Enforcing the independence of national courts by means of EU law

Standards, procedures and actors as exemplified by the crisis of the Polish judiciary

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1 Introduction

Among the numerous crises that the European Union has gone through in recent years, the dismantling of the rule of law in several Member States is particularly severe. The rule of law crisis touches deeply on the constitutional foundations of the Union. What is at stake is nothing less than the preservation of the fundamental values enshrined in Article 2 TEU and in particular the principle of the rule of law. It is also (if not primarily) the third branch of government, the judiciary, that is caught in the crosshairs of populist or illiberal plans to restructure society. The Polish "judicial reforms" that have been gradually introduced since 2015 are a particularly impressive – and depressing – example in this regard. The origins, substance and result of these reforms have been described in detail many times[1] and do not need to be repeated here.

This article takes the perspective of Union law instead. Taking the Polish judicial crisis as an example, it reconstructs the extent to which EU law allows the domestic dismantling of the rule of law to be legally addressed and, in particular, how the independence of national courts can be enforced by means of EU law. In doing so, the article focuses on one of the most dynamic fields of European constitutional law. In recent years, the European Court of Justice (CJEU) has established a new and almost revolutionary line of case law in this area, which has further developed the constitutional

1 Mirosław Wyrzykowski, 'Experiencing the Unimaginable: the Collapse of the Rule of Law in Poland' (2019) 11 Hague Journal on the Rule of Law 417; Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019); Marcin Wiącek, 'Constitutional Crisis in Poland 2015–2016 in the Light of the Rule of Law Principle' in Armin von Bogdandy et al. (eds), *Defending Checks and Balances in EU Member States* (Springer 2021); Laurent Pech, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action' (2021) 13 Hague Journal on the Rule of Law 1.

architecture of the European Union on a crucial point. This case law has recalibrated or "sharpened" certain standards of Union law, which are now applied with regard to the independence of national courts. This process has subsequently had a visible impact on the instruments used to counter national rule of law crises and on the role of European institutions in combating the rule of law crisis.

In a first step, the article deals with the relevant standards of EU law. The judicial innovations in this area directly oblige the Member States under EU law to ensure judicial independence of national courts and contribute to a more effective enforcement of the values of Article 2 TEU on the part of the EU – a move which was by no means accepted without contradiction (see Section 2). The article then turns to the procedures and instruments which are used by the EU to counter the lack of judicial independence at the national level. Unlike a few years ago, infringement proceedings and preliminary rulings before the CJEU now play a central role in the EU's toolbox with regard to national judicial reforms. This also entails consequences at the institutional level (see Section 3). The article concludes that the Union's crisis response is characterized by a fundamental EU constitutional evolution that will permanently change the Union's constitutional architecture (see Section 4).

The article is also aimed at a non-legal audience and attempts to reduce the issues, some of which are highly complex from a legal point of view, to their essential core and to present them as comprehensibly as possible.

2 Standards

2.1 Starting point: The limited scope of application of EU law

Starting from its beginnings as the law of an economic community, EU law has meanwhile developed into a highly differentiated law of a supranational political order. It not only claims primacy over national law,[2] including national constitutional law,[3] but also extends into a multitude of politically

2 CJEU, case 6/64 *Costa v ENEL* (1964).

3 CJEU, case 11/70 *Internationale Handelsgesellschaft* (1970), paras 2 et seq. and, more recently, CJEU, case C- 430/21 *RS* (2022), paras 51, 53. However, this claim to primacy did not go unchallenged, cf. for Poland already a decade before the beginning of the judicial crisis, Polish Constitutional Court (*Trybunał Konstytucyjny*), K 18/04 *Accession Treaty* (2005).

significant and at the same time controversial policy areas, such as migration law or environmental law. However, EU law also increasingly touches on areas that are sensitive to fundamental rights, such as the question under what circumstances accused persons in criminal proceedings may be transferred to other (Member) States.[4] Accordingly, the protection of fundamental rights under EU law, originally based purely on case law,[5] has undergone significant developments. Today, it is predominantly based on the Charter of Fundamental Rights of the European Union (CFR or Charter), which is very different from, for example, the fundamental rights section of the German Basic Law.[6]

As differentiated, practically relevant and life-shaping as modern EU law may be, it is far from covering all legally regulated areas of life in European societies. EU law is not a legal order with a comprehensive claim to regulate everything, but only extends to the matters expressly laid out in the Treaties.[7] The field of EU fundamental rights illustrates this vividly. According to Article 51(1) of the Charter, EU Member States are only bound to the extent that they implement Union law. What exactly is meant by "implementation" has been the subject of in-depth discussions in scholarship[8] and legal practice,[9] discussions which were fed not least by concerns about an excessively homogenizing effect of EU fundamental rights.[10] The CJEU has nevertheless opted for a comparatively broad approach, which, however,

4 See e.g. CJEU, case C-128/18 *Dorobantu* (2019), paras 50 et seq.

5 Groundbreaking CJEU, case 29/69 *Stauder* (1969).

6 Of course, this still says little about the actual scope of protection in practice. But here, too, the case law of the CJEU has set milestones, cf. for example CJEU, case C-293/12 et al. *Digital Rights Ireland et al.* (2014) regarding the annulment of the Data Retention Directive.

