



ARTICLES

IT TAKES TWO TO TANGO:

THE PRELIMINARY REFERENCE DANCE BETWEEN THE COURT OF JUSTICE OF THE EUROPEAN UNION AND NATIONAL COURTS

edited by Jasper Krommendijk

DEFENDING THE RULE OF LAW OR REALITY BASED SELF-DEFENSE? A NEW POLISH CHAPTER IN THE STORY OF JUDICIAL COOPERATION IN THE EU

URSZULA JAREMBA*

TABLE OF CONTENTS: I. Introduction. – II. Theoretical framework: why national judges participate in judicial dialogue with the CJEU. – III. Judiciary reforms in Poland 2017-2018: a brief overview. – IV. Preliminary questions as reaction of Polish courts to the judiciary reforms. – V. Defending the rule of law or reality based self-defense? – VI. Conclusions.

ABSTRACT: In the course of the last two years, the Polish courts frequently resorted to the procedure of preliminary ruling requesting the Court of Justice to qualify the Polish judiciary reforms introduced by the PIS-regime in the light of the principle of judicial independence, the rule of law and effective judicial protection. Against this backdrop, one could suggest that the issue regarding the use of the preliminary ruling mechanism by national courts and the reasons that incentivise the judges to engage in dialogue with the Court of Justice have gained a novel dimension. It is the aim of this *Article* to discuss the relevant preliminary questions referred by the Polish courts and place them in the context of various theoretical streams that aim at explaining the reasons and motivation behind national courts' participation in judicial dialogue with the Luxembourg Court.

KEYWORDS: Polish courts – constitutional crisis – judiciary reforms – preliminary ruling procedure – judicial dialogue – rule of law.

* Assistant Professor of EU Law, Department of International and European Law, School of Law, Utrecht University, u.jaremba@uu.nl.



I. INTRODUCTION

On the 25th of October 2015, the conservative, populist and nationalist Law and Justice Party (hereinafter referred to as PIS) won the majority of seats in both chambers of the Polish Parliament, becoming the first party since the collapse of Communism able to govern alone, without needing a coalition, in Poland. A vivid constitutional crisis has since confronted the Polish legal system.¹ The comprehensive and far-reaching changes in the Polish legal, particularly the judicial, system commenced soon after the parliamentary elections, with PIS' offensive aimed at dismantling and paralyzing the Constitutional Tribunal. Despite the uproar this process triggered at both the national and European level,² the government continued to advance its attempts at forming the Tribunal into a personal tool that would acquiesce to its perverse political agenda.³ The changes introduced by the PIS regime caused so much concern that Poland became the first EU Member State to face an inquiry into its rule of law (the Rule of Law Framework mechanism) by the European Commission.⁴

After it gained political control over the Constitutional Tribunal in 2017, the government continued its strategy, launching an offensive on the ordinary courts and regular judges. It targeted the National Council for the Judiciary (KRS), the Supreme Court, and the organization of ordinary courts. The government began to pass laws to reform the judiciary system, often in overnight parliamentary sessions and without any public consultation. The amended Act on the National Council for the Judiciary shifted the power to appoint members of the Council from the judiciary itself to the Parliament, thus strengthening political influence over the appointment process. The comprehensive amendment to

¹ U. JAREMBA, *The Rule of the Majority vs. the Rule of Law - How Poland Has Become the New enfant terrible of the European Union*, in *Tijdschrift voor Constitutioneel Recht*, 2016, p. 262 *et seq.*; T.T. KONCEWICZ, *The Polish Constitutional Crisis and "Politics of Paranoia"*, in *Verfassungsblog*, 11 March 2016, verfassungsblog.de; M. MATCZAK, *Poland's Constitutional Crisis. Facts and interpretations*, The Foundation for Law, Justice and Society, 2018, www.fljs.org; W. SADURSKI, *How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding*, in *Sydney Law School Research Paper*, 2018, p. 22 *et seq.*; S. BIERNAT, *The Rule of Law in Poland*, May 2019, trema.nvvr.org; Helsinki Foundation for Human Rights, *Disciplinary Proceedings against Judges and Prosecutors*, 2019, www.hfhr.pl; F. ZOLL, L. WORTHAM, *Judicial Independence and Accountability: Withstanding Political Stress in Poland*, in *Fordham International Law Journal*, 2019, p. 874 *et seq.* Several posts by L. Pech and others regarding the developments in Poland at *Verfassungsblog*, verfassungsblog.de, offer an excellent and comprehensive academic analysis of the situation in Poland.

² See Opinion of the Venice Commission on the Act on the Constitutional Tribunal, adopted by the Venice Commission at its 108th Plenary Session, to be found at www.venice.coe.int.

³ See W. SADURSKI, *How Democracy Dies (in Poland)*, *cit.*, p. 31, for illustration of the clearly politically motivated change in the way the Constitutional Tribunal adjudicates cases.

⁴ For more see D. KOCHENOV, L. PECH, *Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality*, in *European Constitutional Law Review*, 2015, p. 512 *et seq.*; D. KOCHENOV, L. PECH, *Better Late than Never? On the Commission's Rule of Law Framework and Its First Activation*, in *Journal of Common Market Studies*, 2016, p. 1062 *et seq.*; R. UITZ, *Poland, Hungary and Europe: Pre-Article 7 Hopes and Concerns*, in *Verfassungsblog*, 14 March 2016, verfassungsblog.de.

the Act on the Supreme Court lowered the retirement age of judges and forced 27 of them, including the President of the Supreme Court, to retire. The Act also created two new chambers of the Supreme Court – the Disciplinary Chamber and the Chamber of the Extraordinary Control and Public Affairs – whose members would be selected by the new and politicised KRS. The amended Act on the Organization of the Common Courts altered the process of appointing and dismissing the presidents of the courts making them dependent on the Ministry of Justice. The government also simultaneously introduced a new model of disciplinary proceedings that made the liability of judges to be subjected to the control by the Minister of Justice.⁵ The above-mentioned reforms, which were introduced by the amendments to the three main laws regulating the functioning of the Polish judiciary, are now accompanied by disciplinary proceedings against judges and prosecutors who do not favour the reforms or act contradictory to the government's preferences.⁶ Even without detailing these legal changes and their political motivations too much at this point, the respective amendments appear to contradict the fundamental guarantees of judicial independence and aim to undermine the position of the judiciary.⁷

Unsurprisingly, due to the aforementioned reasons, these comprehensive judicial reforms have drawn much attention and triggered a fierce backlash, both internally and at the European level. Indeed, much has been said and written regarding the distressing, and perhaps even dramatic,⁸ developments in Poland.⁹ Political, media and academic voices claiming the death of the Polish democracy and the systemic threat to the rule of law have become common.¹⁰ However, the political, academic and societal circles do not represent the only groups to respond to this undermining of the core elements of the rule of law; the judges themselves have also actively and somewhat ingeniously reacted to this new legal reality. In addition to publicly showing their objection to and disapproval of the PIS reforms, Poland's judges have vigorously attempted to employ the mechanism of preliminary rulings under Art. 267 TFEU. In a relatively short time, the Polish courts have referred a high number of preliminary questions to the Court of Justice that contested the legality of the reforms *vis-à-vis* EU law, and specifically, the rule of law.

