



INSIGHT

EU COURT OF JUSTICE STANDING UP TO ILLIBERAL DEMOCRACY: POLISH JUDICIAL “REFORMS” ON TRIAL

POLAND BEFORE THE COURT OF JUSTICE: LIMITLESS OR LIMITED CASE LAW ON ART. 19 TEU?

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ABSTRACT: In 2019, the Court of Justice has ruled in an innovative case on the protection of the independence of Member States’ judiciaries. In two judgments, delivered in June and November, the Court declared that several statutes amending the organisation of the Polish judicial system infringed the second subparagraph of Art. 19, para. 1, TEU because they did not respect judicial independence. This case law relies on two key legal arguments: an “ideal” holistic approach to judicial independence and the broadening of the material scope of Art. 19 TEU (see Court of Justice: judgment of 24 June 2019, case C-619/18, *Commission v. Poland (Independence of the Supreme Court)* [GC]; judgment of 5 November 2019, case C-192/18, *Commission v. Poland (Independence of ordinary courts)* [GC]). Both arguments may invite us to think that this case law is boundless. This *Insight* considers if some limits should nevertheless apply.

KEYWORDS: judicial independence – rule of law – Art. 19 TEU – Poland – Art. 2 TEU – scope of EU law.

“Aquí hay tres cosas: la una que yo, Polonia, os estimo tanto que os quiero librar de la opresión y servicio de un rey tirano, porque no fuera señor benigno el que a su patria y su imperio pusiera en tanto peligro.”

(Basilio, Rey de Polonia)

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Jornada I, Escena VI, *La vida es sueño*
Calderón de la Barca¹

I. INTRODUCTION

Respect for the rule of law by the Member States (MS) of the European Union is an evidently complex extensive topic that has conditioned the recent history of the Union politically and legally.² The implications of this issue entail many technical aspects but they also relate to the very constitutional core of the EU since the rule of law is a founding value of the EU and a common value to all MS as provided in Art. 2 TEU.³

Although not limited to these countries, Hungary and Poland have played a leading role in this context, which has triggered political monitoring and sanctioning mechanisms (including, the pre-Art. 7 TEU rule of law framework) and filing legal actions before the Court of Justice as well. In this sense, the Court has been called upon to act on

¹ Fearing his heir Segismundo to be a tyrant king, Basilio the King of Poland proclaims “Here there are three things: the first / I dote, O Poland, on thee so / Since my wishes are thee to save / From the oppression and affliction / Of a tyrant King, because / Of his country and his kingdom / He were no benignant father / Who to such a risk would expose it” (Pedro Calderón de la Barca, *Life is a Dream*, Act I, Scene VI). The symbolic influence that Calderonian theatre displayed centuries later over Polish romanticism seems to revive today. As an elongation of the awe in *Life is a Dream*, the tribulations of Basilio, the King of Poland, uncannily mirror the current situation within the EU. If the quoted passage adamantly reflects EU position with regards to Poland’s compliance with the rule of law, would it suffice to add that the second thing troubling Basilio’s mind is committing himself a crime by seeking to prevent Segismundo’s ones, i.e. that in its pursuit to protecting the rule of law in Poland, the EU trespasses it itself.

² The already extensive literature on MS compliance is part of the larger topic and bibliography on the rule of law in the EU, see D.J. LIÑÁN NOGUERAS, P. MARTÍN RODRÍGUEZ (eds), *Estado de derecho y Unión Europea*, Madrid: Tecnos, 2018; C. CLOSA, D. KOCHENOV (eds), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge: Cambridge University Press, 2016. Most prestigious journals have in fact dedicated specific volumes to this topic, see for example the introductory chapters by D. KOCHENOV, A. MAGEN, L. PECH, *Introduction: The Great Rule of Law Debate in the EU*, in *Journal of Common Market Studies*, 2016, p. 1045 *et seq.*; M. AVBELJ, *Rule of Law and the Economic Crisis in a Pluralist European Union*, in *Hague Journal on the Rule of Law*, 2016, p. 191 *et seq.*; M. ADAMS, R. JANSE, *Rule of Law Decay: Terminology, Causes, Methods, Markers and Remedies*, in *Hague Journal on the Rule of Law*, 2019, p. 1 *et seq.*

³ Some constitutional features of the European project if not the very constitutional essence of the EU seem to hang in the balance waiting for the final outcome. Indeed, the intellectual endeavour placing on the EU a portion of constitutional legitimacy (even non-derivative for some), which is so influential in today’s academia, would be seriously damaged if the EU ultimately proves itself unable to preserve its founding values. See *ad ex.* A. VON BOGDANDY, P. BOGDANOWICZ, I. CANOR, M. TABOROWSKI, M. SCHMIDT, *A Potential Constitutional Moment for the European Rule of Law – The Importance of Red Lines*, in *Common Market Law Review*, 2018, p. 983 *et seq.* However, let us admit that the issue goes far beyond the rule of law and pertains to another common value such as democracy more properly (see excellent T.G. DALY, *Democratic Decay: Conceptualising an Emerging Research Field*, in *Hague Journal on the Rule of Law*, 2019, p. 9 *et seq.*). The capacity of the rule of law to be legally operationalised has determined its use *vis-à-vis* other values (see A. MAGEN, *Cracks in the Foundations: Understanding the Great Rule of Law Debate in the EU*, in *Journal of Common Market Studies*, 2016, pp. 1058-1059).

several occasions with regards to certain controversial measures adopted by the Governments of these countries that could be deemed to contradict the rule of law. Among these measures, those concerning the organisation of the judiciary have brought about noticeable alarm. Unlike what happened previously,⁴ in the second half of 2019 the Court of Justice had established innovative case law and held that several Polish laws amending the organisation of the judiciary were in violation of Art. 19 TEU.

