UiT The Arctic University of Norway

The Faculty of Law

European Rule of Law in National Judiciaries

On the obligation of Member States to establish an independent judiciary

Vetle Magne Seierstad

Master's thesis in Law, JUR-3901, October 2022

Abbreviations

AG	Advocate General
CJEU	Court of Justice of the European Union
Charter	Charter of Fundamental Rights of the European Union
EEA	European Economic Area
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EFTA	European Free Trade Association
EFTA Court	Court of Justice of the European Free Trade Association
ESA	European Free Trade Association (EFTA) Surveillance Authority
EU	European Union
HRC	Human Rights Committee of the United Nations
ICCPR	International Covenant on Civil and Political Rights
IHRL	International Human Rights Law
SCA	Surveillance and Court Agreement
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

Table of Contents

1 Introduction **1**

1.1 Topic and background 1

1.2 Research questions and scope 2

1.3 Outline 3

1.4 Methodology 4

1.4.1 Introduction 4

1.4.2 The ECHR and the case-law of the ECtHR 6

1.4.3 Other instruments of IHRL 7

1.4.4 Soft-law instruments 7

2 Rule of Law and the Independence of the Judiciary **9**

2.1 Introduction 9

2.2 The concept of the Rule of Law and the necessity of an independent judiciary 9

2.3 Checks on Judicial power – balancing independence and accountability 13

3 The development of EU standards on judicial independence **16**

3.1 Introduction 16

3.2 The early case law: The principle of effective judicial protection 17

3.3 The early case law: The definition of a "court" and independence 19

3.3.1 Independence as a judicial function 19

3.3.2 Independence as a fundamental guarantee 21

3.4 The *ASJP*-case: Judicial independence as a substantive treaty requirement 23

3.4.1 Introduction 23

3.4.2 Scope of Article 19(1) – All European courts 24

3.4.3 Substance of Article 19(1) – A Rule of Law provision 27

3.4.4 Conclusion 28

3.5 ASJP in context – never really about Portuguese judges 29

4 Requirements for a judiciary to be independent **32**

4.1 Introduction 32

4.2 The objective of Article 19(1) and the obligation to ensure judicial independence .. 32
4.3 Establishing a separate and independent judicial branch 35
4.3.1 General requirements of separation of powers 35
4.3.2 The use of special courts outside of the judiciary 36
4.3.3 Attempts at side-lining or influencing the judiciary 37
4.4 Ensuring the funding and financial autonomy of the judicial branch 38
4.5 Ensuring a lawfully established judge 41
4.6 Ensuring proper appointment of judges 42
4.6.1 Introduction 42
4.6.2 The conditions for appointments 43
4.6.3 The process for appointments 46
4.6.4 Irregularities during appointments 50
4.7 Establishing tenure and sufficient length of service 53
4.8 Ensuring the irremovability of judges 56
4.9 Limiting and safeguarding disciplinary regimes 59
4.10 Establishing judicial councils 63
4.11 Ensuring the availability of remedies and subsequent control 65
5 Threshold for finding a breach of independence 67
5.1 Introduction 67
5.2 In the case law of the ECtHR 68
5.3 In the case law of the ECJ 72
5.3.1 The scope and overall threshold of the analysis 72
5.3.2 When is a restriction in breach of the requirement of independence 74
5.3.3 When is a "court or tribunal" independent. 82
6 Judicial independence under Article 267 TFEU 86
6.1 Introduction and objective of Article 267 86
6.2 A link between independence in Article 19(1) TEU and Article 267 86
6.3 Discussing the solution of the ECJ 90

7 Judicial independence as a principle of EEA law 92

7.1 Introduction 92

7.2 The Rule of Law and effective judicial protection under the EEA Agreement 92

7.3 Is there an obligation to ensure independent judiciaries in EEA law 94

8 Closing remarks 99

9 Bibliography 101

9.1 Literature 101

9.2 Court cases 108

9.3 Treaties and legislation 122

9.4 Studies and reports 124

9.5 Opinions and news articles 126

1 Introduction

1.1 Topic and background

The topic of this paper is the concept of judicial independence in EU law. More specifically, the obligation of Member States to establish and ensure independent national judiciaries.

The European Union is a Union of values: of fundamental rights, of democracy and of the Rule of law.[1] It is these values that legitimise the existence of the EU in the eyes of Europeans.[2] At the centre of all these values lies the independent judiciary, which is a shared institution and a shared value among all Member States, and the world community at large. The centrality of an independent court is laid down in, inter alia, the ECHR,[3] the Charter,[4] the ICCPR,[5] the American Convention on Human Rights (ACHR),[6] the ASEAN Human Rights Declaration[7] and in the African Charter.[8]

However, judicial independence has been under increasing pressure in Europe, with the so called *Rule of law backsliding* of several EU Member States. That has involved the deliberate capturing or weakening, by elected officials, of internal checks on power like the judiciary, with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party.[9] In Europe, this has particularly been observed in Hungary under *Fidesz* and Poland under *PiS*,[10] but there are multiple Member States in which the confidence in the judiciary, and in their independence, are low.[11]

---

[1] COM(2022) 500 page 1 and Article 2 TEU.

[2] Special 500 Eurobarometer report pages 91-96. Respect for these values was the single most important assets of the EU according to respondents, winning out right in front of "economic and industrial" power.

[3] Article 6(1) ECHR.

[4] Article 47(2) of the Charter.

[5] Article 14(1) ICCPR.

[6] Article 8(1) of the American Convention on Human Rights.

[7] Para 20(1) of the ASEAN Human Rights Declaration.

[8] Articles 7(1) and 26 of the African Charter.

[9] Pech and Scheppele (2017) page 8 following.

[10] See COM(2021) 700 page 8 following. Chapters on Hungary: SWD(2022) 517 and Poland: SWD(2022) 521.

[11] COM(2022) 500 page 5 and Eurobarometer 95 question QA6a.3, at T48-49. However, in general, all European States still score high on Rule of law metrics, compared to any other region, see the WSJ index 2021.

This is an existential threat to the EU, because the Union relies on decentralised enforcement of Union law by the national courts, which serve a dual role as both domestic and European courts.[12] Lack of independence and confidence in these courts will undermine the European project, and inherently challenges the values and aspirations on which it builds.

Traditionally, challenges to judicial independence have been dealt with, both under EU law and under International Human Rights Law (IHRL), through the lens of human rights law, as a procedural guarantee for the human rights of an individual, like Article 6 ECHR and Article 47 of the Charter. This approach has proved insufficient to deal with the more substantial or systematic attacks on the independence of the judiciary in the EU. As will be discussed, this has led the ECJ to find a standalone and general obligation under Article 19(1) TEU, which requires all Member States to establish and uphold independent national judiciaries. That obligation is the topic of this paper.

1.2 Research questions and scope

The aim of this paper is a comprehensive analysis of a quite extensive set of recent case law, with the aim of better understanding the newfound requirement of judicial independence under Article 19(1) TEU. The primary goal will be to clarify the concept of judicial independence, and what obligation that will impose on Member States.

To do that, the paper will analyse a set of sub-questions, including how and why did the ECJ find a requirement of judicial independence under Article 19(1)? What are the general and specific aspects standards used to assess judicial independence? What is the test or threshold used to determine when lacking judicial independence amount to a breach of Article 19(1)? And will the case the case law on judicial independence under Article 19(1) have implications for other areas of Union law?

The topic and questions posed are necessarily quite extensive, so some delineations will need to be made against topics which will not be considered. Firstly, when seeking to clarify the definition and thresholds for judicial independence, this paper does so only under Article 19(1). There is a vast array of literature and law dealing with judicial independence, which this paper cannot seek to cover. Rather, the focus will more narrowly be on the requirements as developed

[12] Lenaerts (2020) pages 29-30.

in recent ECJ case law, supplemented by other sources on judicial independence only where they can expand upon that case law.

Secondly, judicial independence is closely related to – and sometimes jointly considered with – the requirement of judicial impartiality.[13] Where independence requires the absence of external pressure and undue influence, especially from the other branches of power, impartiality focuses on the absence of a personal interest of the judge in the outcome the case before them. Both are central to a functioning court under Article 19(1),[14] but it is the relationship of the judiciary with the other branches of power which has given rise to the recent case law, and which is the subject matter of that case law. This paper will therefore not consider what obligations of ensuring impartiality Article 19(1) imposes on Member States.

Lastly, a substantial set of case law and literature within the saga of Rule of law-backsliding and judicial independence under Article 19(1) has dealt with issues caused by this requirement of independence, for example whether national courts can refuse to recognise European Arrest Warrants issues by other courts that, allegedly, lack independence,[15] or which consequences lacking independence has for the decentralised enforcement of competition law.[16] These are important issues, but necessarily outside the scope of this paper.

1.3 Outline

In order to later understand the balancing of different interests the ECJ does in its case law, chapter 2 will take a short theoretical detour to consider the general principles of the Rule of law and why that necessitates an independent judiciary. Chapter 3 will thereafter focus on the development of Union standards and requirements of judicial independence, specifically with the aim of explaining the background and basis for the judgement of the ECJ in *Associação Sindical dos Juízes Portugueses* (*ASJP)*,[17] the first case where it found that Article 19(1) TEU contains a standalone obligation for Member States to establish independent judiciaries.

---

[13] The ECJ has even stated, citing the ECtHR, that the two concepts should be jointly examined, in Joined cases C-585/18, C-624/18 and C-625/18 [GC] *A. K. and Others v Sąd Najwyższy* para 129.

[14] See, inter alia, C-192/18 [GC] *Commission v Poland (Independence of the ordinary courts)* paras 109-110 and Joined cases C-585/18, C-624/18 and C-625/18 [GC] *A. K. and Others v Sąd Najwyższy* paras 121-122.

[15] For this topic, see C-216/18 PPU [GC] *LM* and the case law following from that.

[16] This is a topic in a recent General Court case, see T-791/19 *Sped-Pro v Commission* para 77 following.

[17] C-64/16 [GC] *ASJP*.

Chapter 4 sets and analyses the general and specific elements which are a part of the larger obligation to uphold judicial independence. Different elements of independence in ECJ case law will be analysed one at a time, and other sources will be used to expand on the ECJ where it has stated a requirement without expanding on its details. Thereafter, chapter 5 will build on that to consider when issues with, or restrictions of, those elements of independence will lead to a Member State being in breach of Article 19(1) TEU. This includes considering what room Member States have to enact certain restrictions on judicial independence in pursuit of other legitimate and useful objectives.

Lastly, chapters 6 and 7 seek to analyse certain wider implications the case law in other areas of Union law. Chapter 6 will consider whether independence under Article 19(1) TEU will affect how the requirement of independence under Article 267 TFEU is defined, and chapter 7 will analyse whether Article 19(1) and the recent case law will have consequences for the obligations of Contracting Parties to the EEA Agreement.

1.4 Methodology

1.4.1 Introduction

This chapter will seek to address certain methodological questions that are pertinent for the research questions this paper seeks to answer. The questions all concern matters of positive law, and the study therefore takes a legal-dogmatic approach to research.

Because the subject matter concerns EU law, the approach bases itself on European legal methodology and sources of law.[18] All questions primarily revolve around an interpretation of Article 19(1) TEU, which means that the paper is concerned with the interpretation of primary law, and is within the field of EU Constitutional Law.[19]

The primary law of the Union consists not just of the treaties, but also includes unwritten principles called "general principles of Union law", which are common-European legal principles adopted from the traditions of Member States. These principles are valid sources of

[18] European is here used to denote the EU and Union law, rather than a comparative-legal approach to common-European legal traditions. But there is a large overlap between European methodology in the wide sense of common legal traditions and in the narrow sense as the methodology of Union law.

[19] For a discussion on the employment of the term "constitutional" to primary law, see Dubout (2021) pages 5-41. Cf. also Lenaerts et al. (2021) *EU Constitutional Law*.

Union law in accordance with Article 6(3) TEU, both in themselves as principles of interpretation. Article 19(1) TEU, the subject of this paper, has its roots as a general principle.[20]

The methodology used to interpret EU primary law differs greatly from the traditional methodology of international law.[21] The CJEU has adopted a much more teleological approach, interpreting provisions in accordance with their objective, and in accordance with wider Union objectives.[22] Such an approach seeks to maximise the *effet utile* – effectiveness – of the provision and of Union law.[23] This focus on teleology allows the CJEU to take a much more dynamic approach to the development of law,[24] leading to it being described as a driver of integration.[25]

However, the CJEU has a famously frugal writing style, often in the form of postulates rather than arguments,[26] and often repeating postulates made in earlier cases word-for-word,[27] even if there might being nuances that separate the cases. This means that the meaning of judgements sometimes has to be interpreted by reading "between the lines", rather than being stated explicitly. As a further consequence, it is often not as useful to focus on whether a statement constitutes *ratio decidendi* or *obiter dicta*.[28]

Interpretation can be aided by the opinions of the Advocates General (AG).[29] They can theoretically expand on the statements of the Courts, or state explicitly what the Court only said

[20] See, for this, section 3.2.

[21] This is justified by the CJEU because the EU treaties aimed to create a "new legal order", see Case 26/62 *van Gend & Loos* and Case 6/64 *Costa v E.N.E.L.* This justified taking a different methodological approach, as explicitly argude by the General Court in Joined cases T-27/03, T-46/03, T-58/03, T-79/03, T-80/03, T-97/03 and T-98/03 SP *SpA and Others s* para 58. See also Streinz (2021) page 161.

[22] Especially "ever closer union" as enshrined in Article 1(2) TEU, see also recital thirteen TEU, and the first recital TFEU. Other shared values and objectives of the Union are enshrined in Articles 2 and 3 TEU.

[23] See Beck (2016) page 494-496; Lenaerts and Gutiérrez-Fons (2020) pages 55-58; and Streinz (2021) page 170

[24] Streinz (2021) pages 161-163 and 175-177.

[25] Tömmel (2014) pages 16 and 111-112, see also Nugent (2017) page 243-245, and pages 448-460 for a general overview of theories of integration.

[26] Fredriksen and Mathisen (2022) page 349. This is a heritage from the early CJEU being modelled heavily on the French *Conseil d'État*, famous for its succinct style of writing judgements, see Borger-De Smedt (2008) pages 8 and 23-24 and Bragdø-Ellenes (2020) page 494 and 501-502.

[27] This is arguably due to the necessity of translation, where using standard phrases makes translation more accurate. This phenomenon is heavily prevalent in the case law used in this paper.

[28] Fredriksen and Mathisen (2022) page 349.

[29] Advocates General assist the ECJ by making reasoned submissions prior to the Court's deliberations, see article 252 TFEU. In other words, the AGs hear the case like a judge and writes a proposal for a judgement. That

between the lines. If the AG has disagreed with the court, it is also the closest thing the CJEU has to a dissenting opinion. Furthermore, AGs also often expand on points the Court feels no need to address,[30] which is useful as legal literature. There are a number of useful AG opinions within the subject matter of this paper, and they will be used throughout.

While it is outside the scope of this paper to give a comprehensive overview of methodology and sources, some short comments will still be made regarding certain specifically relevant non-EU sources to the subject matter of judicial independence.

1.4.2 The ECHR and the case-law of the ECtHR

As far as non-EU sources go, the ECHR holds a special position in EU law. Article 6(2) TEU states that the EU shall accede to the ECHR, but this accession was blocked by the ECJ,[31] with the consequence that the ECHR is not a formally incorporated and applicable instrument within EU law.[32] However, Article 6(3) TEU still states that the fundamental rights of ECHR shall constitute "general principles of the Union's law", making the ECHR an indirectly relevant source of EU law.[33]

In addition to that, the ECHR has also more or less been the inspiration for several provisions in the Treaties and the Charter, including Article 47 of the Charter[34] and to a lesser degree Article 19(1) TEU.[35] The recent case law of the ECJ on judicial independence also draws heavy inspiration from ECtHR case law.[36]

---

usually means that they give a reasoned opinion on every point asked (whereas the Court might not see a need to answer every point), with the AG being freer as to the form and scope of their deliberations on questions. This concept was largely derived from the French *avocat général* of the *Cour de Cassation* and the *rapporteur public* of the *Conseil d'État*.

[30] Fredriksen and Mathisen (2022) page 355.

[31] In its Opinion 2/13 [Full Court] *Accession of the EU to the ECHR*.

[32] See, inter alia, case C-311/18 [GC] *Schrems II* para 98.

[33] This was also the case before codification in the treaties, see Case 222/84 *Johnston* para 18.

[34] Art. 47 of the Charter was intended to correspond to art. 6 and 13 ECHR, see the Explanations relating to the Charter of Fundamental Rights page 29-30, and must be interpreted in light of those, see among others case C-338/20 *D.P.* (28-29).

[35] See the case law on effective judicial protection in section 3.2, which builds on the ECHR.

[36] See, inter alia, C-487/19 [GC] *W.Ż.* paras 123-125, C-132/20 [GC] *BN and Others* paras 117-120 and Joined Cases C-585/18, C-624/18 and C-625/18 [GC] *A.K. and Others* paras 126 following.

Therefore, the case-law of the ECtHR is a relevant source of law for Union law.[37] In this paper it will be used actively as both a supplement to requirements the ECJ has discussed, and as likely solutions to requirements which the ECJ has not yet discussed in detail.

1.4.3 Other instruments of IHRL

Other instruments of IHRL Ithan the ECHR are not explicitly mentioned by the treaties, with Article 6(3) TEU just mentioning the "constitutional traditions" common to Member States.

However, the CJEU does take account of other IHRL instruments in its case law, especially those concluded under the auspices of the UN and to which the Member States are ratifying parties.[38] For this paper, it is main the International Covenant on Civil and Political Rights (ICCPR) that is of relevance, which a long established use in CJEU case law as an aid in deducing the content of fundamental rights and principles.[39] AG Tanchev argued that it had "long since been stablished as a source of General Principles",[40] in the context of referencing a case from the Human Rights Committee (HRC) which interpreted the ICCPR.[41]

Therefore, the ICCPR, and pronouncements from the HRC, can be used as sources of Union law. However, it cannot be accorded the same weight as the EHCR, both the special status of the latter[42] and the more extensive and binding case-law of the ECtHR.[43]

1.4.4 Soft-law instruments

Soft-law instruments are inherently not legally binding, and often do not primarily – or at all – seek to provide legal analysis. However, various soft-law instruments deal extensively with issues like the rule of law, the functioning of judiciary and with judicial independence, and they

---

[37] Opinion of AG Tanchev in C-619/18 *Commission v Poland (Independence of the Supreme Court)* para 71.

[38] This can include, among others, the ICCPR, the CRC and conventions in the ILO system, see Lenaerts et al. (2021) page 661-662.

[39] See, inter alia, Case 374/87 *Orkem* para 31; Joined cases C-297/88 and C-197/89 *Dzodzi* para 68; C-249/96 *Grant* paras 44-45; C-540/03 [GC] *Parliament v Council* para 37; C-244/06 *Dynamic Medien* para 39; and the opinion of AG Mengozzi in C-380/17 *K and B* para 44.

[40] Opinion of AG Tanchev in C-192/18 *Commission v Poland (Independence of the ordinary courts)* paras 104-105.

[41] Which, while not a Court for the ICCPR system, gives Views and General Comments that are assigned "great weight" for the interpretation of the ICCPR, as stated by the ICJ in *Diallo* (2010) para 66, and reiterated in the preliminary objections of *Qatar v. United Arab Emirates* (2021) para. 101. The HRC itself calls their pronouncements an "authoritative" interpretation, see its General Comment no. 33 para. 13.

[42] The special status of the ECHR, even compared to other IHRL instruments, has been consistently affirmed in case-law, see e.g. C-540/03 [GC] *Parliament v Council* para 35.

[43] The ECtHR, unlike the HRC, is actually a court with legally binding judgements, see Article 46 ECHR.

do so in a broader and more theoretical manner than courts are able to. In the European context, the European Commission for Democracy through Law (the Venice Commission), a body composed of experts in constitutional law under the Council of Europe-system, is very relevant. Its main purpose is to provide legal advice and assistance to states wishing to bring their legal and institutional structures in line with European standards in the fields of democracy, human rights and the rule of law.

While its opinions are clearly not legally binding, nor necessarily only focused on legal analysis, they can be said to constitute guidelines that embodies a "normative consensus" on institutional matters, and can constitute a "useful referencing point" for the CJEU.[44] Because of the wide-ranging guidelines the Venice Commission has given on the issue of judicial independence, they will be used in this paper as a useful supplement to the other sources. It expands on some details or theoretical problems only briefly touched upon in ECJ case law.