In particular, in August 2018, the Polish Supreme Court referred six preliminary questions on the position of the post-Supreme-Court-reform Polish judiciary and the alleged limiting of their independence and impartiality. Soon after, the regional court in

⁵ Prior to the amendment the model of disciplinary proceedings was formally independent of public authorities.

⁶ Komitet Obrony Sprawiedliwości, *A Country that Punishes. Pressure and Repression of Polish Judges and Prosecutors*, 2019, see citizensobservatory.pl, p. 10 *et seq.*

⁷ S. BIERNAT, *The Rule of Law in Poland*, cit.

⁸ W. SADURSKI, *How Democracy Dies (in Poland)*, cit., p. 2.

⁹ See various Authors cited in footnote 1.

¹⁰ W. SADURSKI, *What Went Wrong with Poland's Democracy*, in *OUP Blog*, 14 August 2019, blog.oup.com; L.D. SPIEKER, *Breathing Life into the Union's Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis*, in *German Law Journal*, 2019, p. 1182 *et seq.*

Łódź referred preliminary questions to the Court of Justice asking it to assess the new disciplinary proceedings. Another preliminary question regarding the very same issue came from the Regional Court in Warsaw. On 20 September 2018 the Supreme Court referred questions asking whether the newly-created chamber at the Supreme Court is an independent court or a tribunal within the meaning of EU law. On 3 October 2018, two different cases before the Supreme Court resulted in a referral of a further five preliminary questions identical to the ones from August. Later that month, the same court filed another preliminary question concerning the issue of judicial independence. On 21 November, the Supreme Administrative Court referred several preliminary questions concerning the amended Act on the Supreme Court to assess if it violated the rule of law and the principle of effective judicial protection. On 21 May 2019, the Supreme Court chose to refer another preliminary question regarding the issue of judicial independence and impartiality, specifically questioning the procedure regulating the appointment of judges and the lawfulness of sitting on the bench. Finally, in 2019, the Supreme Court referred another set of comprehensive questions regarding the position of judges in light of the principle of effective judicial protection and the rule of law.

Clearly, the number of Polish preliminary ruling requests alleging that the PIS judiciary acts violated the principles of judicial independence and effective judicial protection grew quite rapidly at the Court of Justice over the course of 11 months. This background suggests that the attempts of Polish courts to use the preliminary ruling mechanism and the reasons why they have chosen to do so represent a novel dimension in the academic discourse regarding the use of the preliminary ruling mechanism by national courts and the reasons that incentivise the judges to engage in dialogue with the Court of Justice. This *Article* aims to discuss the relevant preliminary questions referred by the Polish courts and contextualise them within various academic theories that attempt to explain the motivation behind the national courts' participation in the judicial dialogue with the Luxembourg Court.¹¹

This *Article* is structured as follows. First, the existing theories explaining the motives behind referring preliminary questions by national courts are briefly discussed. Next, the judiciary reforms introduced by the PIS government are addressed in more

¹¹ On judicial dialogue see for instance: E. PAUNIO, *Conflict, Power, and Understanding – Judicial Dialogue between the ECJ and National Court*, in *NoFo*, 2010, p. 7 *et seq.*; M. CLAES, M. DE VISSER, *Are You Networked Yet? On Dialogues in European Judicial Networks*, in *Utrecht Law Review*, 2012, p. 100 *et seq.*; A. PÉREZ, Melloni in Three Acts: From Dialogue to Monologue, in *European Constitutional Law Review*, 2014, p. 308 *et seq.*; O. POLLICINO, *From Partial to Full Dialogue with Luxembourg: The Last Cooperative Step of the Italian Constitutional Court*, in *European Constitutional Law Review*, 2014, p. 143 *et seq.*; B. GUASTAFERRO, *The Unexpectedly Talkative “Dumb Son”: The Italian Constitutional Court’s Dialogue with the European Court of Justice in Protecting Temporary Workers’ Rights in the Public Education Sector*, in *European Constitutional Law Review*, 2017, p. 493 *et seq.*; D. KOCHENOV, M. VAN WOLFEREN, *Dialogical Rule of Law and the Breakdown of Dialogue in the EU*, in *EUI Working Papers*, no. 1, 2018; K. LEMMENS, *Protocol No 16 to the ECHR: Managing Backlog Through Complex Judicial Dialogue?*, in *European Constitutional Law Review*, 2019, p. 691 *et seq.*

detail. This elaboration is followed by an examination of the relevant preliminary questions referred by Polish courts to the Court of Justice before September 2019. Those references are subsequently assessed against the previously discussed theoretical streams. Finally, some conclusions are drawn. It is important to emphasise that the general topic of the judiciary reforms in Poland is subject to a constant and intense evolution. However, this topic comprises many interesting issues that pose questions of constitutional importance but are not directly relevant for the discussion at hand. In this respect, the political and media discourse surrounding the judicial reforms, the steps taken by the EU (and elsewhere) as a reaction to the PIS reforms, the (fierce) reaction of the Polish government to the aforementioned referral of preliminary questions, the later legislative changes to the original reforms, and the answers of the Court of Justice to the questions at hand, although absorbing and important, are only addressed to the extent necessary for some basic understanding of the contextual framework.

II. THEORETICAL FRAMEWORK: WHY JUDGES PARTICIPATE IN JUDICIAL DIALOGUE WITH THE CJEU

The motives underlying the participation of national courts in judicial dialogue with the Court of Justice have been subject to an absorbing and very comprehensive academic debate for several decades. Many distinct and competing theories exist that attempt to explain why national judges resort to the Court of Justice. Much of the relevant scholarship examines why judges appear reluctant to resort to this route or, put differently, the non-cooperative element of the judicial dialogue.¹² In addition, scholars have tried to explain cross-national variations in preliminary references.¹³ A global review of the relevant scholarship reveals that, on the one hand, scholars disagree on the motives underlying the referral of preliminary questions,¹⁴ and on the other hand, judicial behaviour in the context of the procedure might be affected by various legal and extra-legal factors.¹⁵ Scholars therefore point to several constitutional, institutional, procedural, cultural, political, and individual variables to explain the participation (or the lack thereof)

¹² See M. GLAVINA, *To Refer or Not to Refer, That Is the (Preliminary) Question: Exploring Factors Which Influence the Participation of National Judges in the Preliminary Ruling Procedure*, in *Croatian Yearbook of European Law of Policy*, 2020, available at www.cyelp.com, p. 3.

¹³ A. STONE SWEET, T.L. BRUNELL, *The European Court and National Courts: A Statistical Analysis of Preliminary References 1961-95*, in *Journal of European Public Policy*, 1998, p. 66 *et seq.*

¹⁴ See M. GLAVINA, *To Refer or Not to Refer, That Is the (Preliminary) Question*, *cit.*, pp. 2-3.