In a first judgment, of 24 June 2019, the Court affirmed that the law lowering the retirement age of the judges of the Supreme Court, while giving the President of the Republic the power to extend discretionarily their mandates, led to a violation of Art. 19 TEU because it breached judicial independence and the inherent irremovability of judges.⁵ Later, on November 5th, the Court ruled that the Polish Law of 12 July 2017 amending the retirement age of ordinary judges was in violation of Art. 19 TEU and also formed a direct discrimination based on sex as laid down in Directive 2006/54/EC.⁶

Of course these two judgments do not exhaust all the legal issues raised by a defective respect of the rule of law by MS, not even from a judicial perspective. There are many other cases (some of them still pending or imminent) that are directly related to this subject matter.⁷ Nevertheless, it is in these two judgments that the Court has set out a remarkably broad interpretation of Art. 19 TEU, the limits of which are not clear.⁸ This last question (i.e., the new case law on Art. 19 TEU and its potential limits) is the modest object of this *Insight*.

II. THE BROAD INTERPRETATION OF ART. 19 TEU

There are, in my opinion, two key legal elements in the reasoning of the Court that have led to the broad interpretation of Art. 19 TEU: 1) an “ideal” holistic approach to judicial independence, and 2) the emancipation of the material scope of Art. 19 TEU from the

⁴ A similarly questionable reform of the judiciary already took place in Hungary, but neither the Court of Justice (that condemned it for being a discrimination based on age in judgment of 14 December 2012, case C-286/12, *Commission v. Hungary* [GC]) nor the European Court of Human Rights (judgment of 23 June 2016, no. 20261/12, *Baka v. Hungary*) were able to reverse it.

⁵ Court of Justice, judgment of 24 June 2019, case C-619/18, *Commission v. Poland (Independence of the Supreme Court)* [GC].

⁶ Court of Justice, judgment of 5 November 2019, case C-192/18, *Commission v. Poland (Independence of ordinary courts)* [GC].

⁷ See, for example, Court of Justice: case C-522/18, *Zakład Ubezpieczeń Społecznych*; case C-537/18, *Krajowa Rada Sądownictwa*; joined cases C-558/18 and C-563/18, *Miasto Łowicz*; case C-563/18, *Prokuratura Okręgowa w Płocku*; case C-623/18, *Prokuratura Rejonowa w Słubicach*; C-668/18, *Uniparts*; case C-791/19, *Commission v. Poland (disciplinary regime)*.

⁸ In the recent judgment of 19 November 2019, joined cases C-585/18, C-624/18 and C-625/18, *A.K. and Others (Independence of the Disciplinary Chamber)* [GC], the Court of Justice answered some questions referred by the Polish Supreme Court applying Art. 47 of the Charter of fundamental rights of the EU and EU secondary law but it did not to rule on Art. 19 TEU respect.

classic definition of the scope of EU law. Whereas the former is not too innovative, the latter certainly is, although it has not come as a surprise.

Both elements fit in the legal strategy that, in my opinion, the Court of Justice is putting in place to deal with this situation. This strategy is determined by previous experience in two ways. First, the Court is aware of the fact that the failure of political mechanisms has turned itself into the ultimate legal bastion to defend the common values enshrined in Art. 2 TEU.⁹ Beyond the failure of this judicial solution it is difficult to discern which possibilities are available.¹⁰ Accordingly, I think the Court is knowingly opting for a case law that both leaves open future developments and avoids loopholes that might be used to escape from it. Secondly, prior cases have proven beyond doubt that *interim* relief is paramount, given the extraordinary difficulty to reverse a *fait accompli* in these matters.¹¹ Since its judgment in *Associação Sindical dos Juizes Portugueses*,¹² the Court seems to be reinforcing this provisional protection with an anticipatory strategy in the sense of announcing or revealing the direction of future rulings.¹³ I believe that the “al-

⁹ As easily predicted, the political sanction mechanism encapsulated in Art. 7 TEU has cast no tangible results. More than two years ago, the Commission adopted a Reasoned proposal of 20 December 2017 in accordance with Article 7(1) TEU regarding the rule of law in Poland that included a Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, COM(2017) 835 final. More than a year ago the European Parliament issued Resolution P8_TA(2018)0340 of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) TEU, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded. No further developments within the Council there have been so far (see the recent criticisms raised by the European Parliament in Resolution P9_TA(2020)0014 of 16 January 2020 on ongoing hearings under Article 7(1) TEU regarding Poland and Hungary). Furthermore, in its Communication COM(2019) 343 final of 17 July 2019, *Strengthening the rule of law within the Union – A blueprint for action*, the Commission emphasises its enforcement powers as the guardian of the Treaties, thereby recognising the limited results that can be expected from dialogue only (within the pre-Art. 7 TEU rule of law framework). Finally, the Council Presidency conclusions (ST 13622/19) of 19 November 2019 on the Evaluation of the annual rule of law dialogue should be seen as an enormous exercise of cynicism if it were not for the sad avowal of political impotence embodied therein.

¹⁰ See D. KOCHENOV, P. BÁRD, *The Last Soldier Standing? Courts vs Politicians and the Rule of Law Crisis in the New Member States of the EU*, in *European Yearbook of Constitutional Law*, 2019, p. 243 *et seq.*

¹¹ The perils of reacting too late are clear: once courts are seized, they turn into enablers as distinctly proves what happened with the Constitutional Courts in Hungary and Poland (see W. SADURSKI, *Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal to a Governmental Enabler*, in *Hague Journal on the Rule Law*, 2019, p. 63 *et seq.*; P. CASTILLO-ORTIZ, *The Illiberal Abuse of Constitutional Courts in Europe*, in *European Constitutional Law Review*, 2019, p. 48 *et seq.*). Hence, the relevance of the innovative resort to interim relief in the first case *Commission v. Poland*, including the Order of the Vicepresident of 19 October 2018, case C-619/18 R, not published) awarding provisional protection, and confirmed by Order of 17 December 2018, case C-619/18 R).

¹² Court of Justice, judgment of 27 February 2018, case C-64/16, *Associação Sindical dos Juizes Portugueses* [GC].