[44] As stated by AG Tanchev in his opinions in C-619/18 *Commission v Poland (Independence of the Supreme Court)* para 71, note 51 and Joined Cases C-585/18, C-624/18 and C-625/18 *A.K. and Others* para 107. The Court also references the Venice Commission in the former case, see C-619/18 [GC] *Commission v Poland (Independence of the Supreme Court)* para 82.

2 Rule of Law and the Independence of the Judiciary

2.1 Introduction

The purpose of this chapter is to provide a theoretical understanding of the concept of the Rule of law, and its related concepts, and how that relates to judicial independence. This is useful because, as will be discussed, the ECJ case law on judicial independence is fundamentally about combating the backsliding of the Rule of law.

This chapter will first, in section 2.2, discuss the concept of the Rule of law and its history, and why it necessitates judicial independence. Thereafter, section 2.3 will discuss why Rule of law and the separation of powers also can necessitate checks and balances on the judiciary.

2.2 The concept of the Rule of Law and the necessity of an independent judiciary

The concept of the Rule of law, and the different but related *Rechtsstaat* and *État de droit*,[45] can be described as meta-legal principles of the European legal order.[46] Meta-legal because it is neither strictly defined nor strictly a legal principle, and has different meanings in different national histories and legal cultures.[47] Broadly speaking, three main uses of the "Rule of law" can be defined: firstly, it can have a descriptive function, describing a certain manner of organising a polity; secondly, it can have a normative function, describing certain values and aspirations that a polity should strive towards; and thirdly, it can have a legal function, meaning it is codified as a rule or principle of law which is applicable by courts.

Part of the problem with the Rule of law, and the related concepts of separation of powers and judicial independence, is this triality of use and application without clearly separating between the manner of usage. The use of Rule of law as a normative aspirational value aligns especially poorly with also being a legal principle or rule which can be applied directly by courts.

---

[45] See also NO: *Rettsstat*; DA: *Retsstat*; SV: *Rättsstat*; ES: *Estado de derecho*; PT; *Estado de direito*; IT: *Stato di diritto*; PL: *Państwo prawa*; and RU: *Правовое государство (Pravovoe gosudarstvo)*.

[46] This is also strictly referring to the concept as developed in modern European legal theory, which must not be taken to mean that rule of law principles are uniquely a European invention. Similar concepts meant to ensure correct legal application, legal foreseeability, *rechtssicherheit* and/or simply good administration developed in several legal systems. See for example Chinese legalist thinker *Han Fei Tzu*, in Watson (1964), or on their extensive use of legal codification, inter alia, Jiang (2011) and Glenn (2014) chapter 9.

[47] Loughlin (2010): pages 314-315.

The vagueness of the term and the plurality of its use caused the German jurist Carl Schmitt to argue that the concept of *Rechtsstaat* was so vague that it essentially amounted to nothing more than "the law should be what me and my friends value".[48] On the one hand, Schmitt probably has a point that any attempt at closely defining the principle will be coloured by who defines it. However, on the other hand, it would be hard to argue that no commonalities can be observed in the way the Rule of law concept is used and theorised in the European legal order.

This section will therefore take a short look at the history and meaning of the concept, with the objective of further describing why the Rule of law necessitates judicial independence in the following section. Both of these concepts were largely developed in response to the increasing scope, responsibility and capacity of the developing states of the 19th century, even if their roots stretch further back.

In Germany, *Rechtsstaat* was first developed, at the start of the 19th century, as a quite liberal doctrine the "rule of reason", a system that limited the power of the state through the separation of powers and guarantee of natural rights, following in Kantian logic of reconciling order and freedom. The *Rechtsstaat* stood in opposition to the despotic state, with its arbitrary use of power, and the police state (*polizeistaat*), which while using law, did so purely procedurally with no limitation in superior norms.[49] This can be said to be normative use, and a "thick" definition of *Rechtsstaat*, which sees the legal system as limited by certain higher norms.

Such a normative and "thick" use of *Rechtsstaat* became influential in France towards the latter half of the century. It was used as a critique of the Third Republic,[50] which had come to revolve strongly around concept of Rosseau's concept of the *volonté générale*, and a system of parliamentary sovereignty. French jurists denoted the Third Republic as an *État légal*, but not an *État de droit*, which they saw as requiring not just the rule by law, but also the subjugation of the state and the legislative process by constitutional rules and individual rights.[51] Many French jurists argued that those rights could not be upheld simply by the self-limitation of the state in legislation or constitution, but the judiciary could base itself on certain universal values

[48] Schmitt (1932) page 14.

[49] Chevallier (2017) pages 16-18 and Loughlin (2010) pages 317-319.

[50] The "Third Republic" refers to the system of government established in France between the fall of Napoleon III and the Second French Empire in 1870 and the establishment of the Vichy government and German occupation in 1940.

[51] Chevallier (2017) pages 29-30, Loughlin (2010) 322-323 and Laquièze (2007) pages 265-266.

to limit and check state power. The debate was especially centred around the 1789 *Déclaration des droits de l'homme et du citoyen*, which had not been given explicit legal status under the Third Republic, but which jurists like Léon Duguit argued that represented certain inherent or natural rights that were above even the constitution.[52]

During the same period, however, a more positivist and formal view of the *Rechtsstaat* gained prominence in Germany, rejecting the "thick" doctrine of natural rights, rather insisting that rights would be ensured by the interest the state in self-limitation through law. This "thin" doctrine of *Rechtsstaat* was focused primarily on the rule by law,[53] largely functioning as a principle of administrative law where administrative courts controlled that the executive, still under the control of the monarch, acted on, and in accordance with, a legal basis. [54]

The development of the "Rule of law" principle in the United Kingdom also corresponds more closely with such a "thin" definition. It was popularised in the writings of Albert Venn Dicey, who used the term descriptively, alongside the principle of parliamentary sovereignty, as the two cornerstones of British constitutionalism.[55]

There are three fundamental aspects to Dicey's Rule of law: firstly, the principle of rule by law. Actions by the administration that can infringe on liberty require a legal basis; second, a principle of equality before the law and equal access to justice, which also meant that the government had to be subject to the same laws and courts as other subjects, rejecting the continental administrative law and tribunals. The third aspect was unique to Britain and consisted of the fact that the constitution and individual rights were ensured by the common law of the land. This emphasised the role of the judiciary in defining and upholding those rights and rejected continental constitutionalism, which he saw as less efficient.[56]

---

[52] Chevallier (2017) pages 32-35 and Laquièze (2007) pages 266-269.

[53] This "thin" and positivist view of the Rule of law, which while on the one hand a principle of individual liberty and *rechtssicherheit*, was also seen as useful by more or less authoritarian states (like Germany at the time) because it functions as a tool of good government and of the effective application of policy. This Rule of law as *the rule by law,* is employed by authoritarian regimes to self-limit their discretion, thereby increasing the efficacy and legitimacy of their law, in a similar way to how it is used in democratic or mixed regimes. For an overview of the use of Rule of law principles in modern authoritarian regimes, see Chen and Fu (eds. 2020).

[54] See Loughlin (2019) pages 319-321, Tiedeman (2014) page 172 and Grote (2014) page 195.

[55] Santoro (2007) pages 161-163. It is clearly a "thin" usage of the Rule of law, as it does not restrict the legislative capacity of the parliament.

[56] Santoro (2007) pages 160-169. Loughlin (2010) pages 315-317.

The end of the Second World War saw a break with this "thin" and more formal conception of the Rule of law both in the UK and in Germany. In the latter, the "thin" notion was complemented by a more substantive conception of the *Rechtsstaat*, where there also had to be certain values and principles which directed and acted as a limitation on all branches of government. Many of these were codified in the first chapter of the *Grundgesetz* of 1949,[57] and the newly established *Bundesverfassungsgericht* was established to play an active role as a limitation on state power.[58]

Similarly, in the United Kingdom, Former Lord Chief Justice Bingham has argued that a state which does not adhere to fundamental human rights cannot be said to adhere by the Rule of law,[59] illustrating an embrace of a "thick" version of the Rule of law. His views have been embraced by the Venice Commission in its study on the topic.[60] However, it can be asked whether Bingham uses this "thick" definition more normatively, because such fundamental rights do not actually pose substantial limitations on parliamentary sovereignty in the UK.[61]

As the discussion illustrates, the Rule of law is used in a set of ways and can mean different things depending on the context. However, in all its conceptions it deals with different ways in which the judiciary can act as a check on the executive, sometimes also the legislative. Some definitions grant the judiciary a more central role with others consigning it to a narrow role. They all have in common that they presuppose a judiciary with some ability to act as a check, in line with the principle of separation of powers.

That principle usually attributed to the writings of Montesquieu, in his 1748 *De l'espirit des lois*. Montesquieu wrote before the theories of *Rechtsstaat* or the Rule of law and was primarily concerned with avoiding tyranny. He argued that the separation of the legislative and executive

---

[57] See the *Grundgesetz* chapter I *Die Grundrechte*, articles 1-19.

[58] See, on the *Bundesverfassungsgericht* (Federal Constitutional Court), Koch (2020) pages 235-238.

[59] Bingham (2010) pages 66 following.

[60] Venice Commission (2009) paras 34-41.

[61] Currently, in the UK, the Human Rights Act of 1998 is the basis for enforcing human rights limitations on the parliament, which does limit its power as long as it is in force, but it can also be rescinded with an ordinary parliamentary vote, so it is still clearly just self-limitation well within the traditional "thin" view of the Rule of law. The current debate in the UK on repealing that act illustrates that even this "thin" limitation on the parliament is controversial, and that any "thick" definition of the Rule of law is nowhere near established neither normatively nor in positive law. See, for this debate, Volou, VerfBlog 13th July 2022 and Reid, VerfBlog 17th June 2022. See also The Guardian "No 10 to set out sweeping plans to override power of human rights court, 21st June 2022, "*UK must curb influence of European human rights rules, says Braverman*", 10th August 2022 and "*Senior Council of Europe official urges UK not to repeal Human Rights Act*", 4th July 2022.

function is necessary to ensure liberty, as combining them in the same body will let a tyrannical executive branch make tyrannical laws. But in addition to that, there had to be an independent judiciary to ensure legality, because if it was enjoined to the legislative branch, justice would be arbitrary, and if it was enjoined to the executive branch, then justice would have the power of an oppressor.[62]

This principle and necessity of judicial independence becomes even more important when the The writers on Rule of Law, *Rechtsstaat* and *État de droit*, building on Montesquieu, expand the role of the judiciary to be an important check on the legality of administrative actions,[63] and even more so when taking a "thick" definition of the Rule of law where the judiciary is supposed to act as the guardian of fundamental rights and of the constitution, a counter-balancing force to the other branches.[64]

2.3 Checks on Judicial power – balancing independence and accountability

In the original notion of separation of powers as envisioned by Montesquieu, the judiciary was not at all a powerful branch of power. It was not meant to have a large controlling function on the other branches, nor to hold any real power. It was separate and independent because the legislative and executive – the real branches of power balancing each other – could not be trusted to decide cases neutrally themselves. In the words of Montesquieu, the judge was simply *la bouche qui prononce les paroles de la loi* – the mouthpiece of the law.[65] As argued by the framers of the US constitution, this power of interpretation could be given to the judiciary precisely because it was such a weak branch with very limited capacity to abuse that power.[66]

However, the 20th century saw the emergence of new viewpoints which accorded the judiciary an increasing role and power. Initially it came with the rise of democracy and majoritarianism in the early, where the decline of royal power, and thus the power of the executive branch, led

---

[62] Montesquieu (1748) page 290.

[63] Chevallier (2017) page 71 and Heuschling (2007) page 220-221.

[64] Heuschling (2007) page 222-223. See also Bingham (2010) pages 91-92 and Venice Commission (2009) para 53 following.

[65] Montesquieu (1748) page 299, full quote: "Mais les juges de la nation ne sont (…) que la bouche qui prononce les paroles de la loi, des êtres inanimés qui n'en peuvent modérer ni la force ni la rigueur."

[66] Gerangelos (2009) pages 10-13, see also Loughlin (2010) page 293. The framers had been very disturbed by examples from various states where the legislators had pronounced judgements in specific cases where it might have an interest or political preference for the outcome.

many to see powerful courts in a positive light as a countervailing power to the new popularly elected national assemblies. The courts were a dam against the democratic flood wave.[67] As argued by a Reuterskiöld, a professor of Constitutional Law, on the emerging Swedish parliamentarism:

> "The more the government is democratized, the more the Cabinet becomes a mere instrument for parliamentary democracy, the more the state bureaucracy becomes a political rather than an administrative organ, the more urgent is the need for another independent and controlling institution in Swedish society in addition to democracy. The only possible power in this respect is the judiciary."[68]

In this sense, in the separation of powers in modern nation states, judiciaries have acquired an increasing role as a counterweight to popular sovereignty, instead of their earlier role as a counterweight to executive overreach,[69] and solving private disputes. The expanding view of the rule of law, from a "thin" to an increasingly "thick" notion, corresponds with this change.

This development was strengthened after the Second World War with the spread of the "thick" notion of the Rule of Law, because of a need to establish legal guarantees against a demagogically manipulated majority like that which had been seen in the Third Reich.[70] As discussed, this saw both the establishment of more powerful courts, the granting of more power to existing courts and over time the increasingly active use of that power. In short, the judiciary was increasingly asserting itself as a branch of power. This development has sometimes, especially from critical authors, been termed the judicialization of politics.[71]

It is not the scope of this paper to discuss the merits of such an analysis, or whether it is a good or bad thing. It is sufficient to note that, as Kelsen warned, a situation where the judiciary increasingly decides cases based on vague provisions or principles like "freedom" or "justice"

---

[67] Østerud (2012) pages 427-428

[68] Reuterskiöld (1918) page 96, my translation.

[69] Lønning (2012) page 88 argues that the less distinct separation between the legislative and the executive in Norwegian parliamentarism necessitated a clearer separation to the judiciary, making judicial independence and control the cornerstone of the Rule of law (*rettsstat*). See similarly in Holmøyvik (2012) pages 122-125.

[70] Østerud (2012) page 431 following. See also Chevallier (2017) page 88-89.

[71] Chevallier (2017) page 133-135. The topic has been studied extensively in Political Science literature, see, for an overview, Hirschl (2000), (2008) and (2011). For the Norwegian context, see Østerud et al. (2003) page 116 following. For judicialisation in Denmark, see Togeby et al. (2004) chap. 7.

will create a shift of power where judgements are necessarily based more on the viewpoints of the judges, rather than the legislator. [72] This also means that the source of judicial legitimacy moves away from being the independent application of legal expertise, [73] to rather being the popularity of judicial decisions that are widely seen as political. This would be a step away from what Schmitt had argued as the justification for the independence of the judiciary – their subordination to the statutes. [74]

This increasingly counter-majoritarian role of the judiciary creates a conflict between, on the one hand, the necessity of ensuring an independent judiciary and on the other hand, the need for to ensure both the accountability of the judiciary, and its democratic legitimacy. The modern judiciary, especially the highest courts, can be said to be met with three expectations that often are contradictory. First, they should act as guardians of individual and human rights, as a check on majoritarianism; second, they should maintain independence and impartiality from politics and political actors; and third they should not undermine democratic legitimacy by excessive judicial activism.[75]

One way in which countries have managed this trade-off has been to designate certain specific Constitutional Courts which, despite ruling based on legal arguments and expertise, are intended to be more political bodies that rule on matters of high political controversy. This can allow there to be a powerful body which can act as a check on majoritarianism, but in exchange, these Courts often have less independence,[76] with the other branches often being granted checks on judicial power, like deciding on appointments.[77] That increased dependency on the other branches means that their judicial activism can either be kept in check, or at least can be somewhat legitimized in a democratic society by those other branches being able to direct or influence that activism, for example through the appointment of judges.

There are many other ways in which countries can ensure both the independence and the accountability of the judiciary, in line with the differing views on the Rule of Law and the role

---

[72] Kelsen (1929) pages 59-61.

[73] Kelsen (1929) pages 47-48.

[74] Schmitt (1931) page 87-88.

[75] Castillo-Ortiz (2020) page 621-629.

[76] Comella (2004) page 1728.

[77] See, as an example, the appointment procedure to the German *Bundesverfassungsgericht¸ Grundgesetz* Article 94(1), or the French *Conseil constitutionnel*, Article 56 of the French Constitution.

of the judiciary. The purpose of this section is just to illustrate that the Rule of Law does not necessarily entail a maximalist view of judicial independence. Rather, independence is a tool to ensure the proper application of law and the necessary checks and balances on the other branches of powers. The amount of independence, interdependence and accountability ensured for each branch of power, including the judiciary, must necessarily depend on their power, legitimacy and assigned function in any given *Rechtsstaat*.

3 The development of EU standards on judicial independence

3.1 Introduction

Rule of law and its various aspects, like judicial independence, have been a part of Union law for a long time. Rule of law was established early on as a general principle of Union Law, borrowing from the constitutional traditions of Member States.[78] It is now codified as both a common value and aspiration of the Union in Article 2 TEU, [79] and by more detailed provisions that seek to regulate and uphold the various aspects of the rule of law, which includes the requirements of judicial independence in Article 19(1) TEU and Article 47 of the Charter.

The purpose of this chapter is to analyse the development of Union standards and requirements of judicial independence, specifically the as they relate to the recent judgement of the ECJ in *ASJP*, where it found that Article 19(1) TEU contains a general obligation for Member States to ensure the independence of their judiciaries. It will be argued that the ECJ expanded principle of effective judicial protection in Article 19(1), which had so far not been used to enforce independence, by combining several strands of case law related to the Rule of law.

To illustrate that, the chapter will firstly, in section 3.2 look at the more modest origin Article 19(1), as the principle of effective judicial protection. Secondly, in section 3.3, this chapter will investigate the requirements of independence as a part of the definition of a "court", especially in the case law under Article 267 TFEU.

[78] Case 294/83 *Les Verts* para 23 is usually credited as the first case to state that the EU was based on the Rule of law. An early reference to a "principle of the rule of law" can also be found in Case 101/78 *Granaria* para 5.

[79] The "rule of law and respect for human rights" represents one of the common values on which the Union is founded in Article 2 TEU, cf. also Articles 21(1) and 21(2)(b) TEU along with the 2nd and 4th recital TEU.

Thereafter, in sections 3.4 and 3.5, this chapter will analyse how the ECJ combined effective judicial protection and its case law on independence, along with Article 47 of the Charter and the shared value of the Rule of law, to create a basis for interpreting Article 19(1) TEU such that it obliged Member States to ensure that the independence of their national courts.

3.2 The early case law: The principle of effective judicial protection

This section seeks to give an overview of the origin of Article 19(1) TEU in case law, as the principle of effective judicial protection.[80]

The background for the development of this principle is the decentralised system of Union law, where Union law is primarily applied and interpreted by Member States and national courts.[81] To ensure that Union rights are actually upheld, the CJEU has consistently sought to develop general principles that limit how Member States can exercise their role. First among these was to ensure the supremacy of Union law even in national systems, through the principles of supremacy and direct effect of EU law.[82]

The Court then had to ensure that individuals actually had access to courts that would uphold this supremacy, which explains the need to develop a principle of effective judicial protection, seemingly inspired by the right to effective remedies in Article 6 and 13 ECHR.[83]

The seminal case for this principle of effective judicial protection is *Johnston*.[84] The case concerned the interpretation of Article 6 of Directive 76/207, which require Member States to introduce measures enabling individuals to judicially pursue claims of gender discrimination.

---

[80] In the English version of Article 19(1) TEU the principle is called "effective legal protection", whereas the French version uses "*protection juridictionnelle effective"*, which translates to "effective judicial protection". As both versions are in common use in English, this paper will opt for "effective judicial protection", which is more in line with the French and the purpose of securing effective protection of Union rights before national courts.

[81] See Article 4(3) TEU and Article 291 TFEU. See also Lenaerts et al. (2021) page 768.

[82] See for that development, Schütze (2015) pages 115-161.

[83] The CJEU also developed two other principles for the same purpose: the principles of *equivalence*, that national procedural rules applicable to protect union rights must be no less favourable than those protecting domestic rights, and *effectiveness*, that the national procedural rules must not render the exercise of such rights practically impossible, see Case 33/76 *Rewe* para 5. The relationship between these principles and effective judicial protection is unclear, but *effective judicial protetion* can be seen a more stringent development or application of effectiveness, see AG Bobek in his opinion in C-89/17 *Banger* para 100, Widershoven (2019) and Schütze (2015) pages 167-170. For a summary on the debate on the relationship between the principles, see Bonneli (2019) pages 39-40.

[84] Case 222/84 *Johnston*, though the principle was also briefly mentioned in Case 14/83 *Von Colson* para 23.