7 In terms of competences, this is expressed in the so-called principle of conferral according to Article 5(2) TEU.

8 See, *pars pro toto,* and with further references each, Frauke Brosius-Gersdorf, *Bindung der Mitgliedstaaten an die Gemeinschaftsgrundrechte* (Duncker & Humblot 2005); Daniel Sarmiento, 'Who's afraid of the Charter?' (2013) 50 Common Market Law Review 1267; Jan H. Reestman and Leonard Besselink, 'After Åkerberg Fransson and Melloni' (2013) 9 European Constitutional Law Review 169; Daniel Thym, 'Die Reichweite der EU-Grundrechte-Charta' (2013) 33 Neue Zeitschrift für Verwaltungsrecht 889; Thorsten Kingreen, 'Ne bis in idem: Zum Gerichtswettbewerb um die Deutungshoheit über die Grundrechte' (2013) 48 Europarecht 446.

9 Critical of the CJEU's approach German FCC (*Bundesverfassungsgericht*), 1 BvR 1215/07 *Antiterrorism File* (2013), para 91.

10 See former judge at the German Federal Constitutional Court Peter M. Huber, 'Auslegung und Anwendung der Charta der Grundrechte' (2011) 33 Neue Juristische Wochenschrift 2385.

still presupposes that the case at hand falls within the scope of application of Union law.[11] The Charter, as CJEU President Koen Lenaerts once put it, follows Union law like a "shadow".[12] In other words, EU fundamental rights are only applied to measures of EU Member States if these measures are sufficiently linked to substantive Union law, e.g. if they apply the General Data Protection Regulation or serve the purpose of implementing a directive in the field of, say, asylum.

With regard to the rule of law crisis, the difficult question arose to what extent the reorganization of national courts and their increasing subordination to populist governments actually fell within the scope of Union law and could be subject to judicial review, especially on the basis of EU fundamental rights. Certain aspects of human resources policy, such as the early retirement of judges and prosecutors, are subject to European guarantees prohibiting the discrimination on grounds of age,[13] just as the different treatment of male and female judges with regard to retirement age is covered by the prohibition of discrimination on grounds of sex.[14] Other aspects of national legislation may be covered by fundamental freedoms[15] or even WTO law, as was the case with the Hungarian Higher Education Act.[16] There are also specific legal supervisory regimes, such as the CVM for Romania.[17] Beyond these specific areas, however, EU law did not seem to have any grip on the national organization of the judiciary and its relations with the national executive and legislature. In particular, the fundamental right to an independent court, enshrined in Art. 47(2) GRC, was in principle not applicable to national judicial reforms. This is because, for the most part, there was no sufficient connection between the Polish reform

11 CJEU, case C-617/10 *Åkerberg Fransson* (2013) referring back to the case law already established before the Charter entered into force.

12 Koen Lenaerts and José A. Gutiérrez-Fons, 'The Place of the Charter in the EU Edifice' in Peers et al. (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014), 1560, 1568.

13 See CJEU, case C-286/12 *Commission v Hungary* (2012) and CJEU, case C-585/18 *A.K. [Independence of the Disciplinary Chamber of the Polish Supreme Court]* (2019).

14 Namely, Article 157 TFEU as well as Directive 2006/54/EC, see CJEU, case C-192/18 *Commission v Poland [Independence of the Ordinary Courts]* (2019).

15 In particular, the freedom of establishment and the freedom to provide services pursuant to Articles 49 and 56 TFEU.

16 CJEU, case C-66/18 *Commission v Hungary [Higher Education Act]* (2020).

17 The Cooperation and Verification Procedure (CVM) was introduced by decision 2006/928 on the occasion of Romania's accession to the EU. Cf. from case law CJEU, case C-357/19 et al. *Euro Box Promotion and others* (2021).

legislation and substantive EU law, with the result that the conditions for the applicability of the Charter were not met.

2.2 Portuguese judges as saviours of the Polish judiciary

In simplified terms, this made EU law look like a toothless tiger. Although it proclaimed that the Union is founded on the value of the rule of law (Article 2 TEU) and guarantees the right to an independent tribunal (Article 47(2) CFR), it could not effectively counter the continued breakdown of the judiciary at the national level. Against the background of these *prima facie* limited possibilities to address the core of the rule of law crisis by means of EU law, the groundbreaking impact of the CJEU's new line of jurisprudence becomes apparent. This jurisprudence has its origins in a landmark ruling from 2018 in the case *Associação Sindical dos Juízes Portugueses (ASJP)*, also widely known as the *Portuguese Judges* case.[18] The case itself was hardly spectacular. The Portuguese judges' association ASJP took action against EU-driven austerity measures in Portugal's public service. The competent Portuguese court referred the matter to the CJEU for a preliminary ruling. The referring court sought to ascertain, in essence, whether the principle of judicial independence as guaranteed by EU law was to be interpreted as meaning that it precluded general salary cuts such as those at issue.[19] The CJEU answered in the negative, in particular because the Portuguese measures were temporary and general, i.e. not specifically aimed at the judiciary.[20]

The outstanding significance of the *Portuguese Judges* case stems neither from the political context nor from the legal outcome of the ruling. Rather, it results from the standards set out in the judgment's reasoning, standards which were, with all likelihood, already fleshed out by the CJEU with specific regard to the Polish judicial reforms.[21] In other words, the standards set out by the CJEU in *Portuguese Judges* reach far beyond the specific case, as their establishment has set – in anticipation, so to speak – a legal precedent

18 CJEU, case C-64/16 *Associação Sindical dos Juízes Portugueses* (2018).
19 Ibid, para 27.
20 Ibid, paras 48–51.
21 See Matteo Bonelli and Monica Claes, 'Judicial Serendipity – How Portuguese Judges Came to the Rescue of the Polish Judiciary' (2018) 14 European Constitutional Law Review 622.

for later cases related to the crisis of the rule of law and in particular the judicial reforms in Poland.[22] At the centre of the *Portuguese Judges* ruling is Article 19(1) subpara. (2) TEU, a norm that had previously not been considered to have any significant impact on the national *organization* of the judiciary. It reads as follows:

> Member States shall provide the necessary remedies to ensure effective judicial protection in the areas covered by Union law.