¹³ In fact, almost everybody did read the judgment in *Associação Sindical dos Juizes Portugueses* [GC], *cit.*, à la polonaise, i.e. announcing the enlarged scope of Art. 19 TEU. Likewise, the June judgment in *Commission v. Poland (Independence of the Supreme Court)* [GC], *cit.*, easily permitted to guess in which di-

ready expected result” tactic facilitates the fulfilment of rulings and the acceptance of interim relief orders.¹⁴

II.1. AN IDEAL HOLISTIC APPROACH TO JUDICIAL INDEPENDENCE

In accordance with existing case law,¹⁵ the Court defines judicial independence from a twofold perspective. From an external point of view, judicial independence requires that judges be protected from any external pressures, authorities or instructions preventing or hindering them adjudicating in an entirely autonomous way. From an internal point of view, judicial independence relates to the neutrality of the judge towards the parties and the outcome of the proceedings.¹⁶ Now, when assessing the respect of both aspects, the Court applies what we may term an ideal holistic approach. I will clarify these two terms (ideal and holistic).

On the one hand, the Court applies an *ideal* approach in the sense that it has opted for a theoretical bar. It is neither a question of proving an actual nor a potential interference in judges’ full autonomy. The standard is more exigent because judicial independence requires that rules be “such as to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it”.¹⁷ As AG Tachev expresses in a more animated way with resonances of the Strasbourg case law, “[a]ppearances are of a certain importance, so that ‘justice must not only be done, it must also be seen to be done’. What is at stake is the confidence which courts in a democratic society must inspire in the public”.¹⁸ Thus it is more about ruling out the suspicion (perception) of the public that the system might enable or tolerate interferences.¹⁹

rection the ruling in the second case would go. Again similarly both the *Commission v. Poland (Independence of ordinary courts)* [GC], cit., judgment and the judgment in *A.K. and Others* [GC], cit., have already in their reasoning enough elements for anticipating that the amended disciplinary regime affecting the Polish judiciary will be certainly considered against Art. 19 TEU in the pending infringement action (case C-791/19).

¹⁴ Given the unsatisfactory answer by Polish authorities to the judgment in *A.K. and Others* [GC], cit., just a few days ago the European Commission announced the request for interim relief in the pending case C-791/19, *Commission v. Poland (disciplinary regime)*. See Agence Europe, *La Commission demande à la Cour de justice de faire cesser provisoirement le nouveau régime disciplinaire visant les juges polonais*, in *Bulletin Quotidien Europe*, n. 12403, 15 January 2020.

¹⁵ *Ad ex.* Court of Justice, judgment of 25 July 2018, case C-216/18 PPU, *Minister for Justice and Equality (Défaillances du système judiciaire)* [GC], paras 63 and 65.

¹⁶ *Commission v. Poland (Independence of ordinary courts)* [GC], cit., paras 109-110.

¹⁷ *Commission v. Poland (Independence of the Supreme Court)* [GC], cit., paras 74 and 108; *Commission v. Poland (Independence of ordinary courts)* [GC], cit., para. 111.

¹⁸ Opinion of AG Tachev delivered on 11 April 2019, case C-619/18, *Commission v. Poland (Independence of the Supreme Court)*, para. 71.

¹⁹ See this stricter standard repeatedly applied in *Commission v. Poland (Independence of the Supreme Court)* [GC], cit., paras 78, 82, 84, 85, 86, 111 and 118; and in *Commission v. Poland (Independence of ordi-*

In accordance with this “ideal” approach, the Court enumerates the many aspects that would be comprised (meaning the rules to be analysed) in order to conclude on the inexistence of reasonable doubts. These relate to the composition of the judicial body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members. This evidently also comprises enough protection of their irremovability, which concerns not only the disciplinary system but also the extension of the term of office beyond the retirement age if a MS has decided to allow it.²⁰

On the other hand, it is very relevant in my opinion that the analysis is done in this *holistic* manner. The Court takes as a whole all the rules concerning all those aspects in order to resolve issues on the existence of reasonable doubt and consequently on the violation of judicial independence. This holistic approach is remarkably open, which means that it allows for a variety of arguments of legal and factual nature to be drawn into it.²¹ The relevance of this holistic approach that the Court has been able to apply more clearly in the second judgment is that it ends in a single conclusion with regard to the respect of judicial independence.²² Therefore, it precludes singling out a specific rule as the origin of the infringement and consequently focusing on a single rule whose change or removal would put an end to the violation.²³

Thus the Court dodges the perils of some sort of “lessons learned for taking over the judiciary” while achieving two objectives: *a*) executing the ruling requires dismantling the entire system, not just changing a piece of it, and *b*) there is nothing in its legal reasoning that would preclude the Court or restrict its leeway with respect to hypothetical future appraisals. This holistic assessment might prove very relevant if Poland’s compliance with

nary courts) [GC], cit., paras 119, 124 and 127. See an even more decided application in Opinion of AG Tanchev, *Commission v. Poland (Independence of the Supreme Court)*, cit., paras 87, 88 and 91; and also Opinion of AG Tanchev delivered on 20 June 2019, case C-192/18, *Commission v. Poland (Independence of ordinary courts)*, paras 111-112.

²⁰ *Commission v. Poland (Independence of ordinary courts)* [GC], cit., paras 111, 118-120.

²¹ Applying an ideal holistic approach admits using legal aspects such as the vagueness or objectivity of the rules or the existence of procedural and judicial guarantees against discretionary and arbitrariness (reasonable time, stating the reasons, judicial remedy) but also factual arguments relating to how rules have been in fact applied, the overall impact on the judicial body or on the individual professional carrier, the public declarations of the authorities concerning the purpose of the law, etc. It is also interesting noting that the Court applies judicial independence as the essence of a fundamental right in a perhaps circular way. Thus, when evaluating an exception to the principle of irremovability, the Court requires it to be justified on a legitimate objective and proportionate but also not to be “such as to raise reasonable doubt in the minds of individuals as to the imperviousness of the court concerned to external factors and its neutrality with respect to the interests before it” (*Commission v. Poland (Independence of the Supreme Court)* [GC], cit., para. 79).