The ECJ stated that Article 6 of the directive reflected "a general principle of law which underlies the constitutional traditions common to the Member States", and was also found in Articles 6 and 13 ECHR.[85] Article 6 of the directive had to be interpreted in light of this general principle, and obliged Member States to "ensure effective judicial control" of national legislation giving effect to Union rights.[86] The Court found the UK provision to be contrary to effective judicial protection, because it limited access to review when cases concerned national security or public safety.[87] In essence, *Johnston* established effective judicial protection as a principle of access to national remedies for alleged breaches of Union rights.

The principle has been reiterated and strengthened in later cases, with the Court clarifying that the access must be effective, not illusory. As an example, the ECJ has required that the principle entails a duty to give reasons for a refusal, which must then be evaluable before a court,[88] that the time-limits for bringing an action cannot be so short as to render the access to remedies ineffective in practice,[89] and that national courts must be able to grant interim relief.[90] The Court has also connected effective judicial protection to the rule of law, stating that the EU is a community based on the rule of law, which necessitates judicial review and effective protection of Union rights.[91]

In other words, the principle of effective judicial protection largely started out as a tool in the toolbox of the CJEU to ensure a community legal order where Union law would be effectively upheld in national courts. It sought to prevent Member States from limiting access to national courts, so that those courts could uphold and protect citizens' Union rights. In this early iteration of the principle, the ECJ had not connected it to judicial independence.

This principle, as developed in pre-Lisbon case law, was codified during the Lisbon Treaties negotiations, with the second paragraph of Article 19(1) TEU now stating that "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by

---

[85] Case 222/84 *Johnston* para 18.

[86] Case 222/84 *Johnston* para 19.

[87] Case 222/84 *Johnston* 20. Note that *Johnston* uses the terms "effective judicial control" or "effective judicial remedy" to refer to the principle instead.

[88] See Case 222/86 *UNECTEF* para 15.

[89] See C-63/08 *Virginie Pontin* paras 41-69.

[90] C-432/05 [GC] *Unibet* para 72.

[91] C-50/00 P *UPA* paras 38-39.

Union law", or "Les États membres établissent les voies de recours nécessaires pour assurer une protection juridictionnelle effective dans les domaines couverts par le droit de l'Union" in the French version.

The principle was also, in practice and consequence, codified by the inclusion of Article 47 of the Charter, which mirrors Articles 6 and 13 ECHR.[92]

3.3 The early case law: The definition of a "court" and independence

3.3.1 Independence as a judicial function

This section will take a closer look at the early EC case-law dealing with issues of when a court is independent, in the context of answering the question of which bodies have the competence to refer questions to the ECJ. The ECJ can, according to Article 267(2) and (3) TFEU, only take referrals from a "court or tribunal", "*une jurisdiction*" in the French version.[93]

In deciding whether the referring body is a "court or tribunal", the ECJ established early on that certain requirements and factors had to be taken into account. One of those requirements was that the court had to judge independently, as the Court held in *Pretore di Salò*:

> "The Court has jurisdiction to reply to a request for a preliminary ruling if that request emanates from a court or tribunal which has acted in the general framework of its task of judging, independently and in accordance with the law."[94]

In the early case-law, independence was used by the ECJ to determine whether the referring body was a court. Specifically, many of the early cases deal with whether the referring body has a judicial function, and whether the body acted like a neutral third party to the proceedings.

Judicial function was considered in *Dorsch Consult*, where the ECJ had to consider whether the Federal Supervisory Body, formally a part of the Ministry for Economic Affairs of Germany, "carries out its task independently and under its own responsibility". [95] The ECJ

[92] See above, note 34.

[93] See similarly in previous treaties, the Treaty Establishing the European Community (TEC) Article 234(2) and (3) and the Rome Treaty (EEC) article 177(2) and (3).

[94] Case C-14/86 *Pretore di Salò* para 7.

[95] C-54/96 *Dorsch Consult* para 35.

pointed out that there were provisions on withdrawal and appointments, and provisions ensuring their impartiality. This led the ECJ to conclude that the Federal Supervisory Body "exercised a judicial function", and therefore constituted a "court or tribunal" which could refer cases.[96]

In *Pierre Corbiau*, the referring body was not a neutral third party to the proceedings. The referring *Directeur des Contributions* was formally a part of the administration which had made the contested decision and would be a party to the proceedings if the case was appealed to the *Conseil d' État*.[97] Similar, in *Criminal Proceedings against X*, the referring body was not a neutral third party because it was acting as a prosecutor in the case.[98]

This early case law focused on function, and did not interpret independence too strictly. In *Gabalfrisa*, the ECJ accepted that an administrative tribunal, which was formally a part of the Ministry responsible for the contested decision, was independent because the law ensured a separation of functions and a third-party relation to the proceedings themselves.[99] This was done in spite of the wide discretion of the Minister over appointments and dismissals, which the Court simply glossed over.[100]

A seemingly more principled approach to independence was stated in *Köllensperger*, where the ECJ stated that independence had to "guarantee against undue intervention or pressure on the part of the executive".[101] However, that statement came in the context of an administrative authority, which had vaguely defined power to appoint and remove members of the referring body, being a party in the case brought before that referring body. In that light, the statement and case seem to be in line with the abovementioned cases considering whether the referring

---

[96] C-54/96 *Dorsch Consult* para 37. See also the opinion of AG Damon in C-24/92 *Pierre Corbiau* para 10, which emphasises independence as an 'inherent element of the judicial function'. As a further example, see Case 109/88 *Handels- og Kontorfunktionærernes Forbund* paras 7-8, where the Danish Industrial Arbitration Board had a 'judicial nature'.

[97] C-24/92 *Pierre Corbiau* paras 15-16. See also C-17/00 *De Coster* paras 18-22, especially para 19.

[98] Joined cases C-74/95 and C-125/95 *Criminal proceedings against X* paras 18-20.

[99] Joined Cases C-110/98 to C-147/98 *Gabalfrisa* paras 39-40.

[100] The issue was not raised by the ECJ but was one of the factors that led AG Saggio to find that the body was not a 'court or tribunal', see his opinion in Joined Cases C-110/98 to C-147/98 *Gabalfrisa* para 16.

[101] C-103/97 *Köllensperger* para 21.

body actually has the status of a neutral third party to the proceedings.[102] In any tase, there vague powers were not decisive, because "it is not for the Court to infer that such a provision is applied in a manner contrary to the Austrian constitution and the principles of a State governed by the rule of law".[103] In other words, the Court quite explicitly did not seek to enforce rule of law-norms when it required independence under Article 267 TFEU, but only sought to determine the function of the referring body.

In total, it is clear that the ECJ in long-standing case-law has required referring bodies to be independent, as a part of the requiring the referring bodies to be "courts or tribunals". Initially, while this case-law does require some degree of independence for national courts in the case at hand, that was not related to wide of law and separation of powers-considerations. There is a noticeable lack of references to the ECHR or other general or fundamental principles in this case-law, which only sought to ensure that the referring body, in its function, was a court, in line with the purpose under Article 267 TFEU of ensuring a *dialogue des juges* and the uniform interpretation of EU law.

3.3.2 Independence as a fundamental guarantee

The ECJ would take a more principled approach to independence when it had to deal with the definition of "court or tribunal" in a different sphere of law, in *Wilson*. That case arose in the context of directive 98/5, on the free movement of lawyers, whose article 9 provided for right to remedy before a "court or tribunal". Wilson had his application to a bar association denied, and that denial could only be appealed to the Disciplinary and Administrative Committee and its Appeal Committee, which Wilson argued did not constitute an independent "court or tribunal", thus violating his right to remedy.

In determining whether the committee was a "court or tribunal" as required by the directive, The ECJ referred to the right to remedy as a general principle in Union law, in line with ECHR

[102] That was how the question was considered in the opinion of AG Saggio in C-103/97 *Köllensperger* paras 21-30. Unlike the Court, the AG found that the referring body was not an independent third party to the proceedings, and thus not a "court or tribunal".

[103] C-103/97 *Köllensperger* para 24.

arts. 6 and 13.[104] In further defining "court or tribunal" it referred to its earlier case law under Article 267 TFEU, of which independence was one of the requirements, as discussed above.[105]

However, the Court took a principled approach to independence and expanded the requirements. Basing itself on ECtHR case law, it found that independence requires the body to be impartial, and to be shielded from external intervention or pressure that could jeopardise its independent judgement, and that its members had to be impartial.[106] This necessitated several guarantees, including rules and on the composition of the body and the appointment, length of service and the grounds for abstention, rejection and dismissal of its members. Those rules had to be such as to "dismiss any reasonable doubt in the minds of the individuals as to the imperviousness of that body to external factors".[107]

In applying these requirements, the Court concluded that the Committee and the Appeal Committee lacked impartiality, because they were composed exclusively of lawyers, which could give a lawyer who had their registration denied concern of conflicting interests in keeping them out of the market.[108]

The definition of "court or tribunal" in *Wilson* takes a quite different approach to independence than the abovementioned case law under Article 267 TFEU.[109] The approach is taken in light of the case law of the ECtHR and seems much more in line with principles of rule of law and the separation of powers.

On the one hand, this move can be explained by the fact that *Wilson* dealt with defining "court or tribunal" in the context of an individual right to remedy, and not the question of who can make referrals under Article 267 TFEU.[110] Because different provisions have different objectives, there is no inherent problem with "court or tribunal" being defined somewhat differently, or having different thresholds, in Union law. On the other hand, *Wilson* has been influential and can be said to represent an early shift towards a more principled approach to

---

[104] C-506/04 [GC] *Wilson* para 46.
[105] C-506/04 [GC] *Wilson* paras 48-49.
[106] C-506/04 [GC] *Wilson* para 50-52.
[107] C-506/04 [GC] *Wilson* paras 50-53.
[108] C-506/04 [GC] *Wilson* paras 54-58.
[109] See Reyns (2021) pages 31-32.
[110] See Bonnelli and Claes (2018) page 639 and Reyns (2021) page 32.

defining independence. This is exemplified by the fact that it has been extensively cited in later case law dealing with independence under Article 267 TFEU,[111] despite the differing objectives of that provision.

3.4 The *ASJP*-case: Judicial independence as a substantive treaty requirement

3.4.1 Introduction

Before *ASJP*, the methods of the Court to ensure independence were quite straightforward. The principle of effective judicial protection in Article 19(1) TEU, and the largely corresponding right to effective remedies in Article 47(1) of the Charter, ensured that national courts had the jurisdiction over Union law matters to uphold Union rights. The CJEU could then monitor the independence of those national courts when those courts referred cases to the ECJ, under Article 267 TFEU, or when it had to considering whether the national procedures fulfilled the "fair trial" standard now codified in Article 47(2) of the Charter, which requires an "independent and impartial tribunal".

However, those requirements of independence are all limited in their scope. Article 47 of the Charter applied only as a procedural guarantee where a Member State are "implementing Union law", see Article 51(1) of the Charter, and any requirements under Article 267 TFEU obviously only applied when a reference for a preliminary ruling is made.

That scope had been sufficient to allow the CJEU to address irregularities undermining the fairness of specific trials where an individual was claiming a violation of their Union rights, or to address smaller scale issues affecting independence. It, however, left the Court with insufficient powers to deal with Member State reforms that sought to undermine the judiciary more systematically, an issue which became increasingly pressing with the judicial reforms in Poland, Hungary and other Member States.[112]

The first opportunity to address that insufficiency came in *ASJP*.[113] In that case, Portugal had implemented a series of austerity measures, which among other things temporarily reduced

---

[111] It is cited, among others, in C-517/09 *RTL Belgium* paras 38-39, Joined Cases C-58/13 and C-59/13 *Torresi and Torresi* para 18, Case C-222/13 *TDC* 30-32, Case C-203/14 *Consorci Sanitari paras* 19-20, and Case C-503/15 *Panicello* paras 37-38.

[112] See section 1.1.

[113] C-64/16 [GC] *ASJP*.

remuneration in the public sector, including for judges. A union of Portuguese judges, representing judges in the Court of Auditors, argued before the Portuguese Supreme Administrative Court that the reduction breached the principle of judicial independence. That court then referred the case for a preliminary ruling from the ECJ.

Because the Portuguese austerity measures were not a matter of implementing Union law, and because it was not the independence of the referring court that was under question, it was not clear the ECJ had jurisdiction to deal with the question of whether the measures undermined independence. The referring court and parties had probably foreseen this and had asked both about Article 47 of the Charter, and whether the same protection of independence could be achieved under the principle of effective judicial protection in Article 19(1) TEU.

Somewhat surprisingly, the ECJ chose to analyse the question solely under Article 19(1) TEU, foregoing any analysis of whether Article 47 of the Charter would apply.[114] This allowed the Court to develop an obligation for Member States to ensure the independence of national judiciaries, without needing to rely on the Member States "implementing EU law" which an individual seeks to uphold in Court, like Article 47 of the Charter, or a reference being made by the Court in question under Article 267 TFEU.

How the Court goes about constructing the scope and substance of that obligation under Article 19(1) TEU will be analysed further below in section 3.4.2 and 3.4.3, respectively.

3.4.2 Scope of Article 19(1) – All European courts

As said, the ECJ framed the question exclusively on the basis of Article 19(1) TEU, and the reasons becomes clear when the ECJ discusses its scope. The Court reiterated that Article 19(1) was applicable in "all fields covered by union law", which meant that it applied "irrespective of whether the Member States are implementing Union Law, within the meaning of Article 51(1) of the Charter.".[115]

In other words, the Court was of the view that Article 19(1) has a wider scope than the guarantees of the Charter. It would apply if the reforms of remuneration affected a field "covered by union law", meaning they did not have to be "implementing Union law".

---

[114] See section 3.5 note 142 for a consideration of why the Court chose this route.

[115] C-64/16 [GC] *ASJP* para 29.

The Court noted that Article 19(1) TEU, which gave concrete expression to the value of the rule of law in Article 2 TEU, entrusted national courts with a shared duty of judicial review, and thus the correct interpretation and application of the treaties.[116] This obliges the Member States, in light of the principle of sincere cooperation in Article 4(3) TEU, to establish a system of "legal remedies and procedures ensuring effective judicial review" in fields covered by Union law.[117]

The principle of effective judicial protection in Article 19(1) had to be ensured for all "courts and tribunals" established for that purpose. The scope of that statement became clear when the ECJ went on to consider whether the Court of Auditors was within the scope of Article 19(1), with the Court holding that:

> "[T]o the extent that the [Court of Auditors] may rule (…) on questions concerning the application or interpretation of EU law (…) the Member State concerned must ensure that that court meets the requirements essential to effective judicial protection, in accordance with the second subparagraph of Article 19(1) TEU."[118]

In other words, where a court or tribunal may rule on questions of EU law, that court must meet the requirements of Article 19(1) TEU. As all national courts have jurisdiction to rule on questions of EU law, this, in practice, means that the scope of any requirements in Article 19(1) TEU extends to all national courts.

In this manner the ECJ can have jurisdiction even when the case does not concern a Union right or implementation of Union law, because the national courts themselves come within the scope of Article 19(1) TEU requirements because they are European courts which can rule on questions of Union law.

This laid the groundwork for potentially reading Article 19(1) TEU as having requirements which were not related to ensuring access to remedies individuals seeking to uphold their Union

[116] C-64/16 [GC] *ASJP* paras 30-33.
[117] C-64/16 [GC] *ASJP* paras 34-36.
[118] C-64/16 [GC] *ASJP* para 40.

rights. It could now be the basis for imposing substantive standalone obligations on Member State judiciaries.[119]

The ECJ confirmed in *Commission v Poland (Independence of the Supreme Court)* that the scope it gave Article 19(1) TEU in ASJP, and the obligations imposed on Member States under that scope, was of a general nature and unrelated to the specific facts of the *ASJP* case.[120]

What the Court in essence does is to find that the dual role of national courts, in that they act both as courts of domestic and of Union law, necessarily results in there having to be some general requirements for the organisation of those courts also on the Union level. For this, the Court relied on the requirement of effective judicial protection in Article 19(1) TEU. In later cases the Court has emphasised that, while the organisation of national judiciaries is a Member State competence, they must necessarily comply with obligations deriving from Union law in the exercise of that competence.[121]

This wide scope also allows Article 19(1), in line with the doctrines of supremacy and the direct effect of Union law, to be applied directly by national courts to protect their own capacity to ensure effective judicial protection. In fact, national courts are obliged under Article 19(1) to disapply a national rules in breach of effective judicial protection.[122]

The wide interpretation the ECJ gave to the scope of Article 19(1) TEU in *ASJP* has been reiterated in many later cases and has been the primary basis with which the ECJ has established that it has the jurisdiction to deal with a series of other more systematic issues and measures affecting independence in Member States.[123]

---

[119] Cf. also the analysis by AG Saugmandsgaard Øe, who largely agreed with the scope but would disagree on the obligations it imposed, finding that it did not contain a requirement of independence. see his opinion in C-64/16 *ASJP* paras 37-42 and para 63.

[120] C-619/18 [GC] *Commission v Poland (Independence of the Supreme Court)* para 51.

[121] This has been emphasised by the court in several cases after *ASJP*, see C-619/18 [GC] *Commission v Poland (Independence of the Supreme Court)* para 52, Joined cases C-585/18, C-624/18 and C-625/18 [GC] *A. K. and Others* para 75, C-824/18 [GC] *A.B. and others* para 68, Case C-487/19 [GC] *W.Ż* para 75, and Case C-791/19 [GC] *Commission v Poland (Disciplinary regime of judges)* para 56.

[122] See, inter alia, C-824/18 [GC] *A.B. and Others* para 146 and C-430/21 [GC] *RS* paras 58-59.

[123] See, inter alia, the three Commission infringement proceedings against Poland for not complying with the requirements of Article 19(1) TEU, C-619/18 [GC] *Commission v Poland (Independence of the Supreme Court)* paras 42-59, C-192/18 [GC] *Commission v Poland (Independence of the ordinary courts)* paras 98-107 and C-791/19 [GC] *Commission v Poland (Disciplinary regime of judges)* paras 50-62.

3.4.3 Substance of Article 19(1) – A Rule of Law provision

Having interpreted Article 19(1) TEU to have a wide scope, so that any requirements found under Article 19(1) would apply to all national courts and therefore the Portuguese Court of Auditors, the last question was to determine the substance of Article 19(1) – specifically whether it contained a requirement of independence. Such a requirement is not evident, as both textual approach and earlier case law would indicate that Article 19(1) only obliges member states to uphold the right to an effective remedy in a narrow sense.[124]

In his opinion, AG Saugmandsgaard Øe argued for such a narrow reading of Article 19(1) TEU, opining that effective judicial protection only corresponded to the right to an effective remedy, which was not to be "confused with" the principle of judicial.[125]

The grand chamber of the ECJ unequivocally rejected this approach, rather taking a very wide interpretation of Article 19(1) TEU. The Court starts by placing Article 19 in the context of other Treaty provisions, stating that it "gives concrete expression to the value of the rule of law stated in Article 2" ,[126] and reaffirming earlier case law which ties the principle of effective judicial protection to the right to remedies in Articles 6 and 13 and to Article 47 of the Charter.[127]

Interpreting Article 19(1) TEU as an expression of the rule of law allowed the Court to read argue that effective judicial protection had to uphold various rule of law related requirements. In this regard it referred to the requirement of independence as established in Article 267 TFEU case law and the requirement of independence as a part of the fair trial standard of Article 47 of the Charter,[128]

In other words, despite the Court seemingly being of the view that Article 47 of the Charter was not applicable,[129] a comparable requirement could be read into Article 19(1) TEU, which was applicable. This allowed the Court to continue its case law on independence as established

---

[124] As argued by Dubout (2021) page 197.

[125] See the analysis of AG Saugmandsgaard Øe in his opinion in C-64/16 *ASJP* paras 57-68.

[126] C-64/16 [GC] *ASJP* para 32. Repeated in several later cases, see among others C-156/21 *Hungary v Parliament and Council* para 161 and C-157/21 *Poland v Parliament and Council* para 191.

[127] C-64/16 [GC] *ASJP* para 35. Note that in this earlier case laww this reference was

[128] C-64/16 [GC] *ASJP* para 41.

[129] This was not stated explicitly, but it seems reasonable to assume because the Court did not consider its application. However, note the strategical reasons the Court might have had for this framing, see section 3.5

under the abovementioned provisions, without being restricted by the limited scopes and objectives of those provisions.