In line with established case law, the CJEU states in *Portuguese Judges* that Article 19(1) subpara. (2) TEU confers a European mandate on national courts to the extent that they fulfil the function of European judiciary in cooperation with the CJEU.[23] The EU is not based on a system of dual, but cooperative federalism,[24] that relies largely on national institutions to enforce EU law. In this respect, national institutions simultaneously fulfil a European function in the sense of a *dédoublement fonctionnel*.[25] This is true for national administrative authorities when executing EU law and for national courts when exercising judicial review on the basis of EU law. The groundbreaking novelty of *Portuguese Judges*, however, is that the CJEU for the first time derives from Article 19(1) subpara. (2) TEU a legal obligation of the Member States to comply with certain minimum standards also with regard to the organization of their national judiciary, provided that the respective judicial bodies are "courts" within the meaning of EU law and may, by their type and jurisdiction, be competent to interpret and apply Union law.[26]

22 For more details on the precedent-setting of the CJEU, see Mattias Wendel, 'Auf dem Weg zum Präjudizienrecht?' (2020) 68 Jahrbuch des öffentlichen Rechts der Gegenwart 113, 132 et seq.

23 CJEU, case C-64/16 *Associação Sindical dos Juízes Portugueses* (2018), paras 32 et seq.

24 Robert Schütze, *From Dual to Cooperative Federalism* (Oxford University Press 2009).

25 For international law, Georges A. J. Scelle, 'Le phénomène juridique du dédoublement fonctionnel', in Walter Schätzel and Hans-Jürgen Schlochauer (eds), *Festschrift für Hans Wehberg* (Vittorio Klosterman 1956), 324 with further references.

26 CJEU, case C-64/16 *Associação Sindical dos Juízes Portugueses* (2018), paras 37–45.

2.3 The independence of national courts as a condition for the success of the European community of law

The functioning of the national judiciary is a prerequisite for the functioning of the European community of law. It is this fundamental premise on which the CJEU's case law, which started with *Portuguese Judges* and was subsequently further differentiated on the occasion of the Polish judicial reforms, is based. A functioning national judiciary, however, requires judicial *independence*. According to the CJEU, effective legal protection in the areas covered by Union law, as required by Article 19(1) subpara. (2) TEU, presupposes the independence of the national courts.[27] The CJEU also bases this reasoning on the telos of Article 47(2) CFR, which grants a fundamental right to an independent court and thus underlines the outstanding importance of judicial independence for effective legal protection.[28]

The distinctive feature of the standard based on Article 19(1) subpara. (2) TEU lies precisely in the fact that it does not depend on the (narrower) conditions under which the Charter applies to the Member States.[29] In order to apply Article 19(1) subpara. (2) TEU, it is not necessary to establish that a Member State is, in the case at hand, "implementing" EU law within the meaning of Article 51(1) of the Charter. Rather, it is sufficient that the national court in question, due to its type and jurisdiction, *may* (potentially) find itself in the situation of interpreting and applying Union law.[30] Subsequent case law has further clarified this aspect and put it as follows:

> In that regard, every Member State must, under the second subpara. of Article 19(1) TEU, in particular 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 EU law and which, therefore, are liable to rule *[FR susceptibles de statuer, DE möglicherweise … entscheiden]*, in

27 Ibid, paras 41–45.
28 Ibid, para 41.
29 Ibid, para 29.
30 At least implicitly ibid, paras 39 et seq. More clearly CJEU, case C-619/18 *Commission v Poland [Independence of the Supreme Court]* (2019), paras 52, 55 et seq. and, again more clearly, CJEU, case C-192/18 *Commission v Poland [Independence of the Ordinary Courts]* (2019), para 103.

> that capacity, on the application or interpretation of EU law, meet the requirements of effective judicial protection.[31]

Article 19(1) subpara. (2) TEU thus allows the organisation of the national judiciary to be addressed in a *systemic-structural* way as far as the national courts are functionally part of the European judiciary. As far as this is the case, they are a cornerstone of the European constitutional architecture and must *permanently* meet the requirements of Article 19(1) subpara. (2) TEU, *regardless* of whether or not EU law is implemented in the specific case at hand.[32] As the case law shows, this approach is a veritable *game changer,* as it allows judicial review of the independence of national courts on the basis of EU law beyond the comparatively limited scope of the Charter. In scholarship, Article 19(1) subpara. (2) TEU has therefore been compared to a self-standing – i.e. non-accessory – and quasi-federal judicial standard.[33]

2.4 Article 19(1) subpara. (2) TEU in its systematic context

2.4.1 Mutual linking with the fundamental right under Article 47(2) CFR

The requirements for the independence of national courts resulting from Article 19(1) subpara. (2) TEU have been further spelled out by the CJEU in subsequent case law.[34] In doing so, the Court of Justice has interpreted this provision with due regard to – i.e. in the light of – the fundamental right under Article 47(2) CFR.[35] Even if Art. 47(2) CFR is an individual

31 CJEU, case C-192/18 *Commission v Poland [Independence of the Ordinary Courts]* (2019), para 103 (emphasis added). See subsequently CJEU, case C-824/18 *A.B. and Others [Appointment of Judges to the Polish Supreme Court]* (2021), para 112; CJEU, case C-791/19 *Commission v Poland [Disciplinary Regime for Judges]* (2021), para 54 and in relation to the Romanian judiciary CJEU, case C-896/19 *Repubblika* (2021), para 37.

