The Power of the European Union in Enforcing the Principle of Judicial Independence

by

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Master and Postgraduate of Law in European Union Law in English Language

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Faculty of Law

University of Macau

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"I, Xu Tianjun, hereby declare and confirm that this thesis is entirely the result of my own work except where otherwise indicated. This work has not been submitted anywhere else, either in part or whole, for a degree or other academic credits. I undertake the sole responsibility for any inaccuracy in this declaration."

Yours sincerely,

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Acknowledgements

When Prof. Paulo Canelas de Castro asked me whether I would be interested to write a master thesis on European values, I had no idea that this could be much more challenging than I expected. Indeed, values are very philosophical ideas. The discussions about values normally result from academic or political debates. As Legal practices usually focus on the laws and facts, judges and lawyers tend to refrain from touching upon the more abstract subjects. However, as my research unfolds, the judges of the European Court of Justice completely subverted my opinion. These groundbreaking judgements have contributed to this adventurous thesis. Hence, this thesis not only delivers what I have learnt from the European Union Law, it also displays this adventurous journey of transforming the thinking of a political scientist to a lawyer.

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Abstract

This research presents the responses to the national measures undermining rule of law in Hungary and Poland on the European Union level. On the one hand, the EU has initiated procedures for political sanctions under Article 7 TEU, which concentrates on systemic breach of the rule of law. On the other hand, legal actions are brought before the European Court of Justice to address the violations of rule of law in individual cases. However, although these measures on the EU level are welcomed, their effects have appeared to be inconsequential. In addition, the EU is widely criticized for creating new competences for itself beyond what is conferred by the Treaties. In particular, many are concerned about the jurisdiction of the ECJ to be *ultra vires*.

Therefore, to clear the doubts, this research will investigate the jurisdictions of the ECJ under Article 2 TEU, Article 19(1) TEU and Article 47 CFR which have enabled it to scrutinize the independence and impartiality of national courts or tribunals. The analysis will unfold from the following three aspects. In the first place, the competence of the ECJ in reviewing the organization of national judiciaries will be reviewed under the theoretical perspectives. Then, the theoretical understandings will be examined through the recent ECJ case-law, in which this research will attempt to discover the standard of judicial independence that must be followed by all national courts across the Union. In this regard, this research first studies how the ECJ struggles to maintain a balance between preserving mutual trust and protection of right to fair trial under Article 47 CFR. Second, this thesis will discuss how ambiguous are the specific requirements of judicial independence under Article 19(1) TEU read in conjunction of Article 2 TEU, and Article 47 CFR. Last but not least, this research will assess the far-reaching impacts of such *ultra vires* jurisdiction of the ECJ both on the preliminary ruling procedure and on the constitutional orders in the Member States.

Keywords

European Values, Rule of Law, Judicial Independence, Effective Judicial Remedy, Right to Fair Trial, Mutual Trust, Constitutional Pluralism, Hungary, Poland

Glossary of Acronyms

AFSJ	An Area of Freedom, Security and Justice
AG	Advocates General
CEE	Central Eastern European states
CFR	Charter of the Fundamental Rights
CFSP	Common Foreign and Security Policy
EAW	European Arrest Warrant
EC	European Communities
ECB	European Central Bank
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
e.g.	exempli gratia (for example)
ENCJ	European Network of Councils for the Judiciary
EU	European Union
Fidesz	Alliance of Young Democrats-Hungarian Civic Union
ICCPR	International Covenant on Civil and Political Rights
NJC	National Judicial Council (Hungary)
NJO	National Judicial Office (Hungary)
PiS party	The Law and Justice party
PO	Civic Platform
PSPP	Public Sector Purchase Programme
TCE	Treaty establishing a Constitution for Europe
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
US	United States of America
Venice Commission	European Commission for Democracy Through Law

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Introduction

Article 2 of the Treaty on European Union (TEU) lists certain values that are originated from the common constitutional traditions of the Member States, which binds on all EU institutions and the Member States.[1] Although these values are not mentioned expressly in the Treaties until the Treaty of Lisbon, which was ratified in 2009, these fundamental values, particularly, the rule of law, have been regarded as the force underpinning the process of European integration since the very beginning.[2] However, over the past decade, the rule of law and other European values have been seriously challenged by the illiberal reforms in Hungary and Poland. In a speech delivered on 26 July 2014, *Viktor Orbán*, the Hungarian Prime Minister since 2010, touted that "the new state that we are constructing in Hungary is an illiberal state," which would not make the fundamental principles of liberalism such as freedom the central element of state organisation. Prime Minister Orbán not only prioritize nationalism over liberalism, he also believes that it is possible to construct a new state built on illiberal and national foundations within the European Union.[3]

To reach this goal, taking over the executive and legislature are insufficient. After winning a majority in the elections, the ruling parties in both Hungary and Poland have also adopted a series of measures to put their judiciaries under control. In both states, the ruling parties eradicated the disobedient judges by enacting new legislations forcing these judges to retire earlier than their mandate fixed by previous law. In Poland, the attacks on the judiciary were more systematic. The *PiS*-led government refused to swear in judges elected by the previous *Sejm*, and withheld from publishing judgements of the Constitutional Tribunal (*Trybunał Konstytucyjny*). Furthermore, established the Disciplinary Chamber (*Izba Dyscyplinarna*) within the Supreme Court (*Sąd Najwyższy*), which has jurisdiction over the disciplinary proceedings concerning the judges. Meanwhile, it also reformed the *KRS* (National Judicial Council) so that its members could be replaced every four years with persons elected by the *Sejm*, rather than the assembly of judges. Consequently, the independence of the Disciplinary Chamber is

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[1] *Consolidated Version of the Treaty on European Union*, *OJ* C 326, 26 October 2012, pp. 13-390. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012M%2FTXT. Article 2 TEU: "*The Union is founded on the values of respect for human dignity*, *freedom*, *democracy*, *equality*, *the rule of law and respect for human rights*, *including the rights of persons belonging to minorities*. *These values are common to the Member States in a society in which pluralism*, *non-discrimination*, *tolerance*, *justice*, *solidarity and equality between women and men prevail*."

[2] Koen Lenaerts, "New Horizons for the Rule of Law within the EU," 21, 1, *German Law Journal* (2020), pp. 29-34.

[3] Viktor Orbán, "Speech at the 25th Bálványos Summer Free University and Student Camp," 26 July 2014, available at: http:// www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-sspeech-at-the-25th-balvanyos-summer-free-university-and-student-camp.

seriously in doubt, since it is composed of persons that are closely associated with the *PiS* party.

In response to these crises, the European Union have reacted with the "political instruments" and the "legal instruments." Regarding the "political instruments," the EU has established dialogues, and has threatened to impose sanctions on Hungary and Poland. With respect of the "legal instruments," the EU launched by itself or intervened in the domestic legal proceedings through a series of legal actions. Such interactions between Hungary, Poland and the EU have attracted many researches recently in the field of constitutional law, European Union Law, etc. Although many scholars support the measures taken at the EU level, they are suspicious on the effectiveness of these measures given the fact that the rule of law conditions continue to deteriorate in both Hungary and Poland.[4]

In terms of the "political instruments," *Uitz* points out that the political dialogue is dubious from the start, instead, she argues that the most potent tool to defend the rule of law in the EU is an infringement action by the European Commission.[5] *Pech* and *Scheppele* believe that the existing political tools are inefficient, since to solve the rule of law crisis, all EU institutions must act fast as soon as the danger signals are clear.[6] *Hoffman* claims that Methods under Article 7 TEU might have been inadequate, and there must be other methods of influencing Poland's actions through economic and reputational pressure.[7] However, *Lang* disagrees with the economic sanctions, since withholding EU money from Member States in which there are generalised deficiencies as regards the rule of law would create a nationalistic climate and anti-EU emotions and to new and increasing violations of the rule of law and other EU values.[8]

In respect of the "legal instruments," perhaps the most influential opinion comes from the president of the ECJ, *Koen Lenaerts*, who stresses that the interference from the executive or legislature to the judiciary would undermine the European integration through the rule of law.[9] In this regard, firstly, national courts that are not independent

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[4] European Parliament, *Resolution of 16 January 2020 on ongoing hearings under Article 7(1) of the TEU regarding Poland and Hungary* (2020/2513(RSP)), 16 January 2020. Available at: https://www.europarl.europa.eu/doceo/document/TA-9-2020-01-16_EN.html.

[5] Renáta Uitz, "The Perils of Defending the Rule of Law through Dialogue," 15, 1, *European Constitutional Law Review* (2018), pp. 1-16.

[6] Laurent Pech and Kim Lane Scheppele, "Illiberalism Within: Rule of Law Backsliding in the EU," 19, 3, *Cambridge Yearbook of European Legal Studies* (2017), pp. 1-45.

[7] Michael Hoffman, "[PiS]sing off the Courts: The PiS Party's Effect on Judicial Independence in Poland," 51, 4, *Vanderbilt Journal of Transnational Law* (2018), pp. 1153-1190.

[8] Iris Goldner Lang, "The Rule of Law, the Force of Law and The Power of Money in the EU," 15 *Croatian Yearbook of European Law and Policy* (2019), pp. 1-26.

[9] Koen Lenaerts, "New Horizons for the Rule of Law within the EU," 21, 1 *German Law Journal* (2020), pp. 29-34.

do not have access to the preliminary reference mechanism. Secondly, courts cannot provide effective judicial protection when they are not insulated from internal and external pressure. Lastly, the principle of mutual trust requires all Member States to uphold the values listed on Article 2 TEU, including the principle of judicial independence.

However, concerning the role of the ECJ to discipline Member States over the measures infringing the independence of national courts, the opinions of *Koen Lenaerts* are not always shared by other scholars. *Šubic* observes that the interim measures issued in the course of infringement proceedings demonstrate the Court's increasing boldness and determination to address the Polish rule of law crisis.[10] *Pech* and *Platon* supports centralised and confrontational approach on the EU level, according to which the EU should not only seek to rely more forcefully on Article 19(1) TEU in its infringement actions but also other instruments, including the preliminary ruling procedure.[11] *Zoll* and *Wortham* are more cautious about measures on EU level in that although external forces, including the EU can give pressures, the restoration of rule of law in Poland would have to occur within the existing Constitution.[12] *Bogdandy* and *Spieker* contends that the role of the ECJ must be strictly limited, since under the *Reverse Solange* doctrine, European values under Article 2 TEU are applicable only with their essence, albeit under very restrictive conditions and only in very exceptional circumstances.[13] On this basis, *Pérez* warns that Article 19(1) TEU has the potential to become an open door for enforcing the Charter of Fundamental Rights (CFR) against the Member States regardless of its limited scope of application.[14]

Contrary to what is suggested by the ECJ, *Bonelli* and *Claes* denounce the role of the ECJ on the ground that it not only develops the idea of judicial independence, which appears nowhere in the Treaties, it also seems to be using Article 19 TEU to create the notion of a "European judiciary" consisting of national judiciaries and the Court of

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[10] Neža Šubic, "Executing a European Arrest Warrant in the Middle of a Rule of Law Crisis: Case C-216/18 PPU Minister for Justice and Equality (LM/Celmer)," 21, 1, *Irish Journal of European Law* (2018), pp. 98-109.

[11] Laurent Pech and Sébastien Platon, "Judicial Independence Under Threat: The Court of Justice to the Rescue in the ASJP Case," 55, 6 *Common Market Law Review* (2020), pp. 1827-1854.

[12] Fryderyk Zoll and Leah Wortham, "Judicial Independence and Accountability: Withstanding Political Stress in Poland," 42, 3, *Fordham International Law Journal* (2019), p. 944.

[13] See Armin Von Bogdandy and Luke Dimitrios Spieker, "Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges," 15, 3, *European Constitutional Law Review* (2019), pp. 391-426; Luke Dimitrios Spieker, "Breathing Life into the Union's Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis," 20, 8, *German Law Journal* (2019), pp. 1182-1213.

[14] Aida Torres Pérez, "From Portugal to Poland: The Court of Justice of the European Union as Watchdog of Judicial Independence," 27, 1, *Maastricht Journal of European and Comparative Law* (2020), pp. 105-119.

Justice, which are organized under the supervisory of the ECJ.[15] Regarding the detrimental effects of the rule of law crisis on mutual trust, *Krajewski* prefers a centralised review of fundamental rights violation by the Court of Justice, instead of a peer review by their domestic counterparts.[16] *Wendel* finds that the European Court of Justice links the concept of the "essence of fundamental rights" with the values referred to in Article 2 TEU and acknowledges a new "fundamental right to an independent court," which forms part of the essence of the right to a fair trial under Article 47 CFR.[17]

However, although there are emerging literatures suggesting what EU should/could have done to discipline Hungary and Poland to halt the national measures undermining the European values, they fail to consider whether the EU has the corresponding competences to do so. In particular, research is lacking on whether and how Article 2 TEU, Article 19(1) TEU and Article 47 CFR becomes legally justiciable under the recent jurisprudence of the ECJ. Therefore, this contribution will focus on the following aspects. In the first place, it seeks to present an overview of the "political instruments" and the "legal instruments" adopted on the EU level regarding the rule of law crisis in Hungary and Poland, especially the challenges to the independence of the judiciary. Then, it will focus on the discussion of the "legal instruments" from the perspectives of mutual trust and the substance of Article 19(1) TEU. In this regard, this contribution attempts to discover how the ECJ can forge an EU standard of judicial independence via its emerging case-laws in this respect. The methodology would focus on the direct and indirect influences from other branches of the government. Moreover, the dialogue between national courts and the ECJ through the preliminary ruling procedure is tested under this expanded competence of the ECJ. Last but not least, an analogy is pursued between Article 19(1) TEU and the Fourteenth Amendment of the U.S. Constitution, both as tools of incorporation.

Chapter 1 briefly introduces the discovery and evolvements of the European values, from the goals to the principles, and eventually textualized under Article 2 TEU. In particular, how the European values have gradually acquired a normative function.

Chapter 2 discusses the reforms in Hungary and Poland that has undermined rule of law over the past decade since their illiberal political parties came to power.

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[15] Matteo Bonelli and Monica Claes, "Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary," 14, 3, *European Constitutional Law Review* (2018), p. 622-643.

[16] Michał Krajewski, "Who is Afraid of the European Council? The Court of Justice's Cautious Approach to the Independence of Domestic Judges," 14, 4, *European Constitutional Law Review* (2018), pp. 792-813.

[17] Mattias Wendel, "Mutual Trust, Essence and Federalism – Between Consolidating and Fragmenting the Area of Freedom, Security and Justice after LM," 15, 1, *European Constitutional Law Review* (2019), pp. 17-47.

Chapter 3 presents the political and legal enforcements of the principles of judicial independence against the rule of law backsliding in Hungary and Poland, including the Rule of Law Framework, Article 7 TEU procedures and seminal decisions by the ECJ regarding the attacks on the judiciary. On the one hand, these enforcements on the EU level protect the mutual trust between Member States, and ensure national "courts or tribunals" within the meaning of EU law meet the requirements of independence and impartiality under Article 19(1) TEU. On the other hand, they have yet to be tested under the established rules of preliminary ruling procedure and the theory of constitutional pluralism.

Chapter 1: The Values of the European Union

At the very beginning of the European integration, the goals of the integration were primarily to promote peace and prosperity across Europe, so that tragic wars that had taken place over the past few centuries could be perpetually avoided.[18] These goals were most prominently reflected in the 1950 Schuman Declaration, in which the French foreign minister *Robert Schuman* proposed that "*the goals of peace*, *solidarity*, *social progress and economic development should be the cornerstones and ontological foundations of integration*."[19] At this period, there were emerging debates, both politically and philosophically, over certain values that must be respected during the process of European integration. In 1962, the first President of the Commission of the European Communities, *Walter Hallstein*, characterized the European Economic Community as a "community of law" (*Rechtsgemeinschaft*), which aimed at asserting the rule of law and its values within the framework of the integration. According to Hallstein:

> "*This Community was not created by military power or political pressure*, *but owes its existence to a constitutive legal act*. *It also lives in accordance with fixed rules of law and its institutions are subject to judicial review*. *In place of power and its manipulation*, *the balance of powers*, *the striving for hegemony and the play of alliances we have for the first time the rule of law*. *The European Economic Community is a community of law … because it serves to realize the idea of law*."[20]

Two decades later, *Hallstein*'s phrase was literally adopted by the Court of Justice of the European Communities, in the case of *Les Verts v Parliament*.[21]

As described by Joseph Weiler, European legal integration moved powerfully ahead of the political movement during the foundational period, where the Community legal order emerged as a working constitutional order.[22] When political efforts to pursue European integration became stagnated, the Court of Justice of the European Communities stepped in as an "engine of integration." Such judicially driven

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[18] Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law Text and Materials* (Cambridge: Cambridge University Press, 2014).
[19] Robert Schuman, "The Schuman Declaration," 9 May 1950. Available at: https://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration_en.
[20] Walter Hallstein, "Die EWG- Eine Rechtsgemeinschaft. Rede anlässlich der Ehrenpromotion an der Universität Padua on 12 March 1962," *in* Thomas Oppermann (ed.), *Europäische Reden* (Stuttgart: Deutsche Verlags-Anstalt, 1979). See also Thomas von Danwitz, "The Rule of Law in the Recent Jurisprudence of the ECJ," 37, 5, *Fordham International Law Journal* (2014), pp. 1312-1313.
[21] Case 294/83, *Parti écologiste Les Verts v European Parliament*, 23 April 1986, ECLI:EU:C:1986:166 para. 23.
[22] Joseph, Weiler, "The Transformation of Europe," 100, *The Yale Law Journal* (1991), p. 2422.

constitutionalization during the Foundational Period, established the foundational doctrines of Direct Effect; Primacy; Implied Powers and Human Rights. In *Van Gend & Loos* and *Costa v ENEL*, the Court established the principle of primacy of the EU law.[23] According to the Court:

> "*The founding treaties of the EU*, *unlike ordinary international treaties*, *established a new legal order*, *possessing its own institutions*, *for the benefit of which the Member States thereof have limited their sovereign rights*, *in ever wider fields*, *and the subjects of which comprise not only those States but also their nationals*."[24]

In the face of a growing legitimacy deficit on the Community level, in *Internationale Handelsgesellschaft*, the Court incorporated the protection of fundamental rights as general principles of EC law.[25] Furthermore, when faced the political inertia in constructing the internal market, it was the Court that stepped in with its doctrine of mutual recognition in *Cassis de Dijon*.[26] The "constitutionalization" of the Community legal structure and the judicial review granted by the Court of Justice curtailed the ability of the Member States to practice a selective application of the *acquis communautaire*, as well as limited their abilities to violate or disregard their binding obligations under the Treaties and the laws adopted by Community institutions.[27]

As a result of the success of the European Communities, which indeed brought about peace and prosperity amongst its Member States, in the 1970s, a number of European states, some of which achieved transitions to democracies, requested to join the process of European integration. Then, in 1973, at the Copenhagen Summit, Member States of the European Communities felt the need to draft a "Declaration on European Identity" in order to underline that the first enlargement of the Communities was not resuming the values that inspired European integration.[28] In particular, a

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[23] Case C 26/62, *Van Gend & Loos*, 5 February 1963, ECLI:EU:C:1963:1; Case C 6/64, *Costa v ENEL*, 15 July 1964, ECLI:EU:C:1964:66.
[24] Case C 26/62, *Van Gend & Loos*, 5 February 1963, ECLI:EU:C:1963:1; Case C 6/64, *Costa v ENEL*, 15 July 1964, ECLI:EU:C:1964:66.
[25] Case C 11/70, *Internationale Handelsgesellschaft*, 17 December 1970, ECLI:EU:C:1970:114, para. 4; Giuseppe Federico Mancini, "Safeguarding Human Rights: The Role of the European Court of Justice," *in* Giuseppe Federico Mancini (ed.), *Democracy and Constitutionalism in The European Union* (Oxford: Hart Publishing, 2000), p.81.
[26] Case C 120/78, *Rewe Zentral*, 20 February 1979, ECLI:EU:C:1979:4.
[27] Joseph, Weiler, "The Transformation of Europe," 100, *The Yale Law Journal* (1991), p. 2422.
[28] The Copenhagen Summit Conference, "Declaration on European Identity," 14 December 1973. Available at: https://www.cvce.eu/content/publication/1999/1/1/02798dc9-9c69-4b7d-b2c9-f03a8db7da32/publishable_en.pdf.

country that could meet the entry criteria to join the EU was presumed to retain its constitutional democratic commitments over the long haul.[29]

When the Berlin wall fell in 1989, more than a dozen of Central Eastern European states (CEEs) began their transitions to democracies. Some of them also wished to become members of the European Communities. In this regard, in 1993, the European Council established the "Copenhagen Criteria," which set up strict and demanding conditions for the accession of the CEEs. The "Copenhagen Criteria" requires that all candidate States seeking membership respect certain basic principles of the European Community, including democracy, the rule of law, human rights protection, respect for and protection of minorities.[30] By setting up these preventative mechanisms, the EC expected to minimize the risk of a rule of law crisis.[31]

The signing of the Maastricht Treaty was "a giant leap forward" of the European Integration, which not only established the European Union and the three-pillar structure, but also proclaimed that the European integration process had ceased from being a pure economic project, given the inclusion of social, cultural and political objectives in the TEU.[32] As a founding legal document, the Maastricht Treaty also recognized the basic principles of democracy and protection of human rights under Article F TEU,[33] which had already become settled case-law of the Court of Justice. In particular, the second paragraph of Article F highlighted that these basic principles "*result from the constitutional traditions common to the Member States*." These basic principles were reaffirmed and enlarged later in Article 6 of the Treaty of Amsterdam.[34] For instance, rule of law was mentioned for the first time.

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[29] European Commission, Communication from the Commission to the European Parliament and the Council, *Commission Opinion on Bosnia and Herzegovina's application for membership of the European Union* {SWD(2019) 222 final}, 29 May 2019, pp. 1-184. Available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-bosnia-and-herzegovina-opinion.pdf.

[30] European Council, "Conclusions of the Presidency," SN 180/1/93 REV 1, 22 June 1993. Available at: https://www.consilium.europa.eu/media/21225/72921.pdf.

[31] Christophe Hillion, "The Copenhagen Criteria and Their Progeny," *in* Christophe Hillion (ed.), *EU Enlargement* (Oxford: Hart Publishing 2004).

[32] *Treaty on European Union* (*The Maastricht Treaty*), *OJ C* 191, 29 July 1992, pp. 1–112. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A11992M%2FTXT.

[33] Article F TEU (1992): "*1. The Union shall respect the national identities of its Member States*, *whose systems of government are founded on the principles of democracy*. *2. The Union shall respect fundamental rights*, *as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States*, *as general principles of Community law*."

[34] *Treaty of Amsterdam Amending the Treaty on European Union*, *OJ C* 340, 10 November 19 97, pp. 1-144. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A1199 7D%2FTXT. Article 6 TEU (1997): "*1. The Union is founded on the principles of liberty*, *democracy*, *respect for human rights and fundamental freedoms*, *and the rule of law*, *principles which are common to the Member States*. *2. The Union shall respect fundamental rights*, *as guaranteed by the European Convention for the Protection of Human Rights and Fundamental*

During the revision of the Treaty of Nice, these basic principles of the EU law were referred to as values of the Union both in the preparatory work of the Convention on the Future of Europe and in the document *Pénélope*, which in reality was the draft of the Constitutional Treaty presented by the European Commission.[35] The *Pénélope* project proposed to qualify the European Union as a "community of values."[36] Subsequently, resulting from the convention, the draft constitutional treaty, was much less ambitious in this respect. It never spoke of a community of values, but at the beginning of the treaty it stated in Article 2 TCE the "values of the Union."[37]

The Treaty of Lisbon adopted the revisions in the draft Constitutional Treaty, which replaced the idea of basic principles of the EU with explicit reference to values in Article 2 TEU.[38] In the first place, the Treaty of Lisbon incorporates several new features to the European values. First, Article 2 TEU adds the protection of persons belonging to minorities. Second, European religious heritage is recognized as part of the European value. In this regard, although it is not enumerated on Article 2 TEU, paragraph 2 of the preamble to the TEU states that the Member States are inspired by the religious heritage of Europe and recognize that heritage is the source of the values stated therein.[39] In the second place, values in Article 2 TEU are endowed with normative legal relevance, which are more than the principles of the former Article 6 (1) TEU in the previous Treaties. In this regard, the Charter of Fundamental Rights of the European Union (CFR) is given the same legal value as the TEU and TFEU,[40]

Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law. 3. The Union shall respect the national identities of its Member States. 4. The Union shall provide itself with the means necessary to attain its objectives and carry through its policies."

[35] Marie Lagarrigue, Paolo Stancanelli, Pieter Van Nuffel, Alain Van Solinge, *Projet Pénélope: contribution à un avant-projet de Constitution européenne* (François Lamoureux's Working Group, 4 December 2002). Available at: http://202.171.253.71:9999/ec.europa.eu/archives/emu_history/documents/treaties/Penelope%20pdf_en.pdf.

[36] See *Ibid*., Article premier Union européenne (1): "*L'Union européenne est constituée par les États et les peuples européens qui partagent de façon solidaire une même communauté de valeurs et s'engagent à promouvoir la paix, la sécurité et le progrès en Europe et dans le monde*."

[37] *Treaty establishing a Constitution for Europe*, *OJ* C 169, 16 December 2004, pp. 1-150. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52003XX0718%2801%29. Article I-2 TCE: "*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail*."

[38] *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, *OJ* C 306, 17 December 2007, pp. 1-271. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12007L%2FTXT.

[39] Paragraph 2 Preamble TEU: "*DRAWING INSPIRATION from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law*."

[40] *The Charter of Fundamental Rights of the European Union*, *OJ* C 326, 26 October 2012, pp. 391-407. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:12012P/TXT.

which makes it legally binding, and the EU's unwritten fundamental rights will continue to apply as general principles of EU law.[41]

Besides, Article 2 TEU has at least six main elements of legal relevance: (a) it is a condition of admission of a candidate State's application for membership, pursuant to Article 49 TEU;[42] (b) Article 7 TEU replaces the reference to fundamental principles by reference to values, in order to allow EU institutions to sanction Member States who perform serious breach or manifest risk of a breach of these values;[43] (c) the preservation of values is one of the primary objectives of the EU under Article 3(1) TEU;[44] (d) the values in Article 2 TEU are "universal," which are rooted in "the cultural, religious and humanist heritage of Europe" - recital 2 of the preamble to TEU,[45] and are "common to the Member States;" (e) EU must also respect the values with respect to the Common Foreign and Security Policy (CFSP) according to Article 3(5) of the TEU.[46] As a result, Article 2 of the TEU has become a key article in the new treaties, since it was placed at the heart of the "common provisions," even before the objectives of the Union.