Later case law has confirmed such an understanding of the statements in *ASJP*. The Court was especially clear in the order in *Rejonowa* where the court understands the statement in *ASJP* to mean that "Article 47 of the Charter must be duly taken into consideration for the interpretation of article 19 paragraph 1 second subparagraph TEU",[130] a statement the Court has reiterated in several later cases.[131]

After establishing that Article 19(1) TEU required judicial independence, the Court w borrowed from its case law on the definition of a "court or tribunal" to define independence. Building on *Wilson*¸[132] discussed above, the court stated that to that national courts had be protected against external intervention or pressure liable to impair the independent judgements of its members,[133] and that an important safeguard against such pressure was the right of judges to a remuneration which was "commensurate" to the importance of the functions they carry out.[134]

In conclusion, then, the ECJ in *ASJP* established that Article 19(1) TEU must be read in conjunction with Article 2 TEU, and therefore obliges Member States to uphold the value of the rule of law, including to ensure that their national judiciaries fulfil the requirement of independence.

3.4.4 Conclusion

After having established that the Court of Auditors is within the scope of Article 19(1) TEU, and that Article 19(1) obliges Portugal to ensure the independence of that Court, the ECJ dispensed relatively quickly with the actual matter of the case, which never seemed to actually have been in doubt – let alone warranting an analysis by the grand chamber. The ECJ stated that the reduced remunerations were a part of general measures affecting many public sector

---

[130] Order C-623/18 *Rejonowa* para 28. My translation, original text: «*il ressort, certes, de la jurisprudence de la Cour que l'article 47 de la Charte doit être dûment pris en considération aux fins de l'interprétation de l'article 19, paragraphe 1, second alinéa, TUE*»

[131] See, inter alia, C-487/19 [GC] *W.Ż* para 102, C-791/19 [GC] *Commission v Poland (Disciplinary regime of judges)* para 57 and 87 and C-896/19 [GC] *Repubblika* para 45.

[132] The Court also cites C-503/15 *Panicello*, an Article 267 TFEU case, but that largely builds on *Wilson*.

[133] C-64/16 [GC] *ASJP* paras 42-45. See, for C-506/04 [GC] *Wilson*, section 3.2.2 above.

[134] C-64/16 [GC] *ASJP* para 44, by analogy to the guarantee against removal from office in *Wilson*.

wages, done for the purpose of reducing the budget deficit, and of a temporary nature.[135] As such, the measures did not impair the independence of the members of the Court of Auditors.[136]

3.5 ASJP in context – never really about Portuguese judges

The purpose of this section is to take a closer look at what the context and consequences of *ASJP*. Initially, there seems to be wide agreement on the fact that the interpretation of Article 19(1) in *ASJP* constitutes a clear expansion of possible Union intervention in the competences of Member States to organise their own judicial systems.[137]

It has been argued, as a counterpoint, that *ASJP* only built on existing concepts and as such did not really establish anything new,[138] or alternatively that anything new it did establish was based on the common constitutional tradition of Member States, such that it cannot be said to "impose" anything on the Member States.[139] While both of those points are correct in isolation, the previously existing concepts used in *ASJP* were given a different and novel – and expanded – application. And while judicial independence is a common constitutional tradition of the Member States, it is still quite a drastic change that the CJEU and the federal level of the Union now have the competences to be the guardian of judicial independence and rule of law vis-à-vis the Member States.

This expansion, in scope and substance, of Article 19(1) TEU will, and has, increased the number of situations where litigants – or Union organs themselves – would be able to challenge national measures undermining judicial independence.[140] Furthermore, this "operationalising" of Article 2, by reading its values into Article 19(1) TEU, can provide the blueprint for future

---

[135] C-64/16 [GC] *ASJP* paras 46-50.

[136] C-64/16 [GC] *ASJP* para 51.

[137] This seems to be the general viewpoint in the literature, se inter alia Bonneli and Claes (2018), especially pages 641-643. See also Pech and Platon (2018) who calls it "ground-breaking", similarly in Ovádek's article "Has the CJEU just reconfigured the EU constitutional order?", VerfBlog 28th Feb. 2018 and Taborowski's article, Verfblog 13th March 2018. AG Tanchev also opined in C-619/18 *Commission v. Poland I* para 57, and C-192/18 *Commission v. Poland II* para 70 that the interpretation given to Article 19(1) TEU would amount to an "unwarranted interference in the competence of Poland". Koncewicz calls for Article 19(1) to be rewritten to reflect its new meaning, see VerfBlog 30th June 2022.

[138] This was the viewpoint of AG Collins in his opinion in C-430/21, para 68.

[139] As argued in Lenaerts and Gutiérrez-Fons (2020) pages 65-67.

[140] Pech and Platon (2018) page 1848.

case law and allow the Court to deal with breaches of other rule of law requirements than independence, or even other Union values entirely.

It is not immediately clear from the facts of *ASJP* why the Court felt the need for setting such a far-reaching precedent. It seemed rather evident that the austerity measures did not undermine, or even affect, judicial independence. In fact, the Court has dealt with a lot of cases on judges' remuneration and austerity measures in the past, entirely without mentioning independence.[141] It is also not evident that the Court had to rely on Article 19(1) TEU, in earlier cases on austerity measures the Court considered whether those measures implemented EU law so that the Charter would be applicable, with some being dismissed and some not.[142] In fact, it can seem like the Court deliberately wanted to build the case on Article 19(1) TEU, rather than doing so because it was clear that Article 47 of the Charter could not apply.[143]

The reality of *ASJP* therefore seems to be that it is not actually about Portuguese judges and austerity measures. Rather, the *ASJP*-case came at a time of increasing rule of law-backsliding in Member States, especially Poland, Hungary and to a lesser other Member States too.[144] The judicial development in *ASJP* seems primarily aimed at giving the Court tools to deal with that backsliding.[145] Before *ASJP*, the CJEU had been quite absent in the ongoing rule of law debate, some would even say marginalised.[146] For example, when confronted with Hungarian attempts at removing judges before the end of their terms, by lowering the retirement ages, the Court

---

[141] Austerity measures have previously been dealt with as, for example, issues of non-discrimination, see C-262/14 *SCMD* paras 17-37, of employment rights, see C-264/12 para 16 questions 3-7 and of property rights, see C-258/14 [GC] *Florescu* paras 43-60.

[142] A central question in many of these cases – including in *ASJP* – was whether austerity measures were "Implementing EU law" when the austerity measures were based on a Memorandum of Understanding (MoU) between the EU and the Member State. The Court has dismissed many earlier austerity cases because they failed to argue a connection to Union Law, see the orders in C-434/11 paras 16-17, C-128/12 paras 12-14, C-134/12 paras 13-15, C-264/12 paras 20-22, C-369/12 paras 15-16 and C-665/13 paras 13-16. In C-258/14 [GC] *Florescu* paras 34-36 the Court found that a specific MoU did constitute an EU act, making the Charter applicable. Consideration of that question would have been the "expected" way to deal with *ASJP* and was in fact how AG Saugmandsgaard Øe considered the question, see his opinion in C-64/16 *ASJP* paras 52-53.

[143] AG Saugmandsgaard Øe found that the Charter did apply and considered the case solely on the basis of Article 47 of the Charter, see his opinion in C-64/16 *ASJP* paras 52-53 and 69-82.

[144] See above, section 1.1.

[145] As seems to be the general opinion, see Pech and Platon (2018) page 1828, Bonelli and Claes (2018) page 636 following, Reyns (2021) page 33, Dubout (2021) page 198 and Ovádek, VerfBlog 28 Feb. 2018.

[146] Bonelli and Claes (2018) page 623.

completely ignored the rule of law and independence aspects of the case and dealt with it as a matter of age discrimination.[147]

It seems like the *ASJP* case then, as a low-stakes case with quite trivial and not far-reaching facts, made the ideal test-case for the ECJ with which it could develop principles that would allow it to deal with more serious and fundamental rule of law-backsliding cases down the road. Using a less controversial case to develop new principles is not uncommon, in fact ECtHR used the more innocuous *Ástráðsson v. Iceland*[148] to develop principles that it would later apply in a set of cases dealing with Polish Rule of law-backsliding. *ASJP* was the test-case of the ECJ, allowing it to develop its case law and equip itself to deal with problems the Union and Community legal system was facing.

In addition to giving the Court a basis to deal with Rule of law-backsliding, Article 19(1) TEU as interpreted in *ASJP*, has also give a basis for the other branches of the Union to deal more directly with these issues, for example the Rule of law conditionality to protect the EU budget.[149] *ASJP* and later case law were central to the ECJ upholding the competence of the Union to set such conditions.[150]

In conclusion, Article 19(1) TEU as interpreted in scope and substance by the *ASJP*-judgement, and how that was understood in later cases, was the defining moment which gave the CJEU a foundation on which it could combat democratic and Rule of law-backsliding in Member States. This first development in *ASJP* has spurred on a now-extensive case law on requirements for the proper organisation of European courts, a topic for the next chapter.

---

[147] See C-286/12 *Commission v Hungary* paras 48-81. The Court finding a breach of directive 2000/78/EC. The Hungarian reforms are very similar to the later Polish ones discussed extensively in this paper, but the approach of the Court was entirely different.

[148] *Ástráðsson v. Iceland* [GC], no. 26374/18.

[149] See Regulation (EU, Euratom) 2020/2091 of the European parliament and of the Council, recitals 12-13.

[150] See C-156/21 [GC] *Hungary v Parliament and Council* paras 160-163 and C-157/21 [GC] *Poland v Parliament and Council* paras 196-199.

4 Requirements for a judiciary to be independent

4.1 Introduction

The previous chapter analysed how the ECJ developed requirements of independence in Union law and came to find that Article 19(1) TEU obliges all Member States to ensure the independence of their national judicial systems, in so far as a court may rule on Union law. This section will focus on what the content of that obligations, namely what elements Member States must establish and uphold for their national judiciaries to be sufficiently independent.

While there are many aspects of judicial independence, this paper will necessarily focus on those requirements which has been expanded upon by the ECJ in its recent case law under Article 19(1) following *ASJP*. On some issues that case law is extensive, while the ECJ on other issues has mainly given some general requirements. To expand upon issues of the latter type, the case law of the ECJ will be supplemented with other relevant standards on judicial independence, principally the case law the ECtHR, which, as discussed in section 1.4, is a well-established sources of Union law.

Not every restriction of, or lack of, one or more of these elements of independence will lead to a breach of Article 19(1) TEU. Member States could potentially have legitimate reasons to implement some restrictions, or it could require several small infractions before the Member State breaches the threshold of Article 19(1). This chapter only seeks to analyse the elements that go into the requirement of independence. The threshold for breach of Article 19(1), and the room Member States have to pursue legitimate objectives, will be discussed in chapter 5.

This chapter will, in section 4.2, lay out the general objective pursued by Article 19(1) TEU, as it is now understood in recent cases law. The following sections, 4.3 – 4.11, will analyse different aspects of the obligation of Member States to ensure independent judiciaries.

4.2 The objective of Article 19(1) and the obligation to ensure judicial independence

This section will analyse the objective of Article 19(1) TEU, and the rationale of requiring independence under Article 19(1). The objective will be useful in determining the more specific content and requirements of independence in the following sections.

Starting with the text, Article 19(1) TEU states a requirement, of Member States, to ensure "remedies sufficient to ensure effective legal protection in the fields covered by union law".

The formulation first appeared in the draft Constitutional Treaty during the Convention on the Future of Europe,[151] and was later adopted in the final treaty.[152] With the failure of that Treaty, it was instead added to the TEU by the the Lisbon Treaty changes.[153] Noone of the *travaux préparatoires* explain the motivation for the addition, but it seems likely that it just sought to codify the principle of effective judicial protection as established in CJEU case law.[154] It is unclear why an obligation of effective judicial protection was placed in Article 19(1) TEEU, which otherwise regulates the CJEU. The principle would have made more sense in Article 4(3) TEU, which regulates Member States' obligation to sincerely cooperate with and implement Union law and objectives.[155]

The purpose of the principle of effective judicial in case law was originally to ensure the sufficiency of national remedies when individuals claimed a right deriving from Union law.[156] Recent case law, following from *ASJP*, has arguably expanded the objective of Article 19(1), by clarifying that it gives "concrete expression the value of the rule of law stated in Article 2 TEU."[157] In other words, the principle can be said to have a narrow objective of ensuring sufficient remedies for Union rights, and a wide objective of upholding shared Union values, like the rule of law.

The obligation to establish independent judiciaries relates to both of these objectives. In a narrow sense, an independent court is necessary to ensure that national courts can offer effective protection of individuals' Union rights. In a wider sense, an independent judiciary is a necessary piece of a system of separation of powers and the rule of law, as discussed in chapter 2. As discussed in section 3.5, this wider objective seems to be the main justification for the recent case law and the wide scope given to the requirement of independence.[158] Upholding the

---

[151] See *Document du Praesidium: projet d'articles du titre IV de la partie I de la Constitution concernant les institutions* (23 avril 2002), draft Article 20(1) second subparagraph.

[152] See the Constitutional Treaty Article I-29 second subparagraph.

[153] See the Treaty of Lisbon amendment no. 20, Article 9 F.

[154] See Klamert and Schima (2019) page 182 and Arnull (2013) page 767.

[155] Arnull (2013) page 767 argues that it should have been a fourth subparagraph in Article 4(3).

[156] See above section 3.2. See also Bonelli (2019) pages 37-40.

[157] C-64/16 [GC] *ASJP* para 32, see also Lenaerts et al. (2021) page 79. Lenaerts (2007) page 1629 signalled early on that the codification in Article 19(1) could be an impetus for the Court to further develop the principle.

[158] Dubout (2021) argues that the wide interpretation given to Article 19(1) had the purpose of allowing the court to uphold the value of independence and the rule of law as enshrined in Article 2, see page 197. If purely a question of protecting the Union rights of individuals, it would be sufficient with a scope like that of the Charter, applying when Member States are implementing Union law, see Article 51(1) of the Charter.

common values, specifically the rule of law, can therefore be assumed as the primary objective of this requirement.

The objective of Article 19(1) TEU must be interpreted in conjunction with the obligation of the Union to respect national and constitutional identities in Article 4(2) TEU. The organisation of national judiciaries is still intended to be a Member State competence, with Article 19(1) providing a parameter the Member States must exercise their competence within, thus ensuring that independence and the rule of law are upheld.[159]

That parameter must necessarily give large room for national preferences and variants in how to ensure and uphold judicial independence and the rule of law. This is because the common constitutional traditions of rule of law and judicial independence, on which Article 19(1) and Article 2 are based,[160] themselves vary a lot, as discussed in Chapter 2. Article 19(1) does not seek to standardise European legal traditions, but to prevent new developments that fundamentally diverge from the established and common values.[161]

Lastly, it's worth contrasting the objective of Article 19(1) TEU with that of Articles 6 or 13 ECHR or Article 47 of the Charter, because all of them require national courts to be independent. While the former seeks to oblige Member States to establish an independent judiciary as such, the latter seek to uphold judicial independence in the context of individual rights.[162] AG Bobek has argued that this more systemic focus of Article 19(1) TEU means that the obligations it imposes on Member States will more often concern the institutional and organisational aspects of judicial independence.[163]

---

[159] C-430/21 [GC] *RS* para 43, see also Lenaerts et al. (2021) pages 755-756.

[160] Lenaerts and Gutiérrez-Fons (2020) pages 65-67. See also C-64/16 [GC] *ASJP* para 35 and Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 *PM and Others* para 219.

[161] Alternatively, as formulated by AG Bobek, Article 19(1) has as its objective primarily the more serious or systematic failures of the rule of law, see his opinion in C-132/20 *BN and Others* para 39.

[162] The Venice Commission differentiates these as the objective and subjective components of judicial independence, see Venice Commission (2010) para 6.

[163] See the opinion of AG Bobek in C-132/20 *BN and Others* para 103. This is a difference in factual focus and threshold, not a difference in the definition and requirements of independence.

4.3 Establishing a separate and independent judicial branch

4.3.1 General requirements of separation of powers

The most fundamental element of judicial independence under Article 19(1) TEU is the obligation to ensure separations of powers, specifically the judiciary as a separate branch.[164] The Member States will enjoy large discretion in choosing how to ensure separation of powers and are not required to adopt any specific constitutional models.[165]

The ECJ has not expanded greatly on what separation of powers requires of Member States. It has stated that separation of powers must be enshrined in law, to ensure that the organisation of the judiciary cannot be left to the discretion of the executive, legislative or even judicial authorities.[166] While it is not a requirement, best practice would likely be to enshrine separation of powers in the constitution.[167]

Furthermore, the Court has stated that there must be sufficient separation of power to preclude situations where the other branches can exercise undue influence on the judiciary.[168] That precludes, for example, situations where courts are subject to hierarchical constraints, subordination, or similar powers of instructions or orders over the judiciary.[169]

That would likely also preclude situations like the ECtHR dealt with in *Beaumartin*¸ where a national court was obliged to refer certain legal questions to the executive branch for a binding answer, as that would be a type of instruction on how to decide a case. The ECtHR stated more

---

[164] Joined cases C-585/18, C-624/18 and C-625/18 [GC] *A. K. and Others* para 124. Also required under the ECHR, see *Ástráðsson v. Iceland* [GC], no. 26374/18 para 215.

[165] Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 [GC] *PM and others* para 229 and Case C-430/21 [GC] *RS* para 43. cf. also Article 4(2) TEU.

[166] See C-791/19 [GC] *Commission v Poland (Disciplinary regime of judges)* para 168, building on ECtHR case law. This would likely preclude the issue described by the HRC in its General Comment no 32 para 19, where independence is undermined by there being unclear distinctions between the functions of the different branches.

[167] As recommended by the Venice Commission (2016a) recommendation E(1)(a)(i) and (2010) para 22.

[168] See, on the need to avoid undue influence from the other branches, inter alia, C-791/19 [GC] *Commission v Poland (Disciplinary regime of judges)* para 86 and C-619/18 [GC] *Commission v Poland (Independence of the Supreme Court)* para 72.

[169] See, inter alia, C-430/21 [GC] *RS* para 41 and C-132/20 [GC] *BN and Others* para 96. Such instructions can likely not be accepted internally in the judiciary either, at least as far as specific cases go, cf. *Agrokompleks v. Ukraine* [J] no. 23465/03 paras 137-139 and *Yurtayev v. Ukraine* [J] no. 11336/02 para 26.

generally that national courts had to have full independence to answer the legal question at hand, finding a breach of Article 6 in that case. [170]

In total then, Members States are obliged to establish a separate and independent judiciary, enshrined in law, which is not subordinated to hierarchical constraints by the other branches of power.

4.3.2 The use of special courts outside of the judiciary

A challenge to the doctrine of separation of powers is the use of court-like bodies that are not a part of the ordinary judiciary, either being outside of it or having relations to the other branches of power. This can include bodies like customary or religious courts, tribunals within the administrative, military courts, courts of impeachment or even constitutional courts when established outside the ordinary judiciary. Such bodies are both a threat to the separation of power and an autonomous judiciary, and can be used by the other branches in an attempt to side-line the judiciary.

The ECJ has stated, commenting on constitutional courts, that it is not decisive whether the court is a part of the ordinary judicial system, as long as it fulfils the requirements of independence.[171] Constitutional courts are in a special situation and serve a distinct purpose,[172] so the statement probably cannot be taken to mean that the use of special courts outside of the judiciary more generally is unproblematic. However, the statement can be seen to accept that there is *some* room for Member states to use special courts in limited circumstances.

The HRC has opined, on the use of military and other special courts under Article 14 ICCPR, that trial by use of such courts should be exceptional and limited to situations where the use of such courts serves some objective that the ordinary courts are otherwise unable to undertake.[173] It seems likely that the possibility to use such courts would be similarly restricted under Article 19(1) TEU, because it diverges from the general requirement discussed above. Excessive recourse to special courts outside the ordinary judicial system would challenge the principle of separation of powers.

---

[170] *Beaumartin v. France* [J] no. 15287/89 para 38.

[171] See Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 [GC] *PM and Others* para 232.

[172] See, for an overview of the role of constitutional courts, Venice Commission (2020), especially chapter 2.

[173] HRC General Comment no. 32 para 22-24.

When Member States do use such special courts, they must necessarily also comply with requirements of independence. In case law under Article 267 TFEU, the ECJ has found that the close links of administrative tribunals to the executive can easily undermine the independence of such bodies.[174] The ECtHR has similarly found that military courts which are organised as a part of the executive and under military discipline will violate the requirement of independence in Article 6 ECHR.[175]

4.3.3 Attempts at side-lining or influencing the judiciary

Lastly, it would likely be a violation of the requirement of separation of powers and an independent judiciary also where the other branches seek to side-line or influence the judiciary, both by formal and informal means.

The ECJ can be said to have dealt with an attempt of formal side-lining in *Commission v Poland (Disciplinary regime of judges)*. Poland had established the Disciplinary Chamber of the Polish Supreme Court, which was granted exclusive jurisdiction over all disciplinary matters, but also labour law, social security and retirement matters which used to be the domain of ordinary courts. This new chamber had very close links, for several reasons, to the executive and legislative branches.[176]

In considering the independence of that chamber, the granting of exclusive jurisdiction was one of the factors the Court took into consideration.[177] This can likely be understood to mean that attempts at using changes in jurisdiction to direct cases to courts that are perceived to be more loyal can create issues under Article 19(1), as a form of side-lining of perceived disloyal judges.