32 Koen Lenaerts, 'The Role of the Charter in the Member States', in Michal Bobek and Jeremias Adams-Prassl (eds), *The EU Charter of Fundamental Rights in the Member States* (Bloomsbury 2020), 19, 25.

33 Laurent Pech and Sébastien Platon, 'Judicial Independence under Threat: The Court of Justice to the Rescue in the ASJP Case' (2018) 55 Common Market Law Review 1827, 1838.

34 The details are beyond the scope of this article. For an instructive overview of the case law, see Laurent Pech and Dimitry Kochenov, *Respect for the Rule of Law in the Case Law of the European Court of Justice* (SIEPS 2021) 3.

35 Explicitly CJEU, case C-824/18 *A.B. and others [Appointment of judges to the Polish Supreme Court]* (2021), para 143, but on the merits already in CJEU, case C-64/16

right relating to the individual case, whereas Article 19(1) subpara. (2) TEU is basically construed as an institutional guarantee that structurally binds the national judiciary to (and within) its European mandate,[36] both norms are mutually interlinked as regards the substantive requirements of judicial independence. Accordingly, the CJEU reads the substantive content of Article 47(2) CFR, which in turn is partly derived from the ECHR,[37] into Article 19(1) subpara. 2 TEU.[38] As a consequence, the CJEU also qualifies the obligation resulting from Article 19(1) subpara. (2) TEU as a clear, precise and unconditional "obligation as to the result to be achieved", an obligation which also enjoys primacy over conflicting national law.[39]

However, the fact that the CJEU reads (parts of) the substantive content of Article 47(2) CFR into Article 19(1) subpara. (2) TEU does not mean that Article 47(2) CFR would directly apply. On the contrary, case law shows that there are numerous cases[40] in which Article 19(1) subpara. (2) TEU applies, whereas the fundamental right under Article 47(2) CFR "as such" does not.[41] It is precisely in these cases that the new standard unfolds its added value. This in no way precludes certain cases to be decided on the

Associação Sindical dos Juízes Portugueses (2018), para 41; CJEU, case C-619/18 *Commission v Poland [Independence of the Supreme Court]* (2019), para 57.

36 Clearly highlighting this difference CJEU, case C-896/19 *Repubblika* (2021), para 52.

37 Because of Article 52(3) CFR, the interpretation of those Charter rights that correspond to ECHR rights is guided by the ECHR as interpreted by the ECtHR. Despite several considerable differences, Article 47(2) CFR corresponds structurally to Article 6 ECHR.

38 CJEU, case C-824/18 *A.B. and Others [Appointment of Judges to the Polish Supreme Court]* (2021), para 143; CJEU, case C-619/18 *Commission v Poland [Independence of the Supreme Court]* (2019), paras 71 et seq.

39 CJEU, case C-824/18 *A.B. and Others [Appointment of Judges to the Polish Supreme Court]* (2021), para 146. Confirmed in the case law on Romania, see CJEU, case C-83/19 et al. *Asociația Forumul Judecătorilor din România* (2021), para 250; CJEU, case C-357/19 et al. *Euro Box Promotion and others* (2021), para 253; CJEU, case C-430/21 *RS [Effects of Decisions of a Constitutional Court]*, para 58.

40 Most prominently, perhaps, CJEU, case C-619/18 *Commission v Poland [Independence of the Supreme Court]* (2019), paras 42–59 and CJEU, case C-791/19 *Commission v Poland [Disciplinary Regime for Judges]* (2021).

41 See expressly in the context of Romania CJEU, case C-896/19 *Repubblika* (2021), para 44; CJEU, case C-430/21 *RS [Effects of decisions of a constitutional court],* para 36. Even if Article 19(1) subpara. 2 TEU is sufficiently clear, precise and unconditional, it does not, for its part, trigger the application of the Charter under Article 51(1) CFR. For this conceptual problem see Luke D. Spieker, 'Werte, Vorrang, Identität: Der Dreiklang europäischer Justizkonflikte vor dem EuGH' (2022) 33 Europäische Zeitschrift für Wirtschaftsrecht 305, 308 et seq.

basis of EU fundamental rights. The CJEU relied on Article 47(2) CFR in a major preliminary ruling on the Polish judicial reforms. Several judges had challenged their early retirement and had incidentally questioned the independence of the newly established Disciplinary Chamber of the Polish Supreme Court in the main proceedings.[42] The CJEU answered the preliminary questions essentially on the basis of Article 47(2) CFR and saw no need to additionally interpret Article 19(1) subpara. (2) TEU in the case at hand.[43] What is decisive for legal practice, however, is that the new standard under Article 19(1) subpara. (2) TEU applies in cases where the individual guarantees ultimately do not.

2.4.2 Operationalization of the values from Art. 2 TEU

It is of utmost importance that the recent case law relates the standard under Article 19(1) subpara. (2) TEU directly to the safeguarding of the values enshrined in Article 2 TEU. Whether and how these values can be operationalized is the subject of ongoing academic discussion.[44] The recent CJEU case law has clarified that Article 19(1) subpara. (2) TEU gives concrete expression to the value of the rule of law under Article 2 TEU.[45] According to the explicit understanding of the CJEU, the values of Article 2 TEU are not mere policy guidelines, but constitute the normative core – the very identity – of Union law and are given concrete expression in principles or further provisions of the Treaties.[46] The CJEU also establishes a direct

42 CJEU, case C-585/18 *A.K. [Independence of the Disciplinary Chamber of the Polish Supreme Court]* (2019).

43 Ibid, para 169.

44 In-depth on the potentials and doctrinal modalities Armin von Bogdandy, *Strukturwandel des Öffentlichen Rechts* (Suhrkamp 2022), 154 et seq., and Luke D. Spieker, 'Breathing Life into the Union's Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis' (2019) 20 German Law Journal 1182, 1199 et seq., each with further references. Critically, by contrast, Frank Schorkopf, 'Wertekonstitutionalismus in der EU' (2020) 75 Juristen Zeitung 477, 482 et seq., and Martin Nettesheim, Die 'Werte der Union: Legitimitätsstiftung, Einheitsbildung, Föderalisierung' (2022) 57 Europarecht 525, 543 et seq.