¹⁵ See U. JAREMBA, *Polish Civil Judiciary vis-à-vis the Preliminary Ruling Procedure. In Search for a Mid-range Theory*, in B. DE WITTE, J. MAYORAL, U. JAREMBA, M. WIND, K. PODSTAWA (eds), *National Courts and EU Law. New Issues, Theories and Methods*, Cheltenham: Elgar, 2016, p. 49 *et seq.*; U. JAREMBA, J.A. MAYORAL, *The Europeanization of National Judiciaries: Definitions, Indicators and Mechanisms*, in *Journal of European Public Policy*, 2019, p. 386 *et seq.*

of national courts in engaging in judicial dialogue with the Court of Justice.¹⁶ Several Authors already provide an excellent analysis of the existent theories, thus rendering an extensive summary in this *Article* redundant and repetitive.¹⁷ Therefore, only the most relevant theories from the academic discourse on this topic will be reviewed below.

In general, scholars mainly suggest five explanations for national courts' participation in the processes of legal integration and judicial dialogue in the EU. These explanations are referred to as legalism, neo-realism, neo-functionalism, inter-court competition theory (seen as a sub-theory of neo-functionalism), and individual profiles theory.¹⁸ The legalists claim that the referral of preliminary questions is motivated by legal considerations – that is, the quality of the Court's reasoning and the fact that judges need to know how the law should be interpreted to apply it motivate judges to resort to the Court of Justice for clarification.¹⁹ Neo-realists suggest that national political concerns influence the involvement of courts with EU law, and, consequently, the preliminary ruling procedure. According to this theory, judges consider national political and economic interests to choose their approach towards the application of EU law or the use of the preliminary ruling procedure.²⁰

Neo-functionalism focuses on the interests and motivations of individual judges and other legal actors. It posits that the appearing before the CJEU provides different actors in the procedure with various (personal) incentives that determine whether they choose to participate in the processes of judicial dialogue with the CJEU. Hence, national judges

¹⁶ *Ibid.*

¹⁷ See *inter alia* Authors *supra* footnotes 12, 13 and 15. See also A.-M. SLAUGHTER, A. STONE SWEET, J.H.H. WEILER (eds), *The European Court and National Courts – Doctrine and Jurisprudence. Legal Change in Its Social Context*, Oxford: Hart, 1998; S.A. NYIKOS, *The European Court of Justice and National Courts: Strategic Interaction within the EU Judicial Process*, 2000, www.semanticscholar.org; C.J. CARRUBBA, L. MURRAH, *Legal Integration and Use of the Preliminary Ruling Process in the European Union*, in *International Organization*, 2005, p. 399 *et seq.*; B. DE WITTE, J. MAYORAL, U. JAREMBA, M. WIND, K. PODSTAWA (eds), *National Courts and EU Law*, *cit.*, offers a more recent multidisciplinary analysis.

¹⁸ For more on judicial politics and relevant theories see for instance: M.L. VOLCANSEK, *Judicial Politics in Europe. An Impact Analysis*, New York-Berne-Frankfurt am Main: Peter Lang, 1986; J.H.H. WEILER, *Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration*, in *Journal of Common Market Studies*, 1993, p. 417 *et seq.*; H.-W. MICKLITZ, *The Politics of Judicial Co-operation in the EU. Sunday Trading, Equal Treatment and Good Faith*, Cambridge: Cambridge University Press, 2005; T. SELCK, M. RHINARD, F.M. HÄGE, *The Evolution of European Legal Integration*, in *European Journal of Law and Economics*, 2007, p. 187 *et seq.*; M. WIND, *The Nordics, the EU and the Reluctance Towards Supranational Judicial Review*, in *Journal of Common Market Studies*, 2010, p. 1039 *et seq.*; S.A. NYIKOS, *The European Court of Justice and National Courts*, *cit.*

¹⁹ See M. CLAES, *The National Courts' Mandate in the European Constitution*, Oxford: Hart, 2006; A. ARNULL, *Judicial Dialogue in the European Union*, in J. DICKSON, P. ELEFThERiADIS (eds), *Philosophical Foundations of European Union Law*, Oxford: Oxford University Press, 2012, p. 109 *et seq.*

²⁰ For more see K. ALTER, *Explaining National Courts Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration*, in A.-M. SLAUGHTER, A. STONE SWEET, J.H.H. WEILER (eds), *The European Court and National Courts*, *cit.*, p. 225 *et seq.*

choose to employ the preliminary ruling for various reasons that generally fall under the concept of “judicial empowerment”.²¹ The judicial empowerment stream focuses on extra-legal incentives, namely, “the extent to which judges work to enhance their own authority to control legal (and, therefore, policy) outcomes, and to reduce the control of other institutional actors, such as national executives, parliament, and other judges, on those same outcomes”.²² However, this notion of empowerment is broad, and the process can take different forms. In this sense, judges seek to employ the preliminary ruling to advance their own interests over those of the government or other courts.²³ Alter’s inter-court competition theory suggests that national judges use EU law and resort to the preliminary ruling to maximise their interests in the process of “bureaucratic struggles” between different levels of the judiciary.²⁴ In that sense, referring to the Court of Justice should be seen as a strategic action related to inter-court competition. Finally, a more recent theoretical stream arisen from empirical insights emphasises the role and impact of judges’ individual profiles on their participation in judicial dialogue with the Court. The proponents of this theory hypothesise, backed up by empirical data, that factors such as judges’ knowledge of EU law, experiences with applying it, and their attitudes towards the EU impact the way they use (or not) the preliminary ruling mechanism.²⁵ It also suggests that the operational context in which judges function can profoundly impact the way they apply EU law and resort to the preliminary ruling mechanism.²⁶

III. JUDICIARY REFORMS IN POLAND 2017-2018: BRIEF OVERVIEW

The “crusade against Polish courts and judges”²⁷ started soon after PIS took power in 2015. The new regime launched its “reforms” by first attacking the Constitutional Tribu-

²¹ J.H.H. WEILER, *A Quiet Revolution: The European Court of Justice and Its Interlocutors*, in *Comparative Political Studies*, 1992, p. 510 *et seq.* For more recent discussion on the judicial empowerment theory see T. PAVONE, *Revisiting Judicial Empowerment in the European Union: Limits of Empowerment, Logics of Resistance*, in *Journal of Law and Courts*, 2018, p. 303 *et seq.*

²² A. STONE SWEET, T.L. BRUNELL, *The European Court and National Courts*, *cit.*, p. 69.

²³ S.A. NYIKOS, *The European Court of Justice and National Courts*, *cit.*, p. 9 *et seq.*

²⁴ K. ALTER, *National Courts Acceptance of European Court Jurisprudence*, *cit.*, p. 234.