Of course, Member States have many legitimate reasons to want to establish new judicial bodies, change rules on jurisdiction or enact other similar measures. Article 19(1) will likely not stand in the way of that when it pursues some legitimate purpose, and it would therefore be

---

[174] See C-274/14 [GC] *Banco de Santander* paras 51-80.

[175] *Şahiner v. Turkey* [J] no. 29279/95 paras 39-47. Cf. also *Findlay v. The United Kingdom* [J] no. 22107/93 paras 70-80. Military courts seem to raise larger issues than other special courts, and it is at least recommended best-practice to always have the right of appeal to a non-military court, see Venice Commission (2000) page 5.

[176] See C-791/19 [GC] *Commission v Poland (Disciplinary regime of judges) III* paras 88-112, see also Joined Cases C-585/18, C-624/18 and C-625/18 [GC] *A.K. and Others* paras 133-154.

[177] C-791/19 [GC] *Commission v Poland (Disciplinary regime of judges)* para 89, see also Joined Cases C-585/18, C-624/18 and C-625/18 [GC] *A.K. and Others* para 147.

acceptable in the vast majority of instances where the Member States dose not blatantly seek to direct cases towards more judges that are assumed to be more loyal.

The ECJ has so far not dealt with more informal ways of achieving undue influence over tnhe judiciary. However, AG Bobek has opined that Article 19(1) TEU could not simply concern itself with the law as it is "on the books". It had to be ensured whether the laws, institutions and protections were actually upheld in practice.[178] This must likely be correct, because it would clearly be contrary to the objectives of Article 19(1) if Member States only needed to uphold the values in formal law, and not in their practice and application.

Some examples of such bad practices and undue influencing can be found in the case law of the ECtHR, which has dealt more with such issues. The ECtHR has found the independence of a court to be undermined by clear attempts at interference, like informal attempts by leaders of the legislative and executive to intervene and affect the outcome of a case.[179] It has also found that independence is undermined where practices can give an appearance of undue influences, like a sitting judge being in a hiring process – and later being appointed – for the same ministry that was a party to the case.[180]

Article 19(1) TEU must likely contain similar obligations for Member State to avoid informal interferences or practices from the other branches which can undermine the independence of the judiciary. However, because Article 19(1) does not primarily take aim at issues or irregularities in individual cases it is mainly where such practices are more systematic that it would create issues under Article 19(1).

4.4 Ensuring the funding and financial autonomy of the judicial branch

Ensuring separation of powers and the establishment of an independent judiciary is not just a matter of rules and practice, but also of resources and funding. This section seeks to expand on what Article 19(1) TEU obliges of Member States when it comes to the funding of the judiciary, and the administration of that funding. Initially, it should be noted that matters of public finance

---

[178] See the Opinion of AG Bobek in C-132/20 *BN and Others* para. 98. As a grave example of damaging practices, the Inter-American Court of Human Rights had to deal with a situation where the Ecuadorian National Congress extrajudicially dismissed – the constitution did not give them the competence to do so – the whole Supreme Court in *Quintana Coello et al. v. Ecuador* (2013)

[179] *Agrokompleks v. Ukraine* [J] no. 23465/03 paras 123-141, specifically 133 and 134.

[180] *Sacilor Lormines v. France* [J] no. 65411/01 paras 68-69.

and spending priorities are closely tied to the national democracies, and quite far from what Article 19(1) TEU primarily seeks to regulate.[181] Member States must likely have a large room for varying national priorities.

Financial matters related to judicial independence have been before the ECJ in two cases, *ASJP* and *Vindel*. The cases concerned, respectively, Portuguese and Spanish austerity measures which reduced the wages of public employees, including for the judiciary and therefore judges.[182] The plaintiff in both cases were judges who alleged that this reduction was a threat to judicial independence, in breach of Article 19(1).

Such reductions could restrict independence under Article 19(1) in two ways. Firstly, by the level of remuneration itself; and secondly, by changes and differentiation in that remuneration. These obligations of Member State in both respects will be considered in turn.

On the first issue, the absolute level of remuneration, the ECJ stated in both *ASJP* and *Vindel* that Article 19(1) obliged Member States to provide a level of remuneration that is "commensurate with the importance of the functions", which it saw as an essential guarantee of independence.[183] The Court did not comment further on this in *ASJP*, but clarified in *Vindel*, that an "average remuneration" in light of the "socio-economic context", was sufficient to comply with this requirement.[184]

The purpose of that requirement was to protecting judges from external interference and pressure.[185] By that, the Court probably meant the risk inherent in judges taking on dual roles to increase their remuneration, or in the worst-case resorting to corruption.[186] These are issues that similarly could arise with the underfunding of other parts of the judiciary, where dual roles,

---

[181] Cf. in this regard Article 2 TEU, which also mentions the value of democracy.

[182] C-64/16 [GC] *ASJP* paras 11-18 and 46-49 and C-49/18 *Vindel* paras 6-12 and 67.

[183] C-64/16 [GC] *ASJP* para 45 and C-49/18 *Vindel* para 66. Reiterated in C-216/18 PPU [GC] *LM* para 64. See a similar recommendation by the Venice Commission (2010) para 82 nr. 7, or the HRCs more modest recommendation of "adequate remuneration" in its General Comment no. 32 para 19.

[184] See C-49/18 *Vindel* para 70.

[185] C-49/18 *Vindel* para 70.

[186] Compare here the reasoning given by the Venice Commission for the same requirement, Venice Commission (2010) para 46 and (2016) para 85. See also the reasoning by the ECtHR in *Zubko and others v. Ukraine* [J] no. 3955/04, paras 67-69

corruption, or in the worst-case leave the judiciary without sufficient resources to function also would clearly leave not allow the judiciary to uphold effective judicial protection.

It therefore seems likely that the obligation to provide judges with a sufficient remuneration is a concrete expression of what the Venice Commission recommended more generally, that the judiciary must be provided with adequate resources to live up to the standards required of it.[187]

Regarding the reductions in remuneration in *ASJP* and *Vindel*, the ECJ stated that the reductions in remuneration were a part of general austerity measures to reduce the deficit, which were applied widely and equally-[188] They could therefore not be said to be "specifically adopted" against the plaintiff judges, and did not threaten their independence.[189]

The statements seem to imply that where a reduction in remuneration is adopted specifically against certain judges, it would risk undermining their independence, likely because the executive could use changes in wage to punish or reward judgements. That would be in line with recommendations from the Venice Commission, which has advised against differentiating individual judges' remuneration based on performance assessments.[190]

However, here adopted more generally, either for all public officials, the whole of the judiciary or perhaps even all judges, it would likely be acceptable in most cases, and the Member States would have many legitimate reasons to pursue even targeted changes for only judges, for example if judges have an excessively high wage compared to similar employees.

Best practice on financial matters is likely to follow the recommendations of the HRC and Venice Commission to have clear rules and procedures for establishing remuneration,[191] and preferably also allow the judiciary to have input in the budgetary proceedings, possibly through a judicial council,[192] but it is unclear how far this can be said to be obliged under Article 19(1).

---

[187] Venice Commission (2016a) recommendation E(1)(a)(x) and (2010) paras 52-55.

[188] Case C-64/16 [GC] *ASJP* paras 46-48 and C-49/18 *Vindel* para 67.

[189] Case C-64/16 [GC] *ASJP* paras 49 and 51.

[190] Venice Commission (2010) para 46 recommends avoiding discretion or individual assessments. See also C-791/19 [GC] *Commission v Poland (Disciplinary regime of judges)* para 93, where a 40% higher wage to judges in the newly established Disciplinary Chamber, as compared to the other judges of the Supreme Court, was one factor indicating its close relationship with the other branches of power, and thus lack of independence.

[191] HRC General Comment no. 32 para 19 and Venice Commission (2010) para 46.

[192] Venice Commission (2016a) recommendation E(1)(a)(x) and (2010) para 55. See below, section 4.10, for requirements on such councils, if they are to ensure independence.

In total, it is clear that Article 19(1) TEU can impose certain obligations on Member States when it comes to the funding of the judiciary and the administration of that funding. However, as long as a Member State set and change remuneration based on transparent economic criteria, following ordinary procedures for changes that avoids targeting the judges it should not create issues of independence. Member States will have a large room to make economic priorities.[193]

4.5 Ensuring a lawfully established judge

If the national judiciaries are to uphold effective judicial protection, the courts and the individual judges must have access to cases to decide. In the assignment of jurisdiction for those cases, to courts and judges, Member States must ensure that it is done in a manner which does not undermine the independence of those courts or judges.

The ECJ has dealt with the question of how to allocate cases – how to establish a lawful judge – in one case *Commission v Poland (Disciplinary regime of judges)*.[194] In that case, the President of the Disciplinary Chamber of the Polish Supreme Court, which had jurisdiction as an appellate court in disciplinary cases, had full discretion to decide which court had jurisdiction in the first instance, without needing to base that decision on pre-existing criteria.[195] The Court stated that such a system could be used to put pressure on judges by directing cases to certain judges while avoiding others. Reading Article 19(1) TEU in light of the "established by law" requirement in in Article 47 of the Charter and Article 6 ECHR, the Court found that such discretion in assigning jurisdiction did not meet the requirements of Article 19(1).

The case, albeit in not so explicit terms, can be said to establish the principle of the "lawful judge"[196] in EU law, i.e. the principle that jurisdiction be determined by objective criteria set in advance. The facts of the case only dealt with establishing jurisdiction for courts. However, assigning jurisdiction to judges themselves raises the exact same concerns and issues. Discretion in such matters can similarly be used to direct cases to certain judges for a preferred outcome, or to influence judges by overburdening some while rewarding others with high profile cases.[197] It therefore seems likely that Article 19(1) would oblige Member States to

[193] Especially in an economic crisis, see the opinion of AG Saugmandsgaard Øe in C-64/16 *ASJP* para 82.

[194] C-791/19 [GC] *Commission v Poland (Disciplinary regime of judges)*.

[195] C-791/19 [GC] *Commission v Poland (Disciplinary regime of judges)* paras 164-177.

[196] *Gesetzlicher richter* in German law, see the *Grundgesetz* Article 101(1). See, for an overview of the terminology and use of the term, Venice Commission (2010) para 78, notes 7 and 8.

[197] Cf. here C-487/19 [GC] *W.Ż* para 115, which raises similar concerns regarding the transfer of judges.

ensure that jurisdiction is set in advance both for courts and judges – i.e. would oblige Member States to ensure the establishment of a lawful judge.

Such an interpretation of Article 19(1) would align well with the case law of the ECtHR and the recommendations of the Venice Commission, both of which require that the assignment of jurisdiction both to courts and to individual judges must be determined by objective criteria set in advance.[198]

However, the requirement of jurisdiction being determined in advance does not mean that there is no room for flexibility, which can be useful especially for assigning cases to individual judges, as long as that flexibility is also based on rules. The Venice Commission has stated that allowing for some cases to be assigned to judges with specific competencies, or having rules that considers the workload of judges when assigning cases, would be fine.[199] Furthermore, rules that allow for the reassignment of cases in certain issues must also be permissible, like when the assigned judge falls ill. The limit to such flexibility is likely where the rules are so flexible as to *de facto* allow for discretion in assigning jurisdiction to judges, which could be considered to restrict their independence under Article 19(1) TEU.

In conclusion, then, Article 19(1) obliges Member States to ensure the establishment of lawful judges, by setting objective criteria for jurisdiction in advance. However, the Member States have a large room for allowing flexibility and exceptions within those criteria. As long as any discretion is sufficiently constrained by rules on its exercise, rules on transparency and the judicial culture of that state, it ought not to result in a restriction of independence.

4.6 Ensuring proper appointment of judges

4.6.1 Introduction

The appointment of judges[200] is one avenue through which the other branches of power, or third parties, can seek to influence the judiciary and the results in cases, either by appointing judges which are presumed to have certain viewpoints or – more seriously – by trying to stack the court with judges that are loyal or have informal ties to the other branches of power. For

[198] See the Venice Commission (2016a) page 22 recommendation IV and (2010) paras 73-81. See also *Miracle Europe v. Hungary* [J] no. 57774/13 paras 57-67.

[199] See Venice Commission (2010) para 80.

[200] And, where relevant, transfers, secondments and reassignments. When this section speaks of "appointments" it does so in a broad manner including, where relevant, all these types of hiring a judge for a certain position.

this reason, the ECJ has stated repeatedly that Article 19(1) TEU obliges Member States to have rules on appointment that can dispel any reasonable doubt as to the independence of a judge, and their neutrality with respect to interests before them once appointed.[201]

The purpose of this section is to analyse what obligations Article 19(1) impose on Member states, in order to ensure that judicial appointments do not undermine the independence of the judiciary. That must be ensured during the whole process of appointments, including the substantive conditions for appointment,[202] the procedural rules governing appointments,[203] and any potential irregularities during the appointment.[204] These will be considered in turn.

4.6.2 The conditions for appointments

The substantive conditions for appointments, i.e., which criteria are taken into account when considering which judges to appoint, is the starting point for ensuring their independence. The Member States are obliged to establish such substantive criteria, and they must be such as to protect the appointee form undue influence and external pressure.[205] These criteria must be available and known in advance.[206]

The ECJ, outside of stating the general obligation, has not clarified further what those criteria should be. It can therefore not be said definitely what Article 19(1) TEU requires of Member States in this regard, but some possible solutions can be found in the case law of the ECtHR and recommendations of the Venice Commission.

The Venice Commission has strongly recommended that merit be the primary criteria by which candidates are evaluated, which it sees as ensuring transparency in appointments and creating public trust.[207] The ECtHR has similarly emphasised the "paramount importance" of merit

---

[201] See, inter alia, Joined Cases C-542/18 RX-II and C-543/18 RX-II [GC] *Simpson and HG* para 71 and C-130/20 [GC] *BN and Others* para 95. The ECJ practice here reflects a universal requirement of judicial independence, see Venice Commission (2010) para 25-38. Cf. also HRC General Comment no 32 para 19 and the IACHR case *Quintana Coello et al. v. Ecuador* (2013) para 144.

[202] See, inter alia, C-132/20 [GC] *BN and Others* para 97 and C-487/19 [GC] *W.Ż* para 148.

[203] See, inter alia, C-132/20 [GC] *BN and Others* para 97 and C-487/19 [GC] *W.Ż* para 148.

[204] See Joined Cases C-542/18 RX-II and C-543/18 RX-II [GC] *Simpson and HG* para 75 and C-487/19 [GC] *W.Ż* para 130.

[205] C-896/19 [GC] *Repubblika* para 57, cf. 55.

[206] See joined cases C-748/19 to C-754/19 [GC] *WB and Others* paras 78-79, where the Court stated that the criteria for a secondment of judges had to be known in advance. The point applies equally for appointments.

[207] Venice Commission (2010) paras 25-27, adding that diversity and a sense of fairness and justice can be acceptable to consider. See also Venice Commission (2016a) recommendation vi and para 79.

based selection, by which it means selection based on both technical competence and moral integrity. The ECtHR sees this as ensuring both the technical function and public confidence of the judicial system.[208]

It seems likely that Article 19(1) would, equally, oblige Member States to ensure that the judicial appointees first and foremost are of high technical and moral competence. However, neither the ECtHR nor the Venice Commission require that merit be the only criteria. The real question then seems to be how large a room Member States have for weighting other criteria, especially criteria relating to political preferences.

In that regard, the ECJ has made clear that it does not inherently condemn appointments by the legislative or executive branches.[209] Similarly in the case law of the ECtHR.[210] Of course, the ECJ allowing the involvement of the other branches in judicial appointments does not necessarily mean that it condones political motivations in appointments, but it would seem unnecessary to allow the involvement of the other branches in appointments if they were categorically excluded from taking their own preferences into account. The acceptance of the involvement of the other branches can be seen as a tacit acceptance of at least some political preferences in appointments, at minimum regarding the judicial philosophy or interpretive practices of the potential appointee.

Such a tacit acceptance is also supported by the fact that even blatant political motivations in appointments are somewhat common in European judicial systems, especially in Constitutional Courts.[211] As Article 19(1) TEU builds on the common constitutional traditions, it would be unlikely that it would be interpreted as precluding such appointments. This was clearly the view taken by AG Hogan in his opinion in *Repubblika*, where he states that it is "pointless to deny that politics has played a role – sometimes even a decisive one – in the appointment of judges

---

[208] *Ástráðsson v. Iceland* [GC], no. 26374/18 paras 220-222 and *Advance Pharma v. Poland* [J] no. 1469/20 para 295.

[209] See, inter alia, C-824/18 [GC] *A.B. and Others* para 122 and C-896/19 [GC] *Repubblika* para 56.

[210] See, inter alia, *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC] no. 2312/08 para 49; *Xero Flor v Poland* [J] no. 4907/18 para 252; *Thiam v. France* [J] no. 80018/12 para 59 and *Absandze v. Georgia* [A] no. 57861/00 section F (a).

[211] See Venice Commission (2007) page 3 note 1 and para 47. See also below, page 46, note 215.

in many legal systems, including those in many Member States".[212] Hogan is clear on the fact that these courts have been resolutely independent, despite such appointments.

The purpose of art. 19(1) TEU also seems like it could support such a view. Its purpose is not to maximise independence, but rather to uphold effective judicial protection and the rule of law. In line with the principle of separation of powers, that can require some checks on the judiciary as well. As discussed in section 2.3, executive and legislative involvement in appointments can be one such check against excessive judicial activism and increasing technocratic tendencies, which are also factors that can undermine the public view of the court as an independent arbiter of law.

That said, the room for political considerations or preferences for Member States cannot be very large. Firstly, if merit must be the primary criterion, then political considerations can be acceptable as a secondary criterion to choose between candidates of equal merit. Secondly, while the ECJ has allowed the involvement of the executive and the legislative in appointments, it has clearly disapproved of it where executive has too much discretion in the process.[213] The implication must necessarily be that it can be damaging to independence if the preferences of the other branches can dominate appointment procedures in the judiciary.

Balancing the considerations would in total indicate that Article 19(1) TEU leaves some room for Member States to involve the executive or legislative, and their political preferences, in the appointment of judges, if that for example is deemed a necessary check on the judiciary. The risk created by such appointments, however, makes it more important ensure that there are no issues of independence in other areas.

One way Member States wanting some checks on the judiciary can balance these considerations is by restricting political discretion in appointments to a constitutional court. The power of such courts to set aside, or limit, laws made by an elected parliament can put them at risk of lacking

---

[212] See the opinion of AG Hogan in C-896/19 *Repubblika* para 57. The facts of the case and the judgement of the Court did not revolve around this issue specifically, so it was not commented on by the Court.

[213] In Case C-791/19 [GC] *Commission v Poland (Disciplinary regime of judges)* para 99-101 indicates that it is relevant for the consideration of independence whether there are sufficient checks on the president's discretion in appointments. In para 104 the Court indicated that appointments to the polish NCJ by the executive and legislative create a risk of increased influence over the NCJ. Cf. the opinion of AG Tanchev in C-791/19 *Commission v Poland (Disciplinary regime of judges)* para 93, cf. 97.

democratic legitimacy[214] making checks on such courts more important. Controlling appointments is one way the executive or legislative can have a check on that constitutional interpretation,[215] while also limiting the impact on the independence on the rest of the judiciary.

Furthermore, constitutional courts differ in nature from other courts in that they don't rule on concrete cases, but rather have a dual role of both a political and judicial nature in deciding more general questions of constitutional law. This could make it less problematic with political motives in appointments, as the court is not primarily ruling on specific conflicts where individuals could worry about the influence of the executive. Involvement by the other branches only in the appointments to constitutional courts, then, can allow the those branches some checks on the more politically controversial aspects of legal interpretation, while limiting any negative consequences for independence to one single court.

For Member States without a Constitutional Court, it is unclear whether the same amount of discretion could be accepted in regard to the appointment of judges to ordinary High or Supreme Courts. One the one hand, those courts have some of the same power of review and the final say on constitutional interpretation, meaning there is, to a degree, a similar need for checks on their power. On the other hand, these courts typically rule on concrete cases and only deal with more abstract constitutional questions when it pertains to the case at hand. Influence from the legislative and executive branch in appointments to such courts might create doubt as to the outcomes of those cases, especially if the case is against the state. It seems likely that the participation of the other branches in appointments will still be accepted, but that there is a much smaller room for political discretion than what would be accepted for a constitutional court.