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[41] Article 6 TEU: "*1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. 3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.*"

[42] Article 49 TEU: "*Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. The European Parliament and national Parliaments shall be notified of this application. The applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members. The conditions of eligibility agreed upon by the European Council shall be taken into account.*"

[43] Article 7 (1) TEU: "*On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2.*"

[44] Article 3 (1) TEU: "*The Union's aim is to promote peace, its values and the well-being of its peoples.*"

[45] Paragraph 2 Preamble TEU: "*DRAWING INSPIRATION from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law.*"

[46] Article 3 (5) TEU: "*In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.*"

1.1 Rule of Law in the European Union

Rule of law guarantees the success of democracy and protection of fundamental rights.[47] In the context of national democracies, rule of law can be defined as legality (including a transparent, accountable and democratic process for enacting law); legal certainty; prohibition of arbitrariness; access to justice before independent and impartial courts; respect for human rights; non-discrimination and equality before the law.[48] According to a classic "thin" understanding, rule of law functions as a power-limiting principle, which requires all authorities exercising public power to act according to law, so as to avoid arbitrary power.[49]

Among the many attributes of the rule of law, Vice-President of European Commission, Frans Timmermans refers to judicial independence as an essential element of the rule of law.[50] Thus, the guarantee for judicial independence is a legal obligation at the core of the rule of law.[51] An independent and impartial judicial system is essential for ensuring the protection of human rights and fundamental freedoms. The independence of the judiciary is enshrined in a number of international and regional human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR) and the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[52] Both instruments provide that everyone is entitled to a fair and public hearing by an independent and impartial tribunal established by law.[53]

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[47] United Nations Office of the High Commissioner for Human Rights, "Rule of Law - Democracy and Human Rights," available at: https://www.ohchr.org/en/Issues/RuleOfLaw/Pages/Democracy.aspx.

[48] Venice Commission, *Rule of Law checklist Adopted by the Venice Commission at its 106th Plenary Session*, CDL-AD(2016)007, 11-12 March 2016. Available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)007-e.

[49] Albert Venn Dicey, "The Law of the Constitution: Lectures Introductory to the Study of the Law of the Constitution," *in* J.W.F. Allison (ed.), *The Law of the Constitution* (Oxford: Oxford University Press 2013).

[50] European Commission, Communication from the Commission to the European Parliament, the European Council and the Council *Further strengthening the Rule of Law within the Union-State of play and possible next steps*, COM (163) final, 3 April 2019, p 2. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52019DC0163.

[51] European Commission, Communication from the Commission to the European Parliament, the European Council, the Council, *the European Economic and Social Committee and the Committee of the Regions*, *Strengthening the rule of law within the Union- A blueprint for action*, COM (2019) 343 final, 17 July 2019, p 5. Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM%3A2019%3A343%3AFIN.

[52] *International Covenant on Civil and Political Rights*, 999 United Nations Treaty Series 171, 16 December 1966, pp. 172- 346. Available at: https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf; *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Council of Europe Treaty Series No. 5, 3 September 1953, pp. 1-13. Available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005.

[53] Article 14 (1) ICCPR: "*...everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law*."; Article 6 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...*"

In the context of EU law, aside from serving as the force of integration, rule of law has different meanings than in the context of national law. EU law is a transnational law that stems from an independent source of law, the Treaties, which distinguishes itself from ordinary international treaties by establishing a new legal order, possessing its own institutions, for the benefit of which the Member States thereof have limited their sovereign rights.[54] As has been established in *Van Gend & Loos* since the 1950s,[55] such independent legal order maintains primacy over the laws of the Member States, and has direct effect of not only those Member States but also their nationals.[56] Those characteristics have given rise to a structured network of principles, rules and mutually interdependent legal relations binding the EU and its Member States reciprocally and binding its Member States to each other.[57] Thus, *Halberstam* views the EU legal order as a hydraulic system whose functioning depends on three interrelated conditions: a common set of values and similar level of fundamental rights protection throughout the Union; the Union's ability to effectively remedy violations of its values at Member State level; and a safety valve for the ECJ to invoke overriding policy justifications where compliance with mutual trust would otherwise tear the Union apart.[58]

Rule of law in the EU legal order has evolved from being "principles of legality, legal certainty, confidence in the stability of a legal situation, and proportionality,"[59] to become one of the values of EU shared by all Member States under Article 2 TEU, which also appears on the Preambles of both the TFEU and the CFR. Nevertheless, the definition of rule of law in the EU law context has been a complicated task. *Burlyuk* argues that the definition of rule of law is a deliberate choice to be vague and indeed "defining the rule of law is almost ridiculous.[60] *Pech* and *Platon* hold that the legal importance of the rule of law in the EU system makes it not only as a value and an objective that the EU has a mandate to enforce but also as a functional necessity.[61] In

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[54] Case C 26/62, *Van Gend & Loos*, 5 February 1963, ECLI:EU:C:1963:1; Case C 6/64, *Costa v ENEL*, 15 July 1964, ECLI:EU:C:1964:66.
[55] Rafał Mańko, *Briefing on The EU as A Community of Law Overview of the Role of Law in the Union* (European Parliamentary Research Service, March 2017), p. 2. Available at: http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/599364/EPRS_BRI(2017)599364_EN.pdf.
[56] Opinion 2/13, *Accession of the EU to the ECHR*, 18 December 2014, EU:C:2014:2454, para. 165-167.
[57] *Ibid*.
[58] Daniel Halberstam, "'It's the Autonomy, Stupid!' A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward," 16, 1, *German Law Journal* (2015), p 131.
[59] Thomas von Danwitz, "The Rule of Law in the Recent Jurisprudence of the ECJ," 37, 5, *Fordham International Law Journal* (2014), pp. 1311-1314.
[60] Olga Burlyuk "Variation in EU External Policies as A Virtue: EU Rule of Law Promotion in the Neighbourhood," 53, 3, *Journal of Common Market Studies* (2015), pp. 509-523.
[61] Laurent Pech and Sébastien Platon, "Systemic Threats to the Rule of Law in Poland: Between Action and Procrastination," 451, *Fondation Robert Schumam* (2017).

this regard, *Smith* conceptualizes the rule of law in the context of transnational law within the EU from the following three aspects.[62]

First, the rule of law is a power-limiting norm, which acts as a constitutional principle that limits the use of arbitrary public power, upholding separation of powers and checks and balance between the EU institutions. Therefore, rule of law provides a guarantee on the democratic legitimacy of the EU. Second, the rule of law is a tool of EU integration, which is used as a functional policy tool to ensure adherence to EU policies.[63] Thus, rule of law has functional utility to promote the fundamental integrationist agenda of the EU. On the one hand, rule of law is a precondition for EU membership under Article 49 TFEU. On the other hand, rule of law is a disciplinary tool under Article 7 TEU, which allows the European Council to suspend the voting rights of Member States who "systemically breach" the rule of law. However, in light of the challenges to the rule of law in Hungary and Poland, *Smith* also worries that the functionality of rule of law may enable the EU institutions (particularly the ECJ) to expand is competence beyond what has been designated in the Treaties to ensure the obeyance of the Member States.[64] Third, the rule of law has a moral aspect as a "value," which is distinctive from the utility aspect of the second element. *Smith* argues that the respect of rule of law (we are the good people/polity/club because we respect the rule of law) forms part of the identity of the western culture, which is premised on association of a polity with classic western liberal values such as tolerance and pluralism.[65]

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[62] Melanie Smith, "Staring into the Abyss: A Crisis of the Rule of Law in the EU," 25, 6, *European Law Journal* (November 2019), p. 566.
[63] See Stuart A. Scheingold, *The Rule of Law in European Integration: The Path of the Schuman Plan* (New Orleans: Quid Pro Books, 2013); Giandomenico Majone, *Rethinking the Union of Europe Post-Crisis: Has Integration Gone Too Far?* (Cambridge: Cambridge University Press, 2014).
[64] Melanie Smith, "Staring into the Abyss: A Crisis of the Rule of Law in the EU," 25, 6, *European Law Journal* (November 2019), p. 566.
[65] *Ibid.*, p. 563.

Chapter 2: The Rule of Law Backsliding in Hungary and Poland

During the past decade, both Hungary and Poland adopted a series of illiberal reforms that produced the effect of rule of law backsliding, which threatened the Union's very foundations.[66] These developments have led to a fundamental shift in the relationship between the EU and its Member States, since initially, it was the EU itself that posed somewhat of a "threat" to fundamental rights, democracy, and the rule of law in the Member States.[67] *Pech* and *Scheppele* defines the rule of law backsliding as

> "*the process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party*."[68]

To reach those stated goals, the ruling power must be able to capture:

> "*the executive and legislative branches, but also the media, the judiciary, civil society, the commanding heights of the economy, and the security forces*."[69]

Tan regards the rule of law backsliding as the hallmark of totalitarianism to misuse the State apparatus and criminal justice system to suppress the opposition, civil society and other voices of dissent.[70] On such basis, *Drinoczi* and *Kacala* further contends that Poland and Hungary had established illiberal constitutionalism, which allows a populist political majority lacking self-restraint to develop an illiberal democracy, and transform a liberal constitutionalism to an illiberal one, by capturing the constitution and constitutionalism with legal means such as formal and informal constitutional change and packing and paralyzing the constitutional court.[71]

In this regard, the ruling power seeks to "fundamentally undermine pluralism and create a *de facto* one-party state where changes in government through fair and honest

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[66] Laurent Pech and Kim Lane Scheppele, "Illiberalism Within: Rule of Law Backsliding in the EU," 19, 3, *Cambridge Yearbook of European Legal Studies* (2017).
[67] Luke Dimitrios Spieker, "Breathing Life into the Union's Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis," 20, 8, *German Law Journal* (2019), p.1183.
[68] Laurent Pech and Kim Lane Scheppele, "Illiberalism Within: Rule of Law Backsliding in the EU," 19, 3, *Cambridge Yearbook of European Legal Studies* (2017), p. 8.
[69] Arch Puddington, *Breaking Down Democracy: Goals*, *Strategies*, *and Methods of Modern Authoritarians* (Freedom House, 2017), p 1. Available at: https://freedomhouse.org/sites/default/files/June2017_FH_Report_Breaking_Down_Democracy.pdf.
[70] Floris Tan, "The Dawn of Article 18 ECHR: a Safeguard against European Rule of Law Backsliding?" 9, 1, *Goettingen Journal of International Law* (2018), p. 120.
[71] Timea Drinoczi and Agnieszka Bien-Kacala, "Illiberal Constitutionalism: The Case of Hungary and Poland," 20, 8, *German Law Journal* (2019), p. 1141.

elections become all but impossible." Thus, to establish a one-party state, the ruling power must abolish the principle of separation of power between all branches of the government, and to place them in its total control. The ruling power might easily control the executive and legislative branch, since they are political institutions in nature. The judiciary is much more complicated due to its non-political nature. Therefore, the judiciary has become the primary target of the illiberal reforms in Hungary and Poland, despite the fact that the idea of judicial independence has been an important hook for international intervention to limit backsliding.[72]

2.1 The Challenges to Judicial Independence in Hungary

The Constitution of the Republic of Hungary was adopted on 20 August 1949 and Hungary was the only former CEEs that did not adopt an entirely new Constitution after the fall of Communism.[73] When the *Fidesz* (Alliance of Young Democrats-Hungarian Civic Union) came to power in 2010 with two-thirds of the seats in Parliament, it took advantage of the constitutional majority and passed the Hungarian Fundamental Law on 18 April 2011, which took effect on 1 January 2012.[74]

On the basis of the New Fundamental Law, the Hungarian government led by prime minister *Viktor Orbán* has adopted a number of measures to target the independence of its judiciary. First, the Hungarian government sought to remove those judges who defies the illiberal reforms by passing laws to lower the retirement age in the judiciary, which has immediate effects.[75] Before 1 January 2012, judges were allowed to remain in office until the age of 70. After 1 January 2012, judges must immediately retire upon reaching the applicable retirement age-limit.[76] Therefore, judges who had reached the age of 62 before 1 January 2012 had to retire on 30 June 2012 and judges who reach that age during 2012 have to retire on 31 December 2012.[77] One of the prominent judges removed from the judiciary was the President of the Supreme Court, András

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[72] Tom Ginsburg, "International Courts and Democratic Backsliding," 37, 2, *Berkeley Journal of International Law* (2019), p. 276.

[73] Péter Balázs, András Bozóki, Ştefan Catrina, Adelina Gotseva, Julius Horvath, Donika Limani, Bogdan Radu, Ágnes Simon, Áron Szele, Zselyke Tófalvi and Krisztina Perlaky-Tóth, *25 Years after the Fall of the Iron Curtain: The State of Integration of East and West in the European Union* (Luxembourg: Publications Office of the European Union, 2014).

[74] Freedom House, "Nations in Transit 2012 - Hungary," 6 June 2012. Available at: https://www.refworld.org/docid/4fd5dd2ec.html.

[75] Article 57(2) of the Act LXVI of 1997 on the Organisation and Administration of Courts (*a bíróságok szervezése és igazgatója*), 23 March 1997.

[76] Article 90(ha) of Act CLXI of 2011 on the Organisation and Administration of the Courts (*a bíróságok szervezése és igazgatója*), Magyar Közlöny Page number: 34046-34087, 2 December 2011. English version Available at: https://www.legislationline.org/download/id/7026/file/Hungary_Act_organisation%20and%20administration%20of%20courts_2011_en.pdf.

[77] Article 230 of Act CLXI of 2011.

Baka, who fiercely criticised the Hungarian government's efforts to undermine the independence of the judiciary. Subsequently, the early dismissal of András Baka was found illegal by the ECtHR in *Baka v. Hungary*, in which the human rights court ruled that András Baka's right to access to a court and also his freedom of expression had been violated Article 6 and Article 10 of the ECHR.[78] On 16 July 2012, the Hungarian Constitutional Court (*Alkotmánybíróság*) declared the change to the retirement age for judges to be unconstitutional and repealed that part of the legislation.[79] Its decision has retroactive effect from 1 January 2012, but this does not automatically mean that the judges already compelled to retire will be reinstated in their posts, since they must apply to the competent Hungarian courts to secure such reinstatement. In fact, the majority of the removed judges did not return to their original posts, partly because their previous positions had already been filled.[80]

Second, the Hungarian government created another institution over the judiciary, the National Judicial Office (NJO), aside from the existing National Judicial Council (NJC). The Hungarian government claims that NJO could reduce the workload of the NJC. According to the Opinion by the Venice Commission, the NJO and the NJC were involved in a series of conflicts since 2018.[81] In May 2018, the NJC filed a report blaming the president of the NJO for her unlawful practices in previous years' decisions. The NJO President responded that the NJC was illegitimate because it did not represent all types of court. In May 2019, the NJC presented a motion to the Parliament requesting the removal of the NJO President on the grounds that she had breached her duties and had become unworthy of the office. The Parliament voted down the NJC's motion. In March 2019, at the NJO President's motion, the Hungarian Ombudsperson referred a question to the HCC on the functionality of the NJC in its reduced capacity.

Since 2018, the *Fidesz*-led Parliament had planned to set up a separate administrative court system that would have jurisdiction over taxation; public procurement and other economic matters; as well as elections, freedom of assembly, asylum, and other human rights issues.[82] On 29 June 2018, the Hungarian Parliament

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[78] ECtHR, *Baka v. Hungary*, 14 March 2012, Application no. 20261/12.
[79] Hungary Constitutional Court, Decision No 33/2012 (VII.17), 16 July 2012.
[80] International Bar Association's Human Rights Institute, "Still under threat: the independence of the judiciary and the rule of law in Hungary," October 2015. Available at: https://www.ibanet.org/Document/Default.aspx?DocumentUid=a00b5f64-4b05-4b25-81c6-5e507c45cc74.
[81] Venice Commission, *Opinion on the new Constitution of Hungary adopted by the Venice Commission at its 87th Plenary Session Adopted by the Venice Commission at its 87th Plenary Session*, CDL-AD(2011)016, 17-18 June 2011. Available at: https://www.venice.coe.int/webforms/documents/CDL-AD(2011)016-E.aspx.
[82] Amnesty International, "Constitutional Crisis in the Hungarian Judiciary," 9 July 2019. Available at: https://www.helsinki.hu/wp-content/uploads/A-Constitutional-Crisis-in-the-Hungarian-Judiciary-09072019.pdf.

passed the seventh amendment, which established a distinction between ordinary law courts and administrative courts. Then, the Law of 12 December 2018 established a Supreme Administrative Court, replacing the regional courts to handle appeals lodged against judgments handed down by administrative courts and labour tribunals.[83] However, this reform has received heavy criticisms from the Venice Commission, the European Commission, the Council of Europe, and the UN Special Rapporteur on the Independence of Judges and Lawyers. As a compromise, the Hungarian parliament first postponed, then dropped the new law in November 2019. On 12 December 2019, Parliament adopted a 200-page so-called "omnibus bill," amending various legal provisions pertaining to the court system and the status of judges. According to Amnesty International, the "omnibus bill" was designed to guarantee judicial decisions favourable to the government in politically sensitive cases even without setting up a separate administrative court system.[84]

2.2 The Challenges to Judicial Independence in Poland

The judicial reform in Poland has begun since the conservative Law and Justice party (*Prawo i Sprawiedliwość party*, referred in Polish as *PiS* party) won the general election in October 2015, with a majority of the seats in both the *Sejm* (the Polish parliament) and the Senate (*Senat Rzeczypospolitej Polskie*).[85] Since the *PiS* party obtained control over the executive and legislative branch of the government, it began to target the judiciary. The *PiS* party contended the previous judicial nomination process failed to provide any oversight of the judiciary, breeding corruption and allowing ex-Communists to remain on the bench.[86] The *PiS* party complained that the Constitutional Tribunal was composed of judges appointed either before 1989 or by a former communist-Kwainiewski.[87] However, although the *PiS* party was the first party

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[83] Venice Commission, *Hungary Opinion on The Law on Administrative Courts and On the Law on The Entry into Force of The Law on Administrative Courts and Certain Transitional Rules Adopted by the Venice Commission at its 118th Plenary Session*, CDL-AD(2019)004, 15-16 March 2019. Available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)004-e.

[84] Amnesty International, "Fearing the Unknown How Rising Control is Undermining Judicial Independence in Hungary," 6 April 2020, p. 15. Available at: https://www.amnesty.eu/wp-content/uploads/2020/04/FINAL_Fearing-the-Unknown_report_Amnesty-Hungary_E1.pdf.

[85] The PiS party won 235 out of the 460 seats in the *Sejm* and 61 out of 100 seats in the Senate; see also Wybory do Sejmu i Senatu Rzeczypospolitej Polskiei 2015 (Elections to the Seim and the Senate of the Republic of Poland 2015), available at: http://parlament20l5.pkw.gov.pl/349_wyniki_sejm; The Guardian, "Right Wing Law and Justice Party Wins Overall Majority in Polish Election," 27 October 2015. Available at: https://www.theguardian.com/world/2015/oc t/2 7/poland-law-justice-party-wins-235-seats-can-govern-alone.

[86] BBC News, "Poland MPs Back Controversial Judiciary Bill," 15 July 2017. Available at: http://www.bbc.com/news/world-europe-40617406.

[87] Aviezer Tucker, *The Legacies of Totalitarianism: A Theoretical Framework* (Cambridge: Cambridge University Press, 2015), pp. 113-115.

to control the legislature without a coalition partner, it did not have the two-thirds majority required to make constitutional changes.[88] Thus, the *PiS* party could only introduce reforms under the existing constitutional framework. According to the June 2018 report presented to the Human Rights Council of the UN General Assembly by the UN Special Rapporteur on the Independence of Judges and Lawyers the *PiS* party adopted a two-phased reform that has undermined the independence of the judiciary in Poland.[89]

In the first phase, it took few actions to bring the Polish Constitutional Tribunal in its *de facto* control.[90] In October 2015, the outgoing PO (*Platforma Obywatelska*, Civic Platform)-led government appointed five judges to replace five judges retiring in 2015, among which three to replace judges leaving on 6 November 2015 and two to replace those whose tenure would expire on 2 and 8 December 2015. After the *PiS* party came to power, President Duda refused to accept the oath of the five new judges. The new *PiS*-controlled government appointed five new judges and passed a resolution to nullify the appointments of the PO-appointed five. A subsequent ruling by the Constitutional Tribunal held that the appointment of three judges retiring before the assumption of office by the *PiS*-led government was constitutional, while the two judges retiring after was not. In another ruling, the Constitutional Tribunal reasoned that the beginning of the constitutional judges' term of office is their appointment by the *Sejm*, instead of the moment of the oath-taking before the President of the Republic. Consequently, the Constitutional Tribunal admitted the two judges appointed by the *PiS* party, and dismissed the three judges who were to replace the three judges whose term expired in November, bringing its total members to 12 instead of the 15 required by the Constitution. For a period, there were three "double-judges" the three PO appointments ruled by the Constitutional Tribunal to be legitimate and three others made by the *PiS*-led government.

Moreover, The *PiS*-led government refused to publish and implement rulings of the Constitutional Tribunal.[91] On 22 December 2015, the *Sejm* amended the Act on the

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[88] Anne Sanders and Luc von Danwitz, "Selecting Judges in Poland and Germany: Challenges to the Rule of Law in Europe and Propositions for a New Approach to Judicial Legitimacy," 19, 4, *German Law Journal* (2018), p.773.

[89] Diego Garcia-Sayan, *Report of the Special Rapporteur on the Independence of Judges and Lawyers on his Mission to Poland*, U.N. Doc.A/HRC/38/38/Add. 1, April 5, 2018, para. 22. Available at: https://undocs.org/en/A/HRC/38/38/Add.1.

[90] Urszula Jaremba, "The Rule of the Majority vs. the Rule of Law: How Poland Has Become the New Enfant Terrible of the European Union," 2016, 3, *Tijdschrift voor Constitutioneel Recht* (2016), pp. 262-274.

[91] See Venice Commission, *Poland Opinion on the Act on the Constitutional Tribunal Adopted by the Venice Commission at its 108th Plenary Session*, CDL-AD(2016)026, 14-15 October 2016. Available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)026-e.

Constitutional Tribunal, which increased the attendance quorum for adjudicating cases in full bench (13 out of 15 judges), required a two-thirds majority to issue judgments by the full panel of judges, introduced the "sequence rule" for the handling of cases in chronological order and set a minimum delay for hearings. On 9 March 2016, the Constitutional Tribunal, sitting in a panel of 12 judges without applying such amendments, declared the amendments of 22 December 2015 unconstitutional in their entirety. On 22 July 2016, the *Sejm* adopted a new Act on the Constitutional Tribunal, which lowered the quorum for plenary session from 13 to 11 judges, reintroduced the majority vote for the adoption of decisions, introduced exceptions to the "sequence rule" and reduced the minimum delays for hearings.[92] However, the Act also allowed the Prosecutor-General to block the consideration of politically sensitive cases with his/her absence and those concerning the postponement of a case for up to six months upon request by four judges. On 11 August 2016, the Constitutional Tribunal found that the Act on the Constitutional Tribunal of 22 July 2016 were partially unconstitutional, as they infringed the independence of the judiciary and the principles of separation and balance of powers. The *PiS*-led government did not recognize the validity of both judgments and did not publish them in the Official Journal.

Furthermore, at the end of 2016, when the term of office of the President of the Constitutional Tribunal was about to expire, the *Sejm* adopted three new acts on the work of the Tribunal.[93] These new acts, (a) brought the Act of the Constitutional Tribunal of 22 July 2016 ceased to exist; (b) allowed the President of the Republic to appoint "acting President" of the Constitutional Tribunal, which enabled the three "December judges" to take up their functions; (c) permit the President of the Republic to launch disciplinary proceedings against judges and retired judges of the Tribunal on the motion of the Prosecutor-General; (d) raised possibility of early retirement for Constitutional Tribunal judges by encouraging the current judges to resign in advance of the end of their term of office.

In the second phase, the *PiS*-controlled *Sejm* adopted a number of legislative acts to modify the composition and functioning of the main judicial institutions in the country: the common court system, the Supreme Court and the National Council of the

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[92] The Act on the Organisation of the Constitutional Tribunal and the Mode of Proceedings Be fore the Constitutional Tribunal (*Organizacja i tryb postępowania przed Trybunałem Konstytucyj nym*), *Dz.U*. 2016.2072, 19 December 2016. English version available at: https://www.legislation line.org/download/id/7036/file/Poland_law_organisation_constitutional_tribunal_mode_of_proceeding s_2016_en.pdf.

[93] Diego Garcia-Sayan, *Report of the Special Rapporteur on the Independence of Judges and Lawyers on his Mission to Poland*, U.N. Doc.A/HRC/38/38/Add. 1, April 5, 2018, para. 22. Available at: https://undocs.org/en/A/HRC/38/38/Add.1.

Judiciary.[94] First, the 2017 Act amending the Act on the Organisation of Ordinary Courts empowers the Minister of Justice to dismiss presidents and vice-presidents of the common courts and to appoint their replacements at his own discretion, which can only be blocked by the *KRS* in qualified majority of two thirds of its members. As a result, 160 presidents of ordinary courts were dismissed.[95] Second, the 2017 Law on the Supreme Court,[96] on the one hand, lowers the mandatory retirement age for the judges of the Supreme Court from seventy to sixty-five. However, judges who wish to remain on the bench may request the President of the Republic to extend their term twice, each for a three-year period. These provisions were repealed amid the criticisms from the EU, the Venice Commission and the UN Special Rapporteur on the Independence of Judges and Lawyers.[97]

On the other hand, the 2017 Law on the Supreme Court creates two new chambers within the Supreme Court: The Disciplinary Chamber and the Chamber for Extraordinary Control and Public Affairs (*Izba Kontroli Nadzwyczajnej i Spraw Publicznych*). The Disciplinary Chamber has powers and procedures regarding disciplinary proceeding and could launch disciplinary investigations against the judges of the Supreme Court to deter national judges from making preliminary references to the ECJ.[98] The Chamber for Extraordinary Control and Public Affairs has jurisdiction

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[94] Venice Commission, *Poland Joint Urgent Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law* (*Dgi*) *Of the Council of Europe on Amendments to the Law on the Common Courts*, *the Law on The Supreme Court*, *and Some Other Laws*, CDL-PI(2020)002, 16 January 2020. Available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2020)002-e.