²² *Commission v. Poland (Independence of ordinary courts)* [GC], cit., para. 130.

²³ The Court insists that a single rule or measure is not *per se* an infringement or that a single rule does not guarantee ironclad judicial independence. See *Commission v. Poland (Independence of the Supreme Court)* [GC], cit., paras 111 and 115. The perils of “lessons learned” (i.e., the Hungarian *brief*) may be illustrated by the discrimination claim, interpreting the judgment in the sense that establishing a transitional regulation for retirement would erase the discrimination based on age (*ibid.*, para. 91).

the ruling is defective (i.e. it does not abrogate the laws concerned or amends them but trying again to control the judiciary) and it comes to a new infringement action. To a certain extent the ideal holistic approach has offered a suitable alternative to the clever notion of systemic infringement action suggested by the best doctrine.²⁴

II.2. THE BROADENING OF THE MATERIAL SCOPE OF ART. 19 TEU

This section addresses the core of these judgments' legal argumentation. The key point of this case law has been to understand the mandate enshrined in subparagraph 2 of Art. 19, para. 1, TEU so broadly and/or so literally as to go beyond the traditional scope of EU law. Admittedly, in interpreting that provision the Court seems to privilege a grammatical criterion, but felt it necessary to connect Art. 19 TEU with the value *rule of law* affirmed in Art. 2 TEU. This connection is quite developed in the first judgment concerning the Supreme Court to the point of appearing essential to the reasoning,²⁵ but in the second one concerning Polish ordinary judges it loses prominence compared to the literal interpretation and it appears to be downgraded to an opening and closing remark.²⁶

As known, the second subparagraph of Art. 19, para. 1, TEU reads: "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law". It thus implies, in the Court's opinion, that MS are obliged to establish a system of legal remedies and procedures ensuring for individuals compliance with their right to effective judicial protection in those fields. Put simply, any MS judicial body (court or tribunal) that is called upon to apply EU law – meaning to adjudicate in EU law matters – must meet the requirements of effective judicial protection. The Court points out that the second subparagraph of Art. 19, para. 1, refers to "the fields covered by Union law" and not "when implementing Union law".²⁷ Therefore, this obligation exists irrespective of whether a MS is applying or not EU law in the sense of Art. 51, para. 1, of the Charter of fundamental rights of the EU (the Charter).

Yet, what that obligation entails ought to be deduced from the general principle of effective judicial protection pertaining to EU law. At this point the Court only nominally resumes its classic case law on EU general principles by recalling that this general principle is common to the constitutional traditions of the MS, that it is enshrined in Arts 6 and 13 of the European Convention on Human Rights, and that it has been reaffirmed in Art. 47

²⁴ K.L. SCHEPPELE, *Enforcing the Basic Principles of EU Law through Systemic Infringement Actions*, in C. CLOSA, D. KOCHENOV (eds), *Reinforcing Rule of Law Oversight in the European Union*, cit., p. 105 *et seq.*; M. SCHMIDT, P. BOGDANOWICZ, *The Infringement Procedure in the Rule of Law Crisis: How to Make Effective Use of Article 258 TFEU*, in *Common Market Law Review*, 2018, p. 1061 *et seq.*

²⁵ *Commission v. Poland (Independence of the Supreme Court)* [GC], cit., paras 42-47.

²⁶ *Commission v. Poland (Independence of ordinary courts)* [GC], cit., paras 98 and 106.

²⁷ *Commission v. Poland (Independence of the Supreme Court)* [GC], cit., para. 50; *Commission v. Poland (Independence of ordinary courts)* [GC], cit., para. 99.

of the Charter.²⁸ The consequence then is clear: as the Court states, “[t]o ensure that such ordinary courts are in a position to offer such [effective judicial] protection [in those abstract fields covered by EU law], maintaining their independence is essential”.²⁹

This is of course a bold case law as the Court has determined that EU law obligations under Art. 19 TEU do not depend on the MS implementing EU law. Therefore, as long as any judicial body is to apply EU law, it has to meet the requirements of effective judicial protection in general, and the guarantee of its independence in particular. Art. 19 TEU has thus a material scope that is much wider than the Charter or any general principle of EU law. In fact, for the Charter to be applicable, it would be necessary that the MS be implementing EU law in the sense of Art. 51 of the Charter (i.e., that the situation falls within the purview of EU law).³⁰ And it would be exactly the same with a general principle of EU law.³¹

The enlarged legal effects of Art. 19 TEU emerge when considering if a MS has failed to fulfil it. Because of the combined effect of its wording and the ideal holistic approach to judicial independence there is no need to prove that the independence of Polish judges has been compromised in concrete instances, let alone when applying EU law, in order to rule whether a particular reform of the judiciary infringes Art. 19 TEU.

By means of broadening the material scope of Art. 19 TEU the Court has thus found a smart way to solve the conundrum posed by Art. 2 TEU common values, which, as has been argued,³² must be respected by MS beyond the scope of EU law without calling into question the fundamental principle of conferral.³³ That is the reason why I think the Court’s

²⁸ The Court only pays lip service to the classic sources of EU general principles. No judgments other than its own are mentioned. Contrarily, see Opinions of AG Tanchev in *Commission v. Poland (Independence of the Supreme Court)*, cit., para. 71, and especially in *Commission v. Poland (Independence of ordinary courts)*, cit., *passim*.

²⁹ *Commission v. Poland (Independence of ordinary courts)* [GC], cit., para. 105.

³⁰ Court of Justice, judgment of 26 February 2013, case C-617/10, *Åkerberg Fransson*, paras 17-23.

³¹ Court of Justice: judgment of 25 July 2002, case C-50/00 P, *Unión de Pequeños Agricultores v. Council*, para. 41; judgment of 13 March 2007, case C-432/05, *Unibet* [GC], paras 40-42.