4.6.3 The process for appointments

The process for the appointment, i.e. the actual manner in which judges are appointed, is central both to ensuring that the substantive conditions on which judges are to be evaluated is actually followed, and to ensure that there are no unproper influences in the procedure.

---

[214] Venice Commission (2007) page 3 note 1.

[215] Examples include the French *Conseil Constitutionnel* whose members are appointed by the Presidents of the Republic, of the *Sénat* and of the *Assemblée nationale*, and also include the former Presidents themselves, see Article 56 of the French Constitution.

There are a multitude of processes for appointing judges throughout the Member States of the European Union,[216] and Article 19(1) TEU does not impose an obligation to adopt a certain procedure of appointments. However, Article 19(1) does require that the procedure does not leave room for reasonable doubt as to the independence of the appointee,[217] which inter alia means that the procedure must be laid down in advance, and that statements of reason must be given to ensure transparency and that the criteria were actually followed.[218] This section will consider how different systems and processes for appointing judges align with the requirement of Article 19(1).

The first system to be considered is appointment of judges by way of direct election. This is an extremely rare system of appointment in Europe,[219] and has not been the subject of a case before the ECJ. The Venice Commission states that such systems can, on the one hand, ensure greater democratic legitimacy in the appointment of judges, which is likely a legitimate objective for Member States to pursue under Article 19(1) TEU.[220] On the other hand, such systems might draw judges into electoral politics and risk politicising the process,[221] which could create problems under Article 19(1) if it could cause individuals to doubt the independence of judges, especially in cases against a government whom the judge might have expressed support for in their electoral platform.

A system by direct elections would also seem to conflict with the requirement, as discussed above, that merit has to be the primary criteria for appointments. However, as stated, merit has two sides: technical competence and moral integrity. Merit could be ensured in direct elections by requiring a certain technical-legal competence to be eligible to run, while moral integrity is not an objective value, but rather something that seems suited for an electorate to consider.

---

[216] For an overview, see Venice Commission (1997) and (2007).

[217] See, inter alia, Joined Cases C-542/18 RX-II and C-543/18 RX-II [GC] *Simpson and HG* para 71.

[218] See Joined cases C-748/19 to 754/19 [GC] *WB and Others* paras 78-79 where a judge had been seconded based on criteria that were not public and without stating reasons. This increased the risk of arbitrariness and of manipulation and was thus one of the issues of independence in that case.

[219] Venice Commission (2007) para 9 gives elections at the Swiss canton level as the sole example. Such systems are however more common in the US.

[220] C-272/19 *Land Hessen* para 53 seems to imply that this is the case, in indicating that the involvement of the regional parliament in appointments served to ensure democratic legitimacy. The case dealt with independence under Article 267 TFEU, but the point should apply more strongly under Article 19(1) TEU.

[221] Venice Commission (2007) para 9.

An advantage of direct elections would be that they, by their nature, leave less room for the executive and legislative to exercise undue influence and appoint their preferred candidates. Elections ensure that at least a small majority would think there is a proper basis for the appointment of any given judge.

In total it seems like an open question whether such appointments are acceptable under Article 19(1) TEU. Because they are so unusual, and have very strong and clear advantages and disadvantages, it seems like a matter which could be left to the discretion Member States, as a part of their competence to choose their own constitutional systems. It does not seem, at least as of now, like an inherent threat to independence under Article 19(1) which the ECJ would be likely overrule. In support of that it can be mentioned that The Venice Commission seems to have accepted it, or at least left the question open.[222] However, Member States could be obliged to require certain minimum levels of legal competence and moral integrity, to be eligible election, in order to uphold the requirements discussed in the section above.

The second system to be considered is the appointment of judges by the executive branch, typically done with direct appointments by the head of state or a minister. It is a common way of appointment,[223] and the ECJ has clarified in many cases that executive influence in appointments is acceptable, as long as the appointee is not subordinated and remains independent once appointed.[224] In *Repubblika*, the Maltese President had the power to appoint judges, on the advice of the Prime Minister. The ECJ found that this arrangement did not create issues under Article 19(1) TEU, because the discretion of the Prime Minister and President was constrained by two important factors. Firstly, the discretion was limited by requirements in law for the minimum competence of any appointee.[225] Secondly, discretion was limited by the use of a judicial council,[226] which in practice conducted the evaluations and recommendations of candidates.[227] The Prime Minister could diverge from its recommendations, but the ECJ did not find that to be an issue as long as it was only done sparingly, because the Prime Minister was

---

[222] Venice Commission (2007) para 9.

[223] See Venice Commission (2007) para 13 following.

[224] See, inter alia, C-896/19 [GC] *Repubblika* para 56 and Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 [GC] *PM and others* para 233. Similarly in the case law of the ECtHR, see *Ástráðsson v. Iceland* [GC], no. 26374/18 para 207 and *Xero Flor v Poland* [J] no. 4907/18 para 252.

[225] C-896/19 [GC] *Repubblika* para 70.

[226] Called the Judicial Appointments Committee in this case.

[227] C-896/19 [GC] *Repubblika* para 66, cf para 5.

obliged to state reasons for his recommendations, and would therefore have to explain why they were diverging from the judicial council.[228]

The case indicates that Article 19(1) TEU allows a general system of direct appointments of judges by the executive as long as the law ensures that legitimate substantive conditions are the primary grounds for appointments, and that the discretion of the executive is sufficiently limited, for example by a judicial council. On the other hand, Article 19(1) TEU would preclude a system whereby judges generally were directly appointed without such safeguards. For example, the ECJ found that the appointment by the Polish President to the Disciplinary Chamber of the Polish Supreme Court, without sufficient safeguards, was one of several issues that in total undermined the independence of that chamber, and there were strong indications that such appointments were used deliberately to stack the chamber with loyalists.[229]

However, it is again possible that Constitutional Courts might have more leeway. In *PM and Others* The ECJ accepted appointments to the Constitutional Court of Romania made by the executive and legislative. There were legal requirements aimed at securing a high level of merit, and guarantees of independence once appointed, but no judicial council or similar safeguard against political discretion.[230]

In total, direct appointments by the executive are acceptable under Article 19(1) TEU, where it is ensured that the proper substantive requirements of merit are the primary requirement of candidates, and the discretion of the executive is limited, for example by the participation of a judicial council.[231] Member States might have more leeway for executive discretion in appointments to High Courts, especially Constitutional Courts, as long as strong safeguards ensure the independence of those judges once appointed.

---

[228] C-896/19 [GC] *Repubblika* para 71.

[229] C-791/19 [GC] *Commission v Poland (Disciplinary regime of judges)* paras 88-112. The Chamber was new, and composed exclusively of newly appointed judges, see para 94 appointed by procedure dominated by the executive.

[230] Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 [GC] *PM and others* paras 233-235, cf. para 18.

[231] See, on the use and requirements of such councils, section 4.10 below. An alternative or additional safeguard could possibly be a strong legal culture that de facto constrains the discretion of the judiciary, see *Ástráðsson v. Iceland* [GC], no. 26374/18 para 230 and the Venice Commission (2007) para 5 and (2016) para 82.

The last system to be considered is election of judges by the parliament. Such elections have some of the same benefits in ensuring the democratic legitimacy as direct elections, but also carry similar risks of undue influence and the dominance of political motivations as elections by the executive branch. The nature of parliamentary votes, and the political games in the parliament, might even increase the risk of politicising the process. The Venice Commission recommends that parliamentary votes are unsuited to judges of regular courts.[232]

The ECJ has, in its case law, treated influence from the legislative branch in the same manner with which it has treated the executive. It has stated, like for executive influence in appointments, that it is a question of ensuring that the appointee is not subordinated and remains independent once appointed.[233]

That means that the discussion above about direct appointments by the executive will apply equally to elections by the legislative or other procedures whereby the legislative has influence on the appointment proceedings. Elections by the legislative would then be acceptable where sufficiently constrained by legal requirements and limitations, like a judicial council. Here too, it is likely that Member States have more leeway with elections to an otherwise independent constitutional court, possibly also supreme courts.

4.6.4 Irregularities during appointments

Even if the law lays down proper conditions and processes for appointments, Member States can fail their obligations under Article 19(1) TEU if irregularities undermine the procedure. Irregularities can range from small procedural errors to outright interference and side-lining of the rules. This section seeks to analyse when irregularities are such as to creates issues of independence under Article 19(1).

Minor irregularities or errors in an appointment procedure will not affect the independence of the appointee.[234] Rather, the ECJ has opined that it is only those irregularities that "create a real risk that other branches of the State (…) could exercise undue influence" will undermine

[232] Venice Commission (2007) para 10-12.

[233] In Case C-791/19 [GC] *Commission v Poland (Disciplinary regime of judges)* para 103 the ECJ stated that it did not, in itself, give rise to doubts about the independence of NCJ-appointees, that they were appointed by the legislature. See Similarly in the case law of the ECtHR, see *Ástráðsson v. Iceland* [GC], no. 26374/18 para 207 and *Xero Flor v Poland* [J] no. 4907/18 para 252. adjudicatory role.

[234] Case C-132/20 [GC] *BN and Others* para 123.

independence, which is the case when the irregularity has disregarded "fundamental rules" in the appointment procedure.[235]

The ECJ has dealt with several cases on irregularities. In *Simpson and HG,* the ECJ considered an irregularity in the appointment to the European Civil Service Tribunal, where it had issued a public call to fill two empty seats, and then made a list of applicants, from which it also had drawn candidates to fill a later third seat. This was solely a violation of its own public call, and not a violation of neither its statutes nor other EU law.[236] Such an irregularity was not of such a gravity to indicate that the Council had made unjustified use of its powers.[237] In other words, purely technical irregularities do not create issues under Article 19(1) TEU.

The Court dealt with two further irregular appointments in *BN and Others*. The first judge had originally been appointed during the Polish Peoples Republic, an undemocratic regime, and reappointed on the recommendation of a judicial council which was neither transparent nor open to challenge. [238] The second judge had been appointed, years ago, on the recommendation of a judicial council whose member used rules on tenue that were later declared unconstitutional, thus retroactively making their composition irregular.[239]

The Court found that neither of these irregularities were a threat to independence. The ECJ saw no reason why being originally appointed under the PPR would in any way enable any undue influence over that judge today.[240] The Court stated similarly that it had not been presented no reasons for why unconstitutional rules on tenure on judicial councils, nor the insufficient transparency and lack of challengability, were irregularities that would give rise to reasonable doubt about the independence of the judges now.[241]

---

[235] Joined Cases C-542/18 RX-II and C-543/18 RX-II [GC] *Simpson and HG* para 75; Case C-487/19 [GC] *W.Ż* para 130; and Case C-132/20 [GC] *BN and Others* para 122. Cf. the test employed by the ECtHR of whether the irregularity constitutes a "manifest" breach of domestic law or the Convention, and whether the rules breaches are "fundamental" to the appointment of judges, see *Ástráðsson v. Iceland* [GC], no. 26374/18 paras 244-247.

[236] Joined Cases C-542/18 RX-II and C-543/18 RX-II [GC] *Simpson and HG* para 68. Because the case concerned an EU Court, it was not decided on the basis of Article 19(1) TEU, but rather article 47 of the Charter.

[237] Joined Cases C-542/18 RX-II and C-543/18 RX-II [GC] *Simpson and HG* paras 79-82.

[238] Case C-132/20 [GC] *BN and Others* paras 80, 101-103 and 111.

[239] Case C-132/20 [GC] *BN and Others* para 110.

[240] Case C-132/20 [GC] *BN and Others* paras 105-107.

[241] Case C-132/20 [GC] *BN and Others* paras 125-131.

BN and Others is especially interesting because the appointment procedure of the Polish Peoples Republic would likely have violated Article 19(1) TEU if implemented today. The statements of the Court therefore seem to indicate that, where irregularities have already happened in the past, the best approach to protect judicial independence can be to *laissez faire* unless the irregularity has consequences for the imperviousness of the judge in existing and future cases. In fact, using old irregularities to question the independence of judges could itself be a way for a new executive to put pressure on old judges with whom it disagrees.[242]

The ECJ has also dealt with cases where the irregularities did undermine the independence of the appointee. In *W.Ż.* the judge in question had been recommended by the Polish National Council of the Judiciary, but that recommendation was the subject of an appeal procedure and had been suspended by the Supreme Administrative Court, pending another referral before the ECJ.[243] The President disregarded this suspension and proceeded to appoint the judge in question to the Chamber of Extraordinary Control and Public Affairs of the Supreme Court.[244]

The ECJ found that this irregularity constituted a violation of "fundamental rules" in the appointment procedure, because the judge was appointed despite the suspension and possible annulment of the recommendation.[245] The difference between the irregularities in *W.Ż.* and *BN and Others* or *Simpson and HG* seems to lie in the risk of undue influence created by the irregularity. In *W.Ż.* the irregularity created a high risk of undue executive influence in deciding which judge became appointed, because the President chose to disregard established procedure to get his appointment through. In *Simpson and HG* and *BN and Others*, on the other hand, the irregularities were either old or of a more technical nature, and therefore created no risk of the executive or legislative undermining the appointment procedure or having undue influence over the appointee.

---

[242] This was largely what seems to be the reality behind *BN and Others*. The case was referred by a judge newly appointed by the PiS government of Poland in procedure which itself was found to be in breach of Article 19(1) in C-487/19 [GC] *W.Ż.* It has been alleged that the referral was made not because there was a need for aid in interpreting EU law, but rather as an attempt to "counterbalance" the claims that newly appointed judges lacked independence and to support PiS' rhetoric of "decommunising" the courts, see Filipek, VerfBlog 13th May 2022.

[243] This was the case in C-824/18 [GC] *A.B. and Others*.

[244] This chamber was the second new chamber established by the PiS government in the Supreme Court, along with the Disciplinary Chamber.

[245] See C-487/19 [GC] *W.Ż* paras 134-152, especially 138-144. There were multiple issues affecting the independence of the judge in question, including the lacking independence of the national council of the judiciary, so it is unclear whether this irregularity of ignoring the suspension alone was decisive or sufficient for the finding of a breach. But it seems clear that it is a sufficiently serious

ECtHR case law seems to support such a conclusion. It has found a violation of "fundamental rules" in the appointment procedure where The Icelandic Minister of Justice appointed different judges from a shortlist than those the judicial council had ranked highest, without stating sufficient reasons, and without the parliament voting individually on the changes as required by the rules.[246] It found the same in a case where the Polish president refused to take the oaths of lawfully appointed judges, and instead waited for the next parliamentary majority and took the oaths of the judges they appointed.[247] Both of these irregularities are, clearly, irregularities which have the consequence of creating a risk for undue executive influence in the appointment procedure, or over the appointees themselves.

In total, the case law indicates that different types of irregularities, by their nature and consequences, are more or less likely to restrict the independence of the judiciary under Article 19(1) TEU. It is especially irregularities that breach fundamental rules of the appointment procedure, thereby allowing the executive or legislative increased discretion in appointments, that Member States must try to avoid under Article 19(1).

4.7 Establishing tenure and sufficient length of service

In addition to ensuring the proper appointment of judges, Member States must ensure that they can independently exercise their position once appointed. For that, judges must be secure in their position and know that their rulings will not be met with punishments to their job and career. It is a generally accepted standard of independence that judges must have security of tenure until either mandatory retirement age or the expiry of their term in office, both by the ECJ[248] and in general IHRL.[249]

This raises two questions. Firstly, how long must those terms be. If they can be too short, them it does not offer much security in practice. Secondly, to what degree can Member States utilise probationary or provisional appointments of judges.

---

[246] In the case *Ástráðsson v. Iceland* [GC], no. 26374/18.

[247] In the case *Xero Flor v Poland* [J] no. 4907/18.

[248] See C-619/18 [GC] *Commission v Poland (Independence of the Supreme Court)* para 76 and C-192/18 [GC] *Commission v Poland (Independence of the ordinary courts)* para 113. Similarly, but more principled, in the opinion of AG Tanchev in C-192/18 *Commission v Poland (Independence of the ordinary courts)* para 104.

[249] By the HRC in its General Comment no. 32 para. 19 and in *Zamora v Venezuela* (2017) para 9.3, by the Inter-American Court of Human Rights in *Quintana Coello et al. v. Ecuador* (2013) para 145. See also the Venice Commission (2010) paras 33-35 and (2016) para 76, who favour tenure until retirement.

For the first problem, on the duration of terms. The ECJ has stated that the length of service can be a relevant factor in considering the independence of a judge or court,[250] but has not stated any specific minimum length. A too short period of appointment would likely undermine the purpose of having tenure, and would not offer guarantees to judges that they can rule independently without worrying about their job.

The ECJ did touch upon an issue of short appointments in *Commission v Poland (Independence of the Supreme Court)*, where the Polish President could extend the duration of Supreme Court judges terms beyond the age of retirement by three years, up to two times. The Court found such an arrangement to undermine independence in violation of Article 19(1) TEU, but primarily because of the discretion afforded to the President, instead of the short terms.[251] However, the case could at least indicate that three year terms are on the shorter end.

The ECtHR has dealt more extensively with questions on the durations of terms and has in general not been strict on term lengths. It accepted a 3-year renewable terms were accepted in *Sramek*, as well as the possibility of even shorter terms where a judge was appointed in the middle of a term.[252] Similarly, A 2-year renewable term was accepted by the grand chamber in *Maktouf and Damjanović*. That case was about internationally seconded judges in a time-limited war crimes chamber, so the Court found the short terms "understandable given the provisional nature of the international presence at the State Court and the mechanics of international secondments".[253] The cases indicate what the ECtHR expressed more generally in *Siglfirðingur*: that a "rather short" term "cannot (…), by itself affect their independence".[254]

In other words, the term duration itself is rarely decisive in ECtHR case-law on independence. However, that does not mean that they are irrelevant, and the ECtHR has seen shot terms as a supporting or contributing factor in undermining independence. In *Incal*, the ECtHR found that

---

[250] C-619/18 [GC] *Commission v Poland (Independence of the Supreme Court)* para 74 and C-192/18 [GC] *Commission v Poland (Independence of the ordinary courts)* para 66

[251] C-619/18 [GC] *Commission v Poland (Independence of the Supreme Court)* para 98 following.

[252] *Sramek v. Austria* [P], no.8790/79 para 38, cf. 26. Cf. also the 3-year terms for unpaid appointees in *Campbell and Fell v. The United Kingdom* [J], no. 7819/77, para 80; A 4-year term was accepted in *Belilios v. Switzerland* [P] no. 10328/83 para 66; and a 5-year term in *Ettl and Others v. Austria* [J], no. 9273/81, para. 41.

[253] *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], no. 2312/08, para 51.

[254] *Siglfirðingur Ehf v. Iceland* [A], no. 34142/96. That case also regarded a three-year term. The case reached a friendly settlement and was struck from the list, see *Siglfirðingu*r *Ehf v. Iceland* [J] no. 34142/96 paras 12-14.

a term which “is only four years and can be renewed” was one of the factors which leads it to find that the court in question lacked independence.[255]

In other words, the ECtHR takes a very flexible approach. Two years is acceptable in *Maktouf and Damjanović* where it clearly serves a useful purpose and creates no obvious issues, whereas in *Incal* a four-year term made the court more at risk of undue influence. Such an approach could likely be adopted by the ECJ as well, as it would allow it to better take account of national differences, objectives and the context in which short durations are used.

If that is the case, Article 19(1) would in principle permit short terms in isolation, but the ECJ could take account of short terms as one factor which could support a finding of lacking independence. Very short terms might be precluded, at least if they don’t pursue some useful and legitimate objective, cf. *Maktouf and Damjanović*.

The second problem with the obligation to establish tenure for judges is whether, and to what degree, Member States can use provisional appointments.[256] Such appointments can easily come into conflicts with requirements of independence, because the judges are in a temporary job where their continuing or future employment might seem to depend on how their work is perceived. If allowed, such appointments would be an exception to the general requirement of tenure for judges.

The ECJ has dealt with several types of provisional appointments, and it does not approve of provisional appointments where this gives the executive a lot of sway over the employment of a judge. As discussed above, the ECJ disapproved of a Polish system whereby a judge’s term could be extended for two three year periods after their ordinary retirement age, on the discretion of the President.[257]

However, the ECJ has accepted certain temporary appointments. In *W.B. and Others*, the ECJ dealt with a system for the secondment of judges where the minister could second a judge for both a fixed and indefinite period, with the power to terminate it at any time.[258] The Court stated

[255] *Incal v. Turkey* [GC] no.22678/93 para 68. Similarly, *Çıraklar v. Turkey* [J], no. 1960/92, para 39.

[256] Provisional appointments is used widely here to mean all appointments of a temporary nature or which can be terminated at an uncertain time. It would include, for example, secondments, probationary appointments (trial periods) and temporary positions.