45 CJEU, case C-64/16 *Associação Sindical dos Juízes Portugueses* (2018), para 32.

46 Groundbreaking CJEU, case C-156/21 *Hungary v Parliament and Council [Conditionality Mechanism]* (2022), paras 232 and 124–127 as well as CJEU, case C-157/21 *Poland v Parliament and Council [Conditionality Mechanism]* (2022), paras 264 and 142–145. While almost all other language versions use the term 'identity', the German version speaks of '*Gepräge*', which is terminologically unfortunate since the term 'identity' has become a (controversial!) key term of European constitutional law.

link between Article 2 TEU and the fundamental right under Article 47(2) CFR when it attributes the requirement of judicial independence to the inviolable essence of this fundamental right, pointing to the important role of the latter in upholding the values proclaimed in Article 2 TEU.[47] The significance of the essence of Art. 47 (2) CFR precisely for the (horizontal) relationship between the Member States will be discussed in the context of the preliminary ruling procedure.[48]

So far, the CJEU has not used Article 2 TEU as a justiciable stand-alone standard. Originally, Article 2 TEU played more of a role as the axiological background to the norms that necessarily give concrete expression to it and in particular to Article 19(1) subpara. (2) TEU. In the most recent case law on the rule of law crisis in Romania, however, Article 2 TEU sometimes already figures *alongside* Article 19 TEU,[49] even if this does not (yet) seem to entail any deviating legal consequences.[50] The problems of legitimacy resulting from a (potentially) free-hand judicial application of Article 2 TEU, which may in future be increasingly less linked to concretizing standards, should not be overlooked. One may therefore be curious about further developments, especially since the Commission has recently initiated infringement proceedings against Hungary, including a stand-alone claim that Article 2 TEU has been violated.[51] In this respect, the CJEU would be well advised to continue its previous approach of linking the operationalization of the values of Article 2 TEU to the applicability of concretizing norms.

2.4.3 Effects on the vertical distribution of competences?

In its new case law the CJEU does not claim that the EU has regulatory competence to shape the national organization of justice. The Court of Justice explicitly recognizes that the national organization of justice falls

47 CJEU, case C-216/18 PPU *LM [Shortcomings of the Polish Judicial System]* (2018), para 48.

48 See Section 3.2.2.

49 CJEU, case C-83/19 *Asociația Forumul Judecătorilor din România* (2021), paras 207, 223, 241; CJEU, case C-430/21 *RS [Effects of Decisions of a Constitutional Court]* (2022), paras 38, 43 et seq., 57, 87.

50 Especially since the CJEU in case C-430/21 *RS [Effects of decisions of a constitutional court]* (2022), paras 78, 93 refers to Article 19(1) subpara. (2) 'read in conjunction with' Article 2 TEU.

51 Pending CJEU, case C-769/22.

within the regulatory competence of the Member States, which, when exercising this competence, have to comply with the minimum standards under Article 19(1) subpara. 2 TEU.[52] However, in doing so, the CJEU applies a model of reasoning well-known from other areas of Union law. The Court of Justice restricts the exercise of Member States' competences within the scope of application of European prohibitions or obligations to comply with minimum standards. This can potentially endanger the federal balance between the EU and its Member States, as is being discussed in the area of fundamental freedoms (internal market law) and the general prohibition of discrimination on grounds of nationality.[53] This is why the CJEU must handle the new approach with care.

3 Procedures and actors

3.1 The Article 7 procedure and the EU framework for strengthening the rule of law

The recalibration of European legal standards, and in particular the case law on Article 19(1) subpara. (2) TEU as the European minimum standard ensuring the independence of national courts, has had a significant impact on the set of instruments available to the Union to combat national rule of law crises. This becomes particularly apparent in contrast to other instruments. An instrument that has turned out to be largely ineffective is the dialogue-based EU Rule of Law Framework launched by the Commission in 2014.[54]

The so-called Article 7 procedure, named after its legal basis in the TEU, has also proved ineffective. The procedure was specifically designed as a response to serious breaches of the values enshrined in Article 2 TEU by a Member State. However, due to its procedural arrangements and the limited judicial review under Article 269 TFEU, it is ultimately not a legal but a political procedure. It is for the Council to determine, by a majority of

52 CJEU, case C-192/18 *Commission v Poland [Independence of Ordinary Courts]* (2019), para 102; CJEU, case C-791/19 *Commission v Poland [Disciplinary Regimes for Judges]* (2021), para 56.

53 See Thorsten Kingreen, '§ 13 Verbot der Diskriminierung wegen der Staatsangehörigkeit' in Dirk Ehlers (ed), *Europäische Grundrechte und Grundfreiheiten* (4th edn., De Gruyter 2014), para 3.

