tribunal stepped outside the application. In conclusion, in *K 03/21*, the Constitutional Tribunal exceeded its own competences and the application submitted, which raises the question of the legitimacy and relevance of the judgement.³³⁴ In addition, to this day, the ruling has not been published in the Official Journal.

³³² KASTELIK-SMAZA, op. cit. 201, pp. 106-108

³³³ Constitutional Tribunal, Judgement of 7 October 2021, K 3/21; JARACZEWSKI, Jakub. *Gazing into the Abyss: The K 3/21 decision of the Polish Constitutional Tribunal* [online]. Verfassungsblog, 2022. Available at: <https://verfassungsblog.de/gazing-into-the-abyss/>, DOI: 10.17176/20211012-185821-0

³³⁴ LASEK-MARKEY, Marta. *Poland's Constitutional Tribunal on the status of EU law: The Polish government got all the answers it needed from a court it controls* [online]. European Law Blog, News and Comments on EU Law, 2021. Available at: <https://europeanlawblog.eu/2021/10/21/polands-constitutional-tribunal-on-the-status-of-eu-law-the-polish-government-got-all-the-answers-it-needed-from-a-court-it-controls/>, last accessed 29 March 2022

K 03/21 jeopardises the very existence of the EU and raises the question of whether Poland can remain a Member State. Poland cannot be kicked out of the EU, and Polexit is not a realistic option. *K 03/21* cannot be even equated to the German *Karlsruhe*³³⁵ ruling issued by the Bundesverfassungsgericht. *Karlsruhe* concerned EU secondary law, not primary law. By declaring some of the TEU's provisions unconstitutional, the Polish Constitutional Tribunal has done something unprecedented.³³⁶

Currently, high hopes are associated with the ECtHR's judgement *Xero Flor*³³⁷. In this case, the applicant's rights under Article 6 ECHR were violated by Poland. The right to a fair hearing was violated due to the domestic court's inability to provide reasoned decisions for their refusal to refer a preliminary ruling request to the Constitutional Tribunal. The applicant was also denied the right to a tribunal established by law regarding Judge M.M.'s unlawful appointment.³³⁸ The ECtHR is the first international court to examine the composition of a constitutional court. Despite the systematic specifics, the Constitutional Tribunal is a crucial body guaranteeing individuals' rights stemming from international sources, such as the ECHR or the EU law. Hence, any irregularities in its composition may violate the protection of these rights.³³⁹ Poland's response to *Xero Flor* appeared soon. In judgment *K 6/21*, the Constitutional Tribunal declared Article 6 of the ECHR to be unconstitutional a) 'to the extent that the term 'court' include the Constitutional Tribunal' b) 'insofar as it confers competence on the [ECtHR] to review the legality of the election of judges to the Constitutional Tribunal.' This way, the Constitutional Tribunal, according to it itself, is not a court within the meaning of Art. 6 ECHR, and thus the ECHR is not applicable and the judgment not binding, because it was delivered *ultra vires*. Łętowska views the judgment as paradoxically confirming the Constitutional Tribunal's lack of independence as the judges of the Tribunal are seemingly trying to avoid negative consequences for themselves.³⁴⁰ Arguably, the referring court may contribute to a violation of an individual's right to a tribunal established by law by referring a legal question to a body that does not meet the requirements of judicial independence, e.g., because of unlawfully elected members. Furthermore, there may be attempts

³³⁵ Federal Constitutional Court of Germany, Judgement of 5 May 2020, Karlsruhe

³³⁶ THIELE, Alexander. *Whoever equates Karlsruhe to Warsaw is wildly mistaken* [online]. Verfassungsblog, 2021. Available at: <https://verfassungsblog.de/whoever-equals-karlsruhe-to-warsaw-is-wildly-mistaken/>, DOI: 10.17176/20211010-181242-0, last accessed 29 March 2022

³³⁷ Judgement of 7 May 2021, *Xero Flor w Polsce sp. z o.o. v. Poland*, ECLI:CE:ECHR:2021:0507JUD000490718

³³⁸ *Ibid.*

³³⁹ SZWED, Marcin. *What Should and What Will Happen After Xero Flor* [online]. Verfassungsblog, 2021. Available at: <https://verfassungsblog.de/what-should-and-what-will-happen-after-xero-flor/>, DOI: 10.17176/20210509-210914-0, last accessed 8 March 2022