²⁵ T. NOWAK, F. AMTENBRINK, M. HERTOIGH, M.H. WISSINK, *National Judges as European Union Judges: Knowledge, Experiences and Attitudes of Lower Court Judges in Germany and the Netherlands*, The Hague: Eleven International, 2011; J.A. MAYORAL DIAZ-ASENSIO, *The Politics of Judging EU Law: A New Approach to National Courts in the Legal Integration of Europe*, Florence: European University Institute, 2013; U. JAREMBA, *National Judges as EU Law Judges: the Polish Civil Law System*, Leiden, Boston: Nijhoff, 2014; J.A. MAYORAL, U. JAREMBA, T. NOWAK, *Creating EU Law Judges, the Role of Generational Differences, Legal Education and Career Paths in National Judges. Assessment Regarding EU Law Knowledge*, in *Journal of European Public Policy*, 2014, p. 1120 *et seq.*; U. JAREMBA, *Polish Civil Judiciary vis-à-vis the Preliminary Ruling Procedure*, *cit.*; U. JAREMBA, J.A. MAYORAL, *The Europeanization of National Judiciaries*, *cit.*

²⁶ See U. JAREMBA, *National Judges as EU Law Judges*, *cit.*, p. 321 *et seq.*

²⁷ See S. BIERNAT, *The Rule of Law in Poland*, *cit.*

nal.²⁸ In 2017, after its capture of the Constitutional Tribunal²⁹, the government targeted ordinary courts and their judges. They chose three different paths for legal changes, altering the functioning of the National Council for the Judiciary³⁰ and amending the Act on the Supreme Court³¹ as well as the Law on Organization of Ordinary Courts.³²

The Council for the Judiciary, which is predominantly composed of judges,³³ is a constitutionally designated body with the power to nominate all candidates for judicial positions and propose them to the President.³⁴ The Council also fulfils other essential tasks such as safeguarding the independence of courts and judges,³⁵ referring questions on the constitutionality of normative acts regarding courts and judges to the Constitutional Tribunal, adopting a code of ethics governing the judicial profession, expressing opinions on drafts of normative acts concerning the judiciary,³⁶ selecting a disciplinary prosecutor for judges, and voicing opinions in the case of dismissal of the president of the court.³⁷ Importantly, the judicial members of the Council were, prior to the PIS reform, chosen by the judiciary itself.³⁸ The amended Act on National Council shifted the power to appoint its members from the judiciary to the Parliament, thus greatly strengthening its political influence over the process of appointment.³⁹ In fact, the new provisions provide the ruling party a decisive say on the composition of the Council, consequently greatly politicizing the process of judge nomination. In line with the amended act, Council's previous term of office was terminated in January 2018, and the Parliament started the process of appointing new members. As observed, the process was highly politicised and non-transparent.⁴⁰ The concerns over the vivid politicisation of the Council and its (lack of) independence from the legislature and executive were reflected in the action taken by the European

²⁸ See U. JAREMBA, *The Rule of the Majority vs. the Rule of Law*, cit.

²⁹ See W. SADURSKI, *How Democracy Dies (in Poland)*, cit., p. 17.

³⁰ The Law on the National Council for the Judiciary of 12 May 2011. That law was amended by the *Ustawa o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw* (Law amending the Law on the National Council for the Judiciary and certain other laws) of 8 December 2017 which entered into force on 17 January 2018.

³¹ Law amending the Law on the Supreme Court of 21 November 2018.

³² Law on the Organisation of the Ordinary Courts of 27 July 2001.

³³ Art. 187 stipulates that 15 of Council members are "chosen from amongst the judges". Next to 15 judges, the Council consists of 6 representatives of the Parliament, one representative of the President, Minister of Justice and Presidents of the Supreme Court and the National Administrative Court.

³⁴ Art. 179 of the Polish Constitution.

³⁵ *Ibid.*, Art. 186, para. 1.

³⁶ *Ibid.*, Art. 186, para. 2.

³⁷ Art. 3 of statute of 12 May 2011 on the National Council of the Judiciary.

³⁸ As such the right to choose the 15 members of the Council by the judiciary was not guaranteed by the Constitution.

³⁹ Helsinki Foundation for Human Rights, *The Situation of the Judiciary in Poland*, 2019, www.hfhr.pl, p. 6.

⁴⁰ The Chancellery of Sejm refused to release the information on the list of judges supporting the candidates to the Council, see Helsinki Foundation for Human Rights, *The Situation of the Judiciary in Poland*, cit., p. 5.

Network of Councils for the Judiciary, which on 17 September 2018 proposed a suspension of the Polish Council's membership in the Network, stripped it of its voting rights, and excluded it from participation in its activities.⁴¹

Next, the comprehensive amendment to the Act on the Supreme Court on 8 December 2017 lowered the retirement age of judges from 70 to 65 and consequently forced 27 out of 72 of the Supreme Court judges, including the President, to retirement. The possibility that Supreme Court judges could continue their service beyond the age of 65 was contained in the amendment but was subject to the submission of a statement indicating that the judge desired to continue his duties and his health allowed her or him to do so. This possibility was also subject to the consent of the President of Poland.⁴² Furthermore, the new law provided the President the power to freely decide, until 3 April 2019, whether to increase the number of Supreme Court judges. The Act also created two new chambers of the Supreme Court – the Disciplinary Chamber and the Chamber of the Extraordinary Control and Public Affairs. The judges sitting in these two new chambers would be appointed by the newly selected KRS.⁴³

On 24 September 2018, the European Commission brought an infringement action against Poland before the Court of Justice in relation to the amendment to the Act on the Supreme Court. The Commission considered that by, first, lowering the retirement age and applying that new retirement age to judges appointed to the Supreme Court up until 3 April 2018 and, second, granting the President of the Republic of Poland the discretion to extend the active judicial service of Supreme Court judges, Poland has infringed EU law, *i.e.* Art. 19, para. 1, TEU and Art. 47 of the Charter of Fundamental Rights of the European Union.⁴⁴ On 17 December 2018, the Court of Justice issued a final order imposing interim measures to stop the implementation of the Polish law on the Supreme Court. On 24 June 2019, the Court ruled that the law lowering the retirement age of judges of the Supreme Court, ran contrary to EU law and breached the fundamental doctrine of the irremovability of judges and, consequently, the principle of judicial independence.⁴⁵

⁴¹ It is a condition of European Networks of Council for the Judiciary (ENCJ) membership that institutions are independent of the executive and legislature and ensure the final responsibility for the support of the judiciary in the independent delivery of justice; see www.encj.eu. See further ENCJ's website for their critical opinions concerning the judicial reforms in Poland: www.encj.eu.

⁴² In making his decision, the President of the Republic of Poland is not bound by any criteria and that decision is not subject to any form of judicial review.

⁴³ The Disciplinary Chamber is responsible for hearing the disciplinary proceedings in the case of judges of the Supreme Court and appeals against the decisions issued in the disciplinary proceedings of attorneys at law, solicitors and prosecutors. The Chamber of the Extraordinary Control and Public Affairs is responsible for *inter alia* hearings in the cases concerning extraordinary appeal and declaring the validity of the elections.