54 By way of a communication, cf. COM(2014) 158 final.

four fifths of its members[55] after obtaining the consent of the European Parliament, that there is a clear risk of a serious breach of the values of Article 2 TEU (Article 7(1) TEU). Determining that a serious and persistent breach of the values of Article 2 TEU actually exists requires unanimity[56] within the European Council (Article 7(2) TEU). This unanimous determination is in turn a prerequisite for the Council to launch sanctions against the respective Member State, e.g. by suspending voting rights (Art. 7(3) TEU). However, if two Member States pledge support to each other, as is the case with Hungary and Poland, unanimity cannot be reached in the European Council, which is why the sanctions procedure cannot be initiated either. The Article 7 procedures initiated against Poland in 2017 by the Commission[57] and against Hungary in 2018 by the European Parliament[58] have so far not even cleared the first hurdle, i.e. the determination that there is a clear danger within the meaning of Article 7(1) TEU.

In any event, according to the CJEU, the Article 7 procedure does not have a pre-emptive effect. It does not generally block the use of other instruments to combat violations of the values under Article 2 TEU. Hence, the EU legislator was allowed to introduce the so-called *conditionality mechanism*[59] (to be discussed below), since, in the view of the CJEU, this mechanism was sufficiently different compared to the Article 7 procedure in terms of its objects, subject matter and measures.[60] Moreover, the CJEU has convincingly deemed a number of infringement proceedings and preliminary ruling proceedings in which the core issue was the rule of law under Article 2 TEU and its concretization by Article 19(1) subpara. 2 TEU admissible, without the existence of Article 7 TEU and Article 269 TFEU standing in the way. This already links to the proceedings before the CJEU as well as the conditionality mechanism.

55 Taking out the vote of the Member State concerned, cf. Article 354 TFEU.
56 Once again, not taking into account the vote of the Member State concerned, cf. Article 354 TFEU.
57 COM (2017) 835 final.
58 Resolution of 12 September 2018. Cf. CJEU, case C-650/18 *Hungary v Parliament* (2021).
59 Regulation 2020/2092.
60 CJEU, case C-156/21 *Hungary v Parliament and Council [Conditionality Mechanism]* (2022), para 167.

3.2 Proceedings before the CJEU

3.2.1 Infringement proceedings, including proceedings for interim measures

Infringement proceedings under Article 258 TFEU have become a particularly important instrument for countering the dismantling of judicial independence at the national level. The key leading cases on the Polish judicial reforms are based on this procedure, which is initiated by the Commission as guardian of the Treaties.[61] In all proceedings initiated by the Commission against Poland in this respect, the CJEU has found violations of EU law.

This applies first to the question of the independence of the Polish Supreme Court. This is true, first of all, with regard to the (lacking) independence of the Polish Supreme Court. The CJEU found Article 19(1) subpara. 2 TEU to be violated by the Polish rules that reduced the retirement age for (acting) judges of the Supreme Court while at the same time allowing some of them to exercise their office beyond this age, subject to the discretionary consent of the President of the Republic.[62] Furthermore, the CJEU found a violation of the Treaties by the Polish regulations for the ordinary courts, as these regulations provided for a different retirement age for male and female judges.[63] In addition to Article 19(1) subpara. 2 TEU, the prohibition of discrimination on the grounds of sex played a central role in this case.[64] The CJEU has also found the disciplinary regime for Polish judges to be in breach of Article 19(1) subpara. (2) TEU.[65] The decision covered a whole series of aspects of the judicial "reform", in particular that the Polish rules allowed the content of judicial decisions to be classified as a disciplinary offence, that the Disciplinary Chamber of the Supreme Court lacked independence, that the (local) jurisdiction of disciplinary courts was not sufficiently determined by law and that certain procedural guarantees were not properly protected in the disciplinary proceedings.[66] Furthermore,

61 Cf. Article 258 TFEU. In addition, it is also possible for Member States to initiate the procedure, Article 259 TFEU, but this is rarely used. As an example, see CJEU, case C-591/17 *Austria v Germany [Car Toll]* (2019).

62 CJEU, case C-619/18 *Commission v Poland [Independence of the Supreme Court]* (2019).

63 CJEU, case C-192/18 *Commission v Poland [independence of Ordinary Courts]* (2019).

64 Ibid, para 84 in relation to Article 157 TFEU and Article 5 lit. a) and Article 9(1) lit. f) of Directive 2006/54.

65 CJEU, case C-791/19 *Commission v Poland [Disciplinary Regime for Judges]* (2021).

66 Ibid, paras 50 et seq., 80 et seq., 134 et seq., 164 et seq., 187 et seq.

the Polish rules restricted the dialogue of national courts with the CJEU insofar as they opened up the possibility of disciplining judges for issuing preliminary references.[67]

Further infringement proceedings are currently pending, in particular against the so-called "Muzzle Law", which obliges judges, among other things, to provide information on existing memberships in political parties, clubs or associations, and against Polish rules which prevent, by means of disciplinary measures, Polish courts from questioning the compliance of other Polish courts with European standards of judicial independence and from making referrals to the European Court of Justice in this regard.[68] Finally, the Commission has also initiated infringement proceedings against Poland,[69] because the Polish Constitutional Tribunal, a politically controlled body, had declared parts of the obligations under EU law – including obligations under Article 19(1) subpara. (2) TEU as interpreted by the CJEU – not binding in Poland.[70] Thus, the conflict now also extends to the relationship of the Polish and European supreme jurisdictions.