³⁴⁰ ŁĘTOWSKA, Ewa. *The Honest (though Embarrassing) Coming-out of the Polish Constitutional Tribunal* [online]. Verfassungsblog, 2021. Available at: <https://verfassungsblog.de/the-honest-though-embarrassing-coming-out-of-the-polish-constitutional-tribunal/>, DOI: 10.17176/20211130-191829-0, last accessed 8 March 2022

to challenge any decision of a national body on which the unlawfully elected member sits or otherwise lacks independence. Szwed, however, warns that *Xero Flor* does not hint to such interpretation.³⁴¹

Following *Xero Flor*, the Constitutional Tribunal is an unlawfully established court, which has on numerous occasions stepped outside its constitutional competences, and therefore probably the best option is to ignore its *K 03/21* and *K 06/21* rulings.³⁴²

The independence of the Constitutional Tribunal is crucial for the protection of individual rights arising not only from domestic but also from Union law. The Commission has already launched an infringement procedure against Poland regarding the independence of the Constitutional Tribunal³⁴³, as its rulings may potentially affect EU law rights. Given the importance of the ECtHR's case-law, this judgement will be projected in the interpretation of the Court.³⁴⁴ The Constitutional Tribunal is following the discourse of asserting the supremacy of the Constitution over EU primary law and other international legal acts. Therefore, the potential ruling of the Court of Justice on the independence of the Constitutional Tribunal is unlikely to be well received by the state authorities.

3.2.4. Preliminary reference procedure Article 267 TFEU

The preliminary reference procedure provided in Article 267 TFEU is one of the building blocks to support the application of Article 19(1) TEU. Through a preliminary reference mechanism, the Court of Justice provides the national courts with the points of interpretation of EU law to decide the dispute before them.³⁴⁵ It is for the national court to determine both the need for a preliminary ruling and the relevance of the submitted question.³⁴⁶ Thus the national courts have discretion in referring a question to the Court. At final instance, this discretion is, with exceptions, replaced by an obligation. The Court stresses that the national rules cannot prevent a national court from exercising this discretion or complying with the obligation. This discretion/obligation is 'an inherent part of the system of cooperation' between the national courts

³⁴¹ SZWED, op. cit. 339

³⁴² ATIK, Jeffrey and Xavier GROUSSOT. *Constitutional attack or political feint? – Poland's resort to lawfare in Case K 3/21* [online]. EU Law Live, 2021. Available at: <https://eulawlive.com/op-ed-constitutional-attack-or-political-feint-polands-resort-to-lawfare-in-case-k-3-21-by-jeffery-atik-and-xavier-groussot/>, last accessed 29 March 2022

³⁴³ INFR(2021)2261, Violation of EU law, in particular Art 19(1), second subparagraph, TEU and general principles of EU law, by the Constitutional Tribunal

³⁴⁴ SZWED, op. cit. 339

³⁴⁵ *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, op. cit. 145, para 69

³⁴⁶ *Ibid.* para 97

and the Court established by Article 267 TFEU, responsible for applying EU law. Therefore, for instance, national provisions which subject judges to disciplinary proceedings for referring a preliminary question to the Court cannot be permitted. Such provisions may impair the effective exercise of the discretion or obligation. One of the safeguards necessary for the independence of a judge is, therefore, 'not being exposed to disciplinary proceedings or measures for having exercised such a discretion.' Indeed, independence is essential for the proper functioning of the system of judicial cooperation, which is enshrined in the preliminary ruling mechanism of Article 267 TFEU.³⁴⁷

Preliminary references are not only utilized for the cooperation and communication between the Court and the national courts but also an important instrument through which individuals can seek review of national legislation and measures as well as generally applicable and non-implementing EU law measures which they cannot challenge under Article 263 TFEU. Individuals can bring an action for an annulment of an EU act under Article 263 TFEU. However, generally applicable non-implementing EU measures are not fit to activate the mechanism enshrined therein. Therefore, the only other way to challenge those is indirectly through national courts under the preliminary reference.³⁴⁸ If the judges are discouraged or even prohibited from making the preliminary reference, individuals are deprived of their right to an effective remedy under Article 47 Charter. Moreover, it will lead to a distortion of the uniform interpretation of EU law and the overall symbiosis of the European judiciary.