[95] The Act on the Organisation of Ordinary Courts (*Zmianie ustawy - Prawo o ustroju sądów powszechnych*) *Dz.U.*2016.2062, 16 November 2016. English version available at: https://www.legislationline.org/download/id/7484/file/Poland_Law_Common_Court_Organisation_2001_am2017_en.pdf; see also Diego Garcia-Sayan, *Report of the Special Rapporteur on the Independence of Judges and Lawyers on his Mission to Poland*, U.N. Doc.A/HRC/38/38/Add. 1, April 5, 2018, para. 29. Available at: https://undocs.org/en/A/HRC/38/38/Add.1.

[96] The Law on the Supreme Court (*Ustawy o Sqdzie Najwy*), *Dz.U*. 2018.1045, 16 June 2018. English version available at: https://www.legislationline.org/download/id/8518/file/Poland_Act_on_the_Supreme_Court_2017_am2019_en.pdf.

[97] See European Commission Press release, "Rule of Law: Commission launches infringement procedure to protect the independence of the Polish Supreme Court," 2 July 2018. Available at: https://europa.eu/rapid/press-release_IP-19-1957_en.htm; Venice Commission, *Poland Opinion on the Draft Act Amending the Act on the National Council of The Judiciary*, *on the Draft Act Amending the Act on the Supreme Court*, *Proposed by the President of Poland*, *and on the Act on the Organisation of Ordinary Courts Adopted by the Venice Commission at its 113th Plenary Session*, CDL-AD(2017)031, 8-9 December 2017. Available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)031-e; Diego Garcia-Sayan, *Report of the Special Rapporteur on the Independence of Judges and Lawyers on his Mission to Poland*, U.N. Doc.A/HRC/38/38/Add. 1, April 5, 2018. Available at: https://undocs.org/en/A/HRC/38/38/Add.1.

[98] See the letter of the Polish Deputy Disciplinary Officer Lasota addressed to Lodz Regional Court judge Igor Tuleya, 13 December 2018. Available at: www.iustitia.pl/en/2722-polishdisciplinary-prosecutor-michal-lasota-launched-a-case-against-judge-igor-tuleya-who-sent-pre-judicial-queries-to-luxembourg; and letter of the Polish Deputy Disciplinary Officer Lasota addressed to Warsaw Regional Court judge Ewa Maciejewska, 12 December 2018. Available at: www.iustitia.pl/en/2714-

over “extraordinary appeals” that could reopen past judgments without limitation to discovery of new facts.[99]

Lastly, prior to the 2018 Law on the National Council of the Judiciary, the *KRS* consisted of the Minister of Justice, four *Sejm* members, two senators, one presidential appointee, the First President of the SC, the President of the Supreme Administrative Court, and fifteen other judges selected by the judiciary. The 2018 Law on the National Council of the Judiciary replaced the fifteen judicial representatives that should have been selected by their peers in different general assemblies of judges with a qualified majority of the *Sejm*.[100] The new law also provided that the term for the fifteen current judge members would end in February 2018 (the time of election), regardless of where they were in the four-year terms.[101] In this regard, effectively 21 of the 25 members of the *KRS* were now elected by *PiS*-controlled Parliament.[102]

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polishdisciplinary-prosecutor-michal-lasota-launched-a-caseagainst-judge-ewa-maciejewska-who-sent-pre-judicial-queries-to-luxembourg.

[99] Diego Garcia-Sayan, *Report of the Special Rapporteur on the Independence of Judges and Lawyers on his Mission to Poland*, U.N. Doc.A/HRC/38/38/Add. 1, April 5, 2018, para. 31. Available at: https://undocs.org/en/A/HRC/38/38/Add.1.

[100] The Law on the National Council of the Judiciary (*Krajowa Rada Sądownictwa*), *Dz.U*. 20 16.976, 5 July 2016. English version available at: https://www.legislationline.org/download/id/675 5/file/Poland_Act_on_National_Council_Judiciary_2016_en.pdf.

[101] Diego Garcia-Sayan, *Report of the Special Rapporteur on the Independence of Judges and Lawyers on his Mission to Poland*, U.N. Doc.A/HRC/38/38/Add. 1, April 5, 2018, para. 27. Available at: https://undocs.org/en/A/HRC/38/38/Add.1.

[102] *Ibid*., para. 29.

Chapter 3: The Enforcement of the Principle of Judicial Independence

The EU relies on two main "political instruments" to address the challenges to the independence of judiciary in Hungary and Poland. First, Article 7 TEU, which is characterised by former European Commission President Barroso (2004-2014) as the EU's "nuclear option," allows the EU to monitor and eventually subject any of its Member States to sanctions in a situation of serious and persistent breach of the values laid down in Article 2 TEU. In contrast to the "nuclear option" under Article 7 TEU, in 2014, The European Commission adopted the "rule of law framework," which is a more lenient approach that aims to "resolve future threats to the rule of law."[103] In another word, The Framework was adopted to fill a gap in EU remedies before a Member State's situation reached the level of a "clear risk of a serious breach" of rule of law, which Article 2 TEU lists as one of the common values upon which the EU was founded.[104] Thus, the "rule of law framework" is also regarded as the "pre-Article 7 procedure."[105] The Rule of Law Framework and Article 7 TEU are similar since both are addressed to "systemic threat to rule of law." In contrast, only Article 7 TEU provides for a possible political consequence with sanction of suspension of a Member State's EU rights including voting in the European Council.

In this regard, the EU has invoked the Rule of Law Framework on Poland. The Rule of Law Framework establishes a dialogue between the EU and Poland, which enables EU to send recommendations to improve the rule of law situations in the latter. However, such dialogue form of instrument has attracted a wide range of criticism, since it lacks sufficient normative value. The EU moved a step further by activating Article 7 TEU on Hungary and Poland, which enables the European Council to decide, on the basis of a reasoned proposal, whether a Poland has "systemically breached" the rule of law under Article 2 TEU. If the result is affirmative, the voting rights of Poland could be suspended with unanimous support from the European Council. In fact, Article 7 TEU is paralyzed since the unanimous support from the European Council could never be achieved if Hungary and Poland protect each other.

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[103] European Commission, "Rule of law framework," available at: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/effective-justice/rule-law/rule-law-framework en.

[104] European Commission, "Rule of law framework," available at: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/effective-justice/rule-law/rule-law-framework en.

[105] European Commission, *Reasoned Proposal in Accordance with Article 7(1) of the Treaty on European Union Regarding the Rule of Law in Poland*, COM (2017) 835 final, 20 December 2017. Available at: http ://ec.europa.eu/newsroom/just/document.cfmaction-display&doc_id=49108.

3.1 The Political Enforcements

3.1.1 The Rule of Law Framework

The Rule of Law Framework enables the European Commission to enter into a structured dialogue with the Member State concerned so as to prevent perceived systemic threats to the rule of law from escalating. This procedure consists of three main phases,[106] (1) the Commission assesses whether there are clear preliminary indications of a systemic threat in the country under preliminary investigation in which case a "rule of law opinion" will be sent to the government concerned; (2) in a situation where no appropriate actions are taken following the notification of the opinion, a "rule of law recommendation" may be adopted and may include specific suggestions on ways and measures to resolve the situation within a prescribed deadline; and (3) the Commission monitors how its recommendation is implemented. Lacking satisfactory implementation, the Commission may then decide at its discretion whether Article 7 TEU should be invoked.

The Rule of Law Framework was only applied in Poland so far, where the European Commission sent four recommendations to Poland respectively on 27 July 2016;[107] 21 December 2016; [108] 27 July 2017 [109] and 20 December 2017. [110] These recommendations required the Polish authorities to fully implement the judgments of the Constitutional Tribunal, some of which they had refused to publish and follow, so as to be able to appoint judges approved by the ruling *PiS* party. On the contrary, the European Commission was reluctant to launch the Rule of Law Framework against Hungary, on the ground that though the situation in Hungary raised concerns, there was no systemic threat to the rule of law, democracy and human rights.[111]

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[106] European Commission, "Rule of law framework," available at: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/effective-justice/rule-law/rule-law-framework en.

[107] European Commission, *Commission Recommendation Regarding the Rule of Law in Poland*, COM (2016) 5703 final, *OJ L* 217, 27 July 2016, pp. 53-68. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016H1374.

[108] European Commission, *Commission Recommendation Regarding the Rule of Law in Poland Complementary to Commission Recommendation* (*EU*) *2016/1374*, COM (2016) 8950 final, *OJ L* 22, 21 December 2016, pp. 65-81. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017H0146.

[109] European Commission, *Commission Recommendation Regarding the Rule of Law in Poland Complementary to Commission Recommendations* (*EU*) *2016/1374 and* (*EU*) *2017/146*, COM (2017) 5320 final, *OJ L* 228, 26 July 2017, pp.19-32. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017H1520.

[110] European Commission, *Commission Recommendation Regarding the Rule of Law in Poland Complementary to Commission Recommendations* (*EU*) *2016/1374*, (*EU*) *2017/146*, *and* (*EU*) *2017/1520*, COM (2017) 9050 final, *OJ L* 17, 20 December 2017, pp. 50-64. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018H0103.

[111] European Parliament Press Release, "Hungary: no systemic threat to democracy, says Commission, but concerns remain," 2 December 2015. Available at: https://www.europarl.europa.eu/news/en/press-room/20151201IPR05554/hungary-no-systemic-threat-to-democracy-says-commission-but-concerns-

As a result, *Lang* points out that although the Rule of Law Framework is certainly a step in the right direction, which is both legally stronger and politically wiser than the abuse of the excessive deficit procedure for rule of law purposes, it might have not been as effective in improving the rule of law conditions in Poland.[112] *Smith* questions that the dialogue format was dubious from the start: it is premised on cooperation; it is preventive in nature and it is ultimately based on an assessment of systemic threats.[113] *Pech* and *Scheppele* claim that the experiences of Hungary and Poland in the past few years have shown that the Rule of Law Framework might not be able to achieve the goal of improving the overall environment of rule of law in the Member States.[114]

First, the Rule of Law Framework suffered from a crucial design weakness, in that it is highly questionable whether a "constructive dialogue" or a "broader political dialogue" could lead to positive outcomes. In particular, for Hungary and Poland, which deliberately undermines the rule of law, dialogue is unlikely to be productive. Second, the Rule of Law Framework only allows Hungary and Poland to accelerate their efforts to undermine the rule of law. Under the Rule of Law Framework, other than engaging in dialogues, the EU could not adopt binding measures, i.e. forcing Hungary and Poland to reinstate fired judges. Consequently, Hungary and Poland would simply neglect the advice of the EC and continue their illiberal agendas. In fact, Poland still managed to disregard the recommendations from the European Commission by unpublishing the unfavourable judgements of the Constitutional Tribunal, and swearing in the three judges the *PiS* party appointed. Thus, the *PiS* party was successful in bringing the Constitutional Tribunal under its *de facto* control despite engaging in the dialogue with the EU. Third, the Rule of Law Framework buys time for Hungary and Poland to reach consensus to block the unanimous votes required under Article 7 TEU to initiate the political sanctions. Since both Hungary and Poland adopted illiberal policies, the Hungarian prime minister Orbán quickly announced that Hungary would veto Article 7 sanctions as soon as the Commission launched the Rule of Law Framework against Poland.[115]

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remain#:~:text=The%20EU%20Commission%20sees%20no,debate%20with%20MEPs%20on%20Wednesday.

[112] Iris Goldner Lang, "The Rule of Law, the Force of Law and The Power of Money in the EU," 15 *Croatian Yearbook of European Law and Policy* (2019), p. 15.

[113] Melanie Smith, "Staring into the Abyss: A Crisis of the Rule of Law in the EU," 25, 6, *European Law Journal* (November 2019), p. 573.

[114] Laurent Pech and Kim Lane Scheppele, "Illiberalism Within: Rule of Law Backsliding in the EU," 19, 3, *Cambridge Yearbook of European Legal Studies* (2017), p. 25.

[115] Budapest Business Journal, "Hungary Counts on Poland Veto, Won't Backtrack," 23 May 2017. Available at: https://bbj.hu/politics/hungary-counts-on-poland-veto-wont-backtrack_ 133253.

Unless the respective Member State has a critical mass of citizens and organisations which share a European understanding of the values prescribed by Article 2 TEU, the rule of law conditionality is likely to be perceived as forcefully imposed from the outside − instead of being wanted, needed or consented to internally.[116]

3.1.2 The Article 7 TEU Procedures

Prior to the Lisbon Treaty, Article 7 TEU was controversial. First, *Kochenov* argues that when Article 7 TEU was first inserted into the EU Treaties via the Amsterdam Treaty, the EU and the Member States were unconfident in the effectiveness of pre-accession conditionality at a time when the EU was getting ready to welcome ten new countries from Eastern Europe.[117] Second, the European Commission has taken the position that the scope of Article 7 TEU "is not confined to areas covered by Union law," which means that the Union may act "in the event of a breach in an area where the Member States act autonomously" because any country breaching the EU's fundamental values in a manner sufficiently serious to be caught by Article 7 TEU is likely to "undermine the very foundations of the Union and the trust between its members, whatever the field in which the breach occurs."[118]

For rule of law crisis since 2010, *Smith* criticises that the Rule of Law Framework, which introduces a political dialogue between the EU and the Member States, has weakened Article 7 TEU, rendering such "nuclear option" not very nuclear.[119] In the aftermath of the failure of the Rule of Law Framework, which prioritised dialogues rather than sanctions, the European Commission finally initiated Article 7 TEU proceedings by submitting a reasoned proposal to the European Council. In 2017, the European Commission for the first-time invoked Article 7 TEU proceedings against Poland. In the fourth recommendation sent to Poland under the Rule of Law Framework, the European Commission also submitted their Reasoned Proposal for a Decision of the European Council under Article 7(1) TEU.[120] Subsequently, following a series of

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[116] Iris Goldner Lang, "The Rule of Law, the Force of Law and The Power of Money in the EU," 15 *Croatian Yearbook of European Law and Policy* (2019), p. 7.
[117] Dimitry Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-accession Conditionality in the Fields of Democracy and the Rule of Law* (The Hague: Kluwer Law International, 2008).
[118] Commission of The European Communities, *Communication on Article 7 of the Treaty on European Union. Respect for and promotion of the values on which the Union is founded* COM(2003) 606 final, 15 October 2003 pp.1-13. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52003DC0606&from=EN.
[119] Melanie Smith, "Staring into the Abyss: A Crisis of the Rule of Law in the EU," 25, 6, *European Law Journal* (November 2019), p. 573.
[120] European Commission, *Reasoned Proposal in Accordance with Article 7(1) of the Treaty on European Union Regarding the Rule of Law in Poland*, COM (2017) 835 final, 20 December 2017. Available at: http ://ec.europa.eu/newsroom/just/document.cfmaction-display&doc_id=49108.

reform introduced by the Seventh Amendment, the European Parliament also activated the same procedure against Hungary in September 2018.[121] In the Hungarian case, the European Parliament directly invoked Article 7 TEU proceedings without going through the Rule of Law Framework.

Article 7 TEU is activated through a two-step test. The first step, the warning stage, requires that four-fifths of Council members consent to a finding that there is a "clear risk of a serious breach" of EU values by a member state. The second step, the sanctioning stage, requires the Council members' unanimous agreement that a member state is committing a "serious and persistent breach" of EU values.

However, similar to the Rule of Law Framework, the Article 7 TEU procedure is also unfortunately dysfunctional. In fact, it is unrealistic to expect all Member States, except the state concerned, in the European Council to reach a consensus of a "serious and persistent breach" of Article 2 TEU values. Hungary has already committed itself to blocking any eventual sanctions against Poland and *vice versa*.[122] Article 7(1) does, however, contain another clause providing for the adoption of "recommendations" by the Council should the Council agree that a clear risk of a serious breach of EU values is imminent and that clause does not require unanimity. That said, even invoking this first "warning" step is difficult, since it requires a two-thirds majority of the European Parliament and four-fifths of the Member States in the Council to agree.

The ineffectiveness of Article 7 TEU procedure was further demonstrated by the European Parliament resolution on 16 January 2020, according to which "the situation in both Poland and Hungary has deteriorated since the triggering of Article 7(1) TEU" and that "failure by the Council to make effective use of Article 7 TEU continues to undermine the integrity of common European values, mutual trust and the credibility of the European Union as a whole."[123]

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[121] European Parliament, *Resolution of 12 September 2018 on a proposal calling on the Council to determine*, *pursuant to Article 7*(*1*) *of the Treaty on European Union*, *the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded* (2017/2131(INL)), 12 September 2018. Available at: https://www.europarl.europa.eu/doceo/document/A-8-2018-0250_EN.html#top.

[122] Financial Times, "Orban Promises to Veto Any EU Sanctions against Poland," 8 January 2016. Available at: https://www.ft.com/content/0390ad5a-b60d-11e5-8358-9a82b43f6b2f.

[123] European Parliament, *Resolution of 16 January 2020 on ongoing hearings under Article 7*(*1*) *of the TEU regarding Poland and Hungary* (2020/2513(RSP)), 16 January 2020. Available at: https://www.europarl.europa.eu/doceo/document/TA-9-2020-01-16_EN.html.

3.2 The Legal Enforcements

Since the EU institutions have failed to be productive through the dialogues under the Rule of Law Framework and also could not succeed in placing sanctions under Article 7 TEU, the EU may only turn to the "legal instruments" to find breaches of Article 2 TEU in Hungary and Poland, particularly attacks on judicial independence, though a case-by-case approach. In this regard, the EU must consider the procedure and substantive laws that might be used as "legal instruments" against the rule of law backsliding.

In terms of the procedural laws, there are two types of legal procedures involved, namely the infringement proceedings under Article 258 TFEU and the preliminary ruling procedure under Article 267 TFEU. As the guardian of the Treaties, Article 258 TFEU enables the European Commission to bring infringement proceedings against Member States that have failed to fulfil their obligations under EU law. In contrast to a determination of "systemic breach of values" under Article 7 TEU, the European Commission may only launch Article 258 TFEU infringement actions for a "breach of a specific provision of EU law."[124] Moreover, Article 267 TFEU also establishes a dialogue between the ECJ and national courts through the preliminary ruling procedure, which guarantees the right of individuals to challenge before the ECJ the legality of any decision or other national measure relating to the application to them of an EU act.[125] Unlike the dialogue under the Rule of Law Framework, the dialogue through the preliminary ruling procedure bears legal effects. Thus, under the preliminary ruling procedure, the national court is required to refer the question to the ECJ, since the primacy of EU law requires that EU law must be interpreted in conformity across the Union.[126] In this regard, the courts of the Member States also act as the courts of the EU when they apply EU laws.[127]

However, the application the substantive laws in these EU legal procedures are much more complicated. Rule of law might become justiciable under two aspects, (a) from the value perspective, it is one of the values listed on Article 2 TEU; (b) from the human rights perspective, it incorporates the right to independent and impartial tribunal, which is essential to the fundamental right to fair trial under Article 47 CFR. Therefore,

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[124] European Commission, "Rule of law framework," available at: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/effective-justice/rule-law/rule-law-framework en.

[125] Case C-64/16, *Associação Sindical dos Juízes Portugueses*, 27 February 2018, EU:C:2018:117, para. 31; Case C-216/18 PPU, *Minister for Justice and Equality v. L. M*, 25 July 2018, ECLI:EU:C:2018:586, para. 31.

[126] Case C-284/16, *Achmea*, 6 March 2018, EU:C:2018:158, para. 35.

[127] Case C-64/16, *Associação Sindical dos Juízes Portugueses*, 27 February 2018, EU:C:2018:117, para. 31; Case C-216/18 PPU, *Minister for Justice and Equality v. L. M*, 25 July 2018, ECLI:EU:C:2018:586, para. 49.

the EU could either protect rule of law by directly invoking Article 2 TEU or indirectly through Article 47 CFR. Both choices can be extremely controversial. On the one hand, the ECJ had never reviewed the substance of Article 2 TEU values prior to the rule of law backsliding in Hungary and Poland. In the jurisprudence of the ECJ, the values of Article 2 TEU had merely symbolic sense. For instance, in the seminal *Opinion 2/13 (Accession of the EU to the ECHR)*, the ECJ famously stated that the values in Article 2 TEU on which the EU was founded and also shared by all Member States, served as the fundamental premise that the EU legal structure was based on, which justified the existence of mutual trust between the Member States that those values would be recognised and the EU law that implemented them would be respected.[128] On the other hand, Article 51 CFR restricts the competence of the ECJ to review fundamental rights violations, including the violations of Article 47 CFR by national or EU institutions that are implementing EU law.

3.2.1 The *Solange* Doctrines

From the theoretical point of view, *Bogdandy* and *Spieker* argue that the ECJ might review the violations to rule of law, especially judicial independence under Article 258 TFEU and Article 267 TFEU on the basis of the *Reverse Solange* doctrine.[129] Although the Court of the European Communities had already established the principle of primacy of EU law, during the 1980s, the courts in Germany and Italy challenged such principle through the *Solange* doctrine developed in the *Solange* saga, on the ground that EU did not offer sufficient fundamental rights protection.[130] Under the *Solange* doctrine, the Member States could review the EU *ultra vires* acts, if the EU had failed to provide the same level of protection of fundamental rights afforded by the Member States.[131] According to *Bogdandy* and *Spieker*, a mutual respect can be reached between the national legal order and EU legal order under the *Solange* doctrine give that three elements have been fulfilled.[132] First, essential standards defined by one legal order (A) are applied to acts of another legal order; (B) as a prerequisite for cooperation,

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[128] Opinion 2/13, *Accession of the EU to the ECHR*, 18 December 2014, EU:C:2014:2454, para. 168.
[129] See Armin Von Bogdandy and Luke Dimitrios Spieker, "Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges," 15, 3, *European Constitutional Law Review* (2019).
[130] German Federal Constitutional Court, Judgment of 29 May 1974, 2 BvL 52/71, *Solange I*, para. 62; Judgment of 22 October 1986, 2 BvR 197/83, *Solange II*, para. 132; Italian Constitutional Court, Judgment of 27 Dec. 1973, *Frontini*, No. 183/73; Judgment of 8 June 1984, *Granital*, No. 170/1984; Judgment of 21 April 1989, *Fragd*, No. 232/1989.
[131] *Ibid*.
[132] Armin Von Bogdandy and Luke Dimitrios Spieker, "Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges," 15, 3, *European Constitutional Law Review* (2019), p. 408.

the doctrine presupposes that the courts of legal order A are empowered to review acts of legal order B regarding whether they meet those standards. Third, legal order A establishes the presumption that acts emanating from legal order B comply with those standards.

On the basis of the *Solange* doctrine, scholars have developed a plenty of doctrine amidst the harmonization between different legal orders. *Canor* developed the *Horizontal Solange* doctrine, which balances the peer review of fundamental rights protection and mutual trust between (at least) two Member States.[133] The *Horizontal Solange* doctrine relies on the premises that both legal order (A) and (B) remain autonomous in its fundamental rights protection and respect Article 2 TEU, the exceptions must be interpreted strictly.[134] On the basis of the *Horizontal Solange* doctrine, *Spieker* created the *Triangular Solange* doctrine, which enables the ECJ to participate in the peer review process between Member States through the preliminary ruling procedure to determine whether the presumption of compliance should be rebutted, leading to an extended competence of the ECJ.[135] However, the most controversial doctrine is the *Reverse Solange* doctrine developed by *Bogdandy* and *Spieker*, in the midst of the rule of law crisis in Hungary and Poland, where the ECJ conducted a series of reviews over the challenges to the Article 2 TEU values regarding the measures infringing judicial independence in both states. Under the *Reverse Solange* doctrine, the ECJ might extend its competence to review national law that threats the "essence" of the Article 2 TEU values or fundamental rights enumerated on the CFR.[136]

In this regard, the ECJ might examine the rule of law conditions of the Member States on two circumstances. First, the human rights approach might be considered under the *Triangular Solange* doctrine, the ECJ might examine the compliance of rule of law requirements in the Area of Freedom, Security and Justice (AFSJ), which requires the mutual recognition of judicial decisions. In particular, rule of law and judicial independence could be a major concern regarding the execution or suspension of the European Arrest Warrants (EAWs). Since it would involve secondary EU law, the ECJ might apply the right to fair trial under Article 47 CFR. In fact, in *L. M.*, the

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[133] Iris Canor, "My Brother's Keeper? Horizontal Solange," 50, 2, *Common Market Law Review* (2013).
[134] *Ibid*.
[135] Luke Dimitrios Spieker, "Breathing Life into the Union's Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis," 20, 8, *German Law Journal* (2019), p.1194.
[136] Armin Von Bogdandy and Luke Dimitrios Spieker, "Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges," 15, 3, *European Constitutional Law Review* (2019).