³² O. MADER, *Enforcement of EU Values as a Political Endeavour: Constitutional Pluralism and Value Homogeneity in Times of Persistent Challenges to the Rule of Law*, in *Hague Journal on the Rule of Law*, 2019, p. 133 *et seq*. This conundrum of EU founding values has been illustrated by judicial cooperation in criminal matters. In order to apply mutual recognition based on mutual trust it is compulsory that MS respect fundamental rights (another Art. 2 common value) even when they are not implementing EU law (Court of Justice, judgment of 30 May 2013, case C-168/13 PPU, *Jeremy F.*, para. 48). The interest of this new approach in *Commission v. Poland* is that it offers a new better solution. So far (especially in the *Aranyosi* case, namely Court of Justice, judgment of 5 April 2016, case C-404/15, *Aranyosi and Căldăraru* [GC]), the Court was only able to design a shield for the EU legal system based on individual fundamental rights, but not a sword to address the underlying issue. See *in extenso* P. MARTÍN RODRÍGUEZ, *La emergencia de los límites constitucionales a la confianza mutua en el Espacio de libertad, seguridad y justicia en la Sentencia del Tribunal de Justicia Aranyosi y Căldăraru*, in *Revista de Derecho Comunitario Europeo*, 2016, p. 859 *et seq*.

³³ It is worth quoting AG Tanchev’s reflection: “I would like to close, however, by underscoring that, in delimiting the scope of Art. 19(1) TEU, second subparagraph, what is at stake, at constitutional level, is the extent to which the Court has competence to substitute national constitutional courts and the European

emphasis on Art. 19 *vis-à-vis* the common values in Art. 2 in its second judgment is unfortunate. The argument based on the literal wording is not, in my opinion, as compelling as the Court holds. In fact, it is difficult to corroborate the idea that a concrete provision might go beyond EU competences (the scope of EU law) when the Treaties use the word “field” or “fields”, in particular when other linguistic versions such as the Spanish one are taken into account. The distinct connection of that provision with the case law in *Unión de Pequeños Agricultores* or *Unibet* does not favour that enlarged interpretation either.³⁴

Contrariwise, I think a broad interpretation of Art. 19 would find a strong substantive legal ground if it were guided by Art. 2 TEU, provided that the latter be construed as requiring MS to respect those common values even when they are not applying EU law. This interpretation of Art. 2 TEU does not encroach upon the principle of conferral but only limits MS when exercising those competences not conferred upon the Union, as the Court has precisely observed with regard to Art. 19 TEU.³⁵

Having said that, it should be noticed that, unless another equivalent Treaty provision is found, this case law is only valid for the common value of the rule of law and as long as the latter can be connected with effective judicial protection.³⁶ It is thus advisable to consider if, despite the unbound scope, this case law may have more limited effects.

III. THE PARADOX OF THE LIMITED EFFECTS OF THE CASE LAW ON ART. 19 TEU

III.1. AN UNLIKELY LIMIT: DENYING ART. 19 TEU DIRECT EFFECT

If the reasoning of the Court of Justice is followed literally, i.e. if Art. 19 TEU is to be understood as covering every single act or rule affecting directly or indirectly any national judicial body that is liable to apply EU law in abstract – covering practically all judges or courts that may adjudicate in fields covered by EU law – this case law would have a virtually boundless scope.

Court of Human Rights in adjudicating over fundamental rights violations. Respect for the boundary between the competences of the EU, and those of the Member States, is as important in an EU legal order based on the rule of law as the protection of fundamental rights” (Opinion of AG Tanchev, *Commission v. Poland (Independence of ordinary courts)*, cit., para. 112).

³⁴ See A. ARNULL, *Article 19 [The Court of Justice of the European Union] (ex-Articles 220–224 EC)*, in H.-J. BLANKE, S. MANGIAMELI (eds), *The Treaty on European Union*, Berlin, Heidelberg: Springer-Verlag, 2013, p. 759 *et seq.*

³⁵ *Commission v. Poland (Independence of the Supreme Court)* [GC], cit., para. 52. *Commission v. Poland (Independence of ordinary courts)* [GC], cit., para. 102.

³⁶ Other prominent elements encompassed by the rule of law concept such as the principles of legality and legal certainty (including thereby the interdiction of arbitrariness) would be hardly covered by the effective judicial protection laid down in Art. 19. On the current content of the notion rule of law in EU law, see P. MARTÍN RODRÍGUEZ, *El estado de derecho y el sistema jurídico de la Unión Europea*, in D.J. LIÑÁN NOGUERAS, P.J. MARTÍN RODRÍGUEZ (eds), *Estado de derecho y Unión Europea*, cit., p. 160 *et seq.* *In extenso* see T. KONSTADINIDES, *The Rule of Law in the European Union. The Internal Dimension*, Oxford: Hart, 2016).

Any national judge may feel inclined to use EU law to challenge whatever legal measure that might amount in his/her opinion to an encroachment of his/her independence, which by definition would include any single disciplinary measure and/or rule, any single promotion rule or decision, every rule regarding appointment, abstention, rejection or dismissal of judicial members or any concrete application of those rules, just to name a few examples of components that the Court has mentioned in order to assess compliance with judicial independence.³⁷ The comprehensive definition of the latter (with its external and internal dimensions) would make the material scope of Art. 19 even broader. Furthermore, it should be borne in mind that there is no need for an actual application of those rules to bring a case, since the Art. 19 TEU mandate does not require it (the ideal approach), nor does it need a legal context in which the MS is applying or implementing EU law.

Moreover, it may be recalled that judicial independence is more a fundamental right for individuals than a privilege for judges; hence the tight link between Art. 19 TEU and Art. 47 of the Charter. So, theoretically, there should be no legal reason why individuals would be impeded from challenging any decision or rule on the ground that the competent judicial body lacks due independence.

Finally, bearing in mind the *ex tunc* declaratory effect of the judgments of the Court of Justice, the interpretation of Art. 19 TEU set out in this case law should apply to all instances, at least since the entry into force of the Treaty of Lisbon on December 1st 2009. This may prove extremely relevant because, as known, there have been other measures affecting the judicial independence in Poland or Hungary that were not tackled in time and remain in force.