⁴⁴ Court of Justice, case C-619/18, *Commission v. Poland (Indépendance de la Cour suprême)*.

⁴⁵ Court of Justice, judgment of 24 June 2019, case C-619/18, *Commission v. Poland (Indépendance de la Cour suprême)* [GC].

Finally, in July 2017, the Parliament adopted the Act on the Organization of the Ordinary Courts, which altered the process of appointing and dismissing the presidents of the courts making them dependent on the Ministry of Justice.⁴⁶ The presidents of the courts were henceforth appointed by the Minister of Justice without any consultation with the general assemblies of the judges in each court. The amendments broadened the opportunities for the Ministry of Justice to influence the working of ordinary courts. Within a short period of time, the posts of the courts' presidents were filled by candidates selected by the Ministry.⁴⁷ At the same time, a new model of disciplinary proceedings for judges was introduced in which judicial discipline is subject to the control of the Minister of Justice, now Prosecutor General as well. Prior to the changes, disciplinary proceedings were independent of the public authorities; now, the Minister of Justice endows disciplinary court judges with their duties and appoints and recalls the Disciplinary Commissioner of Ordinary Court Judges and his deputies. The Minister of Justice may request the initiation of proceedings against a selected judge. He may also appoint a special disciplinary commissioner for handling a disciplinary case against a judge. In certain cases, this commissioner may serve as a prosecutor in the case.⁴⁸ The objective of those reforms seems to be to place the system of penalising judges for disciplinary reasons under the control of the executive, in order to influence judges and their decisions and obtain tools for investigating and removing troublesome judges from the profession.⁴⁹ Onlookers have observed that these systemic reforms have been followed by many instances of disciplinary proceedings against judges and prosecutors who either criticised the judicial reforms introduced by the government or ruled on decisions undesirable from the government's perspective.⁵⁰ On 3 April 2019, the European Commission has launched a new infringement procedure against Poland due to this disciplinary regime. The Commission claimed that the regime undermined the judicial independence of Polish judges by failing to offer guarantees necessary to protect them from po-

⁴⁶ In a short period of time, the Minister replaced almost 150 presidents in the courts of every rank across the country, without providing any justification, see Helsinki Foundation for Human Rights, *The Situation of the Judiciary in Poland*, cit., p. 6.

⁴⁷ As observed by Helsinki Foundation for Human Rights, *The Situation of the Judiciary in Poland*, cit., p.6, the entire process was conducted in a non-transparent way and based on irrelevant criteria. The Ministry of Justice was not bothered to conduct any open consultations with the judicial community on the appointment of new presidents. As informed by media outlets the presidents in office were dismissed from office in a very short time by means of receiving faxed letters, see katowice.wyborcza.pl. In the end, more than 150 presidents and vice presidents of courts were replaced including presidents of the largest court in Poland.

⁴⁸ See Komitet Obrony Sprawiedliwości, *A Country that Punishes*, cit., p. 6.

⁴⁹ *Ibid.*

⁵⁰ Helsinki Foundation for Human Rights, *The Situation of the Judiciary in Poland*, cit., p. 7; Komitet Obrony Sprawiedliwości, *A Country that Punishes*, cit., p. 10. In 2019 the Helsinki Foundation for Human Rights published a list of recent disciplinary proceedings against judges and prosecutors: www.hfhr.pl. See also Amnesty International, *Polska: wolne sądy, wolni ludzie*, 2019, amnesty.org.pl, where 10 cases of disciplinary proceedings against judges are discussed.

litical control.⁵¹ These charges were followed by a reasoned opinion released on 17 July 2019 and, finally, a case filed against Poland by the Commission in the Court of Justice on 25 October 2019.⁵²

IV. PRELIMINARY QUESTIONS AS REACTION OF POLISH COURTS TO THE JUDICIARY REFORMS

The relevant preliminary questions concerning PIS judiciary reforms evaluated against the principle of judicial independence and effective judicial protection commenced on 9 August 2018 with six preliminary questions submitted by the Supreme Court.⁵³ The questions concerned the position of the Polish judiciary after the amendments introduced by the Act on the Supreme Court that allegedly undermined the principles of judicial independence and impartiality. The case appeared before the Supreme Court as the result of the proceedings started by the Polish Insurance Institution against an individual.⁵⁴ However, the relevant preliminary questions were in no way linked to the substantive merits of this main case. Moreover, the Supreme Court formulated its preliminary questions even before proceeding with its substantive examination of the main case. At the chamber hearing, the main case was heard by seven judges, two of which had been forced to retire as a consequence of the new regime. The question standing central in this preliminary question was whether the forced retirement of Supreme Court judges is compatible with EU law. More precisely, the Supreme Court sought to answer whether the new rules on retirement are compatible with EU primary law, that is, Art. 19, para. 1, TEU, in conjunction with Art. 4, para. 3, TEU, Art. 2 TEU, Art. 267, para. 3, TFEU and Art. 47 of the Charter, as well as EU secondary law, that is, Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation. Simultaneously, the Supreme Court suspended the application of the controversial provisions of the amended Act. The Court of Justice agreed to consider the questions through an expedited procedure due to the importance of the issues raised, as well as the many uncertainties on the functioning of the Supreme Court and the application of Art. 267 TFEU, which could not properly work without independent national courts, created by the new laws.⁵⁵

Only eight days after referring the above questions, the Supreme Court again resorted to the Court of Justice. The new questions were formulated from an appeal case

⁵¹ Commission, Press release of 3 April 2019.

⁵² Court of Justice, case C-791/19 brought on 25 October 2019, *Commission v. Poland*.

⁵³ Court of Justice, case C-522/18, *Zakład Ubezpieczeń Społecznych*.

⁵⁴ The issue concerned the social insurance contributions in a situation when a Polish person has a company in Slovakia or Czech Republic. The main proceedings related to the coordination of social security systems as regulated in Regulation (EC) 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

⁵⁵ Court of Justice, order of 26 September 2018, case C-522/18, *Zakład Ubezpieczeń Społecznych*.

lodged by a judge of the same court, who had been forbidden by the Council to continue his service in the judiciary.⁵⁶ The Supreme Court essentially sought to answer whether Art. 47 of the Charter, in conjunction with Art. 9, para. 1, of Directive 2000/78, should be interpreted as meaning that the Supreme Court should refuse to apply a national law that claims jurisdiction over a unit of that court that cannot operate due to a failure to appoint the judges adjudicating within it.