ECJ ruled that the right to fair trial under Article 47 CFR is applicable in extradition cases.[137]

Second, in terms of the substance of Article 2 TEU, *Bogdandy* and *Spieker* argue that the only way for the ECJ to scrutinise national measures by relying on the standards of Article 2 TEU is to respect the "*Reverse Solange doctrine*," in which the basic idea is not to upset the federal balance epitomised by Article 51 CFR.[138] In this regard, Article 2 TEU must be interpreted narrowly, since if the ECJ could challenge any domestic rules or acts undermining the values of EU, the ECJ would have brought about a massive power shift to the Union and undermine the balance established between the Union and its member states to the detriment of national autonomy, identity, and diversity.[139] Under the *Reverse Solange doctrine* there are two "red lines" that the ECJ may not cross. Firstly, Article 2 TEU cannot demand "equivalent" standards from member states, as such an interpretation cannot be squared with either Articles 4(2) and 5(1) TEU or Article 51(1) CFR.[140] Second, Article 2 TEU can hardly force detailed obligations upon the member states' legal orders. According to Armin Von Bogdandy and Luke Dimitrios Spieker:

> "*The Treaties protect diversity among the national constitutions: the republics and monarchies*, *parliamentary and semi-presidential systems*, *strong and weak parliaments*, *competitive and consensual democracies*, *strong and weak political party systems*, *strong and weak social institutions*, *unitary and federal systems*, *strong*, *weak or absent constitutional courts*, *diverse and perhaps even incompatible systems of judicial independence*, *significant divergences in the content and level of protection of fundamental rights*, *not least Ottoman*, *Catholic*, *Protestant*, *secular*, *socialist*, *anarcho-syndicalist*, *postcolonial and statist constitutional traditions*."[141]

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[137] Case C-216/18 PPU, *Minister for Justice and Equality v. L. M*, 25 July 2018, ECLI:EU:C:2018:586.
[138] Armin Von Bogdandy, Matthias Kottmann, Carlino Antpöhler, Johanna Dickschen, Simon Hentrei and Maja Smrkolj, "Reverse Solange–Protecting the Essence of Fundamental Rights Against EU member states," 49, 2, *Common Market Law Review* (2012) p. 489.
[139] Armin Von Bogdandy and Luke Dimitrios Spieker, "Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges," 15, 3, *European Constitutional Law Review* (2019), p. 421.
[140] *Ibid*., p. 422.
[141] *Ibid*., See also F. Hanschmann, *Der Begriff der Homogenität in der Verfassungslehre und Europarechtswissenschaft* (Berlin: Springer, 2008) p. 259.

In essence, the "red lines" limit general applicability for the CFR to situations which threaten essential norms of the values of the EU.[142] In other words, the protection of fundamental rights might only substantiate the Article 2 TEU values.

In fact, the ECJ in *Associagio Sindical dos Juizes Portugueses*, admitted that its competence to review the Article 2 TEU values, including the principle of rule law, is limited to the essence of those values. As a result, the ECJ claimed that to safeguard the value of rule of law, the principle of judicial independence is provided with a normative content which corresponds to the principle of effective judicial protection provided in Article 19(1) TEU and the right to fair trial in Article 47 CFR.[143]

3.2.2 Judicial Independence under the Principle of Mutual Trust

Since it has been proven that the ECJ theoretically has the jurisdiction to examine rule of law violations, the recent ECJ case-law regarding the principle of mutual trust might be tested under these doctrines. The principle of mutual trust between the Member States and, in particular, their courts and tribunals are based on the fundamental premise that Member States share the common values of Article 2 TEU, such as the rule of law.[144] The principle of mutual trust between the Member States is of fundamental importance to allow an area without internal borders to be created and maintained.[145] The principle of mutual trust requires each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law.[146] Thus, when implementing EU law, the Member States may not only not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but also, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the European Union.[147]

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[142] Armin Von Bogdandy and Luke Dimitrios Spieker, "Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges," 15, 3, *European Constitutional Law Review* (2019), p. 407.
[143] Takis Tridimas and Giulia Gentile, "The Essence of Rights: An Unreliable Boundary?" 20, 6, *German Law Journal* (2019), p. 812.
[144] See Opinion 2/13, *Accession of the EU to the ECHR*, 18 December 2014, EU:C:2014:2454, para. 168; Case C-64/16, *Associação Sindical dos Juízes Portugueses*, 27 February 2018, ECLI:EU:C:2018:117, para. 30; Case C-216/18 PPU, *Minister for Justice and Equality v. L. M*, 25 July 2018, ECLI:EU:C:2018:586, para. 36.
[145] *Ibid*.
[146] *Ibid*.
[147] *Ibid*.

The principle of mutual trust between the Member States also requires the mutual recognition of judicial decisions,[148] which is facilitated by minimum complementary harmonization.[149] However, mutual recognition requires a balancing between the free movement of judicial decisions and the protection of fundamental rights.[150] The balancing test raises two questions. First, who should have the competence to determine the threshold of exception? The EU or the Member States? Second, how should the exception to the presumption of compliance of fundamental rights be interpreted? Broad or restricted?

A. The Jurisdictions of the European Court of Justice

For the first question regarding the competence to determine the threshold of exception, *Wendel* suggests that the standards for review must be set and strictly defined in a centralized manner and in much greater detail by the ECJ.[151] For the first time the ECJ in its judgment of *N.S. and Others*, acknowledged that the presumption of compliance of Member States with EU fundamental rights standards was not conclusive in refugee policy. This case concerned the Member States' obligations to manage the influx of refugees under the *Dublin II Regulation of 2003* (which was succeeded by the *Dublin III Regulation of 2013*).[152] In this case, the ECJ adopted a centralized approach by ruling that there were systemic deficiencies in Greece which prevented the transfer of asylum seekers from the referring courts,[153] since the systemic deficiencies would

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[148] Case C-216/18 PPU, *Minister for Justice and Equality v. L. M*, 25 July 2018, ECLI:EU:C:2018:586, paras. 36-41; Koen Lenaerts, "New Horizons for the Rule of Law within the EU," 21, 1, *German Law Journal* (2020), p. 32.

[149] Koen Lenaerts, "La Vie Apr`es l'Avis: Exploring the Principle of Mutual (yet not Blind) Trust," 54, 3, *Common Market Law Review* (2017), p. 811.

[150] Koen Lenaerts, "The Principle of Mutual Recognition in the Area of Freedom Security and Justice," Lecture at Oxford University," 30 January 2015. Available at: https://www.law.ox.ac.uk/sites/files/oxlaw/the_principle_of_mutual_recognition_in_the_area_of_freedom_judge_lenaerts.pdf (accessed 25 June 2020).

[151] Mattias Wendel, "Mutual Trust, Essence and Federalism – Between Consolidating and Fragmenting the Area of Freedom, Security and Justice after LM," 15, 1, *European Constitutional Law Review* (2019), p.41.

[152] Council of the European Union, Regulation (EC) No 343/2003 of 18 February 2003 *establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national* (*Dublin II*), *OJ L* 50, 2 February 2003 (invalidated since 18 July 2013), pp. 1-10. Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32003R0343 ; The European Parliament and the Council, Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 *establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person* (*Dublin III*), *OJ L* 180, 29 June 2013, pp. 31–59. Available at: https://eur-lex.europa.eu/legal-content/en/ALL/?uri=celex%3A32013R0604.

[153] Joined Cases 411 and 493/10 21, *N. S. and Others*, December 2011, ECLI:EU:C:2011:865. Article 4 CFR: "*No one shall be subjected to torture or to inhuman or degrading treatment or punishment*."

lead to inhuman or degrading treatments prohibited under Article 4 CFR. Indeed, the Court ruled that a decentralized control by each Member State could lead to diverging or incompatible decisions throughout the EU judicial space and jeopardize the uniform application of Union law.[154] The centralized approach in *N. S. and Others* immensely extended the ECJ's scope of review. Generally, the ECJ cannot directly assess all relevant policies in the issuing or rendering Member States, as these are not always covered by EU law. Through the gateway of mutual recognition regimes, however, the ECJ can indirectly assess whether these Member States comply with essential EU standards even in policy areas that seem to escape the scope of EU law. In this sense, the ECJ develops an indirect competence to review the situation in issuing or rendering Member States without facing restrictions like Article 51(1) CFR.[155]

However, the ECJ appeared to have diverted from the centralized approach since *Aranyosi and Căldăraru*, where it adopted a decentralized approach regarding the challenges to the mutual trust between Member States in the execution of EAW. In this case, the Higher Regional Court of Bremen (*Hanseatisches Oberlandesgericht Bremen*) asked the ECJ whether generalized deficiencies concerning prison conditions in Hungary precluded the surrender of Mr. *Aranyosi* and Mr. *Căldăraru* to that State at the request of an EAW, since they might be subject to inhuman or degrading treatment within the meaning of Article 4 CFR. Instead of analysing the systemic threats to the principle of mutual trust, the ECJ left this task to the referring court to assess the individual risk in this particular case.[156]

The ECJ continued with the decentralized approach in *L. M*. In this case, the High Court of Ireland requested preliminary ruling from the ECJ on whether the mutual trust between the two jurisdictions still existed given that European Commission's reasoned proposal submitted to the Council under Article 7(1) TEU, stated that there is a clear risk of a serious breach by Poland of the rule of law.[157] In essence, the High Court of Ireland asked whether the execution of the Polish EAWs must be refused since it would undermine the surrendered that Polish suspect's right to fair trial under Article 47 CFR. Even though the Polish suspect claimed that there were systemic deficiencies in the Polish judiciary, the ECJ did not assess the rule of law in Poland itself, but left this delicate task to the High Court of Ireland. Under the decentralized approach, the High

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[154] Joined Cases 411 and 493/10 21, *N. S. and Others*, December 2011, ECLI:EU:C:2011:865, paras. 86, 89, 94, 106.
[155] Iris Canor, "My Brother's Keeper? Horizontal Solange," 50, 2, *Common Market Law Review* (2013), pp. 383-421.
[156] Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*, 5 April 2016, EU: C:2016:198, paras. 92-93.
[157] Case C-216/18 PPU, *Minister for Justice and Equality v. L. M*, 25 July 2018, ECLI:EU:C:2018:586.

Court of Ireland was permitted to suspend the execution of the EAW if there were substantial grounds for believing that Polish suspect will run a real risk of breach of his fundamental right to an independent tribunal and the essence of his fundamental right to a fair trial.

B. The Exceptions to the Principle of Mutual Trust

In terms of the second question concerning the interpretation of the exceptions to the presumption of compliance of fundamental rights, the ECJ has decided in *Opinion 2/13 (Accession of the EU to the ECHR)* that limitations of the principles of mutual recognition and mutual trust between Member States can be made "in exceptional circumstances."[158] In this regard, the exceptions must be strictly interpreted.

In *N. S. and Others*, the ECJ established a limit to mutual trust in cases of systemic deficiencies in the asylum procedure and in the reception conditions for asylum seekers in the responsible Member State, which prevented the transfer of the asylum seekers who risked suffering inhuman or degrading treatment prohibited under Article 4 CFR.[159] In this case, the ECJ distinguished the slightest infringement from the systemic deficiencie*s*, in which only the latter might halt the transfer process.

In *Jawo*, the ECJ elaborated on the "real risks" to which the asylum seekers might be exposed. The "risks" must be substantial and reach a particularly high level of severity. That particularly high level of severity is attained where the asylum seeker is placed under a situation of extreme material poverty, to an extent that undermines the human dignity of that person.[160] In this regard, the ECJ ruled that Article 4 CFR is not violated even if the asylum seekers are placed under the situations of a high degree of insecurity or a significant degradation of the living conditions of the person concerned.[161]

The limitations of mutual trust must also be strictly applied in the application of EAWs. On whether the execution of EAWs must be suspended due to the risks that the person wanted might receive inhuman or degrading treatments in the issuing State, in *Aranyosi and Căldăraru*, the ECJ developed a two-step test. In the first step, the executing authority shall, taking into account materials from international organizations, reports of NGOs and judgments of the ECtHR, assess if there are systemic deficiencies

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158 Opinion 2/13, *Accession of the EU to the ECHR*, 18 December 2014, EU:C:2014:2454, para. 191.
159 Joined Cases 411 and 493/10 21, *N. S. and Others*, December 2011, ECLI:EU:C:2011:865.
160 Case C-163/17, *Jawo v Germany*, 19 March 2019, ECLI:EU:C:2019:218, para. 92.
161 *Ibid*., para. 93.

undermining Article 4 CFR.[162] Then, if the existence of systemic deficiencies is identified, the executing authority shall also assess whether there are substantial grounds to believe that the individual concerned will be exposed to that risk.[163] If the two tests are both met, the executing judicial authority must postpone the surrender procedure. However, neither did the ECJ elaborate on the standard of systemic deficiencies, nor did it specify the risks resulting from the execution of the EAWs.

The assessment on systemic deficiencies and individual risks in *Aranyosi and Căldăraru* is stricter than the mere assessment on systemic deficiencies in *N. S. and Others*, while similar on the assessment of particularly high level of severity in *Jawo*. A possible justification for the ECJ's reluctance to derogate from the principle of mutual recognition in the EAW may be found in the different weight of the State interest involved. *Simonelli* argues that a refusal to execute an EAW, indeed, impinges upon the requesting State *jus puniendi*, a power lying at the core of State sovereignty, whereas in the Dublin regime neither the transferring nor the responsible State has such a compelling countervailing interest.[164]

Nevertheless, the ruling in *Aranyosi and Căldăraru* placed a lot of emphasis on the absolute nature of Article 4 CFR, which concerns the right to prohibition of torture and inhuman or degrading treatment or punishment, leaving space to doubts as to whether the same test would be applicable in case of CFR provisions which are not absolute in nature, for example, the right to a fair trial of Article 47 CFR.[165] This question was answered in *L. M*, where the ECJ ruled that the non-absolute the right to a fair trial of Article 47 CFR can also provide grounds of limitation to the principle of mutual trust. According to the ECJ, the principle of mutual trust not only requires the Member States to protect fundamental rights enumerated on the CFR, but also requires the Member States to respect the values of Article 2 TEU. In particular, the principle of judicial independence must be protected, since if forms part of the essence of the fundamental right to a fair trial of Article 47 CFR, which also safeguard the value of the rule of law in Article 2 TEU.[166]

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[162] Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*, 5 April 2016, EU: C:2016:198, paras. 88-89.
[163] *Ibid*., paras. 92-93.
[164] Marco Antonio Simonelli, "'...And Justice for All?" The Right to An Independent Tribunal After the Ruling of the Court of Justice in LM," 10, 4, *New Journal of European Criminal Law* (2019), p. 5.
[165] Georgios Anagnostaras, "Mutual Confidence is not Blind Trust! Fundamental Rights Protection and the Execution of the European Arrest Warrant: Aranyosi and Caldararu," 53, 6, *Common Market Law Review* (2016), pp. 1688–1689.
[166] Case C-216/18 PPU, *Minister for Justice and Equality v. L. M*, 25 July 2018, ECLI:EU:C:2018:586, para. 48.

The ECJ applied the *Aranyosi* and *Căldăraru* test to the non-absolute right to fair trial under Article 47 CFR, however, in a slightly different way. First, the refusal of execution must meet the requirement that there are systemic or generalised deficiencies, affecting the independence of the judiciary in the issuing Member State, which compromises the essence of the fundamental right to a fair trial of the wanted person.[167] The ECJ distinguished this case from *Aranyosi and Căldăraru* in that the Irish Courts might not examine the systemic or generalised deficiencies in Poland itself, even on the basis of the proposal from the European Commission to the European Council regarding Article 7(1) TEU.[168] Rather, it is only if the European Council were to adopt a decision determining, as provided for in Article 7(2) TEU, that there is a serious and persistent breach in the issuing Member State of the principles set out in Article 2 TEU, such as the rule of law, and the Council were then to automatically suspend the execution of any EAW issued by that Member States.[169]

In applying the second prong of the *Aranyosi* and *Căldăraru* test, the ECJ drew similar conclusion that the referring court must decide whether there are substantial grounds for believing that the requested person will run a real risk of breach of his fundamental right to an independent tribunal and the essence of his fundamental right to a fair trial. Furthermore, the ECJ specified the circumstances that might be considered in determining such risks, including his personal situation, as well as to the nature of the offence for which he is being prosecuted and the factual context that form the basis of the European arrest warrant.[170] Consequently, The ECJ left this decision to be ultimately made by the Irish Court. According to *Šubic*, the ECJ seems to suggest in *L. M*, that not all non-absolute rights, but rather only those that play a particularly important role for the functioning of the EU as a whole, are capable of rebutting mutual trust. In this regard, the role of the right to fair trial in securing all other EU rights was particularly emphasized.[171]

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[167] *Ibid*., para. 60.
[168] *Ibid*., para. 61.
[169] *Ibid*., para. 72.
[170] *Ibid*., para. 76.
[171] Neža Šubic, "Executing a European Arrest Warrant in the Middle of a Rule of Law Crisis: Case C-216/18 PPU Minister for Justice and Equality (LM/Celmer)," 21, 1, *Irish Journal of European Law* (2018), p. 104.

C. The Threshold of Rebuttal

Wendel emphasises that the protection of fundamental rights "must fall primarily within the responsibility of the issuing Member State."[172] *Krajewski* also points out that Member States are "ill-equipped" to assume the role of guardians over their "peers" fundamental rights compliance, laws regarding the organisation of judicial systems.[173] The exceptional circumstances must be interpreted strictly, setting high threshold for rebuttal for mutual trust, which requires the assumption of compliance of fundamental rights protection and respect for Article 2 TEU values.

In the field of EU criminal justice cooperation, the high threshold prevents the abusive freezing of all the EAWs issued from jurisdictions that are solely "not independent." Such "penalty" by the suspension of all EAWs would be excessively severe. After all, as Polish judge Gaciarek's reply to the High Court of Ireland demonstrates, there are still independent judges in Poland. Moreover, The ECJ should also set high rebuttal threshold on the transfer of refugees within the controversial Dublin regime. The more difficult to deport unqualified refugees, the more the responsible state might be incentivised to lower its own standards of fundamental rights protection for asylum seekers. In a worst-case scenario, this could ultimately contribute to a cynical strategy, where the responsible state might deliberately offer inhuman and degrading treatments, forcing asylum seekers to leave for another state, which offers "better" conditions. In light of the fundamental divisions across Europe on refugee policy, such a race to the bottom is by no means a theoretical scenario.[174] Ultimately, this would damage the mutual trust between the Member States, and threatens the success of AFSJ.

Ever since *N. S. and Others*, although through a decentralised approach, the ECJ have consistently set high threshold for national courts. In *Jawo*, the withhold of transfer must be justified by inhuman and degrading treatments that reach particularly high level of severity. In *Aranyosi* and *Căldăraru*, the suspension of EAWs must satisfy two strict tests, which both exposes the person wanted to systemic and generalised deficiencies and individual risks. In *L. M*, the non-execution of the EAW not only

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[172] Mattias Wendel, "Mutual Trust, Essence and Federalism – Between Consolidating and Fragmenting the Area of Freedom, Security and Justice after LM," 15, 1, *European Constitutional Law Review* (2019), p. 37.

[173] Michał Krajewski, "Who is Afraid of the European Council? The Court of Justice's Cautious Approach to the Independence of Domestic Judges," 14, 4, *European Constitutional Law Review* (2018), p. 799.

[174] Mattias Wendel, "Mutual Trust, Essence and Federalism – Between Consolidating and Fragmenting the Area of Freedom, Security and Justice after LM," 15, 1, *European Constitutional Law Review* (2019), p. 37.

requires meeting the *Aranyosi* and *Căldăraru* test, the risk must aslo amount to "breach of the essence of the right to fair trial."

The high threshold of rebuttal is much needed in balancing the interest between the principle of mutual trust and the protection of the non-absolute rights. As for the fundamental right to an effective remedy and to a fair trial of Article 47 CFR, the principle of judicial independence is not its only essence. Rather, each paragraph of that provision contains components of the essence of this fundamental right, including access to a court, legal representation, and legal aid. In fact, a lower level of protection,[175] or even a violation of certain elements,[176] do not constitute a breach of the essence of Article 47 CFR. In this regard, where Article 47 CFR is under attack, courts must apply a very high, perhaps excruciatingly high, degree of scrutiny, since the core element of the right is difficult to determine.

Tridimas and *Gentile* suggests that non-absolute rights like right to an effective remedy and to a fair trial of Article 47 CFR could be defined subjectively from the point of view of the right holder, or objectively from the point of view of the function of rights within the constitutional polity. The problem with a subjective definition is that it leads to an excessively broad understanding of essence. An objective definition would consider its positioning in the constitutional hierarchy, the objectives of the limitations imposed on it, and the circumstances of a specific restriction.[177]

In the context of EU law, in the Opinion in *L. M*, AG Tanchev proposed that the test of Article 47 CFR should be on the basis of the ECtHR decision in *Soering v. the United Kingdom*,[178] which considers that for the postpone of extradition, the suspected person must risk suffering in the requesting Member State not just a breach of Article 6 of the ECHR, but a "flagrant denial" of justice or of a fair trial.[179] AG Tanchev corresponded the "flagrant denial" of justice test to the respect of the essence of fundamental rights under Article 52(1) CFR. There must be real risk of breach not of the right to a fair trial but of the essence of that right under Article 47 CFR.

According to that court, "a flagrant denial of justice" of the principles of fair trial guaranteed by Article 6 ECHR requires a breach which is so fundamental as to amount to a nullification, or destruction of the very essence of the right. The ECtHR only in *Al Nashiri v. Poland* and *Al Nashiri v. Romania*, considered that the lack of independence

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[175] Case C-399/11, *Stefano Melloni v Ministerio Fiscal*, 26 February 2013, EU: C:2013:107, para 63.
[176] Case C-396/11, *Ciprian Vasile Radu*, 29 January 2013, ECLI:EU:C:2013:39, para 39.
[177] Takis Tridimas and Giulia Gentile, "The Essence of Rights: An Unreliable Boundary?" 20, 6, *German Law Journal* (2019), p. 805.
[178] Opinion of Advocate General Tanchev in Case C-216/18 PPU, *Minister for Justice and Equality v LM*, 28 June 2018, ECLI:EU:C:2018:517, para. 70.
[179] ECtHR, *Soering v. the United Kingdom*, 7 July 1989, Application no. 14038/88, para. 113.

and impartiality of a tribunal can be regarded as amounting to a flagrant denial of justice, since the military commission established on the base at Guantanamo Bay was neither independent nor impartial and could not therefore be regarded as a "tribunal" within the meaning of Article 6(1) of the ECHR.[180] Consequently, AG Tanchev concluded that the "flagrant denial of justice" test can only be satisfied, with regard to the lack of independence and impartiality of a tribunal if it is so serious that it destroys the fairness of the trial.[181]

In the judgement of *L. M*, neither did the ECJ adopt nor disregard the test developed by AG Tanchev based on the ECtHR "flagrant denial of justice" test. Instead, the ECJ concentrated on the breach of the essence of fundamental rights under Article 52(1) CFR. Thus, in the second prong of the *L. M* test, the ECJ ruled that the EAW must be suspended if there are real risk of breach of the essence of the suspect's fundamental right to a fair trial under Article 47 CFR, without further elaborating on the seriousness of such violation.

Taking the Opinion by AG Tanchev and the judgement in *L. M*., the High Court of Ireland in *The Minister for Justice and Equality v. Celmer*, developed its understanding of the *L. M*. test most likely based on the Opinion by AG Tanchev. In essence, the High Court of Ireland rejected the application by the Polish suspect on the suspension of execution of the EAW. The Irish High Court equated the *L. M*. test, which required "real risk of breach of the essence of the right to fair trial" with the ECtHR "flagrant denial of justice" test. The Irish High Court found that despite the lacking of judicial independence, "all the other indices of fair trial rights in Poland remain intact."[182] In particular, the high threshold to suspend the execution of a EAW which "amount to a nullification or destruction of the very essence of the right to fair trial" is extremely difficult to be reached.[183]

The Polish suspect subsequently appealed to the Supreme Court of Ireland, but the appeal was dismissed. The Supreme Court of Ireland did not follow the equation designated by the High Court of Ireland, instead, it insisted that the threshold should be reached and it should be demonstrated that there is a real risk on substantial grounds of a breach of the essence of a right that the exceptional jurisdiction to refuse surrender arises. According to the highest court in Ireland, the threshold should be extremely high,

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[180] ECtHR, *Al Nashiri v. Poland*, 6 May 2011, Application no. 28761/11, paras. 565-569; ECtHR, *Al Nashiri v. Romania*,1 June 2012, Application no. 33234/12, paras. 719-722.
[181] Opinion of Advocate General Tanchev in Case C-216/18 PPU, *Minister for Justice and Equality v LM*, 28 June 2018, ECLI:EU:C:2018:517, paras. 72-85.
[182] The High Court of Ireland, *The Minister for Justice and Equality v. Celmer* (No.5), para. 105.
[183] Marco Antonio Simonelli, "'...And Justice for All?' The Right to an Independent Tribunal After the Ruling of the Court of Justice in LM," 10, 4, *New Journal of European Criminal Law* (2019), p. 11.

since a breach of the essence of the right means that the breach should be a "particularly serious breach."[184] The Supreme Court of Ireland assessed the evidence that might put the Polish suspect in a real risk of depriving him the essence of right to fair trial, including, (a) presidents and vice-presidents had been dismissed in at least 130 cases in Poland, one of which was the regional Court of Wloclawek, which was one of the courts that has jurisdiction over the suspect; (b) the Deputy Minister of Justice made clear statements about the suspect, calling him "dangerous criminal," of which the Irish Court was principally concerned.

However, the Irish Court found also that the available evidence was insufficient to reach the high threshold.[185] First, there was no evidence suggesting such changes had affected the hearing or determination of charges involved in this case. Second, in the observations of Judge Gaciarek, he discounted the statements as little more than the type of statement made by the Minister of Justice of Poland, and the impact of any such statement made in the resolution of litigation in his jurisdiction.[186] Furthermore, he also discounts any possible impact of judicial independence on the changes at the level of president or vice president upon such a trial.[187] Therefore, by giving considerable weight to observations of Judge Gaciarek, the Supreme Court of Ireland upheld the High Court of Ireland's decision to execute the EAW.