The Polish disciplinary regime allows for judges to be brought before the Disciplinary Chamber for requesting a preliminary reference, and the chamber has the competence to sanction judges making a request. The Disciplinary Chamber is competent to sanction judges for making requests under Article 267 TFEU. The Court found this to be incompatible with EU law.³⁴⁹

³⁴⁷ Judgement of 26 March 2020, *Miasto Łowicz and Prokurator Generalny (Disciplinary regime concerning judges)*, C-558/18, ECLI:EU:C:2020:234 paras 57-59

³⁴⁸ In *UPA* case (T-173/98), the Court assumed that those wishing to challenge EU acts not expressly addressed to them should do so through their national courts, which could then, if necessary, refer a question to the CJEU for a preliminary ruling.; BOEKESTEIN, Tom. *Plaumann and the Rule of Law: The importance of judicial independence for the system of preliminary references* [online]. Verfassungsblog, 2021. Available at: <https://verfassungsblog.de/plaumann-and-the-rule-of-law/>, DOI: 10.17176/20211112-182550-0, last accessed 8 March 2022

³⁴⁹ BOEKESTEIN, op. cit. 348

3.2.5. Other Possible Outcomes

The last consequence mentioned relates to the failure to fulfil the primary law obligation to ensure the independence of the judiciary. It concerns a possible change of approach to the European Arrest Warrant (EAW). This matter appeared already in *L.M.* case. Polish court issued EAW against a person arrested in Ireland to be surrendered to Poland for the purposes of criminal proceedings. The person concerned, however, refused his surrender on the basis that the recent legislative reforms of the Polish judiciary ‘would expose him to a real risk of a flagrant denial of justice in contravention of Article 6 ECHR’³⁵⁰ and thus, by analogy, of rights in Article 47 Charter. The EAW mechanism is based on the high level of trust between the Member States, which operates on the premise that the national courts of the Member States meet the requirements of effective judicial protection, especially of independence and impartiality.³⁵¹ On that note, the Court admitted that if the surrender of the person concerned would mean ‘breach of his fundamental right to an independent tribunal, and therefore, of the essence of his fundamental right to a fair trial, a right guaranteed by the second paragraph of Article 47 of the Charter’, the executing judicial authority is permitted, exceptionally, to refrain from giving effect to the issued EAW.³⁵² It is, therefore, likely that more individuals will invoke the protection of Article 47 rights because of the uncertainty as to whether their rights will be secured before the issuing national court.

The Polish government has already expressed its outrage at the ‘double standards’ allegedly applied to Poland by the Court and the ECtHR. The Ministry of Justice argued that the judgments of the Court and the ECtHR are political in nature rather than legal, aiming at ‘the destabilization and anarchy in the Polish judiciary.’³⁵³ Regarding this accusation, the Ministry of Justice, for example, critiques that the nomination of judges to Bundesgerichtshof, the German equivalent of the Supreme Court, has not been considered by the EU authorities.³⁵⁴ Therefore, the Government views the treatment of Poland by the EU bodies to be discriminatory. The escalated language is apparent in the press releases by the Ministry of Justice, often referring to the Court and the ECtHR as using ‘slandorous campaign against Poland’ and allowing ‘anarchy in the Polish

³⁵⁰ *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, op. cit. 215, paras 14-17

³⁵¹ *Ibid.* para 58

³⁵² *Ibid.* para 59

³⁵³ Ministry of Justice of Poland. *The Ministry of Justice is against the use of double standards towards Poland* [online]. Website of the Republic of Poland, 2021. Available at: <https://www.gov.pl/web/justice/the-ministry-of-justice-is-against-the-use-of-double-standards-towards-poland>, last accessed 8 March 2022

³⁵⁴ The Minister of Justice points out that its members are elected by the Judges Election Commission which may be composed entirely of politicians. Moreover, he claims insufficient immunity of those members etc.; Ministry of Justice of Poland. *The Ministry of Justice calls for an examination of the German model of judicial appointments* [online]. Website of the Republic of Poland, 2021. Available at: <https://www.gov.pl/web/justice/the-ministry-of-justice-calls-for-an-examination-of-the-german-model-of-judicial-appointments>, last accessed 8 March 2022

judiciary.³⁵⁵ On the one hand, one may agree that the Commission seems to be focusing on reviewing Polish national legislation on the organisation of the judiciary, but on the other, the case law developed sends a clear signal also to the other Member States that a review of their legislation in this respect is also possible. In addition, given that the Court's decisions have *ex tunc* effects, national measures adopted after the entry into force of the Lisbon Treaty that could not previously be examined due to the absence of this new mechanism may also be affected.³⁵⁶ Relating to Poland's accusations of double standards, another possible outcome could be accusations of and pointing at the other Member States for not complying with the obligations under the Treaties (Art. 259 TEFU).³⁵⁷ However, this could paradoxically lead to stricter supervision of the national judiciaries and, in fact, maybe help inter alia ensure a higher standard of the fundamental right to an effective remedy and to a fair trial.