A groundbreaking development lies in the quality and quantity with which the infringement proceedings were accompanied by interim measures. The judgment in the first infringement procedure was already preceded by a decision on interim measures under Article 279 TFEU.[71] The same is true for the infringement proceedings on the disciplinary regime.[72] In the still pending infringement proceedings against the "Muzzle Law", in addition to the issuance of extensive interim measures (for the provisional

67 Ibid, paras 222 et seq.

68 Pending CJEU, case C-204/21 *Commission v Poland [Independence and Private Life of Judges]*.

69 Procedure INFR (2021)2261.

70 Polish Constitutional Court (*Trybunał Konstytucyjny*), P 7/20 (2021) in relation to the interim measures and K 3/21 (2021) in relation to the obligations under Article 19(1) subpara. 2 in conjunction with Article 2 TEU as interpreted by the CJEU. Moreover, the Polish Constitutional Court also considered parts of the ECtHR case law not binding in Poland, insofar as this case law had denied the Constitutional Court the quality of a "tribunal established by law" in the sense of Article 6 ECHR (ECtHR, case No 4907/18 *Xero Flor* (2021)), cf. Polish Constitutional Court, K 6/21 (2021) and K 7/21 (2022).

71 Order of the CJEU of 17 Dec. 2018, case C-619/18 R *Commission v Poland [Independence of the Supreme Court]* (2018).

72 Order of the CJEU of 8 April 2020, case C-791/19 R *Commission v Poland [Disciplinary Regime for Judges]* (2020).

suspension of the regulations in question),[73] a penalty payment of one million euros per day was imposed for the non-implementation of these interim measures,[74] a novelty in terms of procedural law.

3.2.2 Preliminary reference procedure

The preliminary reference procedure has also played a significant role in the context of the Polish judicial reforms. Preliminary rulings were issued with regard to the (lacking) independence of the Disciplinary Chamber of the Polish Supreme Court,[75] the appointment of judges to the Polish Supreme Court[76] and the independence of the "Chamber of Extraordinary Control and Public Affairs" at the Supreme Court.[77] With regard to all these aspects, cases were brought by Polish judges before Polish courts, which then referred the matter to the CJEU for a preliminary ruling. The cases show that the crisis cannot only be brought before the courts in a "top down" mode by the Commission, but also in a "bottom up" mode, according to which individuals – in this case the judges concerned – defend themselves against the judicial reforms.[78] Infringement proceedings and preliminary ruling proceedings thus go hand in hand. However, the preliminary ruling procedure, in the course of which the CJEU interprets the relevant Union law, but leaves its application to the concrete case to the referring court, is ultimately dependent on there being a minimum degree of willingness to comply with the CJEU rulings at the national level. In the event of an open judicial conflict in which a national constitutional court ultimately declares CJEU rulings to be non-binding,[79] conflict resolution

73 Order of the Vice-President of the CJEU of 14 July 2021, case C-204/21 R *Commission v Poland [Independence and Private Life of Judges]* (2021).

74 Order of the Vice-President of the CJEU of 27 Oct. 2021, case C-204/21 R *Commission* v *Poland [Independence and Private Life of Judges]* (2021).

75 CJEU, case C-585/18 *A.K. [Independence of the Disciplinary Chamber of the Polish Supreme Court]* (2019).

76 CJEU, case C-824/18 *A.B. and Others [Appointment of Judges to the Polish Supreme Court]* (2021).

77 CJEU, case C-487/19 *W.Ż. [Chamber of Extraordinary Control and Public Affairs]* (2021).

78 Which does not automatically mean that the reference for a preliminary ruling is admissible, cf. for an inadmissibility ruling CJEU, case C-558/18 et al. *Miasto Łowicz et al.* (2020).

79 Cf. the case law of the Polish Constitutional Court, *supra* note 70. For in-depth and comparative studies of such cross-level judicial conflicts see Franz C. Mayer,

with the means of law, including infringement proceedings, reaches its limits.[80]

Furthermore, the preliminary reference procedure plays a crucial role in cases in which the horizontal relationship between the Member States is at stake. For example, in the much-discussed *LM* case, the question arose as to whether suspects in criminal proceedings may be transferred from an EU Member State to the Polish judiciary on the basis of a European Arrest Warrant if the Polish judiciary is (in part) no longer independent.[81] This is an extremely complex question in legal terms, as it ultimately concerns the limits of the principle of mutual trust between the Member States.[82] In *LM* the CJEU decided to generally maintain the system of judicial cooperation with Poland and to adhere to the high thresholds it had already set previously in its case law on judicial cooperation and asylum law. According to this approach, the transfer of a sought person to another Member State may – beyond the cases provided for in secondary law – only be refrained from if, *firstly,* there is a real risk that Article 47(2) CFR is violated in its absolutely protected essence "on account of systemic or generalised deficiencies concerning the judiciary of that Member State, such as to compromise the independence of that State's courts", and if, *secondly,* there are sufficient reasons to assume that the person will actually be exposed to this danger him- or herself after the transfer, i.e. that the systemic shortcomings have a concrete effect on the individual case.[83] The latter is often not the case in average and "apolitical" criminal law cases.[84]

Kompetenzüberschreitung und Letztentscheidung (CH Beck 2000); Monica Claes, *The National Courts' Mandate in the European Constitution* (Bloomsbury 2006); Heiko Sauer, *Jurisdiktionskonflikte in Mehrebenensystemen* (Springer Berlin 2008); Mattias Wendel, *Permeabilität im europäischen Verfassungsrecht* (Mohr Siebeck 2011), 415 et seq.

80 See for the *political* resolution of the PSPP conflict between the German Federal Constitutional Court and the CJEU Mattias Wendel, 'Constructive Misunderstandings: How the PSPP Conflict Was Eventually Settled and How It Reflects Constitutional Pluralism' in Matej Avbelj (ed), *The Future of EU Constitutionalism* (Hart 2023).