Ultimately, even though both the ECJ and the Supreme Court of Ireland rejected the wording of "flagrant denial of justice," the "real risk on substantial grounds of a breach of the essence of a right" test appears to prefer the absolute view. Thus, when the core is derogated, the right is extinguished. This equates essence to the abolition of a right.[188] *Simonelli* argues that the suspension of the a EAW for the violation of the right guaranteed by Article 47 CFR shall "amount to a nullification or destruction of the very essence of the right," which is evident that such a high threshold is extremely difficult to be reached.[189]

The mission-impossible for the ECJ to determine the existence of right to independent tribunal without adopting the absolute view makes it unfit to adjudicate in this dilemma. In fact, The ECJ in *L. M*, distinguished its own competence from that of

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[184] The Supreme Court of Ireland, *The Minister for Justice and Equality v. Celmer*, 12 November 2019, S:AP:IE:2018:000181, para. 76.
[185] *Ibid*., para. 88.
[186] *Ibid*., para. 86.
[187] The Supreme Court of Ireland, *The Minister for Justice and Equality v. Celmer*, 12 November 2019, S:AP:IE:2018:000181, para. 87.
[188] Takis Tridimas and Giulia Gentile, "The Essence of Rights: An Unreliable Boundary?" 20, 6, *German Law Journal* (2019), p. 803.
[189] Marco Antonio Simonelli, "'...And Justice for All?' The Right to an Independent Tribunal After the Ruling of the Court of Justice in LM," 10, 4, *New Journal of European Criminal Law* (2019), p. 11.

the European Council.[190] While the Court was responsible for fair trials in individual cases, it was the prerogative of the European Council and the Council, bodies composed of heads of state or heads of government to managed the systemic compliance of domestic judicial systems with the rule of law.[191] The Court cited recital 10 of the Framework Decision 2002/584, according to which the EAW mechanism could be suspended "only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 2 TEU, determined by the European Council pursuant to Article 7(2) TEU, with the consequences set out in Article 7(3) TEU."[192]

The EU's competence to ensure on the Member State's compliance of Article 2 TEU values beyond the scope of EU law is limited to the substantive thresholds of Article 7 TEU, which is the only provision explicitly empowering the EU legal order to enforce EU values or sanction violations thereof beyond the scope of EU law.[193] Hence, the EU's competence to conduct *ultra vires* review is limited to the "serious and persistent breach" under Article 7 TEU.

3.2.3 Judicial Independence under Article 19(1) TEU

Aside from rebutting the assumption of compliances of fundamental rights protection and respect of Article 2 TEU values, The ECJ might not directly invoke the right to fair trial of Article 47 CFR to challenge the judicial reforms in both Hungary and Poland, since Article 51(1) CFR restricts the scrutiny of fundamental rights protection in the Member States only when they are implementing EU law. However, most of the reforms in Hungary and Poland are pure domestic affairs that are not covered by EU law, meaning that the European Courts have no jurisdiction whatsoever. In fact, the challenges to the principle of judicial independence resulting from these reforms should be placed under the scrutiny of the ECtHR.

A. The Jurisdictions of the European Court of Justice

Nevertheless, ever since the decision of *Associação Sindical dos Juízes Portugueses*, the ECJ have activated the second paragraph of Article 19(1) TEU, which stipulates

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[190] Michał Krajewski, "Who is Afraid of the European Council? The Court of Justice's Cautious Approach to the Independence of Domestic Judges," 14, 4, *European Constitutional Law Review* (2018), p. 797.
[191] Opinion of Advocate General Tanchev in Case C-216/18 PPU, *Minister for Justice and Equality v LM*, 28 June 2018, ECLI:EU:C:2018:517, paras. 38-45.
[192] Case C-216/18 PPU, *Minister for Justice and Equality v. L. M*, 25 July 2018, ECLI:EU:C:2018:586, para. 70.
[193] Council of the European Union, "Opinion of the Legal Service," 27 May 2014, para. 17. Available at: http://data.consilium.europa.eu/doc/document/ST-10296-2014-INIT/en/pdf.

that "*Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law*." Although effective judicial review and judicial independence are *sine qua non* attributes, their substantive content remains a matter of judicial interpretation.[194] In terms of the substance of Article 19(1) TEU, the ECJ found that the principle of judicial independence forms the essence of the effective judicial remedies provided by national courts. This interpretation is not supported by the text of Article 19(1) TEU.[195] However, it must be recalled that in *Wilson*, the Court found that to provide effective judicial remedies under Article 9 of Directive 98/5, the courts or tribunals within the meaning of EU law must meet the requirements of independence and impartiality. Nevertheless, *Wilson* concerns the free movement of lawyers under Directive 98/5, which has a different context of Article 19(1) TEU.

The reasonings of the ECJ in *Associação Sindical dos Juízes Portugueses* focus on the following aspects. In the first place, the ECJ spent large efforts to explain the relations between Article 19(1) TEU and Article 2 TEU. the ECJ ruled that Article 19(1) TEU gives a concrete expression to the values of Article 2 TEU, including rule of law.[196] Thus, the Court implicitly rejected a self-standing application of Article 2 TEU and opted for a combined approach.[197] *Wendel* finds that the specific link with values is a concept specific to EU law rather than the ECHR, which underlines the constitutional significance of the common values referred to in Article 2 TEU.[198] *Bogdandy* and *Spieker* further suggest that *Associação Sindical dos Juízes Portugueses* serves as a "founding stone" that the Court is willing to scrutinise and sanction member state national institution under the Article 2 TEU.[199] Thus, Article 19(1) TEU was expansively interpreted, despite according to the *Reverse Solange* doctrine, if the European values listed on Article 2 TEU were to be interpreted with Article 19(1) TEU, they should be interpreted narrowly. In this regard, it appears that the application of Article 2 TEU in the interpretation of Article 19(1) TEU requires the ECJ to ensure that

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[194] Takis Tridimas and Giulia Gentile, "The Essence of Rights: An Unreliable Boundary?" 20, 6, *German Law Journal* (2019), p. 812.
[195] Matteo Bonelli and Monica Claes, "Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary," 14, 3, *European Constitutional Law Review* (2018), p. 633.
[196] Case C-64/16, *Associação Sindical dos Juízes Portugueses*, 27 February 2018, EU:C:2018:117, para. 32.
[197] Armin von Bogdandy, Piotr Bogdanowicz, Iris Canor, Maciej Taborowski and Matthias Schmidt, "Guest Editorial: A Potential Constitutional Moment for the European Rule of Law the Importance of Red Lines," 55, *Common Market Law Review* (2018), pp. 1-14.
[198] Mattias Wendel, "Mutual Trust, Essence and Federalism – Between Consolidating and Fragmenting the Area of Freedom, Security and Justice after LM," 15, 1, *European Constitutional Law Review* (2019), p. 27.
[199] Armin Von Bogdandy and Luke Dimitrios Spieker, "Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges," 15, 3, *European Constitutional Law Review* (2019), p. 418.

"Member States shall provide remedies sufficient to ensure effective legal protection (on the values enumerated on Article 2 TEU) in the fields covered by Union law." However, the ECJ did not directly conclude that the principle of judicial independence is a requirement under Article 2 TEU (although it is quite obvious that the principle of judicial independence is essential to rule of law).

In the second place, it appears that the ECJ attempts to take advantage of the ambiguities of Article 19(1) TEU to circumvent the restrictions of the CFR. In fact, the second paragraph of Article 19(1) TEU is drafted in ambiguity, the expression of which shows that remedies sufficient to ensure effective legal protection must be provided by the Member States in "the fields covered by Union law." Such ambiguities enable the ECJ to guarantee fundamental rights protections in order to ensure effective judicial remedies under Article 19(1) TEU, irrespective of whether the Member States are implementing EU law.[200] Article 19(1) TEU obtains a broader scope of application than the CFR.[201] *Bonelli* and *Claes* contend that a link with a "substantive rule of EU law" is thus still required, but it can be more indirect; it is sufficient for the relevant court to "potentially" apply or interpret EU law.[202] Thus, since the principle of judicial independence forms the essence of the right to fair trial under Article 47 CFR, it also forms the essence of effective judicial protection under Article 19(1) TEU.[203]

Moreover, according to the ECJ, the principle of judicial independence is inevitable under the preliminary ruling procedure designated by Article 267 TFEU, where national courts, also as European courts, have to provide remedies to guarantee the effective protection of the rights of individuals merely originating from EU law. However, such interpretation expands the obligations of the domestic "courts or tribunals" for themselves to meet the basic prerequisites for effective judicial protection, irrespective of the implementing of EU law.[204]

Consequently, the ECJ acquired the competence to ensure that any Member States' "courts or tribunals" within the meaning of EU law meets the requirements of

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[200] Case C-64/16, *Associação Sindical dos Juízes Portugueses*, 27 February 2018, EU:C:2018:117, para. 29.

[201] Koen Lenaerts, "On Judicial Independence and the Quest for National, Supranational and Transnational Justice," *in* Gunnar Selvik, Michael-James Clifton, Theresa Haas, Luísa Lourenço and Kerstin Schwiesow (eds.), *The Art of Judicial Reasoning* (Berlin: Springer International Publishing, 2019) p. 155.

[202] Matteo Bonelli and Monica Claes, "Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary," 14, 3, *European Constitutional Law Review* (2018), p. 631.

[203] Case C-64/16, *Associação Sindical dos Juízes Portugueses*, 27 February 2018, EU:C:2018:117, para. 41.

[204] Aida Torres Pérez, "From Portugal to Poland: The Court of Justice of the European Union as Watchdog of Judicial Independence," 27, 1, *Maastricht Journal of European and Comparative Law* (2020), p. 108.

independence and impartiality under Article 2 TEU, Article 19(1) TEU and Article 47 CFR, as stated by Koen Lenaerts:

> "*where a national court qualifies as a* '*court or tribunal*' *as defined by EU law and such a court enjoys jurisdiction to rule on questions of EU law*, *that court acts as a European court and accordingly*, *Article 19*(*1*) *TEU protects its independence*." [205]

Pech and *Platon* claim that the Court effectively and positively transformed the rule of law into a legally enforceable standard to be used against national authorities to challenge targeted attacks on national judiciaries.[206]

B. Judicial Independence in the Context of Human Rights Law

The right to independent and impartial tribunal can be derived from many international treaties, including ICCPR, ECHR and CFR. Article 14 ICCPR affords protection to the right to equality before courts and tribunals and to a fair trial. Article 47 CFR ensures protection to the right to fair trial. Article 6 ECHR and Article 13 ECHR respectively guarantees the right to fair trial and the right to an effective remedy.[207] EU is not a party to the ICCPR and ECHR. In the context of EU law, EU is also required to protect fundamental rights enumerated on CFR while implementing EU law. According to the jurisprudence of the ECJ and Article 52(3) CFR, the level of protections of the fundamental rights listed on the CFR must be the same as the ECHR.[208] Therefore, Article 47 CFR should have the same meaning of Article 6 ECHR, and Article 13 ECHR. In particular, the level of protection of Article 47 CFR should not fall below the level of protection established in Article 6 ECHR.[209]

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[205] Case C-64/16, *Associação Sindical dos Juízes Portugueses*, 27 February 2018, EU:C:2018:117, para. 31; Case C-216/18 PPU, *Minister for Justice and Equality v L.M*, 25 July 2018, EU:C:2018:586, para. 37; Koen Lenaerts, "New Horizons for the Rule of Law within the EU," 21, 1, *German Law Journal* (2020), p. 32.

[206] Laurent Pech and Sébastien Platon, "Judicial Independence under Threat: The Court of Justice to the Rescue in the ASJP Case," 55, 6, *Common Market Law Review* (2018), p.1847.

[207] 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*." Also see ECJ judgements in Case C-619/18, *Commission v Poland*, 24 June 2019, EU:C:2019:531, para. 49; Joined Cases C-585/18, C-624/18 and C-625/18, *A. K. and Others*, 19 November 2019, ECLI:EU:C:2019:982, para. 117.

[208] Article 52(3) CFR: "*in so far as this Charter contains rights which correspond to rights guaranteed by the* (*ECHR*), *the meaning and scope of those rights shall be the same as those laid down by the said Convention*. *This provision shall not prevent Union law providing more extensive protection*."

[209] Joined Cases C-585/18, C-624/18 and C-625/18, *A. K. and Others*, 19 November 2019, ECLI:EU:C:2019:982, para. 118.

The principle of judicial independence is uncompromisable in all three documents. Under the right to equality before courts and tribunals and to a fair trial in Article 14 ICCPR, the requirement of competence, independence and impartiality of a tribunal is not subject to any exception.[210] In terms of the assessing the independence and impartiality of a tribunal required under Article 6 ECHR, the jurisprudence of the ECtHR precludes the application of the proportionality test. Similarly, the ECJ has established that the principle of independence and impartiality of a tribunal forms part of the essence under Article 2 TEU, Article19(1) TEU and Article 47 CFR.

The criteria adopted by the three human rights systems appear to be different but remain identical at the core. In the context of international human rights law and ECHR, both the Human Rights Committee general comment No. 32 on Article 14 ICCPR and the jurisprudence of the ECtHR use the terms of independence and impartiality. While the ECJ prefers to name them external influences and internal influences. In fact, while independence has the same effect of excluding external influences, impartiality aims to shield the court from internal influences. However, this section will only focus on the independence/external part of the discussion, which is a necessary yet not sufficient condition to the presence of the right to independent and impartial tribunal, since one the one hand, the jurisprudence of the ECJ has not yet touched upon the impartiality/internal side of debate; one the other hand, independence/external can only guarantee the appearance of impartiality of the judge, but not also that the judge will actually behave impartially in each and every case.[211]

In terms of the independence/external part of the discussion, according to the Human Rights Committee, the principle of separation of powers requires that the constitution, laws and policies of a country must ensure that the justice system is truly independent from other branches of the State.[212] Thus, judges, lawyers and prosecutors must be free to carry out their professional duties without political interference and must be protected, in law and in practice, from attack, harassment or persecution as they carry out their professional activities. In particular, regarding the political influences, both the ECJ and the ECtHR require that the court concerned must not be subjected to any hierarchical constraint or subordinated to any other body and without taking orders

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[210] United Nations Human Rights Committee, *General comment no. 32*, *Article 14*, *Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32, para. 19. Available at: https://www.refworld.org/docid/478b2b2f2.html.

[211] Helen Keller and Severin Meier, "Independence and Impartiality in the Judicial Trilemma," 111, *American Journal of International Law* (2017), p. 345.

[212] United Nations Human Rights Committee, *General comment no. 32*, *Article 14*, *Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32, para. 19. Available at: https://www.refworld.org/docid/478b2b2f2.html.

or instructions from any source whatsoever.[213] Therefore, it is incompatible with the notion of an independent tribunal if the functions and competencies of the judiciary and the executive are not clearly distinguishable, or the latter is able to control or direct the former.[214]

However, the ECJ and ECHR stress that as long as national judiciaries satisfy the standards of independence/external and have appearances of independence in democratic societies, States are not necessarily required to adopt a particular constitutional model governing in one way or another the relationship and interaction between the various branches of the State, nor requires those States to comply with any theoretical constitutional concepts.[215]

In terms of the specific criteria, in the first place, both the Human Rights Committee and the ECtHR insist that the independence/external is premised on the principle of legality, which requires the interest of the judges secured by law, including, *inter alia*, the clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them. In the context of ECHR, the independence of judges is, at its core, a structural requirement, dependent upon the legal guarantees existing within a legal system to avoid any political pressure on the judiciary.[216]

In the second place, all three human rights systems put great emphasis on the fairness during the procedures of appointment and dismissal of judges. Regarding the appointment procedure, the ECJ and the ECtHR requires that once the judges are appointed by the executive, they must be free from influence or pressure when carrying out their role.[217] However, such assumption of compliance is established on the fact that the substantive conditions and detailed procedural rules governing the adoption of appointment decisions do not give rise to reasonable doubts to the imperviousness of

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[213] Case C-619/18, *Commission v Poland*, 24 June 2019, EU:C:2019:531, para. 72; ECtHR, *Ninn-Hansen v. Denmark*,18 May 1999, Application no. 28972/95, para. 19; ECtHR, *Campbell and Fell v. United Kingdom*, 28 June 1984 Application no. 7819/77 and 7878/77.

[214] United Nations Human Rights Committee, *General comment no. 32*, *Article 14*, *Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32, para. 19. Available at: https://www.refworld.org/docid/478b2b2f2.html.

[215] Joined Cases C-585/18, C-624/18 and C-625/18, *A. K. and Others*, 19 November 2019, ECLI:EU:C:2019:982, para. 130; ECtHR, *Thiam v. France*, 18 October 2018, Application no. 80018/12, para. 62.

[216] ECtHR, *Campbell and Fell v. United Kingdom*, 28 June 1984 Application no. 7819/77 and 7878/77, para. 78.

[217] Joined Cases C-585/18, C-624/18 and C-625/18, *A. K. and Others*, 19 November 2019, ECLI:EU:C:2019:982, para. 133; ECtHR, *Campbell and Fell v. United Kingdom*, 28 June 1984 Application no. 7819/77 and 7878/77, para. 79; ECtHR, *Thiam v. France*, 18 October 2018, Application no. 80018/12, para. 80.

the judges concerned to external factors and as to their neutrality with respect to the interests before them.[218]

In respect of the suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them, the Human Rights Committee requires that judges may be dismissed only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law. Judges cannot be dismissed before the expiry of the term for which they have been appointed, without any specific reasons given to them and without effective judicial protection being available to contest the dismissal is incompatible with the independence of the judiciary. The executive also cannot expel judges alleged to be corrupt, without following any of the procedures provided for by the law.[219]

Under the existing jurisprudence of the international human rights law, ECHR and EU law the right to independent and impartial tribunal is a non-derogable right. Thus, lack of flexibility may render it a useful boundary but an unsuitable judicial tool. *Tridimas* and *Gentile* argue that by stressing the core elements of a right, it invites engagement with theoretical concepts that courts often feel uncomfortable with as they are likely to shift focus from the resolution of the specific dispute to a more abstract discussion of the theoretical underpinnings of constitutionalism.[220]

In this regard, it might provide limited flexibility without affecting the absolute nature of the right through considering the seriousness of the influences on the independence/external part of the right. Therefore, it is important to consider such influences from direct and indirect perspectives. In particular, in the context of EU law, direct influence concerns more of the procedural aspect, including, *inter alia*, the measures that have immediate effects on the judges. As for the indirect influence, which refers to the substantive aspect, questions, *inter alia*, whether the design of the tribunal meets the criteria of independence.

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[218] Joined Cases C-585/18, C-624/18 and C-625/18, *A. K. and Others*, 19 November 2019, ECLI:EU:C:2019:982, para. 133; Case C-619/18, *Commission v Poland*, 24 June 2019, EU:C:2019:531, para. 111.

[219] United Nations Human Rights Committee, *General comment no. 32*, *Article 14*, *Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32, para. 20. Available at: https://www.refworld.org/docid/478b2b2f2.html.

[220] Takis Tridimas and Giulia Gentile, "The Essence of Rights: An Unreliable Boundary?" 20, 6, *German Law Journal* (2019), p. 815.

C. The Direct Influences

The jurisprudence of the ECJ mostly concentrates on the direct influences on the independence of the national tribunals. In *Associação Sindical dos Juízes Portugueses*, the ECJ considered the effects of Portuguese measures reducing the enumeration of judges at the Court of Auditors (*Tribunal de Contas*). In *Commission v Hungary* and *Commission v Poland*, the ECJ evaluated the impacts of the Hungarian and Polish measures ending the career of the judges prematurely. In particular, in *Commission v Poland*, the ECJ discussed the presidential discretion to extend the service of the judges that are retired. It turns out that direct influences with different level of seriousness might produce diverging result in the independency test. the ECJ acknowledged that the measures in Hungary and Poland restricting the independence and impartiality in their respective jurisdictions were much more serious than the Portuguese measures, since the salary-reduction measures cannot be perceived as being specifically adopted to the members of the Court of Auditors, but general measures applied on all members of the national public administration,[221] which was in no way comparable to the effects of a measure with the result of ending, prematurely and definitively, the judicial career of the persons concerned.[222]

i. On the Right to "Receive a Proper Level of Remuneration"

Pech and *Platon* view the ruling in *Associação Sindical dos Juízes Portugueses* as the first significant answer to the "rule of law backsliding" in Hungary and Poland.[223] In this case, Portugal adopted measures for a limited reduction of the amount of remuneration for the Portuguese judges at the Court of Auditors to eliminate the Portuguese State's excessive budget deficit, which was a mandatory requirement of an EU programme of financial assistance to Portugal. Portuguese judges from the Court of Auditors complained that the salary-reduction measures adopted by Portuguese government infringed their right to receive a proper level of remuneration, which was essential to the guarantee of judicial independence.

The ECJ rejected the complaints and ruled that the measures were not against the principle of judicial independence.[224] First, those measures were not discriminate

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[221] Case C-64/16, *Associação Sindical dos Juízes Portugueses*, 27 February 2018, EU:C:2018:117, para. 31; Case C-216/18 PPU, *Minister for Justice and Equality v L.M*, 25 July 2018, EU:C:2018:586, para. 49.

[222] Case C-619/18 *Commission v Poland*, 24 June 2019, EU:C:2019:531, para. 93.

[223] Laurent Pech and Sébastien Platon, "Judicial Independence under Threat: The Court of Justice to the Rescue in the ASJP Case," 55, 6, *Common Market Law Review* (2018), p.1840.

[224] Case C-64/16, *Associação Sindical dos Juízes Portugueses*, 27 February 2018, EU:C:2018:117, para. 50.

against the judges at Court of Auditors. [225] Instead, they were general measures applying also to various public office holders and employees performing duties in the public sector, including the representatives of the legislature, the executive and the judiciary,[226] who all contributed to the austerity effort. Second, the salary-reduction measures were temporary, and the gradual abolition of those measures brought the reduction of remuneration definitively to an end on 1st October 2016. Consequently, Although the salary-reduction measures in Portugal was insignificant on the principle of independence and impartiality, the ECJ gave a warning to national authorities currently engaged or tempted to systematically undermine the rule of law in their countries.[227]

ii. On the Right to "Equal Treatment in Employment and Occupation"

In *Commission v Hungary*, the European Commission did not charge Hungary on the violation of judicial independence for the measures that lowered the age-limit for Hungarian judges from the expected 70 to 62. Instead, it accused Hungary for violating the right to "equal treatment in employment and occupation" under Directive 2000/78/EC.[228] Since it's a discrimination case, the ECJ applied the "proportionality test."[229] To satisfy the "proportionality test," the discriminative measures must both have legitimate aims and be proportionate to achieve such aims. Thus, the ECJ found that the disputed measures in Hungary might have two legitimate aims.[230] On the one hand, disputed measures might have legitimate aims in the standardisation of the age-limit for compulsory retirement, in so far as such an aim ensures observance of the principle of equal treatment for all persons in a specific sector on the time of retirement.[231] On the other hand, disputed measures might have achieved the goals of the establishment of a "more balanced age structure" facilitating access for young lawyers to the professions of judge, prosecutor and notary and guaranteeing them an accelerated career.[232] This aims to prevent possible disputes concerning employees' fitness to work beyond a certain age, while at the same time seeking to provide a high-quality justice service.[233]

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[225] *Ibid.*, para. 49.
[226] *Ibid.*, para. 48.
[227] Laurent Pech and Sébastien Platon, "Judicial Independence under Threat: The Court of Justice to the Rescue in the ASJP Case," 55, 6, *Common Market Law Review* (2018), p.1846.
[228] Case C-286/12, *Commission v Hungary*, 6 November 2012, ECLI:EU:C:2012:687, paras. 22-23.
[229] Case C-286/12, *Commission v Hungary*, 6 November 2012, ECLI:EU:C:2012:687, para. 56.
[230] *Ibid*.. 59-63.
[231] *Ibid*., para. 61.
[232] *Ibid*., paras. 59-60.
[233] *Ibid*., para. 62.

However, the ECJ found that the disputed measures in Hungary were disproportionate to achieve those two aims. First, the disputed measures not only lowered the retirement age without introducing transitional measures to protect the legitimate expectations of the persons concerned,[234] but the measure also had particular economic impact as the affected judges' retirement pension will be at least 30% lower than the full rate.[235] Second, the disputed measures failed to standardise the retirement age-limits between the judicial profession and the rest of professions, since Hungary has failed to establish that more lenient provisions would have made it impossible to achieve the objective of standardisation.[236] In particular, other public sector employees' age-limit has been raised.[237] Third, Hungary failed to establish a more balanced age structure since the ECJ raised doubts on such short-term effects on the possibility of achieving a truly balanced age structure in the medium and long terms.[238] In 2012, the turnover of judges would be very significantly accelerated. However, that rate of turnover will slow down progressively as the age-limit for compulsory retirement is raised progressively from 62 to 65, leading to a deterioration in the prospects for young lawyers of entering the professions of the judicial system.[239] Consequently, failing to pass the "proportionality test," the ECJ came to the conclusion that the disputed measures in Hungary violated the right to "equal treatment in employment and occupation" under Directive 2000/78/EC. However, although the Hungarian measures are very serious in that they are discriminative and constitute violation of the right to "equal treatment in employment and occupation," they are not serious enough to constitute a violation to the principle of judicial independence.

iii. On the Principle of "Irremovability of the Judges"

The principle of irremovability of judges was essential to the principle of judicial independence, since the essence of the external influences requires that the judges of national courts must have guarantees against removal from office.[240] The ECJ defined the principle of irremovability of judges as to require that judges may remain in post provided that they have not reached the obligatory retirement age or until the expiry of their mandate, which is a fixed term.[241] The exceptions to that the principle of

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[234] *Ibid*., para. 68.
[235] *Ibid*., para. 70.
[236] *Ibid*., para. 71.
[237] *Ibid*., para. 74.
[238] *Ibid*., paras. 77-78.
[239] *Ibid*., para. 78.
[240] Case C-619/18, *Commission v Poland*, 24 June 2019, EU:C:2019:531, para. 75.
[241] *Ibid*., para. 76.

irremovability must be warranted by legitimate and **compelling grounds**, subject to the principle of proportionality.[242]

Thus, in the first place, since the principle of irremovability of judges prevents any discrimination on the employment policy against the judiciary, it must consider whether the direct influences from the violation of the right to "equal treatment in employment and occupation" infringe the principle of judicial independence. In *Commission v Poland*, the disputed measures in Poland were partially identical to the disputed Hungarian measures in *Commission v Hungary*. First, the disputed measures' immediate effective on all sitting judges were without proper transitional periods,[243] even considering that the judges retained their judicial titles and continued to enjoy immunity and to receive full emoluments.[244] Second, disputed measures failed to standardise the retirement age-limits between the judicial profession and the rest of professions. Poland forced the judges of the Supreme Court to retire once they reach the age of 65, while it was only the right, not the obligation, for other workers to retire and to receive a retirement pension.[245] Third, disputed measures failed to establish a more balanced age structure, since the early retirement of the judges failed to prevent any discrimination, in terms of the duration of judges' period of judicial activity, between the sitting judges and newly appointed judges.[246] In fact, the mandatory prematurely end of career of elder judges constituted discrimination against these judges since their career was ended earlier,[247] and would not help the young judges in the long term.