[257] See above, page 54 and note 251.

[258] Joined Cases C-748/19 to C-754/19 [GC] *W.B. and Others* paras 9 and 80.

that such temporary secondments in theory were permissible "in the interests of the service",[259] but that several features of this system undermined the independence of the seconded judge, including the discretionary power of the minister to terminate the secondment.[260]

In other words, secondments can be accepted when they are useful for the judicial service but must offer sufficient guarantees to protect the temporary judge against undue influence. The same conclusion must likely be true for other types of provisional appointments, which similarly can be "in the interests of the service", but also create similar issues. For example, temporary appointments can help cover temporary caseloads and ensure resource efficiency, while probationary periods (trial periods) can be useful to ensure the competency of an appointee, but both of these also create similar risks of undue influence.[261] The HRC has recommended more generally for provisional appointments that they must have "sufficient guarantees" and be "exceptional and limited in time".[262]

In total, a likely conclusion on the use of provisional appointments under article 19(1) TEU seems to be that their use is fine, as long sufficient guarantees keep executive and legislative at a minimum, their use is clearly defined in time and space by rules set in advance and the scope of the provisional appointment is limited to what is necessary.[263]

4.8 Ensuring the irremovability of judges

When Member States are largely obliged to establish tenure for judges, they must also ensure that judges have security of that tenure, in other words that they cannot ordinarily be removed before the expiration of their term. This is often called the principle of irremovability, and is

---

[259] Joined Cases C-748/19 to C-754/19 [GC] *W.B. and Others* para 72.

[260] Joined Cases C-748/19 to C-754/19 [GC] *W.B. and Others* paras 77-87, especially 80-83.

[261] The Venice Commission has strongly warned against using probationary periods because making employment reliant upon performance evaluation creates a high risk that the potential appointee will be influenced in their judgements to gain a good evaluation, see Venice Commission (2007) paras 38-43.

[262] *Zamora v. Venezuela* (2017) para 9.3.

[263] That can include limiting the scope of work such appointees do. Venice Commission (2007) para 43 gives an example of limiting trial period-judges to not take judicial decisions, but just assist in judgements. Other possible limitations on could include limiting the cases of provisional judges to those of lesser importance or requiring that provisional judges be in the minority of a panel, so as to not have the sole decisive say.

widely acknowledged both by the ECJ,[264] the ECtHR,[265] and in wider IHRL.[266] If judges could be removed before the expiration of their terms, the executive or legislative could use that to pressure judges for favourable outcomes, or alternatively they could seek to remove disloyal judges while keeping the loyal ones, thus in essence "stacking" the courts.

The ECJ has dealt with several cases on the principle and has stated as a general rule that no exceptions are allowed from the principle unless justified by "legitimate and compelling grounds, subject to the principle of proportionality".[267] In other words, the early removal of judges constitutes a lea restriction of independence under Article 19(1) TEU, and the Member State will be in breach unless the measure can be justified.[268] The rest of this section will look at what constitutes a "removal", in which situations removals can be legitimate and what safeguards Article 19(1) requires for any legitimate removals.

The first problem is what constitutes a "removal" of a judge. The ECJ has clarified that it is more than just being removed from one's job. In *W.Ż* the Court stated that the principle also applies to the transfer of a judge to another position.[269] Furthermore, indirect ways of removing a judge will also be included. In *Commission v Poland (Independence of the Supreme Court)*[270] and *Commission v Poland (Independence of the ordinary courts)*[271] the ECJ dealt with a reform to the retirement ages of, respectively, judges in the Polish Supreme Court and in the ordinary courts, which lowered the retirement age for sitting judges. This reform had the effect of forcing judges to end their term earlier – prematurely – and therefore had to be evaluated against the principle of irremovability.[272] The scope of the principle of irremovability must therefore be interpreted broadly. It will likely apply to any measure which has the consequence of changing

---

[264] See, inter alia, C-619/18 [GC] *Commission v Poland (Independence of the Supreme Court)* para 76; C-192/18 [GC] *Commission v Poland (Independence of the ordinary courts)* para 113 and 125.

[265] see *Ástráðsson v. Iceland* [GC], no. 26374/18 para 239.

[266] See HRC General Comment no. 32 para. 19 and the Inter-American Court of Human Rights in *Quintana Coello et al. v. Ecuador* (2013) para 145. It has also been recognised by the Venice Commission, (2010) para 43

[267] C-619/18 [GC] *Commission v Poland (Independence of the Supreme Court)* para 76 and C-192/18 [GC] *Commission v Poland (Independence of the ordinary courts)* para 113.

[268] See section 6.3 for a discussion on how the ECJ considers such justifications of restrictive measures.

[269] C-487/19 *W.Ż* [GC] paras 114-115. See also the Venice Commission (2016a) para 80.

[270] C-619/18 [GC] *Commission v Poland (Independence of the Supreme Court)*.

[271] C-192/18 [GC] *Commission v Poland (Independence of the ordinary courts)*.

[272] C-619/18 [GC] *Commission v Poland (Independence of the Supreme Court)* para 78.

the position of a judge, without their consent, before the expiration of their term, as it was set when they started it.

The second problem is what constitutes "legitimate and compelling" reasons to remove a judge. The ECJ has stated that removals are widely accepted where a judge is deemed unfit for the purposes of carrying out their duties, or due to serious breaches of their obligations, provided that appropriate procedures are followed.[273] However, it seems like other and more general policy objectives might in theory be acceptable. In *Commission v Poland (Independence of the Supreme Court)*, Poland justified the reduction of the retirement age – resulting in the early removal of judges – by the need to standardise the retirement age applicable to all workers, and to improve the age balance among senior members of the Supreme Court.[274] The ECJ accepted that both of these could, in principle, be acceptable objectives, but in practice raised doubt as to whether those were the real objective, and regardless found the measures unsuitable and disproportional in relation to those objectives.[275] Other examples of legitimate reasons were given by the Court in *W.Ż*, where it stated that needs relating to the distribution of available resources or ensuring the proper administration of justice were particularly relevant.[276]

In total it seems as if the Court is liable to accept a wide range of policy objectives as "legitimate and compelling", at least where they relate to ensuring a good organisation, functioning, resource usage or employment situation in the judiciary. It can also seem like the Court is generally hesitant of overruling or scrutinising the stated objective of the Member State. See section 5.3.2 for a more comparative analysis of how the court has defined "legitimate objectives" in different types of cases.

The third problem is the safeguards required for any legitimate removal to be accepted. Here the ECJ has set up the same requirements for the early removal of judges as it has for the

---

[273] C-192/18 [GC] *Commission v Poland (Independence of the ordinary courts)* para 113 and C-487/19 *W.Ż* [GC] para 112.

[274] C-619/18 [GC] *Commission v Poland (Independence of the Supreme Court)* para 81.

[275] Largely because the rules were applied to already sitting judges without transitional measures and gave the president authorisation to let judges continue beyond the new retirement age, which in fact differed from the rules that were applicable to other workers. This was disproportional, did not actually standardise the rules and made it seem like the objective was to exclude certain groups of judges, see C-619/18 [GC] *Commission v Poland (Independence of the Supreme Court)* paras 82-97.

[276] C-487/19 *W.Ż* [GC] para 118.

imposition of disciplinary sanctions,[277] which makes sense because disciplinary sanctions are one way in which judges can be removed before the expiration of their term. Because the ECJ has expanded more on the requirements of safeguards in cases dealing with disciplinary regimes, this problem will be analysed further in the following section.

4.9 Limiting and safeguarding disciplinary regimes

As discussed in section 2.3, the rule of law does not entail the maximisation of judicial independence at any cost – it also requires checks and balances on the judiciary to ensure that it fulfils its function. One such check is the establishment of a disciplinary regime for judges, to prevent abuse of judicial power.

However, investigating and sanctioning judges because of their conduct on the job also raises many problems and risks for the independence of the judiciary. On the one hand, disciplinary proceedings, or the mere threat of them, can have serious consequences for the individual judge in question and give the other branches of powers a very direct means with which to control the judiciary. On the other hand, a disciplinary regime can ensure that judges conduct their duties faithfully, can ensure the public that the judiciary is well functioning and independent, and can ensure that outside interests and improper considerations are not tolerated.

The ECJ has stated that it is within the Member States' competence to choose if they want to employ disciplinary regimes, which can contribute to ensuring the accountability and effectiveness of the judicial system.[278] However, the use of such sanctioning must necessarily be limited to relevant and necessary situations and must be accompanied by sufficient safeguards to avoid political abuse.[279] These two requirements will be discussed in turn.

Regarding the first requirement, the ECJ requires that liability should be limited to "entirely exceptional" cases of inexcusable forms of conduct, done with the purpose of ensuring the sound administration of justice or preventing external pressure.[280] Examples of such exceptional cases include violations of law done "deliberately and in bad faith" or as a result of

---

[277] C-619/18 [GC] *Commission v Poland (Independence of the Supreme Court)* para 77 and C-192/18 [GC] *Commission v Poland (Independence of the ordinary courts)* para 114.

[278] Case C-791/19 [GC] *Commission v Poland (Disciplinary regime of judges)* para 136 and Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 [GC] *AFJR* para 229.

[279] See C-791/19 [GC] *Commission v Poland (Disciplinary regime of judges)* para 136 and 138.

[280] Case C-719/19 [GC] *Commission v Poland (Disciplinary regime of judges)* para 139.

"serious and gross negligence", or the exercise of duties in a manner which is "arbitrary" or "denies justice".[281]

The ECJ has dealt with a large set of cases where disciplinary liability that was not limited to such "entirely exceptional" cases. Firstly, it is clearly not allowed to sanction judges for making use of their rights under EU law and for cooperating with EU institutions. This was the case in *Proceedings against IS* and *Commission v Poland (Disciplinary regime of judges)*, where judges in Hungary and Poland, respectively, could be held liable for making references to the ECJ under Article 267 TFEU. The Court stated that such liability was a threat to independence and not permissible under Article 19(1) TEU.[282]

Secondly, it is not permissible to sanction judges for, in the exercise of their ordinary adjudication, giving interpretations that contradict a higher court. In *PM and Others* and *RS*, judges in Romania could be held liable for failing to comply with a judgement the Constitutional Court in their adjudication, even where the judges held that the Constitutional Court had misinterpreted, for example, EU law. The ECJ stated that Article 19(1) did not inherently preclude liability as a result of judicial decisions adopted by judges, but that the liability was clearly not limited to "entirely exceptional" circumstances in this case. Article 19(1) would therefore preclude national rules under which any failure to comply with the decisions of a constitutional court could trigger liability.[283]

Lastly, the ECJ has opined in *AFJR* and *Commission v Poland (Disciplinary regime of judges)* that provisions on liability must be sufficiently clear and precise, in order to avoid exposing judges to the risk that disciplinary liability may be triggered solely because of the decisions taken by them.[284] In both cases the provisions were not sufficiently precise. In *AFJR*, Romanian judges could risk financial liability for "judicial errors", without any further delimitation. The

---

[281] Case C-719/19 [GC] *Commission v Poland (Disciplinary regime of judges)* para 137 and Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 [GC] *PM and others* para 238. Cf. Venice Commission (2016b) paras 69, 75 and 77-80.

[282] Case C-564/19 [GC] *Proceedings against IS* para 91 and Case C-791/19 [GC] *Commission v Poland (Disciplinary regime of judges)* para 234. Both cases were considered exclusively under Article 267 TFEU, but the result would likely have been the same if considered under Article 19(1) TEU. Cf. also the statements in Joined Cases C-558/18 and C-563/18 [GC] *Łódzki and Others* paras 55-59, but the case was inadmissible.

[283] Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 [GC] *PM and Others* paras 238-243 and Case C-430/21 [GC] *RS* paras 81-89.

[284] C-719/19 [GC] *Commission v Poland (Disciplinary regime of judges)* para 140 and Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 [GC] *AFJR* para 234. Cf. also the HRC, General Comment no. 32 para 19.

ECJ stated that this could risk influencing the adjudication and was not limited to those "exceptional cases" where liability could be used.[285] In *Commission v Poland (Disciplinary regime of judges)*, judges could be held liable for "errors" entailing an "obvious" violation of law. This provision had been given a broad interpretation in recent case law, so the ECJ stated that it was too broad and risked judges being held liable solely for the "incorrect" content of their decisions, which created issues of independence.[286]

In total, while the abovementioned case law is somewhat casuistic, all the cases seem to have in common that the liabilities are too broad and simply not necessary to uphold the objectives of Article 19(1) TEU, in ensuring effective judicial protection and upholding the rule of law. A useful yardstick for types of liability not yet addressed by the Court can likely be whether and how the liability aligns with the objective of Article 19(1). For example, corruption or nepotism clearly undermines effective judicial protection, whereas sanctioning judges for say, dishonest morality in their private life, would likely not relate to the objectives of Article 19(1).

The case law could indicate that disciplinary regimes are an area the ECJ will tend to scrutinise quite closely with little room for leeway and Member State preferences, but that might be coloured by the subject matter of those cases. It is possible that the Court would be more reluctant to overrule liabilities which the Member State has found to be necessary for more legitimate aims under Article 19(1), like a regime for dealing with serious issues of corruption and nepotism, which both are important under Article 19(1).

In addition to ensuring that liabilities are limited to "exceptional" situations, Article 19(1) TEU also obliges Member States to ensure sufficient safeguards on the disciplinary procedure.[287] The mere prospect of disciplinary proceedings without sufficient safeguards can have a chilling effect on judges that undermine their independence.[288]

The ECJ has stated that the disciplinary regime must fulfil the requirements "of a fair trial, and, in particular, the requirements relating to the respect for the right of the defence", as also affirmed in Article 47 of the Charter and Article 6 ECHR.[289] This includes ensuring that the

---

[285] Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 [GC] *AFJR* paras 229-234..

[286] C-719/19 [GC] *Commission v Poland (Disciplinary regime of judges)* paras 134-158, especially 144.

[287] See C-216/18 PPU [GC] *LM* para 67 and C-487/19 [G.] *W.Ż* para 113.

[288] Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 [GC] *AFJR* para 236.

[289] Case C-791/19 [GC] *Commission v Poland (Disciplinary regime of judges)* paras 203 and 213.

court or body conducting the disciplinary proceedings itself must fulfil the requirements of independence.[290]

In *Commission v Poland (Disciplinary regime of judges)*, for example, the Disciplinary Chamber of the Supreme Court was not sufficiently independent[291] and had excessive power to determine jurisdiction in the first instance thus influence the proceedings.[292] Furthermore, the system allowed for the possibility of judges being investigated indefinitely[293] and allowed for proceedings to go on despite the justified absence of the accused or their counsel.[294] In *AFJR*, the legislation did not ensure the right of the defendant judge to be heard.[295]

Furthermore, sufficient safeguards must also be ensured in the investigation and prosecution of such liabilities. In *AFJR* there were several issues in this regard. The Public Prosecutors office was not sufficiently independent, and could be used to pressure the judges,[296] there were not sufficient resources to conduct investigations within a reasonable time,[297] and the Minister was left large discretion in whether to commence proceedings or not, which created a risk of undue pressure on judges.[298]

In total, Member States must ensure that the requirements placed on them in organising their judiciaries under Article 19(1) TEU are also upheld in the organisation of the disciplinary regime, including ensuring sufficient independence and protections against abuse for the body responsible for investigation and the proceedings. Those proceedings must also uphold the right of the accuses judge under the ECHR art. 6, and art. 47 of the Charter if applicable, for the

---

[290] Case C-791/19 [GC] *Commission v Poland (Disciplinary regime of judges)* para 82. See paras 88-112 for the consideration of the Disciplinary Chamber. From the ECtHR, see, inter alia, *Oleksandr Volkov v. Ukraine* [J] no. 21722/11 paras 109-117 and *Denisov v. Ukraine* [GC] no. 76639/11 para 72, where the High Council of Justice was not sufficiently independent.

[291] Case C-791/19 [GC] *Commission v Poland (Disciplinary regime of judges)* paras 88-112.

[292] Case C-791/19 [GC] *Commission v Poland (Disciplinary regime of judges)* paras 164-176.

[293] Case C-791/19 [GC] *Commission v Poland (Disciplinary regime of judges)* paras 189-202.

[294] Case C-791/19 [GC] *Commission v Poland (Disciplinary regime of judges)* paras 208-213.

[295] Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 [GC] *AFJR* para 239.

[296] Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 [GC] *AFJR* paras 216-220, cf. also paras 199-200.

[297] Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 [GC] *AFJR* paras 221-222.

[298] Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 [GC] *AFJR* paras 239-241.

disciplinary regime not to be a threat to independence and be at risk of creating a chilling effect among judges.

4.10 Establishing judicial councils

The use of judicial councils is one common way many Member States[299] safeguard judicial independence in various processes which can affect the appointment or career of a judge or the autonomy of the judiciary. The term "judicial council" refers to varied group of institutions in the Member States, but they have in common that it is a body which has a central role in the administration of the judiciary and usually serves to establish a degree of autonomy and representation for the judicial profession.

Judicial councils have been mentioned several times in the discussion above, and have been referenced as a possible safeguard of independence by the ECJ in many cases.[300] The purpose of this section is to more closely analyse the use of such judicial councils and what Article 19(1) TEU requires for them to be a safeguard of independence.

As a baseline, the ECJ has stated that councils must themselves be sufficiently independent.[301] In *A.K. and Others* and *Commission v Poland (Disciplinary regime of judges)*, the ECJ had to consider whether the Polish National Council of the Judiciary functioned as a safeguard to the appointment procedures of judges. The Court found that it was not sufficiently independent to act as a safeguard for three reasons. Firstly, the reform of the Council had included reducing the terms of existing members and replacing them with new ones. Secondly, the vast majority judges elected to the Council were appointed by the legislative and executive. Thirdly, the change of the membership of this Council came at the same time as the reforms lowering the retirement ages of Polish judges and the creation of two new Polish Supreme Court chambers, making safeguarding appointment procedures more important.[302]

---

[299] See the opinion of AG Tanchev in Joined Cases C-585/18, C-624/18 and C-625/18 *A.K. and Others* paras 124, with further references.

[300] See, inter alia, C-619/18 [GC] *Commission v Poland (Disciplinary regime of judges)* para 115, C-791/19 [GC] *Commission v Poland (Disciplinary regime of judges)* para 99 and C-896/19 [GC] *Repubblika* para 66.

[301] Joined Cases C-585/18, C-624/18 and C-625/18 [GC] *A.K. and Others* paras 137-138; Case C-824/18 [GC] *A.B and Others* paras 124-125 and Case C-896/19 [GC] *Repubblika* para 66.

[302] Joined Cases C-585/18, C-624/18 and C-625/18 [GC] *A.K. and Others* para 143 and C-791/19 [GC] *Commission v Poland (Disciplinary regime of judges)* paras 103-108. See also the case law of the ECtHR on the NCJ: *Reczkowicz v. Poland* [J], no. 43447/19 (2021) paras 225-282; *Dolińska-Ficek and Ozimek v. Poland* [J]

In other words, Members of judicial councils must, like judges, have some form of security of tenure, and there cannot be excessive legislative and executive influence on such councils. However, this doesn't preclude that the legislative or executive can appoint some of the members. In *Land Hessen*, seven out of 13 council members were appointed by the legislative.[303] The Court stated that a majority of the members being chosen by the legislature wasn't such as to, by itself, undermine the independence of an appointee.[304] That said, the Court clearly saw such legislative influence as making the council a less effective safeguard.[305]

The balance struck by the Court seems to be in line with the recommendations of the Venice Commission. It recognises the need for balance in the composition of such councils, to ensure both the self-administration of the judiciary and the accountability of the judiciary, [306] but states that the primary function of such councils is ensuring judicial independence, therefore the majority of members should be elected by the judiciary itself.[307] *Land Hessen* clearly illustrates that the Member States have room to diverge from this recommeendation, but that would also leave the councils less effective. If judicial councils are to act optimally as a safeguard of independence under Article 19(1) TEU, then, majority representation from the judiciary is the best-practice solution.

It is also from the case law of the ECJ that relatively minor errors in the compositions of judicial council are not such to undermine their function. In *BN and Others*, a provision regulating security of tenure for, and rules for the distribution of, members of the judicial council had been declared unconstitutional. The ECJ contrasted the issue in this case with that in *A.K. and Others*

---

no. 49868/19 and 57511/19 paras 281-320 and 340-355; and *Advance Pharma v. Poland* [J] no. 1469/20 paras 303-321 and 336-351.

303 See C-272/19 *Land Hessen* paras 53. Five members were appointed by the judiciary, and one member rotated between the two regional bar associations.

304 C-272/19 *Land Hessen* paras 54-58. The case was decided under Article 267 TFEU, but this point has been reiterated in C-791/19 [GC] *Commission v Poland (Disciplinary regime of judges)* para 103.