Shortly after, on 3 September 2018, the regional court in Łódź was called to rule in a case arising between the municipality of Łowicz and the national Treasury. According to the plaintiff, the municipality did not receive adequate subsidies from the state to perform its activities.⁵⁷ In this case's context, the regional court judge chose to stay the proceedings and refer the preliminary questions to the Court of Justice.⁵⁸ Namely, the judge asked the Court to assess whether the new disciplinary proceedings contradicted the principle of judicial independence and the principle of effective judicial protection in general and Art. 19, para. 1, TEU in particular. The judge expressed fears that she would face disciplinary sanctions if the case between the state and the local municipality were decided in favour of the latter. Clearly, the preliminary questions were, once again, not linked to the subject of the main proceedings; rather, they concerned a much more fundamental issue of judicial independence. Just two days later, another preliminary question nearly identical to the one above was filed by the Regional Court in Warsaw in a criminal proceeding.⁵⁹ The Warsaw judge considered the possibility of applying a milder penalty to members of organised crime responsible for assassinations and kidnappings. However, the referring judge expressed concerns that the application of a milder punishment might result in disciplinary proceedings initiated against him by the Ministry of Justice. The judge, similar to his colleague in Łódź, felt concerned about political influence on the proceedings and the possibility that the new disciplinary regime could be used to assert political control over the decisions of the courts. The Court of Justice later decided to combine both cases.⁶⁰

On 20 September 2018, the Labour and Social Insurance Chamber of the Supreme Court referred preliminary questions asking, essentially, whether the newly created Disciplinary Chamber of the Supreme Court represents an independent court or tribunal as prescribed by EU law, or, more precisely, whether it is compatible with Art. 267 TFEU,

⁵⁶ Court of Justice, request for a preliminary ruling lodged on 17 August 2018, case C-537/18, *Krajowa Rada Sądownictwa*.

⁵⁷ In this case it was quite likely that the ruling would be disadvantageous for the Treasury.

⁵⁸ Court of Justice, request for a preliminary ruling lodged on 3 September 2018, case C-558/18, *Miasto Łowicz*.

⁵⁹ Court of Justice, request for a preliminary ruling lodged on 5 September 2018, case C-563/18, *Prokurator Generalny (Régime disciplinaire concernant les magistrats)*.

⁶⁰ The Court of Justice rejected the request for the expedited procedure on 1 October 2018.

Arts 2 and 19, para. 1, TEU and Art. 47 of the Charter.⁶¹ The question was motivated by the fact that the members of the new chamber are chosen by the new Council, whose independence could no longer be guaranteed due to the PIS reforms. In the case underlying the reference, a judge from the Supreme Administrative Court who turned 65 before the new Act on the Supreme Court became effective, submitted a declaration indicating his wish to continue in his office. On 27 July 2018, the new KRS issued a negative opinion to that request. On 10 August 2018, the judge brought an action before the Supreme Court challenging this opinion. He contended that his forced retirement at 65 infringed Art. 19, para. 1, TEU, Art. 47 of the Charter and Directive 2000/78.⁶² Clearly, the main case concerned the issue of a mandatory retirement age, as introduced by the judiciary reforms. However, the Supreme Court used this chance to refer an additional question about the legality of the Disciplinary Chamber when evaluated against the principle of judicial independence.⁶³

In the meantime, on 25 September 2018, the Polish Insurance Institution, allegedly under political pressure from the government,⁶⁴ withdrew its original claim before the Supreme Court, thus terminating the proceedings which had induced the preliminary questions from 9 August. Since the original case no longer existed, the Supreme Court was expected to withdraw the preliminary questions referred in case C-522/18. Instead, on 3 October 2018 the Labour and Social Insurance Chamber of the Supreme Court referred five further preliminary questions in two other cases.⁶⁵ This occurred just a day after the European Commission brought an infringement action against Poland due to their mandatory judicial retirement age.⁶⁶ Those cases concerned two judges of the Supreme Court who had also turned 65 before the new regime became effective but did not submit declarations indicating their wish to continue. Once informed that they had been forcibly retired as of 4 July 2018, both judges brought actions before the Supreme Court against the President of the Republic for a declaration that their employment relationship as a judge had not been transformed into an employment relationship as a retired judge. Both requests for a preliminary ruling concerned the interpretation of Arts 2 and 19, para. 1, TEU, Art. 267 TFEU, Art. 47 of the Charter and Art. 9, para. 1, of

⁶¹ Court of Justice, request for a preliminary ruling lodged in case C-585/18, later joined by the Court with cases C-624/18 and case C-625/18, see further.

⁶² See (extensive) decision of the Supreme Court of 19 September 2018 to refer preliminary questions, III PO 8/18, www.sn.pl.

⁶³ For the background of the cases see S. PLATON, *Writing Between the Lines. The Preliminary Ruling of the CJEU on the Independence of the Disciplinary Chamber of the Polish Supreme Court*, in *EU Law Analysis*, 26 November 2019, eulawanalysis.blogspot.com.

⁶⁴ As observed by *Gazeta Wyborcza*, wyborcza.pl.

⁶⁵ Court of Justice, joined cases C-624/18 and C-625/18, *CP, DO v. Sąd Najwyższy*. Those two cases were later joined with case C-585/18, *A.K. v. Krajowa Rada Sądownictwa*. The Court of Justice also granted an expedited procedure on 26 November 2018.

⁶⁶ *Commission v. Poland (Indépendance de la Cour suprême)*, cit.

Directive 2000/78. However, in these cases, similarly to case C-585/18, the Supreme Court cast doubts on the circumstances in which the new judges of the Disciplinary Chamber would be appointed. In particular, they raised the question of whether their members would be sufficiently independent and impartial. The CJEU later decided to combine the three cases.⁶⁷

On 26 October 2018, the Supreme Court referred another preliminary question that considered whether the forced retirement age of Supreme Court judges violated the principle of judicial independence. Those questions were virtually identical to those referred in case C-522/18.⁶⁸ The main cassation case heard by the Supreme Court regarded the correctness of the application of national procedural law implementing the EU Regulation on jurisdiction and recognition of judicial decisions and their enforcement in civil and commercial matters, as well as the EU Directive concerning the posting of workers under the provision of services.⁶⁹ As in some of the aforementioned cases, the preliminary questions referred to the Court of Justice were unrelated to the main case under consideration. Furthermore, similarly to before, the chamber meant to hear the main case comprised one judge who had been forced to retire. The Supreme Court argued that referring similar preliminary questions to the Court of Justice was justified by the fundamental importance of the issue to the maintenance of the EU as a community based on the rule of law. The Supreme Court also observed that political authorities had undertaken various activities aimed at preventing the CJEU from interpreting EU law provisions on the independence of judges in case C-585/18.⁷⁰

On 21 November 2018, the Polish Parliament amended the Supreme Court Act reversing the forced retirement of Supreme Court judges. The amendment reinstated the previous retirement age for judges who performed their duties prior the reform taking effect. Consequently, Supreme Court judges who had retired in accordance with the amended Act were reinstated in the positions they had held on the day of the adoption of the amendment. Only a few hours after the amendment was passed, the Supreme Administrative Court (SAC) decided to refer two extensive preliminary questions concerning the just amended Act on the Supreme Court in the light of the rule of law and the principle of effective judicial protection.⁷¹ The cases considered by the SAC were initiated by candidates for the vacant judges positions at the Supreme Court who had been informed by the new Council for the Judiciary that their requests to be appointed

⁶⁷ Court of Justice, judgment of 19 November 2019, joined cases C-585/18, C- 624/18 and C- 625/18, *A.K. (Indépendance de la chambre disciplinaire de la Cour suprême)* [GC].