By no means those considerations refer to a lab hypothesis. As mentioned, there exist a number of Polish references for a preliminary ruling that are related to these law amendments and pose the question of the application of Art. 19 TEU.³⁸ Indeed, AG Tanchev actually foresaw this possibility in the first infringement and he later regretted that the Court did not openly embrace the idea of demanding a higher bar (*a structural breach*) as suggested.³⁹ However, when delivering his opinions in some of the preliminary references mentioned above, AG Tanchev has proposed (if I have understood him correctly) two different sorts of limits. First, he continues to argue that Art. 19 TEU must be reserved for those measures that have an overall impact on the judiciary (*systemic or*

³⁷ The possibilities for encroaching upon judicial independence are evidently more varied. See E. ZELLER, *Access Points for Infringements of Judicial Independence – A Practical Tour d'Horizon*, in *ERA Forum*, 26 February 2019, available at www.link.springer.com.

³⁸ See *supra* footnotes 8 and 9.

³⁹ Respectively, Opinion of AG Tanchev, *Commission v. Poland (Independence of the Supreme Court)*, cit., footnote 42 and Opinion of AG Tanchev delivered on 27 June 2019, joined cases C-585/18, C-624/18 and C-625/18, *A.K. and Others (Independence of the Disciplinary Chamber)*, paras 146-147.

generalised), although it is not absolutely clear what this actually requires.⁴⁰ Secondly, AG Tanchev upholds that the case law on Art. 19 TEU must not modify the admissibility requirements for preliminary references even when a measure falls within the material scope of the former. Therefore, in order to prevent a request to end up in an advisory opinion, the judge *a quo* must establish a link with EU law (meaning justifying why the interpretation of Art. 19 TEU is relevant for resolving the proceedings that he/she is adjudicating).⁴¹ Perhaps this last remark might be difficult to reconcile with the ideal holistic approach to judicial independence that I introduced above.

The truth is that the Court of Justice maintains a certain ambiguity on this point, what may be seen as part of its cautious judicial strategy. In the recent judgment *A.K. and Others*, the Court has resolved that the application of the law amending the disciplinary chamber of the Polish Supreme Court was an infringement of Art. 47 of the Charter because of its lack of independence, but it has avoided ruling on a violation of Art. 19 TEU as well.⁴²

My view is close to the AG's first position because I think that any measure not affecting systemically judicial independence or, more accurately, any individual decision or question affecting judicial independence should be considered falling outside the reach of Art. 19 TEU. This would be the consequence of the aforementioned linkage with the EU founding values enshrined in Art. 2 TEU, which should guide the interpretation of Art. 19 TEU. Thus, any concrete or specific application of the rules organising the judiciary that might encroach upon judicial independence should be governed by Art. 47 of the Charter only, requiring thereby that the MS be implementing EU law in the sense of Art. 51, para. 1.

Therefore, it is not about reducing the material scope but more about refining the content of the obligation derived from the second subparagraph of Art. 19, para. 1, TEU. That provision obliges MS to establish a system of judicial remedies that guarantees effective legal protection when it comes to EU law. When the obligation is defined in those terms, it could be argued that the second subparagraph of Art. 19, para. 1, TEU should lack direct effect, at least in its classic meaning. Denying it direct effect would basically re-

⁴⁰ The position is better elaborated in Opinion AG Tanchev, *Commission v. Poland (Independence of ordinary courts)*, cit., paras 114-115, where he sustains that Art. 19 TEU should be confined to "structural infirmity" such as when a law impacts across entire tiers of the judiciary, i.e. "systemic or generalised deficiencies, which 'compromise the essence' of the irremovability and independence of judges". Particular incidents should be governed, in his view, by Art. 47 of the Charter only. Finally, the Advocate General does not rule out the simultaneous application of both provisions. However, in *A.K. and Others* the reason why the new disciplinary chamber of the Polish Supreme Court constitutes a structural infirmity affecting tiers of the judiciary falling under Art. 19 TEU seems to be more the previous judgment of Court of Justice (Opinion of AG Tanchev, *A.K. and Others*, cit, paras 149-152).

⁴¹ Opinion of AG Tanchev delivered on 24 September 2019, joined cases C-558/18 and C-563/18, *Miasto Łowicz*, para. 119.

⁴² Court of Justice, *A.K. and Others (Independence of the Disciplinary Chamber)* [GC], cit., para. 169.

strict Art. 19, para. 1, TEU to infringement actions, which does not mean depriving it of legal effects at all within the MS,⁴³ but it does mean empowering only the Commission with regards to its enforcement at EU level. This is in my opinion the best if not the only possible place for a Treaty provision whose material scope has been extended in such a remarkable way as to apply irrespective of whether a MS is implementing EU law or not.

However, one cannot realistically expect such a suggestion to be assumed for three main reasons. In the first place, Art. 19 TEU has so far been understood within the framework of the European *contentieux de la légalité* and the corresponding restricted standing for individuals before the CJEU. In this context, that provision would entail some progress from the previous case law in *Unión de Pequeños Agricultores* and *Unibet* by adding some positive obligations on account of MS that would even be compelled to establish entirely new judicial remedies, should it be necessary to assure the full respect of effective judicial protection. Such a robust reading of this provision was suggested by Lenaerts as early as 2007 and reaffirmed by Wildemeersch as recently as 2019.⁴⁴ However, it should be noticed that these strong effects of Art. 19 have always been thought and displayed within the traditional scope of EU law as proved by its symbiotic and inseparable relationship with Art. 47 of the Charter.

In the second place, it is true that direct effect, as long as it is connected with EU law primacy, has turned into a much more uncertain issue in the current case law of the Court of Justice.⁴⁵ Furthermore, as to the wording of the second subparagraph of Art. 19, para. 1, TEU, a plausible analogy with the *Taricco* judgment could be made, which would probably point in the opposite direction, i.e. interpreting that the primacy of such an unconditional obligation would at least trigger the *invocabilité d'exclusion*.⁴⁶

Last but not least, I believe there is another current reason why the Court would not rule out direct effect of this extended Art. 19 TEU. This reason is precisely not to forsake its potential overriding legal effects in domestic law. Such a powerful provision may come in handy whenever national courts might try to reverse past legal situations or decisions occurred under the empire of laws that breached judicial independence.⁴⁷ Thus, the Court may see in the solution suggested by AG Tanchev in *Miasto Łowicz* case

⁴³ K. LENAERTS, M. MASELIS, K. GUTMAN, *EU Procedural Law*, Oxford: Oxford University Press, 2014, pp. 205-208.