3.3. Conclusion of Part 3

To ensure effective judicial protection, the 'court or tribunal' within the meaning of the EU law, which may rule on the interpretation or application of EU law, must meet the requirements of independence. The Court recognizes two aspects of independence, internal and external, and considers them in the context of the ECtHR case-law. The independence of judges is also linked to the principle of separation of powers. Independence from the other branches of power could not be achieved and maintained without detailed procedural rules for the organization and functioning of the national judiciary. The wording of the provisions and the measures taken are within the competence of the Member State but must respect a certain minimum standard. Of particular relevance are the rules on the composition of the body and appointment mechanisms of members, their length of service, and grounds for any form of dismissal of members. The assessment of whether the rules meet the requirements for independence shall be carried out comprehensively, meaning that the Court examines them in the broader context in which the reforms were introduced and implemented. The ideal standard is for the rules to 'be such as to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it.' Advocate General Tanchev fittingly describes that '[a]pppearance are of a certain importance, so that justice must not only be done, it must also

³⁵⁵ Ministry of Justice of Poland, op. cit. 353

³⁵⁶ RODRÍGUEZ, op. cit. 232, p. 340

³⁵⁷ E.g., Poland lodged a complaint regarding the election of Judges of the Bundesgerichtshof in Germany; Ministry of Justice of Poland, op. cit. 354

be seen to be done. What is at stake is the confidence which courts in a democratic society must inspire in the public.’³⁵⁸ The Court found that the reform measures such as the new retirement age and the disciplinary regime undermine the independence of judges. Although individual provisions could escape criticism, they should be examined together with the other measures. In the case of Poland, it is the combination of the various changes that undermine the independence of judges and reveals the real objectives of the reforms. Those include extensive personnel changes and political control over judges and their decisions, especially by the Sejm.

Regarding the application of Article 47 Charter – the material scope of Article 19(1) TEU is different from that of Article 47 Charter. Article 19(1) TEU relates to ‘the fields covered by Union law’, irrespective of whether the Member States are ‘implementing Union law’, within the meaning of Article 51(1) of the Charter. The material scope of Article 19(1) TEU is thus much broader than that of Article 51(1) Charter, which means that a matter may fall under ‘the fields covered by EU law’ but not under ‘implementing EU law’. Article 19(1) TEU can thus also cover situations outside of EU competences or ‘purely hypothetical links.’ That means that Member States must always fulfil the obligations under Article 19(1) TEU, not only in concrete cases or cases linked to the Union law and competences. Hypothetically, a national body may never apply or interpret EU law; however, the possibility that it sometime in the future could do so requires the State to comply with the obligations of the second subparagraph of Article 19(1) TEU.

Questions have been raised as to whether the applicability of Article 19(1) TEU made the case a situation governed by EU law and thus whether the Charter should be applied. Such an interpretation could be deduced from *Akerberg Fransson*. However, given the sensitivity of this topic, not only in Poland but also in the other Member States, the Court has prudently refrained from indicating such expansion of EU competences. In *ASJP*, the Court used Article 47 Charter to interpret Article 19(1) TEU to set the standard for judicial independence. In *C-619/18* and subsequent cases, the Court draws a link between the two provisions in terms fundamental rights protection. Thus, certain aspects of Article 47 Charter are also contained in Article 19(1) TEU. However, there is nothing in the current case-law to suggest that Article 19(1) TEU can also protect the content of Article 47 Charter. The contents of Article 47 Charter are instead used only as an interpretative tool for Article 19(1) TEU, which means that the case-law developed on Article 47 is, to a degree, used as a guide for the interpretation of Article 19(1) TEU. The right to an effective remedy and to a fair trial has two dimensions.³⁵⁹ It is a fundamental right and a tool to protect other

³⁵⁸ C-619/18 *Commission v Poland (Independence of the Supreme Court)*, Opinion of AG Tanchev, op. cit. 300, para 71

³⁵⁹ KOCHENOV, MORIJN, op. cit. 319, pp. 12-14

fundamental rights. Therefore, if Article 47 Charter were found applicable, other rights and principles of the Charter could be applied as well.