⁶⁸ Court of Justice, case C-668/18, *Uniparst*. The Court of Justice agreed to expedite the procedure for the same reasons as in case C-522/18.

⁶⁹ Polish Supreme Court, decision of 3 October 2018, II PK 153/17, www.sn.pl.

⁷⁰ *Ibid.*, p. 5 *et seq.*

⁷¹ Court of Justice, request for preliminary ruling lodged on 28 December 2018, case C-824/18, *A.B. and Others*.

to a post of a Supreme Court judge would not be presented to the President of Poland. The five applicants decided to challenge those resolutions before the SAC.⁷² However, according to the SAC, the results of such an appellate proceeding could not be considered an effective legal remedy.⁷³ Considering the situation and relevant standards of EU law, the Supreme Administrative Court decided to refer preliminary questions to the Court of Justice on the interpretation of the right to effective remedy and the legality of the new Council for the Judiciary. The extensive and somewhat tortuous preliminary questions related to the interpretation of Arts 2, 4, para. 3, 6, para. 1, 19, para. 1, TEU, Art. 47 of the Charter, Art. 9, para. 1, of Directive 2000/78 and Art. 267 TFEU.

On 26 June 2019, the Supreme Court lodged a preliminary question regarding the appointment of a judge and possible breach of the principle of judicial independence and effective judicial protection.⁷⁴ The underlying main proceeding concerned a judge who, by the decision of a president of a court, had been transferred to another chamber in the same court. The judge appealed this decision at the Council for the Judiciary but the Council dismissed his appeal and discontinued the proceeding. This decision was in turn appealed at the Supreme Court. At this point, the Supreme Court began to doubt whether the newly created Chamber of the Extraordinary Control and Public Affairs, which had been considered competent to hear the case, fulfilled the criteria of an independent court, upon considering that its member(s) were appointed by the new Council. The referred question boiled down to the issue of whether such a single-person court that had been appointed in breach of national law on judicial appointments could be considered an independent and impartial court within the meaning of EU law.

On 3 July 2019, the Supreme Court referred another comprehensive set of questions regarding the position of a judge in light of the principle of effective judicial protection and the rule of law.⁷⁵ The case was initiated before the Supreme Court by a first instance court judge who had been disciplined in the new disciplinary regime. This judge brought action to establish the lack of service relationship of the President of the Supreme Court Disciplinary Chamber, who had appointed a disciplinary court of first instance in her case. Determining that the absence of such a service relationship could undermine the very act that had created a disciplinary court, the Labour and Social Security Chamber hearing the main claim decided to refer five extensive preliminary questions regarding the admissibility, conditions and mechanisms for examining the status of a judge (such as the president

⁷² See decision of SAC of 21 November 2018, II GOK 2/18, *orzeczenia.nsa.gov.pl*.

⁷³ In view of the Supreme Administrative Court, challenging a Council resolution does not stop an appointment for a Supreme Court judge and this, in turn, affects the efficiency of the challenge and prevents the carrying out by the Court of any effective control of the course of the proceedings for the vacant post at the Supreme Court. See decision II GOK 2/18, *cit*.

⁷⁴ Court of Justice, request for preliminary ruling lodged on 26 June 2019, case C-487/19, *W.Ż.* Case III CZP 25/19, *www.sn.pl*.

⁷⁵ Court of Justice, request for preliminary ruling, case C-508/19, *Prokurator Generalny*.

of disciplinary chamber) as well as the consequences of an incorrect appointment of a judge for the binding force of her judgments. Similar to their predecessors, the questions were considered within the framework of Art. 19, para. 1, Arts 2 and 4, para. 3, TEU and Art. 47 of the Charter, in conjunction with Art. 267 TFEU.

V. DEFENDING THE RULE OF LAW OR REALITY BASED SELF-DEFENSE?

Disagreeing with the claim that the judiciary reforms introduced by PIS breach the fundamental guarantees of the rule of law is a difficult task. These reforms aim to undermine the position of the judiciary and they notably disregard the principle of judicial independence and impartiality.⁷⁶ As observed by Sadurski, the cumulative effects of the reforms “amount to the full capture of the judiciary by the ruling party”.⁷⁷ The severe and fast-moving interference of the PIS government with the functioning of Polish courts and the architecture of judicial protection could not be left unchallenged. However, time has revealed that neither widespread public protests⁷⁸ nor the EU and other international fora denouncing Poland could persuade the government to divert from the chosen route. In the face of rapid, progressive and nearly irreversible changes to the judiciary system and the impotence showed by the EU institutions, Poland’s judges decided to take matters into their own hands and sought help at the Court of Justice by referring preliminary questions on their positions that are, at the same time, of fundamental importance for the legal system of the EU.

The previously discussed series of preliminary questions raised by various Polish courts appears to write a new narrative in the long story of judicial dialogue in the EU. The questions also illuminate the possible motives and incentives behind national judges’ participation in this dialogue. Undoubtedly, this intense involvement of the Polish judges with the Court of Justice represents a novel and peculiar example of judicial activism. Clearly, the anti-democratic course taken by the PIS regime and the unprecedented attack on the judiciary, checks and balances and the integrity of the entire judicial system incentivised cooperation with the CJEU. To better understand this new development, a few elements of the respective preliminary references must be emphasised.

Firstly, most of the discussed questions originate from the Supreme Court, which had been most affected by the PIS reforms. The extent of activism of ordinary courts in that regard is somewhat less impressive. However, as has been suggested, the possibility of being sanctioned for referring a preliminary question by means of the (contested) disciplinary proceedings might influence the willingness of ordinary courts judges to

⁷⁶ S. BIERNAT, *The Rule of Law in Poland*, cit.

⁷⁷ W. SADURSKI, *How Democracy Dies (in Poland)*, cit., p. 40.

⁷⁸ M. MATCZAK, *Poland’s Constitutional Crisis*, cit., p. 4.

reach for the procedure.⁷⁹ Ironically, the events following the preliminary questions from cases C-558/18 and C-563/18 indeed triggered disciplinary action against the judges in both cases on account of their preliminary questions.⁸⁰

Secondly, some of the referred questions did not demonstrate a connection to the substantive action in the main national cases which were subject to courts' considerations. According to established case law, the Court of Justice may refuse to rule on a referred question when the interpretation of EU law that is sought is unrelated to the actual facts of the main action or its object, when the questions raised appear irrelevant to the resolution of the dispute or where the problem is hypothetical.⁸¹ In that sense, the admissibility of some of the aforementioned questions could be disputed, as in fact happened *inter alia* in case C-522/18.⁸² This problem was also illuminated by Advocate General Tanchev in his opinion in joined cases C-558/18 and C-563/18. Tanchev concluded that the requests for a preliminary ruling in the respective cases are inadmissible as the referred questions concerned general or hypothetical problems.⁸³ While admitting that judges have the right to refer preliminary questions about judicial independence *vis-à-vis* the new disciplinary system, the AG nevertheless concluded that both judges did not provide sufficient explanations linking the new disciplinary regime and the second paragraph of Art. 19, para. 1, TEU.⁸⁴ The judges must have been aware that this admissibility issue could have played a role in their references. Despite the risk of their cases being found inadmissible, they still decided to approach the Court. These actions emphasise their determination in the face of the PIS reforms.