⁴⁴ K. LENAERTS, *The Rule of Law and the Coherence of the Judicial System of the European Union*, in *Common Market Law Review*, 2007, pp. 1639-1640; J. WILDEMEERSCH, *Contentieux de la légalité des actes de l'Union européenne. Le mythe du droit à un recours effectif*, Bruxelles: Bruylant, 2019, p. 71 *et seq.*

⁴⁵ See M. LÓPEZ ESCUDERO, *Primacía del derecho de la Unión Europea y sus límites en la jurisprudencia reciente del TJUE*, in *Revista de Derecho Comunitario Europeo*, 2019, p. 787 *et seq.*

⁴⁶ Court of Justice, judgment of 8 September 2015, case C-105/14, *Taricco* [GC], paras 51-52.

⁴⁷ In any case I believe that these overriding domestic legal effects might prove extremely problematic in the long term. If the Court recognises the direct effect of Art. 19, para. 1, TEU while keeping its enlarged material scope, then that provision could be argued before any domestic court that is liable to apply EU law even in proceedings where no EU law is being discussed or alleged.

(i.e. strictly applying admissibility rules for preliminary references) a feasible path since it only affects the EU judicial level but it neither solves nor precludes which legal effects Art. 19 may have in MS domestic laws.

III.2. A CONTROVERSIAL EXISTENT LIMIT: ART. 19 TEU AND CASE LAW IN *MINISTER FOR JUSTICE AND EQUALITY (DÉFAILLANCES DU SYSTÈME JUDICIAIRE)*

It is important to consider if prior judgments of the Court within the context of mutual trust and mutual recognition have already set a limit to the potential effects of this case law in *Commission v. Poland*. This is particularly the case of the judgment in *Minister for Justice and Equality (Défaillances du système judiciaire)* because, as is well known, it also related to the independence of the judicial system in Poland as affected by the same amending Laws considered in the aforementioned cases *Commission v. Poland*. The question was referred by the Irish High Court in the context of executing several European arrest warrants (EAWs) surrendering some individuals to Polish judicial authorities.⁴⁸

In the judgment, the Court of Justice confirmed that the *Aranyosi* exception also applied when the essence of the right to a fair trial was compromised because of the lack of independence of the issuing judicial authority. However, having regard to all the “information” at its disposal, including the reasoned proposal of the Commission that clearly showed that the general requirement of systemic deficiencies regarding the independence of the Polish judiciary was met, the referring court asked if the concrete test was still needed. In this respect, the Court of Justice confirmed the *Aranyosi* formula, demanding the executing judicial authority also

“to assess, in the light of the specific concerns expressed by the individual concerned and any information provided by him, whether there are substantial grounds for believing that he will run a real risk of breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial, *having regard to 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*”.⁴⁹

This case law is extremely problematic because it seems to contradict the ideal holistic approach to judicial independence that the Court has used not only with regard to Art. 19 TEU, but also when judging if a national prosecutor may qualify as a judicial authority when issuing an EAW.⁵⁰ Furthermore, this quasi shift from independence to im-

⁴⁸ *Minister for Justice and Equality (Défaillances du système judiciaire)* [GC], cit.

⁴⁹ *Minister for Justice and Equality (Défaillances du système judiciaire)* [GC], cit., para. 75 (emphasis added).

⁵⁰ Admittedly, in this case law the Court seems to focus on potential interferences more than on the perception of individuals, but it is still an ideal approach not needing to prove an actual interference in the instance case. See Court of Justice, judgment of 27 May 2019: joined cases C-508/18 and C-82/19 PPU, *OG and PI* [GC], para. 80; case C-509/18, *PF* [GC], para. 52.

partiality may be more problematic considering that the Court in *Dorobantu* required national executing judges to trust other judicial authorities to the full extent. Thus, any assurances given by the issuing judicial authority are to be trusted in the absence of specific indications to the contrary. So it is “*only in exceptional circumstances, and on the basis of precise information, that the executing judicial authority can find that, notwithstanding an assurance [...] there is a real risk of the person concerned*”.⁵¹ If this applies to the assurances coming from judges who form part of a tainted judicial system, this results in a formidable limit to the case law settled in *Commission v. Poland (Independence of ordinary courts)*, since ordinary courts are in principle the natural addressees of mutual recognition requests in criminal matters.

The fact that there was still no judgment regarding Poland or that the *LM* case dealt with the so called horizontal *Solange*, may explain the cautiousness of the Court but they do not appear crucial in affirming the limitation mentioned above.⁵² Indeed, in *Minister for Justice and Equality (Défaillances du système judiciaire)* the Court made another statement with more far-reaching consequences, which I deem extremely debatable. The Court found that, within a context of mutual recognition, the executing authority can only avoid the general and the concrete tests when the Council had suspended the EAW by virtue of Art. 7 TEU.⁵³ Accordingly, it is submitted that the Court has thereby limited its jurisdiction and, to say the least, the potential effects of its judgments on Art. 19 TEU as well.

Let us say, in the first place, that I respectfully disagree with the underlying premise. In my opinion, Art. 7 TEU cannot be considered *the* legal mechanism for controlling the respect of Art. 2 common values, much less exclusively.⁵⁴ In fact, the judgments in *Commission v. Poland* show another legal channel for determining that a breach of Art. 2 values has occurred, since the Court has explicitly affirmed that Art. 19 TEU is a concrete expression of the value of the rule of law. I think that the Court has admitted a limitation to its own jurisdiction (which assumedly is defined by EU primary law only) based on a recital of an old pre-Lisbon third pillar act.⁵⁵

⁵¹ Court of Justice, judgment of 15 October 2019, case C-128/18, *Dorobantu* [GC], para. 69 (emphasis added).