However, although this part of the disputed measures in Poland constitute a clear violation of the right to "equal treatment in employment and occupation," it was insufficient for the ECJ to automatically draw the conclusion that the principle of irremovability of judges is violated. In fact, the "proportionality test" applied in *Commission v Poland*, which regards to the principle of irremovability of judges, demonstrated a much higher standard of proof of than the one applied in *Commission v Hungary*, concerning the right to "equal treatment in employment and occupation." Under the higher standard, the "proportionality test" not only required "legitimate aims" but also "compelling ground" to justified the discrimination. The "compelling ground" requires the dispel of 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

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[242] *Ibid*., para. 76.
[243] *Ibid*., para. 91.
[244] *Ibid*., para. 87.
[245] *Ibid*., para. 89.
[246] *Ibid*., para. 94.
[247] *Ibid*., para. 95.

interests before it.[248] Therefore, as distinguished from *Commission v Hungary*, the ECJ, in assessing the legitimate aims of the dispute measures, also questioned the so-called "doubts surrounding the true aims of the reform."

Thus, in the second place, the disputed measures in Poland failed to pass the enhanced "proportionality test," since the ECJ found no legitimate interest in the Polish measures that prematurely ended the career of judges. The disputed measures by Poland failed to justify "compelling ground" over the doubts in three aspects: (a) the explanatory memorandum to the draft 2017 Law on the Supreme Court had shown that it aimed at side-lining a certain group of judges of that court;[249] (b) while the retiring age of the sitting judges was lowered, a new mechanism was in place to allow the president of Poland to decide, on a discretionary basis, to extend the shortened period by two consecutive 3-year periods;[250] (c) the reform would force a major restructuring of the composition of the Supreme Court, since almost a third of the serving judges were to retire.[251] Among these findings, the doubts over the presidential discretion to allow the judges to continue to carry out their duties, might not justify the compelling governmental interest required in the enhanced "proportionality test." Consequently, due to the direct influence of the presidential discretion, the principle of "irremovability of judges" was violated.[252]

The direct influences of the presidential discretion were further elaborated by the ECJ in the second part of the judgement. In particular, the presidential discretion also had a decisive impact on the independence and impartiality of the judges at the Supreme Court. Indeed, the ECJ found that such presidential discretion directly raised "reasonable doubt" on the independence of the judges at the Supreme Court.[253] First, the presidential discretion is not governed by any objective and verifiable criterion and for which reasons need not be stated, and additionally, it is not subjected to any judicial review.[254] Second, although the *KRS* is required to deliver an opinion to make the president's decision more objective, it is not required to state the reasons.[255] Consequently, failing to pass the "reasonable doubt" test, the presidential discretion to extend twice, each time for a 3-year term, the period of judicial career of judges of the

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[248] Case C-506/04, *Wilson*, 19 September 2006, EU:C:2006:587, para. 53; Case C-619/18, *Commission v Poland*, 24 June 2019, EU:C:2019:531, para. 74.
[249] Case C-619/18, *Commission v Poland*, 24 June 2019, EU:C:2019:531, para. 82.
[250] *Ibid*., paras. 83-85.
[251] *Ibid*., para. 86.
[252] *Ibid*., para. 77.
[253] *Ibid*., para. 103.
[254] *Ibid*., para. 114.
[255] *Ibid*., para. 117.

Supreme Court beyond the new retirement age fixed in that Law, affected the independence and impartiality of the Supreme Court and Article 19(1) TEU.

Therefore, direct influences of the discretion of the President of Poland constitute violations to the principle of judicial independence.

D. The Indirect Influences

Comparing to direct influences, including *inter alia*, the reduction of renumeration of judges, forcing the judges to retire earlier or extending the career of judges at will through presidential discretions, indirect influences are much harder to identiy. In *A.K. and Others*, the ECJ assessed the indirect influences to the independence of the reformed *KRS* and the newly set up Disciplinary Chamber within the Supreme Court. Instead of setting clear criteria like the "proportionality test" or the "reasonable test" applied in assessing the direct influences, the ECJ considered the indirect influences from the perspective of the composition and functioning of the *KRS* and the Disciplinary Chamber. Consequently, since there is no uniform EU standard, the detrimental effects resulting from the indirect influences cannot be established without any controversy.

i. On the Independence of the National Judicial Council

The *KRS* is the body to ensure the independence of the courts and of the judiciary in Poland.[256] The judges of the Disciplinary Chamber were appointed by the President of the Republic on a proposal of the *KRS*. Thus, as the *KRS* may contribute to making the appointing process more objective, since the degree of independence enjoyed by the *KRS* from the legislature and executive could affect the independence of the judges which it selects.[257]

The ECJ found a several points that might affect the objectivity of the *KRS*. First, the newly composed *KRS* was formed by reducing the ongoing four-year term in office of the members of that body at that time. Second, the 15 members of the *KRS* elected among members of the judiciary that were previously elected by their peers, are now elected by the *Sejm* among judges proposed by groups of 2 000 citizens or 25 judges. This would lead to the members of the *KRS* supported by the *PiS*-led government to 23 out of the total 25 members.[258] Third, the potential for irregularities which could

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[256] Joined Cases C-585/18, C-624/18 and C-625/18, *A. K. and Others*, 19 November 2019, ECLI:EU:C:2019:982, para. 136.
[257] *Ibid*., paras. 137-139.
[258] *Ibid*., para. 143.

adversely affect the process for the appointment of certain members of the newly formed *KRS*.[259] Lastly, it was unclear whether proposal for appointment to the Disciplinary Chamber by the *KRS* was subjected to effective judicial review.[260]

It appears that ECJ has partially followed the Opinion of AG Tanchev in that there is no single model that a jurisdiction is bound to follow in setting up a judicial council so long as its composition guarantees its independence and enables it to function effectively.[261] Thus, the ECJ deliberately avoided setting up an EU standard on the indirect influences, and left this task to the Supreme Court of Poland in order to show that the Member States enjoys a margin of appreciation in the design of the National Judicial Council.

However, these points are insufficient to raise doubts on the objectivity of the *KRS*. Nevertheless, the Opinion of AG Tanchev proposed a "idea situation" where the National Judicial Council could be perfectly independent. In the first place, AG Tanchev suggested that in order to guarantee the continuity of functions, the mandates of the members of judicial councils should not be replaced at the same time or renewed following parliamentary elections.[262] In the second place, AG Tanchev claimed that judicial councils should in principle be composed of at least a majority of judges elected by their peers to prevent manipulation or undue pressure, guarantee a wide representation of the judiciary at all levels, and discourage the involvement of legislative and executive authorities in the selection process.[263]

Nonetheless, it is important to note that the *KRS* does not fall within the scope of "courts or tribunals" within the meaning of EU law. Instead, the *KRS* mostly performs administrative works, which do not necessarily require the same level of independence and impartiality as the judiciary. The proposal by AG Tanchev represents the idea situation where the *KRS* could be formed, while the current mechanism is still above the bottom line. Although 15 judges of the *KRS* are now elected by the *Sejm*, instead of elected by the judiciary, they remain as judges required by Article 187 of the Polish Constitution, rather than members of the legislature or executive.[264] Besides, contrary to what has been suggested by AG Tanchev, it is common practices by the Member

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[259] *Ibid*., para. 143.
[260] *Ibid*., para. 145.
[261] Opinion of Advocate General Tanchev in Joined Cases C-585/18, C-624/18 and C-625/18, *A. K. and Others*, 27 June 2019, ECLI:EU:C:2019:551, para. 126.
[262] Opinion of Advocate General Tanchev in Joined Cases C-585/18, C-624/18 and C-625/18, *A. K. and Others*, 27 June 2019, ECLI:EU:C:2019:551, para. 127.
[263] *Ibid*., para. 126.
[264] The Constitution of The Republic of Poland (*Konstytucja Rzeczypospolitej Polskiej*), *Dz. U.* 78.483, 2 April, 1997. Available at: https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm. Article 187: "*1. The National Council of the Judiciary shall be composed as follows*: *...2) 15 judges chosen from amongst the judges of the Supreme Court*, *common courts*, *administrative courts and military courts*."

States across the EU to have non-judiciary members appointed by the executive or legislature in their respective judicial councils. In fact, according to the data from the European Network of Councils for the Judiciary (ENCJ) presented in Table 1,[265] among its 21 members, although a majority of judicial councils consists of 50% or higher number of judges, Denmark, France, Malta and Portugal do not have a majority in their judicial councils.

Table 1 Compositions of Judicial Councils in the EU

	County	Name	Judges	Non-Judges	Majority
1	Belgium	High Council of Justice	22	22	Tied
2	Bulgaria	Supreme Judicial Council	14	11	Yes
3	Croatia	State Judicial Council	7	4	Yes
4	Denmark	The Danish Court Administration	3	8	No
5	Finland	National Courts Administration	6	2	Yes
6	France	High Council for the Judiciary	6	16	No
7	Greece	Supreme Judicial Council of Civil and Criminal Justice	11/15	0	Yes
8	Greece	Supreme Judicial Council for Administrative Justice	11/15	0	Yes
9	Hungary	National Judicial Council	15	0	Yes
10	Ireland	The Courts Service	9	8	Yes
11	Italy	Consiglio Superiore della Magistratura	19	8	Yes
12	Italy	Consiglio di presidenza della giustizia amministrativa	11	4	Yes
13	Latvia	Council for the Judiciary	15	0	Yes
14	Lithuania	The Judicial Council	23	0	Yes
15	Malta	Commission for the Administration of Justice	4	6	No
16	The Netherlands	Dutch Council for the Judiciary	2	2	Tied
17	Portugal	High Council for (the) Judiciary	8	9	No
18	Romania	Superior Council of Magistracy	10	9	Yes
19	Slovakia	Judicial Council of the Slovak Republic	9	9	Tied

[265] Data from the European Network of Councils for the Judiciary (ENCJ). Available at: https://www.encj.eu/members.

20	Slovenia	The Judicial Council of the Republic of Slovenia	6	5	Yes
21	Spain	General Council for the Judiciary	12	9	Yes
22	Poland[266]	National Council of Judiciary	15	10	Yes

Moreover, neither did the ECJ nor AG Tanchev specify on the "irregularities" that may affect the *KRS*. Finally, the last point raised by the ECJ is based on ungrounded suspicion, since Article 44 of the Law on the *KRS* does not preclude judicial review by the Supreme Administrative Court (*Naczelny Sąd Administracyjny*). In fact, what is precluded is a review alleging an inadequate evaluation of whether the candidates fulfilled the criteria. Consequently, although the reform of the *KRS* made it to depart from the most idea situation presented by AG Tanchev, such indirect influences appear insufficient to establish the fact that the *KRS* is not independent from the legislature and executive.

ii. On the Independence of the Disciplinary Court

The Disciplinary Chamber within the Supreme Court is granted the exclusive jurisdiction to hear cases concerning the removal of judges. In this regard, the Disciplinary Chamber can be characterised as "courts or tribunals" within the meaning of EU law, which is required to meet the requirements of effective judicial protection under Article 2 TEU, Article 19(1) TEU and Article 47 CFR.[267] Thus, the ECJ considered the two factors that could affect its independence: (a) the context of the creation of the Disciplinary Chamber; (b) the context, composition, circumstances and conditions surrounding the appointment of the judges called to sit on it.[268] Before analyzing these factors, the ECJ put a disclaimer by proclaiming that the mere fact that those judges were appointed by the President of Poland does not affect the former's independence, if, once appointed, they are free from influence or pressure when carrying out their role.[269] Therefore, the criteria of assessment were that the substantive conditions and detailed procedural rules governing the adoption of appointment decisions are such that they cannot give rise to "reasonable doubts."[270]

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[266] The *KRS* of Poland was suspended by decision of the ENCJ General Assembly of 17/9/2018.
[267] Case C-64/16, *Associação Sindical dos Juízes Portugueses*, 27 February 2018, EU:C:2018:117, para. 31, C-216/18 PPU, *Minister for Justice and Equality v L.M*, 25 July 2018, EU:C:2018:586, para. 37.
[268] Joined Cases C-585/18, C-624/18 and C-625/18, *A. K. and Others*, 19 November 2019, ECLI:EU:C:2019:982, para. 131.
[269] *Ibid*., para. 133.
[270] *Ibid*., para. 134.

Other than doubts over the objectivity of the *KRS*, the ECJ found a multiple of other issues that have raised "reasonable doubts" on the independence and impartiality of the Disciplinary Chamber.[271] First, the Disciplinary Chamber was granted exclusive jurisdiction to rule on cases related to the mandatory retiring of sitting judges of the Supreme Court.[272] Second, the Disciplinary Chamber can be constituted solely of newly appointed judges, thereby excluding judges already serving in the Supreme Court.[273] Third, the Disciplinary Chamber appears to enjoy a particularly high degree of autonomy comparing to other chambers in the Supreme Court.[274]

The ECJ also deliberately avoided setting up a clear EU standard on the independence of the Disciplinary Chamber, and left the ultimate decision to the Supreme Court of Poland. However, the "reasonable doubts" test was vague and its reasonings were unconvincing. In fact, the ECJ in *A. K. and Others*, did not follow the criteria set in the Opinion of AG Tanchev in this case, and by the ECJ itself in *Commission v Poland*. In *Commission v Poland*, the ECJ found that the disciplinary regime that can dismiss the judges must provide necessary guarantees to prevent any risk of that disciplinary regime being used as a system of political control of the content of judicial decisions.[275] Such guarantees require that the rules define both conduct amounting to disciplinary offences and the penalties are actually applicable, with a procedure which fully safeguards the rights enshrined in Article 47 CFR and Article 48 CFR, in particular the rights of the defence, and which lay down the possibility of bringing legal proceedings challenging the disciplinary bodies" decisions.[276] In this regard, AG Tanchev argues in the Opinion of *A. K. and Others* that it can be concerning that the jurisdiction of the Disciplinary Chamber over the retirement of judges at the Supreme Court and disciplinary proceedings against judges are both aspects concerned by that same package of measures. The package that AG Tanchev was referring to was the 2017 Law on the Supreme Court, which not only established the Disciplinary Chamber, but also provided its jurisdiction over the compulsory retirement of judges at the Supreme Court.[277] However, the ECJ in its judgement did not specifically address these issues.

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[271] *Ibid*., para. 146.
[272] *Ibid*., paras. 147-149.
[273] *Ibid*., para. 150.
[274] *Ibid*., para. 151.
[275] Case C-619/18, *Commission v Poland*, 24 June 2019, EU:C:2019:531, para. 77.
[276] *Ibid*., para. 60.
[277] The Law on the Supreme Court (*Ustawy o Sądzie Najwy*), *Dz.U*. 2018.1045, 16 June 2018. English version available at: https://www.legislationline.org/download/id/8518/file/Poland_Act_on_the_Supreme_Court_2017_am2019_en.pdf.

Following *A. K. and Others*, the Supreme Court of Poland delivered its judgements on the independence of the Disciplinary Chamber on 19 December 2019. In respect of the composition of the Disciplinary Chamber, the Supreme Court found that until the moment when all the posts in the Disciplinary Chamber have been filled for the first time, judges of that chamber are appointed by the President of Poland. Supreme Court found that the Disciplinary Chamber is composed of persons with strong links with the legislature or executive, i.e. the director of the department at the National Prosecutor's Office.[278] Regarding the broad autonomy enjoyed by the Disciplinary Chamber, the Supreme Court found that the Disciplinary Chamber not only serves as the court of first instance adjudicating in disciplinary cases of the legal profession, it also acts as second instance court, in which the judges in this Chamber evaluate each other's judgments, which violates the constitutional guarantees of two-instance proceedings.[279] On this basis, the Supreme Court decided that the Disciplinary Chamber is not an independent court.

E. Is the Fourteenth Amendment of the United States Constitution an Inspiration of Article 19(1) TEU the European Union?

Since Article 19(1) TEU gives concrete meaning to Article 2 TEU, could it be used to develop rights that are not enumerated on the Treaties, or incorporate those rights under the EU law to the Member States? To pursue the analogy further, *Pech* and *Platon* argue that Article 19(1) TEU could be considered as the EU equivalent of the 14th Amendment to the U.S. Constitution.[280]

The United States of America has a federal structure of government, where the public authority is divided between the federal government and state government.[281] During the ratification process of the United States Constitution by the thirteen founding states, the Anti-Federalists like John Adams and Thomas Jefferson raised objections that the Constitution lacks any guarantee on human rights protection.[282] To address this deficiency, the first ten amendments to the U.S. Constitution was approved in 1791, which provides the protection of certain rights and liberties against the trespass by the federal government, as well as reservation of rights to the states that are not explicitly granted to the federal government.[283] Together, the first ten amendments to

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[278] Supreme Court of Poland, *A.K.*, PO 7/18, 5 December 2019, paras. 66.
[279] *Ibid*., paras. 65, 73.
[280] Laurent Pech and Sébastien Platon, "Judicial Independence under Threat: The Court of Justice to the Rescue in the ASJP Case," 55, 6, *Common Market Law Review* (2018), p.1854.
[281] Larry N. Gerston, *American Federalism: A Concise Introduction* (London: Routledge 2007).
[282] Letter from Thomas Jefferson to James Madison, 15 March 1789. Available at: https://www.gwu.edu/~ffcp/exhibit/p7/p7_1text.html.
[283] *The Constitution of the United States*, 4 March 1789 (Last amended 7 May 1992). Available at: https://constitutionus.com/#r27.

the U.S. Constitution are named the "Bill of Rights."[284] However, at the very beginning, the applicability of the "Bill of Rights" was limited. The U.S. Supreme Court in 1833 held in *Barron v. Baltimore* that the Bill of Rights applied only to the federal, but not any state governments.[285] Thus, the rights and freedoms of individuals were then protected by state constitutions.

In the aftermath of the U.S. Civil War, the Fourteenth Amendment (Amendment XIV) to the United States Constitution was adopted in 1868. Although the framers of the Fourteenth Amendment did not spell out its impact on the Bill of Rights, the U.S. Supreme Court examined whether the Due Process Clause and the Privileges or Immunities Clause that is provides could be invoked to incorporate the "Bill of Rights" to the States. However, such early attempts were unsuccessful. In the *Slaughter-House Cases* (1873), the U.S. Supreme Court applied the Privileges or Immunities Clause to the state for the first time, according to which, "*No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States*." In this regard, Justice Miller distinguished the citizenship of the federal from the citizenship of the states, and found that the Fourteenth Amendment only safeguarded the Privileges or Immunities of the citizenship of the federal, which were limited to a small minority of rights, such as the right to seek federal office.[286] Moreover, the U.S. Supreme Court in *United States v. Cruikshank* (1876) also held that the First and Second Amendment did not apply to state governments.[287]

However, starting in the 20th century, the U.S. Supreme Court began to develop the Due Process Clause, which enables it to incorporate the "Bill of Rights" to the States. The Due Process Clause was protected by the Fifth Amendment on actions by the federal government, while the Fourteenth Amendment extended its application to the stats, in which it stipulates that "*No State shall deprive any person of life*, *liberty*, *or property*, *without due process of law*." In *Gitlow v. New York* (1925), the U.S. Supreme Court for the first time successfully incorporated the First Amendment to the State of New York through the Due Process Clause.[288] In this case, the majority opinion delivered by Justice Sanford found that

> "*freedom of speech and of the press which are protected by the First Amendment from abridgment by Congress are among the fundamental personal rights and*

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[284] See Carol Berkin, *The Bill of Rights*: *The Fight to Secure America's Liberties* (New York: Simon & Schuster, 2016).
[285] Supreme Court of the United States, *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833).
[286] Supreme Court of the United States, *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).
[287] Supreme Court of the United States, *United States v. Cruikshank*, 92 U.S. 542 (1876).
[288] Supreme Court of the United States, *Gitlow v. New York*, 268 U.S. 652 (1925).

"liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the States."

Following *Gitlow v. New York*, although most fundamental rights valid against the federal government can be invoked against states under the incorporation doctrine,[289] the methodology applied in this process is still under debates. On the one hand, *Fairman* argued for "selective incorporation," that is, that only parts of the first eight amendments were so incorporated.[290] On the other hand, Justice Black, who wrote a lengthy dissenting opinion in *Adamson v. California*, strongly opposed the "selective incorporation."[291] Instead, he argued for the "total incorporation" of the first eight amendments of the Bill of Rights through the Privileges or Immunities Clause. The idea of "total incorporation" won support of many scholarly works,[292] but was not favoured by the U.S. Supreme Court. Therefore, during the past century, the U.S. Supreme Court incorporated most of rights, enumerated or not on the Bill of Rights in the "selective incorporation" through the Due Process Clause of the Fourteenth Amendment.[293] However, there are still much controversies around rights like the Seventh Amendment right to jury trial in civil cases, which was still not incorporated.[294]

In the context of EU law, following the Lisbon Treaty, the Charter of Fundamental Rights was given the same legal status as the TEU and TFEU. Thus, all the EU institutions and the Member States must respect the human rights enumerated on the CFR. However, the ECJ's competence on safeguarding those rights is limited under Article 51 CFR to cases where the EU law is implemented. The CFR is naturally applicable to the EU institutions, since they must act according to the EU law. Instead, the applicability of the CFR in the Member States must be determined by a case-by-case study. In this regard, the EU had to "cooked from what it had" by trying to making use of its limited powers to forge legal arguments against laws and measures that appeared to infringe upon fundamental rights, using the "supportive by-effects" of

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[289] Jacqueline R. Kanovitz, *Constitutional Law*, 12th ed, (Cincinnati: Anderson Publishing, 2010), p. 23.
[290] Charles Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding," 2, 1, *Stanford Law Review* (1949).
[291] Supreme Court of the United States, *Adamson v. California*, 332 U.S. 46 (1947).
[292] Alfred Avins, "Incorporation of the Bill of Rights: The Crosskey-Fairman Debates Revisited," 6, 1, *Harvard Journal on Legislation* (1968), p. 1-26; Wildenthal Bryan, "The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment," 61, *Ohio State Law Journal* (2000).
[293] Supreme Court of the United States, *Timbs v. Indiana*, 586 U.S. ___ (2019).
[294] Leonard Levy, Charles Fairman and Stanley Morrison, *The Fourteenth Amendment and The Bill of Rights: The Incorporation Theory* (*American Constitutional and Legal History Series*) (Bosto: Da Capo Press, 1970).

largely economic rights and freedoms.[295] For instance, in *Commission v Hungary*, the EC and ECJ had to focus on the violation of the right to "equal treatment in employment and occupation" under Directive 2000/78/EC, instead of directly invoking the idea of right to independent and impartial tribunal.[296]

However, it appears that the ECJ has found a solution to circumvent the limit of Article 51 CFR through a value-oriented interpretation of Article 19(1) TEU. In *Associação Sindical dos Juízes Portugueses*, the ECJ was able to examine the independence and impartiality of the national "courts and tribunals" within the meaning of EU law under Article 19(1) TEU. This essentially raises the question of whether Article 19(1) TEU could serve as the EU version of the "due process clause" that would enable the incorporations of the Article 2 TEU values and the CFR to the Member States? Subsequently, the ECJ gave an affirmative answer in *Commission v Poland*, where the application of Article 19(1) TEU found that the arbitrary removal of the judges at the Supreme Court violated the principle of irremovability of judges, which was essential to the independence and impartiality of the Supreme Court.[297]

However, unlike the Fourteenth Amendment of the United States Constitution, which does not textually prohibit the incorporation of the "Bill of Rights," Article 19(1) TEU, and Article 47 CFR have different material scopes. According to AG Tanchev's opinion in *Commission v Poland*, a combined application of those two provisions would be apt to undermine the current system of review of the compatibility of national measures with the CFR and open the door for Article 19(1) TEU to be used as a "subterfuge" to circumvent the limits of the scope of application of Article 51(1) CFR.[298] In the view of the AG Tanchev, a review based on Article 19(1) TEU was not a human rights review. The independence and impartiality under Article 19(1) TEU were irrelevant to the CFR.

The ECJ did not adopt the opinion by AG Tanchev on the separative application of Article 19(1) TEU and Article 47 CFR. Instead, it argued that "*The principle of the effective judicial protection of individuals rights under Article 19(1) TEU… has been enshrined in Articles 6 and 13 of the ECHR*, *and which is now reaffirmed by Article 47 CFR*."[299] Thus, it adopted the combined approach and attempted to incorporate Article

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[295] Csongor Istvan Nagy, "Do European Union Member States Have to Respect Human Rights: The Application of the European Union's Federal Bill of Rights to Member States," 27, 1, *Indiana International & Comparative Law Review* (2017), p. 9.
[296] Case C-286/12, *Commission v Hungary*, 6 November 2012, ECLI:EU:C:2012:687.
[297] Case C-619/18, *Commission v Poland*, 24 June 2019, EU:C:2019:531.
[298] Opinion of Advocate General Tanchev in Case C-192/18 *Commission v. Poland*, 20 June 2019, EU:C:2019:529, paras. 56-57.
[299] Case C-619/18, *Commission v Poland*, 24 June 2019, EU:C:2019:531, para. 49.

47 CFR through Article 19(1) TEU. This is similar to the methodology of incorporation followed by the the U.S. Supreme Court. In particular, in *Timbs v. Indiana*, Justice Ginsburg ruled that "*a Bill of Rights protection is incorporated*, *if it is* '*fundamental to our scheme of ordered liberty*,' *or* '*deeply rooted in this Nation*'*s history and tradition*'*.*"[300] In this regard, the ECJ has essentially nullified Article 51 CFR, and opens the path to a total incorporation of the CFR in the Member States.