Other consequences of the newly established case-law to Article 47 Charter were also discussed. A sensitive issue, especially for Poland, is the primacy of EU law. Poland rejects EU interference in national matters, such as the national justice system, and the Constitutional Tribunal considers the Constitution the supreme law of Poland. This supremacy has been recently taken to a new level and the Constitutional Tribunal excluded, though unconstitutionally, the applicability of certain EU primary law provisions to Poland. The right to an effective remedy and to a fair trial is also threatened by the current composition of the Constitutional Court, whose unlawfulness was recently confirmed by the ECtHR. This matter is likely to be reviewed by the Court as well. Poland, however, rejects such EU interferences into Polish sovereignty and considers the approach of the Commission and the Court to be biased.

Consequently, the preliminary ruling procedure has been affected as well. Subjecting judges to disciplinary proceedings for referring a preliminary question to the Court affects the independence of the judge and the ability of individuals to fully exercise their rights by restricting access to review of, inter alia, non-implementing EU acts under the preliminary ruling mechanism.

Another area that could be negatively affected by the lack of independence of Polish courts is the EAW mechanism, which is based on the assumption that Member States respect the same values. Mutual trust allows the executing judicial authority not to question the independence of the requesting court; it simply assumes it. However, in exceptional cases, the Court has accepted that executing judicial authority may refuse to transfer an accused if the transfer would violate his rights under the Charter, particularly Articles 47 and 48, and the ECHR.

The EU is not facing Poxxit but the threat of ‘demolition of the EU legal order from within.’ What is at stake is the credibility of the EU. Poland, together with its Constitutional Tribunal, has presented some justifiable arguments. However, one must keep in mind that the Constitutional Tribunal is highly politically influenced, and its decisions are not of a legitimate origin. The EU must draw a line which cannot be crossed, and effectively enforce any violation. Otherwise, it will lose its own functionality.³⁶⁰

³⁶⁰ Balkaninsight. *Forget Poxxit - the EU Must Defend the CJEU* [online]. Reporting Democracy, 2021. Available at: <https://balkaninsight.com/2021/10/10/forget-poxxit-the-eu-must-defend-the-cjeu/>, last accessed 29 March 2022

Conclusion

Poland is facing a rule of law crisis. For several years, the EU has watched the country slowly but surely drift away from the democratic values on which the EU is founded. The Union is becoming increasingly divided. The backsliding of one Member State's democracy can create a domino effect, and if the EU wants to remain 'a champion of freedom and justice in Europe and the world'³⁶¹, it cannot tolerate even the slightest deviation from the values of Article 2 of the TEU.

The aim of this paper was, firstly, to describe the development of the case-law of the Court of Justice concerning national judicial systems, specifically in the context of assessing national rules from the perspective of judicial independence, and, secondly, to discuss the role of Article 47 of the Charter and possible outcomes for its protection.

It follows from the Court's case-law that the principle of effective judicial protection, which is a general principle of Union law, is inherent in the rule of law and is therefore of fundamental importance. This 'umbrella' principle enshrines many rights; the key one is the right to an effective remedy and a fair trial. One of the essential requirements of this fundamental right is the independence of the judiciary, which is also explicitly stated therein. Such independence is ensured through functioning national legal rules governing the organization of the national justice system. However, the organization and functioning of national judicial systems are the exclusive competence of the Member States, which, according to the principle of conferral of powers, would imply that the EU should not interfere in their regulation. The judicial reforms proposed and implemented in Poland, though, undermine the independence of the national judiciary, resp. the European judiciary, and thus endanger the fundamental right to an effective remedy and to a fair trial. Due to the clear threat to the rule of law and rights under EU law, the EU had to act. The political mechanisms to protect the rule of law proved ineffective, and the Court had to reconsider its previous non-intervention approach. Indeed, it did break from this approach in the *ASJP* judgment. Whereas in the previous substantively similar *Florescu* case the Court focused on protecting the rights of judges, the *ASJP* aimed at the protecting the rights of individuals, the protection of which requires judicial independence. This perception is understandable; judicial independence is primarily a prerequisite for the rights of individuals to be adequately protected by the courts, not a prerogative of judges. The requirement of independence is explicitly stated in