81 CJEU, case C-216/18 PPU *LM [Shortcomings of the Polish Judicial System]* (2018).

82 In detail Mattias Wendel, 'Mutual Trust, Essence and Federalism' (2019) 15 European Constitutional Law Review 17.

83 CJEU, case C-216/18 PPU *LM [Shortcomings of the Polish Judicial System]* (2018), para 68.

84 Accordingly, in the original case, the person concerned ended up being transferred to Poland, see Irish High Court, [2018] IEHC 639 *Celmer No. 5* (2018), para 117, upheld by Irish Supreme Court, S:AP:IE:2018:000181 *Celmer* (2019), paras 87 et seq.

3.3 Conditionality mechanism (Regulation 2020/2092)

Finally, it is worth briefly mentioning the conditionality mechanism, based on regulation 2020/2092. This is a legislative instrument on the basis of which the EU can take measures if "breaches of the principles of the rule of law in a Member State affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way."[85] As an example of breaches of the rule of law, the Regulation also explicitly lists "effective judicial review by independent courts" of actions or omissions by the authorities with budgetary or financial relevance.[86] The connection between such violations and a "sound financial management" or the "protection of the financial interests of the Union" does not make the conditionality mechanism an all-purpose weapon against the threat of judicial independence at the national level. However, at least where such a link exists, there is now the possibility to impose financially sensitive measures on the Member States, such as the suspension of payments.[87]

While the practicability of the new instrument remains to be seen, it is, from the perspective of EU law, already significant that the CJEU has rejected the actions for annulment brought against the mechanism by Poland and Hungary. The two lengthy judgments contain not only detailed considerations about competences and the differences between the Article 7 procedure and other crisis intervention instruments. They also contain fundamental statements on the (legal) nature of the Union's values under Article 2 TEU.[88]

Unfortunately, the CJEU will no longer be able to rule on a chapter that is particularly interesting in terms of EU institutional law. In the context of a political deal that preceded the entry into force of the conditionality mechanism in December 2020, the European Council "agree(d)" on the modalities of application of the mechanism and stated in its conclusions, inter alia, that the Commission would not propose any measures under the mechanism until the CJEU had ruled on the actions for annulment brought

85 Article 4(1) Regulation 2020/2092.
86 Article 4(2) lit. d) Regulation 2020/2092.
87 In detail Article 5 VO 2020/2092.
88 CJEU, case C-156/21 *Hungary v Parliament and Council [Conditionality Mechanism]* (2022), paras 232 and 124–127 and CJEU, case C-157/21 *Poland v Parliament and Council [Conditionality Mechanism]* (2022), paras 264 and 142–145.

by Poland and Hungary (which were not even pending at that time).[89] The European Parliament then sued the Commission before the CJEU for failure to act. This case would have given the CJEU the opportunity to rule on the extent to which the Commission might actually be *obliged* under EU constitutional law to initiate action under the mechanism. However, after the Commission had taken up its activities in 2022 (initially against Hungary) following the two rulings, the European Parliament withdrew its action for failure to act in June 2022.

3.4 Institutional impact

From an institutional perspective, it should be noted that the European Commission has become a central player in combating the rule of law crisis. It has abandoned its earlier reticence and initiated a number of infringement proceedings against Poland, which were successful both as regards the interim measures (including even penalty payments) and in the main proceeding. The majority of these proceedings could, of course, only be won on the basis of the standards that had previously been "sharpened" by the CJEU, namely Article 19(1) subpara. (2) TEU. In this respect, the CJEU has also played a significant role in the dynamic development of recent times. The new jurisprudence on Article 19(1) subpara. (2) TEU is, of course, also criticized by some observers, as it harbours an enormous potential of federal power shift towards the Union. This is precisely why a cautious approach to this case law on the part of the CJEU is so important.[90]

89 Conclusions of 10/12/20, EUCO 22/20, I.2.c). This is astonishing because, according to Article 15 TEU, the European Council has no legislative powers whatsoever and therefore may not, in any case, lay down legally binding modalities for the application of an EU legislative act (within the meaning of Article 289(3) TFEU). Similarly, the European Council may not give the Commission specific instructions on the exercise of its supervisory function.

90 Cf. Martin Nettesheim, 'Die Werte der Union: Legitimitätsstiftung, Einheitsbildung, Föderalisierung' (2022) 57 Europarecht 525, 535.

4 Conclusion and outlook

All in all, the new case law of the CJEU on the independence of national courts has given European constitutional law a fundamental boost. The CJEU has elevated the independence of national courts to a condition for the success of the European community of law. Faced with the choice of either observing the systematic dismantling of the national judiciary rather passively with reference to the limited scope of application of EU law, or taking seriously the possibilities of the European mandate of the national courts enshrined in Article 19(1) subpara. (2) TEU and enforcing at least minimum standards of judicial independence through Union law, the CJEU has opted for the latter. It has thus laid the foundation for enforcing the value of the rule of law proclaimed in Article 2 TEU and concretized in Article 19(1) subpara. (2) TEU more effectively vis-à-vis the Member States. However, it is equally incumbent on the CJEU to resist the temptation to expand this new legal grip on the national institutional structure beyond the enforcement of minimum standards. The judicial enforcement of minimum standards of the rule of law or the principle of democracy,[91] which may one day also extend to the national legislatures or executives, must always remain focused with a sense of proportion on what it is intended for: the preservation of the foundations of the European community of law in situations of systemic risks.

91 Analogous considerations to the protection of the rule of law can also be made for the protection of the principle of democracy, although in an institutionally and principally differentiated manner.