However, it is expected that Article 19(1) TEU would be facing strong backlash form the Member States. The ECJ adopted the value-oriented interpretation of Article 19(1) TEU in 2018 and rushed to apply it to Poland in 2019, regarding the independence and impartiality of the Supreme Court. It is also expected to apply Article 19(1) TEU again to Poland in 2020, regarding the independence of the *KRS* and the Disciplinary Chamber. Such rapid application of Article 19(1) TEU not only disrespects democracy of the Member States, but is also not helpful in safeguarding the fundamental values and rights of the EU. As pointed out by in the *Slaughter-House Cases* (1873) by Justice Miller:

> "*[the privileges and immunities of citizens of the United States] are left to the State governments for security and protection*, *and not by this article placed under the special care of the Federal government*, *we may hold ourselves excused from defining the privileges and immunities of citizens of the United States which no State can abridge until some case involving those privileges may make it necessary to do so*."[301]

On the contrary, the ECJ's incorporation of the CFR through Article 19(1) TEU might have to learn from its American counterpart, which is selective, and the process being gradual. In this respect, it was notable that while the right to freedom of expression under the First Amendment was incorporated in 1925, it was 85 years later in 2010 that the right to bear arms of the Second Amendment was incorporated in *McDonald v. Chicago*.[302]

3.2.4 The Impacts of the European Court of Justice's *Ultra Vires* Review

Even though the responsibility to maintain mutual trust between the Member States, and Article 19(1) TEU enables the ECJ to review the independence and impartiality of the national courts or tribunals, such unlimited jurisdiction might produce negative

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[300] Supreme Court of the United States, *Timbs v. Indiana*, 586 U.S. ___ (2019).
[301] Supreme Court of the United States, *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).
[302] Supreme Court of the United States, *McDonald v. Chicago*, 561 U.S. 742 (2010).

impacts on the European Constitutional order. In the first place, the expanded competence is inconsistent with the preliminary ruling procedure under Article 267 TFEU. In this sense, the preliminary ruling procedure requires the ECJ to preserve a balance between the discretion of the national courts to refer questions concerning the implementation of EU law, and the competence of the ECJ to only address those questions that are necessary to solve the disputes before the referring court. The focus should be on the disputes over EU law, instead of the independence and impartiality of the national courts. Hence, an *ultra vires* review by the ECJ would eventually squeeze the "EU legal-free space," to the extent that the ECJ could review national measures irrelevant to EU law. In the second place, although EU law acquires primacy over national law, the EU is required to respect the "national identities" of the Member States under Article 4(2) TEU, including those "national identities" incorporated into the national constitutions. When both the EU and the Member States claim that their constitutional identities are immune from any judicial review, a constitutional crisis within the EU would become inevitable. In this regard, since EU heavily relies on the Member States to implement EU law, whenever the national constitutional identities are intruded by the ECJ, it would be very difficult to force the Member States to respect and implement the EU law.

A. On the Preliminary Ruling Procedure

Although independence is not a textual requirement of the preliminary ruling procedure under Article 267 TFEU, the recent ECJ judgements have appeared to establish that the preliminary ruling procedure under Article 267 TFEU may be activated only by a body responsible for applying EU law which satisfies the criterion of independence.[303] This is elaborated by *Koen Lenaerts*, according to whom Courts that are not independent do not have access to the preliminary reference mechanism, since they could not grant remedies to secure judicial protection of the rights conferred by the EU law, which requires the uniform interpretation and application of EU law, and equal protection of EU law for citizens from across the EU.[304]

Even though it is the established case-law and legal authorities that judicial independence is inevitable for the proper function of the preliminary ruling procedure,

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[303] See Case C-64/16, *Associação Sindical dos Juízes Portugueses*, 27 February 2018, EU:C:2018:117, para. 43; Case C-216/18 PPU, *Minister for Justice and Equality v L.M*, 25 July 2018, EU:C:2018:586, para. 46; Joined Cases C-585/18, C-624/18 and C-625/18, *A. K. and Others*, 19 November 2019, ECLI:EU:C:2019:982; Case C-619/18, *Commission v Poland*, 24 June 2019, EU:C:2019:531.

[304] Koen Lenaerts, "New Horizons for the Rule of Law within the EU," 21, 1, *German Law Journal* (2020), p. 32.

with the value-oriented interpretation of Article 19(1) TEU, the competence of the ECJ has also been improperly expanded so that it can scrutinise any "courts or tribunals" within the meaning of EU law on whether they satisfy the requirements of independence and impartiality under Article 2 TEU, Article 19(1) TEU and Article 47 CFR, irrespective of whether or not the national measure that is challenged is connected with EU law. The expansion of the competence of the ECJ is inconsistent with the referring procedure and produced counter effects on the legitimacy of the preliminary ruling procedure.

Under the preliminary ruling procedure, individuals have the right to challenge before the national courts the legality of any national measure applying EU law.[305] National courts have the widest discretion and also obligation to refer questions to the ECJ involving interpretation of relevant provisions of EU law.[306] Such discretion and obligation to refer questions concerning EU law are accompanied by the obligation of the ECJ to give a judgement provided that there is a presumption of relevance between national law and EU law.[307]

However, the cooperation can be rebutted if the national law is manifestly no longer relevant for the purposes of deciding the case, or if it is quite obvious that the interpretation bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the ECJ does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.[308] Furthermore, the ECJ may interpret EU law only within the limits of the powers conferred upon it, to the extent which are necessary for the referring court to deliver the effective resolution of a dispute before them, instead of giving advisory opinions on general or hypothetical questions.[309]

In this regard, a balance must be established between the wildest discretion of the national courts to refer questions to the ECJ and the competence of the ECJ to give a judgement. Concerning the expansion of competence of the ECJ in scrutinising the independence and impartiality of national courts and tribunals, the balance no longer exists. With the expanded competence, the ECJ raises doubts on whether it is able to

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[305] Case C-619/18, *Commission v Poland*, 24 June 2019, EU:C:2019:531, para. 46.
[306] Case C-64/16, *Associação Sindical dos Juízes Portugueses*, 27 February 2018, EU:C:2018:117, para. 20; Joined Cases C-585/18, C-624/18 and C-625/18, *A. K. and Others*, 19 November 2019, ECLI:EU:C:2019:982, para. 103.
[307] Joined Cases C-585/18, C-624/18 and C-625/18, *A. K. and Others*, 19 November 2019, ECLI:EU:C:2019:982, para. 103.
[308] Joined Cases C-585/18, C-624/18 and C-625/18, *A. K. and Others*, 19 November 2019, ECLI:EU:C:2019:982, p. 98. Case C-64/16, *Associação Sindical dos Juízes Portugueses*, 27 February 2018, EU:C:2018:117, para. 23.
[309] Joined Cases C-585/18, C-624/18 and C-625/18, *A. K. and Others*, 19 November 2019, ECLI:EU:C:2019:982, para. 70.

adjudicate on cases applying only domestic laws that are completely irrelevant to the EU law, as long as there are doubts on the independence and impartiality of the national courts that the case is brought before.[310]

In response to these doubts, there are two main arguments that are worth noting. On the one hand, *Koen Lenaerts* argues that the ECJ must examine all national measures, since it would be impossible for the ECJ to assume that the national courts would behave differently between applying EU law and national law. In the sense, Member States might not be able to limit the independence of judges only when they rule on questions which do not concern either the application or the interpretation of EU law.[311] The national courts that are not independent always have risks on refraining from granting remedies to the parties who have been adversely affected by those measures, no matter whether those measures are implementing EU law or not. Consequently, without judicial independence, remedies grounded in EU law become paper tigers.[312]

On the other hand, the preliminary ruling procedure appears to be used by individuals to express discontent on their national governments. *Uitz* claims that the competence of the ECJ must be expanded so that it can protect dissents of the individuals towards the national government, since when democratic decision-making processes are compromised and dissent is systematically suppressed, national courts that are independent guarantees the individuals to raise objections against the acts of national governments by requesting the ECJ to interpret such national acts through the preliminary ruling procedure.[313]

Although these arguments may help to justify the *ultra vires* review by the ECJ through the preliminary ruling procedure, they have failed to address the consequences that such unlimited judicial power may bring about. In particular, the unlimited expansion of the competence of the ECJ would squeeze the "EU-free legal space" where Member States could make choices without any constraints from EU Law to preserve their autonomy, especially in sensitive areas would have been gradually reduced within national legal systems.[314] Furthermore, ECJ should not address the problems of "structural breaches" of EU law under the preliminary ruling procedure, which only deals with individual complaints. Instead, the "structural breaches" of EU

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[310] Laurent Pech and Sébastien Platon, "Judicial Independence under Threat: The Court of Justice to the Rescue in the ASJP Case," 55, 6, *Common Market Law Review* (2018), p.1840.
[311] *Ibid*., p.1848.
[312] Koen Lenaerts, "New Horizons for the Rule of Law within the EU," 21, 1, *German Law Journal* (2020), p. 32.
[313] Renáta Uitz, "The Perils of Defending the Rule of Law through Dialogue," 15, 1, *European Constitutional Law Review* (2018), pp. 14-15.
[314] Laurent Pech and Sébastien Platon, "Judicial Independence under Threat: The Court of Justice to the Rescue in the ASJP Case," 55, 6, *Common Market Law Review* (2018), p.1854.

law should be considered under the infringement proceedings of Article 258 TFEU. AG Tanchev has argued in several opinions concerning Polish cases that Article 19(1) TEU ought to be confined to "structural breaches" which compromise the essence of judicial independence,[315] since not all the national general measures affecting right to a fair trial are equally susceptible of giving rise to national referrals for a preliminary ruling,[316] e.g., a national law creating excessive limitations to the right to public hearings.[317]

The detrimental effects were evident in *Associação Sindical dos Juízes Portugueses*, in which the ECJ displayed little interest in examining the austerity measures in Portugal. Instead, the ECJ was determined to gain a say in the Polish discussion and to make it clear that the organisation of national judiciaries is not a purely domestic matter.[318] In this regard, the ECJ contradicted the procedures of the preliminary ruling procedure by assuming the *prima facie* connection between the disputed measures and Article 19(1) TEU and Article 47 CFR, so that the disputed measures could fall into the "fields covered by EU law." The ECJ argued that the assumption was based on the so called "sufficient information" provided by referring court without elaborating on it.[319] The European Commission also doubted about the applicability of Article 19(1) TEU, and submitted observation contending that the referring court has not set out the reasons for choosing Article 19(1) TEU to be interpreted.[320]

The ECJ took a step further in *A.K. and Others*. In this case, the 2017 Law on the Supreme Court forcing A.K. and other two judges of the to retire earlier than the age fixed by the previous law had already been repealed by the amending legislation in May 2018, which had completely eliminated the adverse effects of A.K. and other two judges in the main cases, who were resumed to their services and titles.[321] Nonetheless, the ECJ insisted that it should give a ruling, since it has power to explain to the national court points of EU law which may help to solve the problem of jurisdiction, regarding

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[315] Opinion of Advocate General Tanchev in Case C-192/18 *Commission v. Poland*, 20 June 2019, EU:C:2019:529, paras. 115-116; Opinion of Advocate General Tanchev in Joined Cases C-585/18, C-624/18 and C- 625/18 *A. K. and Others*, 27 June 2019, EU:C:2019:551, paras. 145-152.

[316] Laurent Pech and Sébastien Platon, "Judicial Independence under Threat: The Court of Justice to the Rescue in the ASJP Case," 55, 6, *Common Market Law Review* (2018), p.1849.

[317] ECtHR, *Diennet v. France*, 26 September 1995, Application. no. 18160/91, paras. 30-35.

[318] Matteo Bonelli and Monica Claes, "Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary," 14, 3, *European Constitutional Law Review* (2018), p. 628.

[319] Case C-64/16, *Associação Sindical dos Juízes Portugueses*, 27 February 2018, EU:C:2018:117, para. 21.

[320] *Ibid*., para. 19.

[321] Joined Cases C-585/18, C-624/18 and C-625/18, *A. K. and Others*, 19 November 2019, ECLI:EU:C:2019:982, paras. 87-90.

whether such national court that has jurisdiction over EU law meets the requirement under Article 47 CFR.[322] However, the ECJ is ruling on a hypothetical question.

On this basis, the ECJ also repeated the controversial methodology in *Associação Sindical dos Juízes Portugueses*. The ECJ claimed that since the Disciplinary Chamber falls into the "courts or tribunals" within the meaning of EU law with its jurisdiction to apply Directive 2000/78,[323] the law setting up and granting the Disciplinary Chamber jurisdiction (which is purely irrelevant to EU law), falls within the "fields covered by EU law" within the meaning of Article 19(1) TEU. Consequently, the ECJ allowed the referring court to disapply such law, if the it finds out that the Disciplinary Chamber does not meet the requirement of independence under Article 47 CFR.[324]

As a result, the ECJ undermined the cooperation with the Member States through the preliminary ruling procedure, and effectively trespassed the constitutional autonomy of the Member States through creating new chambers within its highest court, which fully fell within the "EU-free legal space." Furthermore, the ECJ has entered itself into a divisive process of domestic constitutional change, with rulings that make the efforts of one side of that debate to change domestic institutions more difficult.[325] *Landau* terms this process as "abusive constitutionalism," [326] which terns constitutionalism to a project for the centralisation rather than dispersal of governing authority.[327] Confrontation at the EU level might be the riskiest strategy protect the rule of law,[328] since an EU legal order that confronts populists' risks, at worst, of being actively demonised or even captured by populist forces. This risk is further manifested in the flat-out refusal of Hungary and Poland to comply with ECJ rulings, and is heightened by the weak position of transnational courts that rely exclusively on their normative force to ensure compliance. [329] Confrontation may seek to protect independent domestic institutions; it is difficult to say with confidence, however, whether it can succeed.[330] According to *Dawson*, if part of the legitimacy of EU law

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[322] *Ibid*., para. 100.
[323] *Ibid*., paras. 79-80
[324] *Ibid*., paras. 163-165.
[325] Mark Dawson, "How Can EU Law Respond to Populism?" 40, 1, *Oxford Journal of Legal Studies* (2020), p. 211. p. 210.
[326] David Landau, "Abusive Constitutionalism," 47, *UC Davis Law Review* (2013), p. 189.
[327] Pablo Castillo-Ortiz, "The Illiberal Use of Constitutional Courts in Europe," 15, 1, *European Constitutional Law Review* (2019), p. 48.
[328] Nicola Lacey, "Populism and the Rule of Law," 15, *Annual Review of Law and Political Science* (2019), p. 12.
[329] Mark Dawson, "How Can EU Law Respond to Populism?" 40, 1, *Oxford Journal of Legal Studies* (2020), p. 211.
[330] *Ibid*., pp. 211-212.

rests on a perception of the EU courts as politically neutral institutions, rulings that can easily be portrayed as activist undermine this claim.[331]

B. On the Constitutional Pluralism in the European Union

The ECJ's expansive interpretation of Article 19(1) TEU is denounced as "over-constitutionalisation,"[332] which demonstrates the concern that the growing competence of the ECJ could be uncontrollable. However, the EU could not become a super state and its *ultra vires* review on national courts must find a limit when it comes to the constitutional identity of the Member States. In fact, the EU is designed by the founding Treaties to be a supranational organization.[333] In this regard, there is no constitution of the European Union in the formal sense since there is no European people. This means that there is no European citizenship that is autonomous from state citizenship, such as the "dual citizenship" of federal states. Therefore, there is no European people with a proper constituent power. Constituent power belongs to the states. This means that States always remain as masters of the treaties, even under the simplified procedure for the revision of the treaties provided for in Article 48(6) EU.[334]

However, the jurisprudence of the ECJ and by much of the doctrine recognized the founding Treaties as the material EU constitution,[335] and the EU "constitutional identity" derived from it. The "constitutional identity" of the Union is, above all, composed of the values of the Union. The Treaty of Lisbon, in this respect also following the 2004 Constitutional Treaty, lays down in Article 2 of the TEU the values of the Union. According to the terms of this article, these values are also common to the Member States. This means that not only the Union but also the Member States must respect them, both in their domestic legal order and in their interstate relations and with the Union. However, as far as the constitutional identity of the Union is concerned, only the values of the Union are of interest to us as such. It should be noted that Article 3(1) TEU links the values to the objectives of the EU, and Article 3(5) TEU requires the EU to respect the values in the context of CFSP.

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[331] *Ibid*.
[332] Laurent Pech and Sébastien Platon, "Judicial Independence under Threat: The Court of Justice to the Rescue in the ASJP Case," 55, 6, *Common Market Law Review* (2018), p.1849.
[333] Peter L. Lindseth, "Supranational Organizations," *in* Jacob Katz Cogan, Ian Hurd, and Ian Johnstone (eds.), *The Oxford Handbook of International Organizations* (Oxford: Oxford University Press, 2016).
[334] Article 48 (6): "*The European Council may adopt a decision amending all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union. The European Council shall act by unanimity after consulting the European Parliament and the Commission, and the European Central Bank in the Case of institutional changes in the monetary area. That decision shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements*."
[335] See Chapter 2.

However, Article 4(2) TEU requires that the EU must respect the "national identities" of the Member States.[336] In this regard, instead of using the term "constitutional identities," the concept of constitutional identity is perceived as the national identities that are collectively incorporated into the national constitution, which can be formed by constitutional drafting, constitutional amendments and constitutional interpretation by the judiciary.[337] Nevertheless, the EU claims that Article 4(2) TEU is applicable only in so far as a Member State respects the values enshrined in Article 2 TEU.[338]

This becomes evident when it comes to the division of competences between the EU and the Member States. In *Commission v Poland*, Poland argued that the organisation of the national justice system constitutes a competence reserved exclusively to the Member States, so that the principle of conferral which governs the competences of the European Union prevent the EU from arrogating competences in that domain.[339] The ECJ rejected this argument, since although the organisation of justice in the Member States falls within the competence of those Member States, the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law.[340] Furthermore, the Court claimed that by requiring the Member States thus to comply with those obligations, the EU was in no way claiming to exercise that competence itself nor was it arrogating that competence.[341] As pointed out by Advocate General Maduro "Just as Community law takes the national constitutional identity of the Member States into consideration, national constitutional law must be adapted to the requirements of the Community legal order."[342]

Such confrontational approach by the ECJ is resisted by the idea of constitutional pluralism, in which Member States have claimed that there are several unamenable core

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[336] Article 4(2) TEU: "*The Union shall respect the equality of Member States before the Treaties as well as their national identities*, *inherent in their fundamental structures*, *political and constitutional*, *inclusive of regional and local self-government*. *It shall respect their essential State functions*, *including ensuring the territorial integrity of the State*, *maintaining law and order and safeguarding national security*. *In particular*, *national security remains the sole responsibility of each Member State*."

[337] Timea Drinoczi, "Constitutional Identity in Europe: The Identity of the Constitution. A Regional Approach," 21, 2 *German Law Journal* (2020), p. 117.

[338] European Parliament, *Resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary* (*pursuant to the European Parliament resolution of 16 February 2012*), 2012/2130 (INI) [2016] OJ C75/09, Rec K and M, 3 July 2013. Available at: https://www.europarl.europa.eu/sides/getDoc.do?reference=P7-TA-2013-0315&type=TA&language=EN&redirect.

[339] Case C-619/18, *Commission v Poland*, 24 June 2019, EU:C:2019:531, para. 38.

[340] *Ibid*., para. 52.

[341] *Ibid*.

[342] Opinion of Advocate General Poiares Maduro, C-213/07, *Michaniki AE v Ethniko Symvoulio Radiotileorasis and Ypourgos Epikrateias*, 8 October 2008, EU:C:2008:544, para 33.

elements on their constitutions which reflect their national constitutional identities.[343] The diverse nature of constitutional identities may not only affect mutual trust between the Member States, it may also create conflicts between national legal order and the EU legal order. Although EU law claims primacy over national law, it remains questionable whether it is the ECJ or the Member States that has the ultimate authority to rule in cases concerning the boundaries of the EU's legal competence when it involves national constitutional identities.[344] The application of constitutional identity by constitutional courts has mainly been the result of defining the limits of EU law within domestic legal systems.[345]

There are divisive attitudes over the impacts of ECJ's *ultra vires* review as a result of constitutional pluralism. On the on hand, *Millet* asserts that it seems to be likely that if a matter is closely related to the core of a member state's constitutional identity, the margin of appreciation can be larger.[346] On the other hand, some scholars argue that constitutional pluralism is a fundamentally flawed and unsustainable concept to abuse by autocrats and other enemies of the rule of law. In this respect, *Kelemen* and *Pech* argues that constitutional pluralism allows the courts of Member States to disapply EU rules they deem incompatible with their constitutions or particularly inviolable aspects of their "constitutional identity."[347] However, the EJC attempts to overrule the national constitutional identity by EU "constitutional identity" has proved to be largely unsuccessful.

i. Democracy

According to *Schroeder*, Article 2 TEU does "not aim at the existence of uniform principles and rules, but solely at the observing of European minimum standards.[348] Article 2 TEU should be read as negatively determining what is not allowed, without

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[343] See Klemen Jaklič, *Constitutional Pluralism in the EU* (Oxford: Oxford University Press, 2014).
[344] R Daniel Kelemen and Laurent Pech "The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland," 21, *Cambridge Yearbook of European Legal Studies* (2019), p. 1.
[345] Timea Drinoczi, "Constitutional Identity in Europe: The Identity of the Constitution. A Regional Approach," 21, 2 *German Law Journal* (2020), p. 106.
[346] François-Xavier Millet, "The EU and the Constitutional Identity of the Member States," 12, 2, *International Journal of Constitutional Law* (2014), pp. 498-505.
[347] R Daniel Kelemen and Laurent Pech "The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland," 21, *Cambridge Yearbook of European Legal Studies* (2019), p. 3.
[348] Werner Schroeder, "The European Union and the Rule of Law – State of Affairs and Ways of Strengthening," *in* Werner Schroeder (ed.), *Strengthening the Rule of Law in Europe* (Oxford: Hart Publishing 2016), pp. 3-11.

positively determining how it should be instead.[349] In fact, the ECJ should always refrain from exercising its *ultra vires* review on the non-justiciable "political issues," as they should always be decided by national democratic process.

In Germany, the principle of democracy is a constitutional identity deriving from, *inter alia*, Article 20,[350] and Article 38,[351] of the Basic Law (*Grundgesetz*), which is not subject to any constitutional amendment under the eternity clause of Article 79(3) of the Basic Law.[352] Moreover, the principle of democracy is not only unamendable in the domestic constitutional process, it also must be respected during the process of European integration under Article 23 of the Basic Law.[353] During the ratification of the Lisbon Treaty, the Federal Constitutional Court (*Bundesverfassungsgericht*) was required to invalidate the German Act Approving the Treaty of Lisbon, which was claimed to have weakened the prerogatives of the German Federal Parliament (*Bundestag*) and the German Federal Council (*Bundesrat*) and infringed the principle of democracy. In this case, while the Federal Constitutional Court filed that the principle of democracy prohibits the German state organs to transfer sovereign powers to the EU in such a way that the EU were authorised to create new competences for itself (*Kompetenz-Kompetenz*),[354] it found no inconsistencies with the German Act Approving the Treaty of Lisbon thereof. Nonetheless, the Federal Constitutional Court

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[349] Armin Von Bogdandy and Luke Dimitrios Spieker, "Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges," 15, 3, *European Constitutional Law Review* (2019), p. 423.

[350] Basic Law for the Federal Republic of Germany (*Grundgesetz für die Bundesrepublik Deutschland*), 23 May 1949 (Last amended on 28 March 2019). Available at: https://www.gesetze-im-internet.de/englisch_gg/. Article 20 Basic Law: "(*1*) *The Federal Republic of Germany is a democratic and social federal state. (2) All state authority is derived from the people*. *It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies*. (*3*) *The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice*. (*4*) *All Germans shall have the right to resist any person seeking to abolish this constitutional order if no other remedy is available*."

[351] Article 38 Basic Law: "(*1*) *Members of the German Bundestag shall be elected in general, direct, free, equal and secret elections*. *They shall be representatives of the whole people, not bound by orders or instructions and responsible only to their conscience*. (*2*) *Any person who has attained the age of eighteen shall be entitled to vote*; *any person who has attained the age of majority may be elected*. (*3*) *Details shall be regulated by a federal law*."

[352] Article 79(3) Basic Law: "*Amendments to this Basic Law affecting the division of the Federation into Länder, their participation in principle in the legislative process*, *or the principles laid down in Articles 1 and 20 shall be inadmissible*."

[353] Article 23 Basic Law: "(*1*) *With a view to establishing a united Europe*, *the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic*, *social and federal principles*, *to the rule of law and to the principle of subsidiarity and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law*. *To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat*. *The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Article 79*."

[354] German Federal Constitutional Court, Judgment of the Second Senate of 30 June 2009, 2 BvE 2/08, BVerfG, para. 142.

interpreted Article 1, article 20 and Article 23 in conjunction with Article 79(3) of the Basic Law, to mean that those German constitutional identities were immune from the *ultra vires* challenges by the ECJ.[355]

In Hungary, Article E of the Hungarian Fundamental law limits the competence of *ultra vires* review of the Hungarian constitutional identity by both the national authorities and the EU institutions. In the first place, as a jurisprudence, in its decision 22/2016 (XII. 5.) AB, the Hungarian Constitutional Court identified two main limits on the conferred or jointly exercised competences under Article E: They cannot infringe Hungary's sovereignty and constitutional identity, namely sovereignty review and constitutional identity review.[356] Applying these two reviews, the Hungarian Constitutional Court found that public authorities, including EU institutions, must not infringe upon human dignity, other fundamental rights, the sovereignty of Hungary, or Hungary's self-identity based on its historical constitution.[357]

In the second place, such limits were textualized by amending Article E of the Hungarian Fundamental law. After consolidating a constitutional majority in the 2018 election, the Seventh Amendment was introduced into the Fundamental Law.[358] According to *Drinóczi*, the constitutional identity of Hungary becomes unamenable to constitutional amendments, and forms part of the sovereignty not transferable to the EU.[359] In this regard, a Section (2) was added in Article E,[360] which provide that Hungary may only participate to the EU and comply with its EU obligations to the extent that these are "consistent with the fundamental rights and freedoms laid down in the Basic Law, and shall not limit Hungary's inalienable right of disposal related to its territorial integrity, population, form of government and governmental organisation."

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[355] *Ibid*.

[356] Gábor Halmai, "The Application of European Constitutional Values in EU Member States- The Case of the Fundamental Law of Hungary," 20, 2-3, *European Journal of Law Reform* (2018), p. 24.

[357] See Gábor Halmai, "Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article (E)(2) of the Fundamental Law," 43, 1, *Review of Central and East European Law* (2018), pp 34–35.

[358] Seventh Amendment of the Fundamental Law of Hungary (*Magyarország Alaptörvényének h etedik módosítása*), T/332, 28 June 2018. English version available at: https://www.helsinki.hu/wp-content/uploads/T332-Constitution-Amendment-29-May-2018-ENG.pdf.