Thirdly, quite strikingly the questions emerged from situations surrounding a specific judge (or judges). The two questions referred in cases C-558/18 and C-563/18 constitute perhaps the most distinct examples in that regard.⁸⁵ These cases underscore the personal motivations of judges to have their questions being heard by the Court of Justice. Fourth, some of the questions do not differ from ones previously asked by the same court. This fact, again, seems to stress the determination of the courts to ensure

⁷⁹ See K. PODSTAWA, *Living on the Edge – How the Poles Hang in there whilst the Court Deliberates*, in *Verfassungsblog*, 31 May 2019, verfassungsblog.de.

⁸⁰ See L. PECH, P. WACHOWIEC, *1095 Days Later: From Bad to Worse Regarding the Rule of Law in Poland (Part II)*, in *Verfassungsblog*, 17 January 2019, verfassungsblog.de.

⁸¹ See Court of Justice, judgment of 11 March 1980, case 104/79, *Foglia v. Novello*; judgment of 16 December 1981, case 244/80, *Foglia v. Novello*; judgment of 17 May 1994, case C-18/93, *Corsica Ferries*.

⁸² For further analysis of the referred questions and his arguments why the questions are admissible, see S. BIERNAT, *Why the Polish Supreme Court's Reference on Judicial Independence to the CJEU is Admissible after All*, in *Verfassungsblog*, 23 August 2018, verfassungsblog.de .

⁸³ Opinion of AG Tanchev delivered on 24 September 2019, joined cases C-558/18 and C-563/18, *Miasto Łowicz*, para. 4.

⁸⁴ *Ibid.*, para 5.

⁸⁵ In fact, the names of those judges who referred both preliminary questions are even directly mentioned in the opinion of AG Tanchev.

these questions are heard and answered by the Court of Justice but can also be seen as an attempt to draw more attention to the deteriorating situation of the Polish judiciary.

Finally, most of the referred questions are comprehensive but all of them place the contested Polish laws in the context of fundamental provisions of EU primary law, that is, Arts 2 and 19 TEU, Art. 47 of the Charter and Art. 267 TFEU. In that regard, the preliminary questions are not only well considered but also extensive and quite boldly formulated. By requesting the CJEU to express its view on the EU standards regarding the rule of law, the right to effective judicial protection, and the principle of judicial independence, the concerned courts consciously and deliberately placed the discussion in the context of the vital principles underpinning the entire EU legal system. Simultaneously, these all-embracing questions created a unique opportunity for the Court of Justice to express its views on and advance the protection of EU core values and its system of judicial protection in general.

Taking all these elements into consideration, it can be proposed that the judicial activism represented by the Polish courts and the possible motives behind their preliminary questions can be viewed as linked to a strategic action – that is, they represent (determined) attempts at self-protection in the face of a real and immediate threat and a risk of instant harm.⁸⁶ Also, one would agree with a thesis that the preliminary questions can be perceived as a case of judicial empowerment, or “the extent to which judges work to enhance their own authority to control legal (and, therefore, policy) outcomes, and to reduce the control of other institutional actors, such as national executives, parliament, and other judges, on those same outcomes”.⁸⁷ This *Article* illustrates, however, that the Polish judges resorted to the mechanism not to *enhance* but to *preserve* their authority. In the end, they aimed to impair the attempts of the legislative and executive actors to take control of the judiciary. In that sense, the preliminary questions represent a vivid example of the desire to protect key elements of the rule of law, such as independence and impartiality of the judiciary and the right to a fair trial and effective judicial protection. At the same time, they also aim to defend the judiciary’s own place in the legal system and, ultimately, to secure the position of specific judges serving at the Supreme Court and other courts.

VI. CONCLUSIONS

As prior studies have observed, while the various theories that aim to explain the reasons why national courts participate in the process of judicial dialogue with the Court of Justice provide many valuable explanations of judicial behaviour, none seem to offer a

⁸⁶ The term of “judicial self-defence” is borrowed from T.T. KONCEWICZ, *Unconstitutional Capture and Constitutional Recapture. Of the Rule of Law, Separation of Powers and Judicial Promises*, in *Jean Monnet Working Papers*, no. 3, 2017, p. 41.

⁸⁷ A. STONE SWEET, T.L. BRUNELL, *The European Court and National Courts*, cit., p. 69.

full and exhaustive explanation of this phenomenon.⁸⁸ An onlooker can only agree with Arnall, who argues that understanding what prompts national judges to refer to the Court of Justice clearly requires legal as well as political and other factors to be considered.⁸⁹ This *Article* indeed supports the argument that the story of judicial dialogue is not only a very complex one but also an evolving one that is, new reasons and factors may appear that motivate the national courts to refer preliminary questions to the Court of Justice. This *Article* also reaffirms the claim that the motivations behind preliminary questions might be very much context related.

This *Article* illustrates a new chapter in the story of judicial cooperation in the EU that can be viewed from either a negative or positive angle. Sadly, the preliminary questions of interest reveal the dramatic derailment of one of the EU's Member States and paint a disturbing picture of a failing democracy and integral national institutions in distress. The preliminary questions referred to the Court of Justice by the Polish judges touch upon the very fundamental EU values such as the rule of law, democracy, independent courts, and the right to a fair trial, which underlie the entire system of judicial protection in the EU. They also represent a desperate cry for help and illustrate that national judges are prepared to exploit different paths of redress. Sadly, the discussion in this *Article* also underscores the impotent reaction of the EU to the democratic backsliding of one of its members and the lack of effective EU mechanisms capable of enforcing the rule of law. On positive note, the disturbing events in Poland clearly incentivised some Polish judges to become truly active members of the European judicial community and genuine co-creators of the supranational legal order, particularly if we consider the fundamental values at the centre of the discussed preliminary questions. However, though it is fascinating and leaves much room for further academic analysis, this particular example of judicial activism will hopefully remain a unique example in the process of European Union integration.

On a final note, it must be emphasised that the story of judicial empowerment and self-defence, that is pictured in this *Article* remains incomplete. To fully understand the factors that motivated the judges to cooperate with the Court of Justice, empirical investigation of the reasons would be necessary. However, such an exercise seems too involved and intricate from both methodological and ethical perspective, at least for the time being.

⁸⁸ U. JAREMBA, *Polish Civil Judiciary vis-à-vis the Preliminary Ruling Procedure*, cit., p. 66.

⁸⁹ A. ARNULL, *Judicial Dialogue in the European Union*, cit., p. 123.