³⁶¹ Resolution of 7 October 2020 on the establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights, op. cit. 155, point 1

Article 47 of the Charter. In view of the limited applicability of the Charter and Poland's general disregard for the Charter, the Court had to look for another applicable provision of primary EU law under which this requirement could be subsumed and found the second subparagraph of Article 19(1) TEU. The Portuguese case was used as a springboard for the development of the Court's jurisdiction over national rules on the organization and functioning of national judicial systems. The Court has based its interpretation of Article 19(1) TEU on other provisions of primary law, including Article 47 Charter. Through this judgment and its broad interpretation of Article 19(1) TEU, the Court has succeeded in extending its powers and actively shaping national rules on the judiciary. This extension of the EU's powers can be, however, seen as controversial and must be used with caution, but the Court seems to be aware. After all, '[r]espect for the boundary between the competences of the EU, and those of the Member States, is as important in an EU legal order based on the rule of law as the protection of fundamental rights.'³⁶²

It can be summarized that these newly acquired powers aim to supervise the national judicial system in terms of judicial independence and to ensure that national rules respect and protect independence. In this respect, national rules must reach a certain standard. The ECtHR and the Court set out these standards of judicial independence in their case law and provide some guidance as to the objectives to be achieved and, for example, which combinations of measures are not appropriate. Ultimately, 'what is at stake is the confidence which the courts in a democratic society must inspire in the public, and first and foremost in the parties to the proceedings.'³⁶³ Applying the criteria laid down by the Court of Justice and the ECtHR to the measures adopted by Poland, the Court concluded that those measures are contrary to EU law as they fail to maintain and safeguard the independence of the national judiciary.

The second objective of this thesis concerned the role given to Article 47 Charter. First of all, the Court had to distinguish between the material scope of Article 19(1) TEU and Article 47 Charter, creating a sphere of EU law where the Charter does not apply but Article 19(1) TEU does. Thus, 'courts or tribunals' within the meaning of the EU law, which may be called to rule upon the interpretation or application of the EU law, must meet the requirement of independence under the second subparagraph of Article 19(1) TEU irrespective of whether the Charter is applicable. Notwithstanding this, where Union law applies, States are bound by the standard of protection afforded by the Charter. Still, Article 47 Charter could only be given a secondary role.³⁶⁴ Even this

³⁶² C-192/18 *Commission v Poland (Independence of ordinary courts)* [2019] ECLI:EU:C:2019:924, Opinion of AG Tanchev para 114

³⁶³ A.K. (*Independence of the Disciplinary Chamber of the Supreme Court*), C-585/18, op. cit. 144, para 128

³⁶⁴ The Czech Constitutional Court points to cases such as *Karlsson* (Pl.ÚS 19/08 Lisbon I paras 190,191)

position, however, has evolved. In the *ASJP*, this provision was used as a mere interpretative tool along with other provisions of the founding treaties. Article 47 Charter has been used, particularly because the case-law of the Court of Justice and the ECtHR relating to this Article is broad and allows it to provide guidance for assessing whether a national authority is a court within the meaning of EU law which satisfies the requirements of independence. Later in the Polish cases, the Court referred to Article 47 of the Charter for a slightly different reason. To an extent, the Court of Justice linked the content of Article 19(1) TEU with the content of Article 47 of the Charter in terms of fundamental rights protection. Of course, this may again raise questions on the applicability of the Charter and the question of protecting the content of Article 47 of the Charter through Article 19(1) TEU. However, there is nothing to suggest such a conclusion. Nevertheless, this lacuna creates room for further clarification by the Court of Justice. AG Tanchev suggested further clarification might be to distinguish, concerning the irremovability of judges and their independence, between Article 47 Charter as a provision protecting fundamental rights and Article 19(1) TEU as a provision protecting the institutional structure of the judiciary in a Member State.³⁶⁵