[359] Timea Drinoczi, "Constitutional Identity in Europe: The Identity of the Constitution. A Regional Approach," 21, 2 *German Law Journal* (2020), February 2020.

[360] Article E (2) of the Fundamental Law: "*With a view to participating in the European Union as a Member State and on the basis of an international treaty, Hungary may, to the extent necessary to exercise the rights and fulfil the obligations deriving from the Founding Treaties, exercise some of its competences arising from the Fundamental Law jointly with other Member States, through the institutions of the European Union. Exercise of competences under this paragraph shall comply with the fundamental rights and freedoms provided for in the Fundamental Law and shall not limit the inalienable right of Hungary to determine its territorial unity, population, form of government and state structure*."

However, the *ultra vires* review must be exercised with restraint given the openness of the Basic Law to European integration and the CJEU's the mandate to ensure uniformity and coherence application of EU law.[361] In this regard, the Federal Constitutional Court acknowledged that they must be resolved in a cooperative manner, in keeping with the spirit of European integration, and mitigated through mutual respect and understanding.[362] Scholars have argued that the German experiences have shown that neither the ECJ nor national constitutional or supreme courts could claim definitive primacy on questions of *Kompetenz-Kompetenz*, but instead would engage in on-going dialogue, self-restraint, and mutual accommodation based on sincere cooperation.[363].

In the judgement of 5 May 2020, the Federal Constitutional Court paid special attention to the challenges of Article 19(1) TEU to the principle of *Kompetenz-Kompetenz*. The Federal Constitutional Court did not dispute with the applicability of Article 19(1) TEU, however, it found that the mandate conferred in Article 19(1) TEU is exceeded where the traditional European methods of interpretation or the general legal principles that are common to the laws of Member States are manifestly disregarded.[364] An exceeding of competences may be regarded as "manifest" even where this finding derives only from a careful and meticulously reasoned interpretation.[365] Such "manifest" exceeding of competences then lacks the minimum of democratic legitimation necessary under Art. 23(1) second sentence in conjunction with Article 20(1) and (2) and Art. 79(3) Basic Law.[366]

Thus, the judges of the ECJ should not be involved in determining whether a democracy is good or bad, since there is no universal model of democracy. A "bad" democracy in the view of the ECJ has to constantly reform itself until it satisfies the "EU standard." This amounts to *de facto* judicial totalitarianism by the ECJ, which is participated in the actual design of mode democracy in its Member States. Instead, the fate of a democracy should only be controlled by the people of the Member States, not

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[361] German Federal Constitutional Court, Judgment of the Second Senate of 5 May 2020, 2 BvR 859/15, para. 111.
[362] *Ibid*.
[363] R Daniel Kelemen and Laurent Pech "The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland," 21, *Cambridge Yearbook of European Legal Studies* (2019), p. 2; R Daniel Kelemen, "On the Unsustainability of Constitutional Pluralism," 23, 1, *Maastricht Journal of European and Comparative Law* (2016), p. 136; Miguel Poiares Maduro, "Contra Punctual Law: Europe's Constitutional Pluralism in Action," *in* Neil Walker (ed.), *Sovereignty in Transition* (Oxford: Hart Publishing, 2003), p 501.
[364] German Federal Constitutional Court, Judgment of the Second Senate of 5 May 2020, 2 BvR 859/15, para. 101.
[365] *Ibid*.
[366] *Ibid*.

the EU. Thus, even though the result of democracy could sometimes be frustrating, it should be able to correct it by the power of democracy itself.

ii. Cultural Identity

Since a migration crisis from the Middle East to Europe emerged in 2015, Hungarian prime minister *Viktor Orbán* has been reluctant in accepting aliens, and sought to restrict the amount of the illegal immigrants settling within the territory of Hungary. In response to the mandate to relocate refugees to Hungary, *Viktor Orbán* promised to amend the Hungarian Fundamental Law to protect Hungary's "sovereignty and cultural identity" against an influx of "Muslim invaders."[367]

According to Orbán, the Hungarian constitutional identity has a strong connection with its culture, and the alteration of a country's ethnic makeup amounts to an alteration of its cultural identity."[368] Hungarian government introduced the Seventh Amendment to the Fundamental Law, which constitutionalizes such "cultural identity" with the addition of a clause in the National Avowal providing that "it is a fundamental obligation of the state to protect our self-identity rooted in our historical constitution." In addition, Section (4) is added in Article R, which provides that "The protection of the constitutional identity and Christian culture of Hungary shall be an obligation of every organ of the State."[369]

In fact, the Seventh Amendment was aimed at refusing to comply with EU migration and refugee policies, especially the European Council Decision 2015/1601 and the subsequent Decision 2016/1754 on refugee quotas.[370] The European Commission announced these Decisions to provide for a quota system requiring the Member States to share the amount of the refugees arriving in the EU. Decision 2015/1601 aims at relocating 120000 illegal immigrants from Greece and Italy to other Member States, including Hungary. Among those 120000 illegal immigrants, the European Commission initially proposed 15600 applicants to be relocated from Italy,

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[367] DW, "Hungary's Orbán Tells Germany: 'You Wanted the Migrants, We Didn't,'" 8 January 2018. Available at: http://p.dw.com/p/2qV1w?tw.

[368] Victor Orbán, "Speech at the 28th Bálványos Summer Open University and Student Camp," 22 July 2017. Available at: https://visegradpost.com/en/2017/07/24/full-speech-of-v-orban-will-europe-belong-to-europeans.

[369] The Fundamental Law of Hungary (*Magyarország Alaptörvényének*), 18 April 2011 (Last amended on 28 June 2018). available at: https://www.refworld.org/pdfid/53df98964.pdf.

[370] Budapest Beacon, "Hungary's Constitutional Identity Is Whatever Viktor Orbán Says It Is," 28 March 2018. Available at: https://budapestbeacon.com/hungarys-constitutional-identity-is-whatever-viktor-orban-says-it-its.

50400 applicants from Greece and 54000 applicants from Hungary.[371] During the following debates, Hungary gave up the status of beneficiary Member State as well as the quota of 54000 applicants to be relocated from it. Nonetheless, in the final Decision 2015/1601, [372] and the subsequent Decision 2016/1754,[373] Hungary was still included as a destiny of relocation of applicants from Italy and Greece respectively and allocations were therefore attributed to it.

In defiance against the EU's migration policies, Slovak Republic, Hungary and Poland brought annulment actions against Decision 2015/1601 before the ECJ in *Slovakia and Hungary v Council*.[374] Hungary argued that Decision 2015/1601 violates Article 78(3) TFEU,[375] since it places a disproportionate burden on Hungary by setting mandatory relocation quotas for it as it does for the other Member States.[376] The ECJ rejected such claim. Instead, it ruled that the allocation of quotas is divided between all the other Member States, in accordance with the principle of solidarity and fair sharing of responsibility between the Member States.[377]

Therefore, until Decision 2015/1601 and Decision 2016/1754 have expired in September 2017, Hungary refused to relocated any refugee allocated to its territory from other states. As a response, the European Commission brought infringement proceedings against Hungary in *Commission v Poland*, *Hungary and the Czech Republic*. However, in this case, Hungary did not invoke the constitutional identity as a defence. Instead, it still attempted to resolve this issue within the framework of EU law by claiming that its inaction can be justified under Article 72 TFEU, which provides that Member States have responsibilities with regard to the maintenance of law and

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[371] European Commission, *a Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy*, *Greece and Hungary* (COM(2015) 451 final, 9 September 2015. Available at: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:52015PC0451.

[372] Council of the European Union, Decision (EU) 2015/1601 *establishing provisional measures in the area of international protection for the benefit of Italy and Greece*, *OJ* 2015 *L* 248, 22 September 2015, p. 80. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015D1601.

[373] Council of the European Union, Council Decision (EU) 2016/1754 *amending Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece*, *OJ* L 268, 1 October 2016, pp. 82–84. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32016D1754.

[374] Joined Cases C-643/15 and C-647/15, *Slovakia and Hungary v Council*, 6 September 2017, ECLI:EU:C:2017:631, paras. 279-282.

[375] Article 78(3) TFEU: "*In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission*, *may adopt provisional measures for the benefit of the Member State*(*s*) *concerned*. *It shall act after consulting the European Parliament*."

[376] Joined Cases C-643/15 and C-647/15, *Slovakia and Hungary v Council*, 6 September 2017, ECLI:EU:C:2017:631, paras. 279-282.

[377] *Ibid*.

order and the safeguarding of internal security.[378] This attempt failed, since the ECJ dismissed the claim by ruling that Hungary cannot peremptorily invoking Article 72 TFEU for the sole purposes of general prevention, suspension or even cessation of the implementation of its obligations under the relocation decisions.[379] Thus, an exception must be based on a case-by-case investigation, on concrete evidence that provides grounds for suspecting that the applicant in question represents an actual or potential danger.[380]

The failures to reject illegal immigrants by Hungary in both *Slovakia and Hungary v Council* and *Commission v Poland*, *Hungary and the Czech Republic* have shown that the ECJ would always favourably interpret the refugee policies alongside with the EU. It remains a question whether Hungary government would, similar to Germany, make *ultra vires* complaints to its Constitutional Court to annul those decisions by the ECJ.

iii. Monetary and Fiscal Policies

In terms of fiscal policies, the ECJ directly confronted with the constitutional identity of Italy in the *Taricco* saga. While the ECJ initially took a confrontational approach in *Taricco I*, it later switched to a more cooperative approach and integration-friendly arguments in *Taricco II*.[381] In *Taricco I*, the Italian Constitutional Court (*Corte Costituzionale*) referred the questions to the ECJ arguing that the EU requirements to counter fraud and any other illegal activities affecting the financial interests of the Union under Article 325 TFEU was only applicable if it was compatible with the constitutional identity of Italy, and it fell to the competent Italian authorities to carry out such an assessment.[382] In this regard, the Italian Constitutional Court claimed that rules regarding periods laid down in statutes of limitation for the duration of criminal proceedings is applicable to such EU counter fraud measures under Article 325 TFEU, since it is part of the Italian constitutional identity. The ECJ rejected the assertion by the Italian Constitutional Court and ruled that national measures arising from its self-claimed constitutional identity could not override Article 325 TEU.[383] Therefore, the

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[378] Joined Cases C-715/17, C-718/17 and C-719/17, *Commission v Poland*, *Hungary and the Czech Republic*, 2 April 2020, ECLI:EU:C:2020:257, para. 134.
[379] *Ibid*., para. 160.
[380] *Ibid*.
[381] Timea Drinoczi, "Constitutional Identity in Europe: The Identity of the Constitution. A Regional Approach," 21, 2 *German Law Journal* (2020), p. 108.
[382] Case C-105/14, *Criminal Proceedings against Ivo Taricco and Others* (*Taricco I*), 8 September 2015, ECLI:EU:C:2015:555.
[383] *Ibid*.

Italian Constitutional Court must disapply the rules if they violated Article 325 TFEU.[384]

In its *Taricco II* judgment, the ECJ did not use the word "identity," but, following the EU law friendly language and approach of the Italian Constitutional Court, it recognized that the *nullum crimen* and *nulla poena* principles form part of the constitutional traditions common to the Member States.[385] Consequently, the ECJ ruled that Article 325 TFEU must be interpreted as requiring the national court to disapply national provisions on limitation, forming part of national substantive law, which prevent an effective response to fraud and any other illegal activities affecting the financial interests of the EU, unless that disapplication entails a breach of the principle of legality.[386] The result of the *Taricco* saga was that one of Italian constitutional provisions prevailed: The understanding of criminal legality in Italy was preserved and respected through an interpretation that also worked for the ECJ.[387]

In respect of monetary policies, in *Weiss and Others*, Germany complained that the ECB made ultra vires decision in the field of monetary and economic policies.[388] In this case, the Federal Constitutional Court requested the ECJ to rule on the validity of the ECB's Decision establishing the Public Sector Purchase Programme (PSPP), which aims at purchasing the excessive sovereign debt acquired by the states during the Eurozone crisis. The Federal Constitutional Court claimed that the ECB's Decision establishing the PSPP constitutes *ultra vires* acts, since although it appears that the ECB is exercising its competence in monetary policy though the PSPP, the purchase of public debt has produced spill over effects on economic policy, which is a competence reserved to the states. However, the ECJ rejected such claim and ruled that the PSPP does not breach the prohibition of monetary financing established in the Treaty.

Surprisingly, in the 5 May 2020 judgement, the Federal Constitutional Court did not follow the interpretation of the ECJ on the competence of the ECB.[389] Instead, it found that ECB's Decision establishing the PSPP affected the limits set by the overall budgetary responsibility of the German Federal Parliament, which is part of the German constitutional identity unamendable under Article 79(3) of the Basic Law. Consequently, the Federal Constitutional Court ruled that through the PSPP, the ECB manifestly

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[384] Case C-105/14, *Criminal Proceedings against Ivo Taricco and Others* (*Taricco I*), 8 September 2015, ECLI:EU:C:2015:555.
[385] Case C-42/17, *Criminal Proceedings against M.A.S. and M.B* (*Taricco II*), 5 December 2017, ECLI:EU:C:2017:936, paras. 53, 58.
[386] *Ibid*.
[387] Timea Drinoczi, "Constitutional Identity in Europe: The Identity of the Constitution. A Regional Approach," 21, 2 *German Law Journal* (2020), p. 124.
[388] Case C-493/17, *Weiss and Others*, 11 December 2018, ECLI:EU:C:2018:1000.
[389] German Federal Constitutional Court, Judgment of the Second Senate of 5 May 2020, 2 BvR 859/15.

disregarded the principle of proportionality by unconditionally pursuing its monetary policy objective while ignoring its economic policy effects. Therefore, for the first time in its history, the Federal Constitutional Court has declared the ECJ's judgement of *Weiss and Others* and ECB's Decision establishing the PSPP *ultra vires* acts, which are inapplicable in Germany.

iv. The Organization of the Judiciary

Although the reforms regarding the judiciary in Hungary and Poland were illiberal in nature, the ECJ has underestimated the popularities. In response to the EU refugee policies by, the Hungary legislature was able to round up a two-third majority to pass a constitutional amendment incorporating its anti-refugee policy as part of the Hungarian constitutional identity. In Poland, public opinion polls show that over 60 percent of Poles favoured judicial reform,[390] which was praised by the Minister of Justice as ending "corporatism," introducing "the oxygen of democracy," and ending "court-ocracy."[391] In particular, the Polish essentially argued that tensions between the executive and the judiciary lie in the nature of democratic systems, yet their very existence does not mean that judicial independence is endangered.[392]

Regarding the compatibility of the design of the national judiciaries, which is a democratic process, with the principle of judicial independence on the EU level, *Koen Lenaerts* points out that the ECJ does not seek to redesign national judiciaries, as that remains an exclusive competence of the Member States. Rather, the ECJ limits itself to examining whether rules that concern the organization and functioning of national courts comply with the principle of judicial independence.[393] In *Minister for Justice and Equality*, the ECJ does not straightforwardly require the Polish judiciary to follow certain form of design to meet the requirement of the right to a fair trial under Article 47 CFR.[394] Instead, the ECJ rules that the wanted suspect can only be refused to be extradited on the ground that there is a real risk of infringement of the independence and impartiality of the courts that the suspect will be subject to.

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[390] BBC News, "Poland Court Bill: Parliament Votes for Judicial Reforms," 20 July 2017. Available at: http://www.bbc.com/news/world-europe-40670790.
[391] BBC News, "Poland MPs Back Controversial Judiciary Bill," 15 July 2017. Available at: http://www.bbc.com/news/world-europe-40617406.
[392] The Chancellery of the Prime Minister, *White Paper on the Reform of the Polish Judiciary*, Warsaw, 7 March 2018, p. 207. Available at: https://www.premier.gov.pl/en/news/news/the-government-presents-a-white-paperon-the-reforms-of-the-polish-justice-system.html.
[393] Koen Lenaerts, "New Horizons for the Rule of Law within the EU," 21, 1, *German Law Journal* (2020), p. 33.
[394] Case C-216/18 PPU, *Minister for Justice and Equality v. L. M*, 25 July 2018, ECLI:EU:C:2018:586, paras. 59-60.

However, following *Commission v Poland* and *A.K. and Others*, the ECJ has demonstrated that the interference to the national democratic process regarding the organization of national judiciary is unavoidable. Rather than ensuring that the EU standard was observed, the ECJ is in fact, involved in redesigning the judiciaries in Poland. In this regard, the ECJ has enlarged its competence to not only interpret what the EU law should be, it has also replaced the national legislators to create law for the Member States.

As a result, the judicial intervention by the ECJ was not productive in both Hungarian and Poland. After the ECJ decision in *Commission v Hungary*, the Hungarian government waited until it had replaced most of the prematurely retired judges, before indicating that it would comply by allowing back any retired judges who wanted to come back. however, those retired judge could not return to their former positions because those positions had already been filled. Meanwhile, Hungary offered compensation to the prematurely retired judges if they did not want to go back to work, which was accepted by most.[395] Consequently, the Hungarian government was able to avoid restoring many judges to their prior position while still complying with the ECJ's verdict in reality.[396] Moreover, Hungary refused to accept any relocation of refugees even after the ECJ had already affirmed the legality of Council Decision 2015/1601 and the subsequent Decision 2016/1754 on refugee quotas.

Zoll and *Wortham* put forward a multiple suggestions to eliminate the effects of "rule of law backsliding" in Poland, including inter alia, (a) to use constitutional means including the Supreme Court Extraordinary Appeals Chamber to revise grossly illegal judgements; Remedy must be proportional to avoid excessive damage; (b) to dismiss the Disciplinary Chamber and judges appointed through illegal procedures; (c) to discontinue the practice of seconding judges to the Ministry of Justice; (d) to take liability for damages caused by the unlawful operation of courts.[397] All these measures can only be achieved on the Member States' level, instead of on the EU level. Although the judiciary can correct itself from within, most reforms are likely to happen through the democratic process in Poland, i.e. the election of a new government. In particular, the Polish *Sejm* passed a amending law, which was later signed on 17 December 2018 by president Duda, partially repealing the 2017 Law on the Supreme Court, where judges of the Supreme Court, including those appointed as the First President of the

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[395] Gábor Halmai, "The Early Retirement Age of the Hungarian Judges," *in* Fernanda Nicola and Bill Davies (eds), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge: Cambridge University Press, 2017), p. 471.
[396] *Ibid*.
[397] Fryderyk Zoll and Leah Wortham, "Judicial Independence and Accountability: Withstanding Political Stress in Poland," 42, 3, *Fordham International Law Journal* (2019).

Supreme Court, who were retired pursuant to those provisions of the 2017 Law on the Supreme Court were reinstated as judges and the performance of their duties was deemed to have continued without interruption.[398]

On the contrary, the ECJ's intervention regarding the independence and the impartiality of the *KRS* and the Disciplinary Chamber in *A.K. and Others*, along with the following judgement by the Supreme Court were both ineffective. Following the ECJ decision in *A.K. and Others*, on 5 December 2019, the Supreme Court held that the *KRS* did not guarantee standards for effective judicial protection outlined by the ECJ, as it was neither impartial, nor independent from the legislature and the executive.[399] Consequently, the Disciplinary Chamber was not a court within the meaning of EU law and Polish law. Therefore, the Supreme Court was precluded from exercising the jurisdiction conferred upon it by the 2017 New Law on the Supreme Court. Subsequently, on 23 January 2020, the Supreme Court adopted a resolution that while ruling on the disciplinary cases, the judges of the Disciplinary Chamber appointed by the President of the Republic after proceedings under the Law of 8 December 2017 amending the Law on the National Council for the Judiciary gives rise to a reduction in the standard of impartiality and independence of the court in the light of Article 6(1) of the ECHR, Article 45(1) of the Constitution and Article 47 of the CFR.[400]

As a response, Poland was determined to preserve the reform regarding the *KRS* and the Disciplinary Chamber. On 20 April 2020, the Constitutional Tribunal annulled the above-mentioned resolution by the Supreme Court for its inconsistencies with the Constitution of the Republic of Poland, b) Article 2 and Article 4(3) TEU, and c) Article 6(1) ECHR.[401] By striking down the resolution of the Supreme Court, the Constitutional Tribunal demonstrated that, in fundamental cases with a systemic dimension, it retains the position of "last word court" with regard to the Polish Constitution. Furthermore, on 2 February 2020, the president of Poland signed a legislation addressing the current crisis with broadening the range of disciplinary offences and increasing sanctions against recalcitrant judges.[402] The amendments prevent ordinary courts, as well as the Supreme Court from questioning independence

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[398] The Law amending the Law on the Supreme Court (*Ustawa z dnia 21 listopada 2018 r. o zmianie ustawy o Sądzie Najwyższym*), *Dz. U.* 2018.2507, 21 November 2018.
[399] Supreme Court of Poland, *A.K.*, PO 7/18, 5 December 2019.
[400] Supreme Court of Poland, *Resolution of the Supreme Court of 23 January 2020* (*Uchwała Sądu Najwyższego z dnia 23 stycznia 2020 r*), BSA I-4110-1/2020, Opublikowano: LEX nr 2770251.
[401] Constitutional Tribunal of Poland, *U 2/20 | 20 IV 2020*, Ref. No. U 2/20, 20 April 2020.
[402] The Act amending the Act - Law on the System of Common Courts, the Act on the Supreme Court and certain other acts (*Ustawa o zmianie ustawy - Prawo o ustroju sądów powszechnych*, *ustawy o Sądzie Najwyższym oraz niektórych innych ustaw*), *Dz.U.* 2020.190, 20 December 2019. Available at: https://www.sejm.gov.pl/Sejm9.nsf/PrzebiegProc.xsp?nr=69

of another court or a judge, making the ECJ judgment in *A.K. and Others* virtually ineffective.

It is foreseeable that the ECJ would be highly supportive of the complaints by the European Commission in the coming judgement regarding the infringement proceedings challenging the independence and impartiality of the *KRS* and the Disciplinary Chamber. Nevertheless, since Poland has determined to adopt a confrontational approach, the judgement by the ECJ could hardly force it to take further actions. The EU must be aware that the it could only rely on the Polish people to eliminate the defectiveness of the rule of law back-sliding in Poland through the power of democracy. If the reforms adopted by the *PiS* party indeed seriously undermined the independence and impartiality of the Polish judiciary, it would have been unpopular among the Polish people, who consequently, would have made their choices in the next election.

Conclusion

There is no doubt that the reforms in Hungary and Poland regarding the judiciary have posted serious threats on the rule of law, particularly, the independence of the judiciary. However, exhausting nearly all "political instruments" and "legal instruments," the EU could still not effectively ensure their compliances. Indeed, EU might also be partially responsible for the rule of law crisis in Hungary and Poland. In this regard, *Smith* argues that the EU responses are too fragmented in that rule of law has been "hollowed out" from a constitutional principle to an expedient policy tool.[403] Although European integration through the rule of law prohibits illiberal state in a Union founded upon liberal values, the institutions of the EU must also respect the EU legal order and the competences conferred on the EU by the Treaties. In this regard, *Koen Lenaerts* argues that a "chain of justice" established by dialogues between national courts and the ECJ would be broken by courts that are not independent.[404] However, applying the test developed by the ECJ in *L.M.*, both the Irish High Court and the Irish Supreme Court had decided to extradite the suspect to Poland, despite the fact that there were strong indications that that suspect would not receive a fair trial from an independent court. Hence, rule of law as a policy tool has failed to defend the principle of mutual trust, since the Irish courts have prioritised the interest of combating international crimes over the presumption of compliance to the European values.

The ECJ's invocation of Article 19(1) TEU was not only controversial, but the EU standard that it set up was ambiguous. In particular, the reasoning of the ECJ regarding the indirect influences on the independence of *KRS* and the Disciplinary Chamber was unconvincing, since their independence is not worse than their peers. On the surface, the ECJ was ensuring that national courts meet the EU standard of independence and impartiality under Article 19(1) TEU. In fact, the ECJ was expanding its competence to conduct *ultra vires* review beyond what is fixed by the Treaties.

Koen Lenaerts claims that courts or tribunals that are not independent are not qualified to refer questions to the ECJ, since they would undermine the preliminary ruling procedure. However, scrutinising the independence and impartiality of national courts through the preliminary ruling procedure is itself an abusive use of such procedure. Instead of assisting national courts on resolving questions of EU law, the ECJ is squeezing the autonomy of the national courts. Moreover, the ECJ is not only

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[403] Melanie Smith, "Staring into the Abyss: A Crisis of the Rule of Law in the EU," 25, 6, *European Law Journal* (November 2019), pp. 561–576.

[404] Koen Lenaerts, "Speech at the National Congress of the Polish Bar: On Judicial Independence and the Quest for National, Supranational and Transnational Justice," May 20, 2018. Available at: www.*KRS*.pl/admin/files/poland may_2017.pdf.

clashing with national constitutional identity regarding the organization of judiciary, but also on democracy, refugee policies and monetary and fiscal policies. Consequently, either the ECJ made compromise to national law, or the judgements of the ECJ were not implemented, in which the national governments did not adopt any measure to comply with the requirements under the EU law. An analogy between Article 19(1) TEU and the Fourteenth Amendment of the U.S. Constitution has demonstrated that it is doubtful whether Article 19(1) TEU enables the incorporation of fundamental rights, since there is a clear material restriction of the CFR as to when the EU law is actually implemented.

In conclusion, confrontational approaches at the EU level would not help to improve the rule of law conditions in Hungary and Poland. The more external pressures coming from the EU, the more illiberal Hungary and Poland would become. The institutions of the EU, including the ECJ, should not expand their competences or jurisdictions beyond what is conferred by the Treaties in the name of protecting the European values. In particular, the function of Article 19 TEU is to ensure that this diffused EU judicial system works and that no protection gaps arise.[405] In this regard, *Spieker* warns that since the Member States could never escape the obligations stemming from Article 2 TEU, it could become the core of a European Constitution threatening the federal equilibrium established by the Treaties.[406]

[405] Koen Lenaerts, "The Rule of Law and Coherence of the Judicial System of the European Union," 44, 6, *Common Market Law Review* (2007), pp. 1625-1629.
[406] Luke Dimitrios Spieker, "Breathing Life into the Union's Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis," *German Law Journal* 20 (2019), p.1207.

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