⁵² See M. WENDEL, *Indépendance judiciaire et confiance mutuelle: à propos de l'arrêt LM*, in *Cahiers de droit européen*, 2019, p. 188 *et seq.*

⁵³ *Minister for Justice and Equality (Défaillances du système judiciaire)* [GC], cit., paras 71-72.

⁵⁴ In my opinion, defending Art. 7 TEU exclusiveness results in the aporia of claiming that the ultimate respect of the rule of law in a Union based on it escapes none other than judicial review (P. MARTÍN RODRÍGUEZ, *El estado de derecho y el sistema jurídico de la Unión Europea*, in D.J. LIÑÁN NOGUERAS, P.J. MARTÍN RODRÍGUEZ (eds), *Estado de derecho y Unión Europea*, cit., p. 165 *et seq.* See concurrent arguments in M. SCHMIDT, P. BOGDANOWICZ, *The Infringement Procedure in the Rule of Law Crisis*, cit., pp. 1070-1072. See also contra O. MADER, *Enforcement of EU Values as a Political Endeavour*, cit., p. 139.

⁵⁵ This line of reasoning resorting to recital 10 of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States was

In any case, it might be difficult to understand why Art. 7 TEU, which refers to Art. 2 TEU values, would have made the Court limit its jurisdiction to enforce Art. 19 TEU. I think that even accepting the limitation of the jurisdiction of the Court of Justice in matters of Art. 2 TEU and the corresponding competence of the Council to sanctioning an infringing MS, there is nothing in Art. 7 TEU that would obstruct the Court from determining the legal consequences of its declaratory judgments, especially when they clearly imply that mutual trust has been broken.

Commission v. Poland (Independence of ordinary courts) is a ruling declaring the existence of a violation of the essence of the right to a fair trial in terms of judicial independence of the whole Polish system. This hardly fits with sustaining at the same time that judicial resolution only suffices for considering the general test of systemic deficiencies met but not the concrete one. If so, the executing authority would still need to appreciate a concrete risk of fundamental rights violation after seeking contact with the issuing authority and loyally considering the guarantees and assurances that the latter might offer. This means no less than trusting the assurances emanating from a judge who pertains to a judicial system authoritatively declared not to be compliant with judicial independence. In my view, both lines of case law are not compatible with each other.

It is thus submitted that such a judgment declaring the infringement of Art. 19 TEU should supersede the *Minister for Justice and Equality (Défaillances du système judiciaire)* case law requiring both general and concrete tests. Accordingly, any nuance to the full declaratory effects of the Court's judgment should be placed in the obligation incumbent upon the executing judicial authority of relying on updated information which would mean assessing if the MS concerned has fulfilled the Court's ruling.

IV. FINAL REMARKS

The innovative case law regarding Art. 19 TEU that has been settled by the Court of Justice in 2019, even if expected, must be considered a conspicuous new element of EU constitutional law. The Court has managed to put that provision at the service of the founding values of the EU enshrined in Art. 2 TEU. By means of a literal reading thereof, the Court has found a smart way to resolve the legal conundrum posed by these common values, whose transversal nature makes them spill over the classic scope of EU law and conferred competences. Whereas to this date the better solution had been protecting the EU legal system from getting contaminated by the challenges to the common values that occurred outside the scope of EU law (such as the *Aranyosi* exception in judi-

originally suggested by AG Bot in the context of refusing recognition of an EAW for grounds other than those explicitly provided for and it seems to have been assumed by the Court of Justice in *Aranyosi and Căldăraru* [GC], cit., para. 81. Anyways I think that the old third pillar legislator does not deserve such legal credit, let alone when the Lisbon Treaty abrogates former Art. 46 TEU (Treaty of Nice) limitations on the CJEU's jurisdiction.

cial cooperation in criminal matters), this new case law offers a different and more incisive legal approach since the material scope of Art. 19 has been detached from the need of the MS to be implementing EU law.

It is regrettable that the Court had to act under the tremendous pressure of being the last legal barrier because of the disgraceful passiveness of EU intergovernmental bodies and the somewhat understandable early hesitance and insecurities of the Commission in such an uncharted territory. Leaving it all to the judicial weaponry is nonetheless dangerous.

However I think that the Court has lived up to the high expectations and this should be borne in mind when the unoriginal criticisms denouncing judicial activism flourish again as usual.

In this regard, I firmly believe that the ideal holistic approach to judicial independence applied within the framework of an infringement action will prove its cleverness in the long run, especially because of the extension of the material scope of Art. 19 TEU.

Nevertheless, that extension inevitably calls for considering its potential limits. It is by thinking over these potential limits that one realizes that the strategy of the Court has not come without a price and the chief task is to ensure that the new case law is clearly defined and congruent with the extant jurisprudential *acquis*.

As to the clearly defined effects, the situation is unmistakably unfinished. The Court still has to clarify very relevant aspects of this newly interpreted Art. 19 TEU, particularly to which extent it is to be applied *sic et simpliciter* in Member States' legal orders. Here it has been submitted that the content of the obligation deriving from Art. 19 TEU should be redrafted to cover only a systemic dimension and that rejecting its direct effect would place Art. 19 TEU in an enforcement scenario deemed adequate to its brand new constitutional position.

Concerning the compatibility with existing case law, the picture is less uniform. While one might be forced to conclude that prior case law on Art. 19 TEU has been profoundly disrupted by this new case law and its extended material scope, I find that the new case law on Art. 19 TEU may in fact help identify lines of case law that were not as rock-solid as we thought. *Minister for Justice and Equality (Défaillances du système judiciaire)* is an outstanding example of this situation, perhaps because it also deals with the question of EU founding values. And, in my opinion, this is the genuine legal issue that the Court has to firmly construe: the legal articulation of the EU founding values beyond the dominion of EU political actors (i.e. Art. 7 TEU).