In order to fully exercise the right to an effective remedy and a fair trial within the European judiciary, individuals must have access to mechanisms that help protect this right. One of those is the preliminary ruling procedure under Article 267 TFEU. Since the reference for a preliminary ruling is within the discretion of the national court, judges must be protected from any external or internal influences to preserve their independence and thereby freedom to take such decisions. Another mechanism is, for example, the EAW. Transferring an arrested person to the judicial authorities of another Member State, whose judicial independence is questionable, would expose the person to the risk of a violation of his or her rights enshrined inter alia in Article 47 Charter. Another result of the development of the case law, or rather the Polish reaction thereto, relates to the primacy of EU law. Together with the Constitutional Tribunal, the Polish authorities assert the primacy of the Constitution even over primary EU law. According to the Constitutional Tribunal, in the case of a collision between EU law and the Constitution provisions, the Constitution, as the supreme law of Poland, prevails. The Constitutional Tribunal, to some extent, rejects the principle of the primacy of EU law, which may even require national courts to disapply national rules if they do not comply with EU law. The strict approach undoubtedly deprives individuals of the protection of their fundamental rights, especially if the constitutional level of protection falls

³⁶⁵ C-192/18 *Commission v Poland (Independence of ordinary courts)* [2019] ECLI:EU:C:2019:529, Opinion of AG Tanchev para 115

below the EU standard. Notwithstanding the fact that the Constitutional Tribunal is unlawfully composed according to the ECtHR, which will probably also be confirmed by the Court of Justice.

Nonetheless, it can be argued that the Charter should have been enforced in a way as to utilize the potential for which it was drafted and adopted. However, given Poland's accession to Protocol No. 30 and its generally precarious position on the Charter, its enforcement would reduce the impact and relevance of such Court of Justice rulings. Moreover, this could potentially result in even greater discontent not only among Polish authorities, creating room for a rejectionist policy fuelled by the fact that the EU is creepily expanding its competences. In terms of efficiency, the chosen strategy is probably the most appropriate. All in all, the Court of Justice, through the unfortunate Polish crisis, has opened a new way for national judges and individuals to exercise their rights. Given the wide scope of Article 19(1) TEU, individuals can challenge any regulation or decision because the court lacks the required judicial independence under EU law. In the same context, judges can also challenge any national rules which they consider interfering with their judicial independence.

Seznam zkratk / List of Abbreviations

AG	Advocate General
Court	Court of Justice of the European Union
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
Charter	Charter of Fundamental Rights of the European Union
Commission	European Commission
Constitution	Konstytucja Rzeczypospolitej Polskie (Constitution of the Republic of Poland)
Constitutional Tribunal	Trybunał Konstytucyjny
KRS	Krajowa Rada Sądownictwa (National Council of the Judiciary)
Law on the KRS	Act on the National Council of Judiciary
Law on the ordinary courts	Law on the Organisation of Common Courts
New Law on the Supreme Court	Act on the Supreme Court
PiS	Prawo i Sprawiedliwość (Law and Justice)
Sejm	Lower house of the Polish Parliament
Supreme Administrative Court	Naczelny Sąd Administracyjny (Supreme Administrative Court of Poland)
Supreme Court	Sąd Najwyższy (Supreme Court of Poland)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

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Abstrakt (ČJ)

Po polských parlamentních volbách roku 2015, začala vítězná strana prosazovat řadu reforem soudního systému, které se ale ve své kombinaci ukázaly být problematické, a to zejména z hlediska zajištění nezávislosti vnitrostátních soudů. Ve vztahu k jednotlivcům tím došlo mimo jiné k ohrožení práva na účinnou právní ochranu a spravedlivý proces dle článku 47 Listiny základních práv EU (dále jen „Listina EU“).

Úvod této diplomové práce stručně shrnuje, jakým vývojem evropské společnosti prošlo ve vztahu k ochraně základních lidských práv, zaměřujíc se na zásadu efektivní právní ochrany, která byla kodifikována ve zmíněném článku 47. Poté následuje vymezení použitelnosti Listiny EU, jež je zásadní pro analýzu hlavních cílů práce. Prvním z těchto cílů je snaha zmapovat přeměnu přístupu Soudního Dvora k problematice vnitrostátních pravidel upravujících organizaci soudního systému. V této souvislosti text také představuje polské reformy a popisuje jejich zhodnocení Soudním Dvorem. Druhým cílem je pak analýza role, která byla v tomto vývoji udělena článku 47 Listiny EU, a to zejména do jaké míry, či vůbec, se jeho aplikace důsledkem rozšíření pravomocí soudu změnila. Na to navazuje polemika nad dalšími možnými následky nového směřování judikatury Soudního Dvora pro práva v tomto článku zakotvená.

Vnitrostátní právní úprava organizace soudních systémů je ve výlučné pravomoci členských států a Soudní Dvůr se tak po dlouhá léta zdržoval o takových pravidlech rozhodovat. Nicméně následkem nedemokratických tendencí posledních let byl nucen tento svůj postoj přehodnotit a skrze článek 19(1) SEU našel mechanismus, který umožnil jeho pravomoci rozšířit. Tento mechanismus nejprve představil v případě portugalského snižování odměn soudců, a dále jej aplikoval a specifikoval v několika svých rozsudcích týkajících se polských reforem, které také nakonec shledal neslučitelnými s právem EU. Co se týče článku 47 Listiny EU ten v tomto vývoji hraje na první pohled spíše vedlejší roli. Nejprve je použit jako interpretační pomůcka pro vymezení podmínky nezávislosti, poté dojde i k určitému propojení jeho obsahu s obsahem článku 19(1) SEU. Ve vztahu k obsahu článku 47 Listiny EU se tak objevuje otázka ochrany práv zde zakotvených, které jsou důsledkem reforem ohroženy, a to například v kontextu předběžných otázek, zásady přednosti práva EU či evropského zatýkácího rozkazu.

Diplomová práce konstatuje, že polské soudní reformy ohrožují nejen strukturální nezávislost vnitrostátních soudů, a tedy evropského soudnictví jako celku, ale také nezávislost jako podmínku práv dle článku 47 Listiny EU. Za účelem ochrany základních hodnot EU tak Soudní Dvůr rozšířil své pravomoci a aktivně zasáhl do dosud výlučně vnitrostátní záležitosti.

Takový přístup nicméně Polsko odmítá respektovat, což v důsledku může vést k ještě významnějšímu ohrožení práva na účinnou právní ochranu a spravedlivý proces.

Klíčová slova: právo na účinnou právní ochranu a spravedlivý proces, Polsko, reformy soudnictví, nezávislost soudů

Abstract (EN)

Following the Polish parliamentary elections in 2015, the winning party began to push for several judicial reforms, which have, in their combination, proved to be problematic, especially in terms of ensuring the independence of national courts. In relation to individuals, this has notably undermined their right to an effective remedy and to a fair trial under Article 47 of the EU Charter of Fundamental Rights (hereinafter as ‘the Charter’).

The introduction of this thesis briefly summarises how the European Community has evolved in relation to the protection of fundamental human rights, focusing on the principle of effective legal protection, which has been codified in the aforementioned Article 47. This section is followed by a description of the Charter's applicability, which is essential for analysing the main objectives of this thesis. The first of these objectives is to map the change in the approach of the Court of Justice in relation to the national rules governing the organisation of the national justice system. In this context, the Polish reforms and the Court's subsequent assessment of them are presented. The second objective is to analyse the role of Article 47 Charter in this case-law development. In particular, to what extent, if at all, has the expansion of the Court's competences affected its application. Following is a discussion of other possible implications of this recent development for the rights enshrined in Article 47 of the Charter.

National legislation on the organisation of judicial systems falls within the exclusive competence of the Member States. Therefore, the Court of Justice has refrained from deciding on such rules for many years. However, due to the recent undemocratic tendencies, it has been driven to reconsider this position and find a mechanism to extend its powers, namely through Article 19(1) TEU. The Court first introduced this mechanism in the Portuguese case on reducing judges' remuneration and applied it and further specified it in several of its latest judgments concerning Polish reforms, which were eventually found incompatible with EU law. Regarding Article 47 of the Charter, it has played a minor role at first sight. Article 47 was initially used only as an interpretative tool to define the requirement of independence, but later a link was also established between its content and that of Article 19(1) TEU. As regards the contents of Article 47 of the Charter, the question of the protection of the rights enshrined therein, which are jeopardised by the reforms, arises, for example, in the context of preliminary questions, the principle of the primacy of EU law or the European Arrest Warrant.

The thesis concludes that the Polish judicial reforms undermine not only the structural independence of national courts, and thus of the European judiciary, but also independence as a requirement of the rights under Article 47 of the Charter. In order to protect the fundamental values

of the EU, the Court of Justice has thus extended its competences and actively intervened in what was hitherto an exclusively national matter. However, Poland refuses to respect such an approach, which may lead to an even more significant threat to the right to an effective remedy and to a fair trial.

Key words: Right to an effective remedy and to a fair trial, Poland, judicial reforms, judicial independence