305 C-272/19 *Land Hessen* para 57, cf. 55. The Court clearly considers the legislative influence as ”one factor” which in isolation would escape criticism under Article 19(1), but when combined with other issues it could undermine the independence of the procedure.

306 Venice Commission (2007) para 27. Cf. also the discussion in section 2.3.

307 Venice Commission (2007) para 29 and (2010) paras 26-27. Cf. also the opinion of AG Tanchev in Joined Cases C-585/18, C-624/18 and C-625/18 *A.K. and Others* para 126.

and *Commission v Poland (Disciplinary regime of judges)* above, and stated that this issue, unlike those, did not reinforce the influence of the executive or legislative in the process.[308]

Lastly, if a judicial council is to function effectively as a safeguard of independence, it must also have sufficient powers and jurisdiction. An example of where that was the case is *Repubblika*. In that case the Maltese president's power to appoint judges was checked by an independent Judicial Appointment Committee. The President did not have to follow the recommendations of the Committee, but he had to state sufficient reasons for why recommendations were not followed. The ECJ found that a committee with such powers offered sufficient safeguards to ensure that the presidential appointments did not threaten independence. [309]

In total, judicial councils are an effective way of ensuring judicial autonomy and self-administration in procedures affecting the judiciary. Most of the cases before the ECJ concerned appointments, but councils can play a role in most issues concerning the judiciary.[310] Article 19(1) TEU does not oblige Member States to establish such bodies, and especially in states where legal culture and other types of established institutions achieve a similar result, it might not be necessary to establish such a council. However, where they are used, their independence must be ensured for them to be effective.

4.11 Ensuring the availability of remedies and subsequent control

The last point to be considered under this chapter is the relevance of existing national remedies and subsequent control within the domestic system to the consideration of independence under Article 19(1) TEU. Sufficient national remedies could allow the national system to "repair" elements and issues that might otherwise create issues of independence under Article 19(1), of course presuming that the remedying or reviewing body is independent itself.

The ECJ has mentioned remedies in several cases on irregularities in judicial appointments. In that regard, the ECJ stated that the existence of judicial review for an appointment decision is

---

[308] See Case C-132/20 [GC] *BN and Others* paras 125-128.

[309] Case C-896/19 [GC] *Repubblika* paras 66-72.

[310] For example, disciplinary proceedings, if they don't go directly to a disciplinary court, could go to a council, see Venice Commission (2010) para 43. Financial autonomy, and the involvement of the judiciary in budgetary processes, can be ensured by consultation of a judicial council, se Venice Commission (2010) para 55.

important factor that could help safeguard against improper exercise of authority or errors in law or assessment of facts.[311] Furthermore, where other parts of the procedure do not offer sufficient guarantees of independence "the existence of a judicial remedy available to unsuccessful candidates (…) would be necessary in order to help safeguard the process".[312] Lastly, removal of already existing possibilities of review or remedy can give rise to increased doubts about whether the appointment procedure upholds independence.[313]

Remedies will likely have more of a "repairing" effect on some types of issues than others. Remedies on can effectively act as a check and guarantee for independence not being undermined in an appointment procedure.[314] Similarly, subsequent independent review can act as a guarantee for decisions taken by bodies which themselves are not independent.[315] In general, remedies or review can likely act as a guarantee that procedures were properly conducted with no undue interferences.

On the other hand, the ECJ has not emphasised remedies in regard to wider and more systemic issues, where the problem is the rules and systems themselves, like a too broad disciplinary regime or rules not ensuring the lawful establishment of judges. Of course, even such measures could be reviewed and set aside by constitutional review, or review on the basis of Union law. But the existence of this possibility does not make the measure themselves less damaging to independence while they are in force.

In total then, the availability of remedies, review and subsequent control can be important for considering whether a measure or a procedure is likely to give rise to doubts about independence. Remedies can act as a good safeguard, ensuring that there is no undue influence in decisions and procedures, as long as the remedying body is independent itself.

---

[311] See, inter alia, Joined cases C-585/18, C-624/19 and C-625/18 [GC] *A.K. and Others* para 145 and C-824/18 [GC] *A.B. and Others* para 128.

[312] C-824/18 [GC] *A.B. and Others* para 136. The comment was given in the context of the judicial council not being sufficiently independent, thus not being able to safeguard the procedure. Therefore, remedies were an alternative way of offering sufficient guarantees of the procedure.

[313] C-824/18 [GC] *A.B. and Others* para 129.

[314] Cf. the cases mentioned above. Cf. also the ECtHR in *Ástráðsson v. Iceland* [GC], no. 26374/18 para 248.

[315] Cf. C-403/16 *El Hassani* para 39 which states that subsequent judicial control is necessary when a decision was made, in the first instance, by an administrative authority which is not independent.

5 Threshold for finding a breach of independence

5.1 Introduction

In the previous chapters this paper has analysed the basis for requiring independence under Article 19(1) TEU, and some of the details of what that requirement entails. The purpose of this chapter is to look at when issues or non-compliance with those requirements will lead a Member State to be in breach of the requirement of independence, and thus Article 19(1) TEU – in other words, what kind of test the CJEU is utilising when it considers whether there is a breach.

As a starting point, judicial independence necessarily requires balancing against other competing values. As discussed in chapter 2,[316] the principle of separation of powers does not mean maximising of the independence of the branches from each other, but is meant to be a system of mutual checks and balances. That also necessitates checks on the judiciary, like ensuring accountability and democratic legitimacy,[317] which can conflict with independence.

Furthermore, independence under Article 19(1) is not an end in itself, but a means to ensure the rule of law and effective judicial protection of Union rights. To ensure those objectives, Member States also have to uphold, for example, the administrative and budgetary efficiency of the judiciary, and the absence of corruption. This can require certain checks and controls on the judiciary. In addition to that, the objectives of Article 19(1) might also have to be balanced against other public policy objectives, like public health or national security.

Article 19(1) TEU, therefore, does not impose upon Member States a specific requirement of how to organise national judiciaries, but leaves most of the balancing of different concerns to Member States in line with their competence to organise their judicial system in line with national and constitutional identity and preferences, see Art 4(2) TEU. Article 19(1) TEU should only limit that competence where the Member State goes beyond a reasonable balancing of these interests, thereby systematically undermining judicial independence.

This chapter will analyse the threshold for finding a breach of independence under Article 19(1) TEU. Because ECJ case law is so inspired by ECtHR case law, section 5.2 will shortly consider the threshold and test used by the ECtHR. Thereafter, section 5.3 will attempt to answer, in

---

[316] See above, section 2.3.

[317] Ensuring the democratic legitimacy of courts is a legitimate purpose for measures which can affect independence, see C-272/19 *Land Hessen* para 53, which was a case considered under Article 267 TFEU.

more detail, what kind of test or consideration the ECJ uses to determine when a Member State is in breach of independence requirements under Article 19(1) TEU.

5.2 In the case law of the ECtHR

This section will look at how the ECtHR analyses questions of independence under Article 6(1) ECHR, and the test it uses to consider whether there is a breach. This is useful both directly, because the ECtHR is used as a source of, and inspiration for, EU law, and indirectly in providing an example for comparison. Specifically, it is relevant because the ECtHR has recently developed its caselaw in several areas affecting judicial independence, including developing a much more defined test for certain issues.

Independent courts or tribunals are a clear requirement of the ECHR. The rule of law is mentioned in the preamble,[318] and while the ECHR contains no requirements for specific constitutional arrangements, the "right to a fair trial" as enshrined in Article 6(1) ECHR includes the right to "an independent and impartial tribunal established by law". This constitutes three separate, but related, requirements: A requirement of the body being a "tribunal"; of "independence and impartiality"; and of the proper "establishment" of that "by law". In earlier case law, issues of independence have been dealt with, somewhat pragmatically, through the lens of all of these requirements, depending on how the issue has manifested.[319]

The case law of the ECtHR on independence has been quite casuistic, focused on the determining whether the requirements of the Convention are met in any given case.[320] The Court itself states that the rule of law and separation of powers has assumed a growing importance in its case law,[321] and that the convention is a 'rule of law instrument',[322] but it has

---

[318] ECHR preamble para 6.

[319] See, inter alia, for Independence and impartiality: *Kleyn and others v. The Netherlands* [GC], no. 39343/98 paras 190-202 and *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], no. 55391/13 paras 153-165; for established by law: *Ástráðsson v. Iceland* [GC], no. 26374/18 para 217 with further references; and for tribunal: *Beaumartin v. France* [J], no. 15287/89 and others paras 34-39.

[320] *Kleyn and others v. The Netherlands* [GC], no. 39343/98 para 193.

[321] *Ramos Nunes de Carvalho e Sá v. Portugal* ([GC], no. 55391/13 para 144 and *Svilengaćanin and Others v. Serbia* [J], no. 50104/10 and others para 64.

[322] *Grzęda v. Poland* [GC], no. 43572/18 para 339.

also been criticised for failing to deal with larger systemic issues or challenges, with the Venice Commission stating that the ECtHR "does not approach the issue in a systematic way". [323]

The recent case law of the ECtHR seems like a response to this criticism, and the growing problem of more systemic challenges to independence among ECHR State Parties, and among cases on its docket. In *Ástráðsson v. Iceland* the Court found a good case to revise and clarify how the three requirements of a "tribunal", of "independence and impartiality", and of being "established by law" relate to each other and relate to wider standards on the rule of law and judicial independence.[324] The court stated, in relation to the three requirements, that:

> "[W]hile they each serve specific purposes as distinct fair-trial guarantees, the Court discerns a common thread running through the institutional requirements of Article 6 § 1, in that they are guided by the aim of upholding the fundamental principles of the rule of law and the separation of powers."[325]

The case was, as it dealt with irregularities in the appointment of judges to the Icelandic Court of Appeal, technically considered under the "established by law" criteria, but the court clearly stated that it, regardless of which criteria it relied on, had to consider "whether the alleged irregularity in a given case was of such gravity as to (…) compromise the independence of the court in question".[326]

However, the ECtHR also stated that any finding that a court lacked independence, and therefore did not constitute court established by law, risked further undermining the independence of that court. Such a finding would call the finality of its judgements into question and would undermine the position of the irregularity appointed judge – in conflict with the principle of the irremovability of judges. Therefore, a finding of a breach had to be justified by the pressing needs of the case.[327] The Court developed a three step test to determining to determine when irregularities were of such a gravity to warrant the finding of a breach of Article 6 ECHR:

---

[323] Venice Commission (2010) para 13. See similar criticism by Kosař and Šipulová (2018) page 101 and Andrés Sáenz de Santa María (2021) pages 184-185.

[324] *Ástráðsson v. Iceland* [GC], no. 26374/18 paras 218-234.

[325] *Ástráðsson v. Iceland* [GC], no. 26374/18 para 233.

[326] *Ástráðsson v. Iceland* [GC], no. 26374/18 para 234.

[327] *Ástráðsson v. Iceland* [GC], no. 26374/18 paras 237-240.

(i) The irregularity in the appointment must constitute a "manifest breach of domestic law" or produce results that are "incompatible with the object and purpose of the convention."[328]

(ii) The irregularity must constitute a "disregard of fundamental rules in the appointment procedure, such that there is a real risk of "undue discretion undermining the integrity of the appointment process".[329]

(iii) The irregularities must either not have been remedied by national courts, or the national remedy must have been "arbitrary or manifestly unreasonable".[330]

This test was developed specifically to deal with irregularities in the appointment procedure for judges. Whether the test can be applied to other irregularities or issues is so far unclear The Court has reiterated the test in a number of later cases, but all of those also deal with irregularities in the appointment of judges.[331]

While the ECtHR so far has not developed a clear test to other facets of independence, it has dealt with similar issues in some recent cases on early termination of the terms of judges and members of judicial councils, primarily in *Grzęda v. Poland*. The problem with these cases is that the judges themselves are the applicant and victim, while the right of an independent court or tribunal is a right of the parties to a case – not of the judge themself. Therefore, the ECtHR dealt with the cases under a "right of access to court" requirement in Article 6 ECHR,[332] because the Polish rules did not provide for judicial remedies for such terminations.[333] While therefore technically not considering the issue under the requirement of independent court, the ECHR still considers independence in its balancing, making it relevant and interesting for this paper.

---

[328] *Ástráðsson v. Iceland* [GC], no. 26374/18 paras 244-245.

[329] *Ástráðsson v. Iceland* [GC], no. 26374/18 paras 246-247.

[330] *Ástráðsson v. Iceland* [GC], no. 26374/18 paras 248-252.

[331] This includes *Xero Flor v. Poland* [J], no. 4907/18 paras 252-291, *Reczkowicz v. Poland* [J], no. 43447/19 paras 225-282, *Dolińska-Ficek and Ozimek v. Poland* [J] no. 49868/19 and 57511/19 paras 281-320 and 340-355 and *Advance Pharma v. Poland* [J] no. 1469/20 paras 322-334.

[332] Such a requirement is found both in Articles 6 and 13 ECHR, but Article 13 was in that case absorbed by the more stringent requirements of Article 6, see *Grzęda v. Poland* [GC], no. 43572/18 paras 351-353.

[333] See *Broda and Bojara v. Poland* [J] no. 26691/18 and 27367/18, *Grzęda v. Poland* [GC], no. 43572/18, and *Żurek v. Poland* [J], no. 39650/18. The cases represent a development of the approach taken in *Baka v. Hungary* [GC] no. 20261/12.

The ECtHR firstly stated that Article 6 had to be interpreted in light of the preamble and rule of law standards.[334] In considering whether restrictions on the right of access to court for judges facing termination could be accepted, the Court set three requirements: (1) the very essence of the right must not be impaired; (2) the restriction had to be made in pursuit of a legitimate aim; and (3) the restriction had to be proportional to the aims sought. The threshold for any in such cases had to be high, due to due to the importance of, and strong public interest in, ensuring the independence of judges and members of judicial councils.[335]

The Court, due to the total absence of review, and in the context of the successive Polish reforms weakening the judiciary, found that the very essence of the right of access to court was impaired.[336]

It is interesting to consider why the Court uses such a different test to deal with irregularities in appointments in *Ástráðsson*, as compared with restrictions on access to remedies when a judge is terminated in *Grzęda*. It seems clear that undue interference from the other branches in both the appointment and the termination of judges can affect or undermine the independence of the judiciary.

The difference seems to lie in the subject matter of the cases. *Grzęda* deals with a set of legislative measures that deliberately restrict access to courts in cases where a judge is terminated before the end of tenure. In other words, a set of rules enacted by parliament, presumably for some objective. The ECtHR must therefore consider the possible legitimate objective pursued by this legislation, and how it stacks up against the damage it does to fair trial and judicial independence.

Ástráðsson, on the other hand, does not deal with a legislative measure, but with an irregularity in the procedure laid down by the law. In other words, the subject matter is a deviation from the procedure and objective laid down in legislation and cannot be said to pursue any legitimate objectives. Whether irregularities undermine independence must therefore be considered based on the consequences – of whether the irregularity is sufficiently serious to undermine the

---

[334] *Grzęda v. Poland Poland* [GC], no. 43572/18 para 339.

[335] *Grzęda v. Poland Poland* [GC], no. 43572/18 paras 342-346 and *Żurek v. Poland* [J], no. 39650/18 paras 145-148. See similarly in *Broda and Bojara v. Poland* [J] no. 26691/18 and 27367/18 para 140.

[336] *Grzęda v. Poland Poland* [GC], no. 43572/18 paras 348-349 and *Żurek v. Poland* [J], no. 39650/18 para 150. See quite similarly, *Broda and Bojara v. Poland* [J] no. 26691/18 and 27367/18 paras 141-150.

independence. Or more generally, of whether the process offers sufficient guarantees and safeguards against undue interference to enable independence to be upheld at all, even with the irregularity.

As will be discussed in more detail below, the approaches taken by the ECtHR are relevant, and to a degree have been taken into account, by the ECJ, both directly as sources of EU law and indirectly as inspiration. However, the ECJ when dealing with cases under Article 19(1) TEU necessarily has a bit of a different approach, in considering Member States duty to establish a system that can effectively – and independently – uphold Union law, rather than an individual's right to a fair trial.

5.3 In the case law of the ECJ

5.3.1 The scope and overall threshold of the analysis

This chapter will look at how the ECJ, in its case law so far, has determined whether there is a breach of Article 19(1) TEU. Most of the cases have dealt with questions of whether specific measures, or a set of measures, are in breach of Article 19(1), and how the Court proceeds in those cases will be discussed in section 5.3.2. A smaller set of cases have dealt with the question of whether a specific body no longer meets the requirements of independence, and how the Court proceeds in those cases will be discussed in section 5.3.3.

Before discussing how the Court goes determines the threshold is breached, it must be discussed what the threshold is and what facts the Court takes into consideration in aa consideration of an alleged breach. That will be the topic in this section 5.3.1.

In line with the purpose of Article 19(1), as discussed above,[337] the requirement of independence as developed in ECJ case law obliges Member States to uphold the proper and autonomous functioning of their judicial systems. At the same time, the Union must necessarily respect the varying constitutional organisations and identities of the Member States in line with Article 4(2) TEU and must respect that the organisation of the judiciary is a Member State competence. Article 19(1) should therefore only apply to issues that go well outside what can be considered "normal" differences and preferences among Member States, i.e. issues that are

[337] See above, section 4.2.

of a more serious or systemic nature. In other words, Article 19(1) TEU must necessarily have a relatively high threshold.[338]

In regards to the facts that are accounted for under Article 19(1), the Court has stated that all relevant elements must be taken into account and assessed together, in light of the broader legal and institutional landscape.[339] In other words, as humorously summarised by AG Bobek, the assessment "cannot be limited to a microscopic study of one slice of a salami, without having regard to the rest of the salami stick, how and where it is normally stored, its distance and relation to other objects in the storage room, and while nonchalantly ignoring the fact that there is a rather large carnivore lurking in the corner of the room."[340]

Taking account of "all relevant elements" means that both concrete and case-specific, and more formal and institutional, elements will be relevant to the consideration. However, because Article 19(1) TEU primarily seeks to prevent more structural or systemic failures in a Member State, it is likely that the focus will often be on the more formal and institutional elements. Unlike what is the case under Article 47 of the Charter and Article 6 ECHR, there is no need to establish that the restrictions on judicial independence have had consequences in any specific case or for a specific individual. As argued by AG Bobek, this focus on the more formal and institutional elements does not mean that Article 19(1) TUE is only concerned with the law as it is "on the books". [341] Structural or systemic issues of independence can equally arise in the practice and application of rules that "on the books" look fine.

Lastly it must be considered that Article 19(1) TEU requires both that the Member States ensue that judiciaries actually are independent, and also that this independence is readily apparent to

---

[338] The ECJ has not explicitly discuss the threshold, but several cases indicate that smaller or isolated issues are not likely to constitute a breach, see for example the issues in C-132/20 [GC] *BN and Others* or C-896/19 [GC] *Repubblika*. The threshold is discussed more extensively by AG Bobek in his opinions in C-132/20 *BN and Others* paras 36-39 and Joined Cases C-748/19 to C-754/19 *WB and Others* para 164, see also paras 146-149.

[339] See, inter alia, Joined cases C-585/18, C-624/19 and C-625/18 [GC] *A.K. and Others* para 145 and C-824/18 [GC] *A.B. and Others* paras 147-153.

[340] See AG Bobek in his opinion in C-132/20 *BN and Others* paras 100.

[341] Opinion of AG Bobek in C-748/19 to C-754/19 *WB and Others* para 152. The topic of what elements are taken into account under Article 19(1) is discussed geneerally in his opinions in C-748/19 to C-754/19 *WB and Others* paras 143-155, C-132/20 *BN and Others* paras 93-104 and in Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 [GC] *AFJR* paras 241-248. See also the opinions of AG Tanchev in C-192/18 *Commission v Poland (Independence of the ordinary courts)* paras 114-116 and Joined Cases C-558/18 and C-563/18 *Łódzki and Others* para 125.

a reasonable observer.[342] This is because justice must be “seen to be done”.[343] It should be apparent to both the parties to a case, and the wider society, that the rule of law is being upheld. The consequence of this is that the ECJ, in evaluating an alleged breach of Article 19(1), can take accounts of facts even where they don’t indicate that independence is actually being undermined, as long as the facts are such as to make the judiciary appear, to a reasonable observer, to be affected by undue influence or to have its independence undermined.

5.3.2 When is a restriction in breach of the requirement of independence

The purpose of this section is to look at how the ECJ considers whether a specific measure, action or issue, is in breach of the requirement of independence under Article 19(1) TEU. The Court has yet to develop an explicit test for finding a breach, so this section will seek to analyse and construct an aggregate from the case law so far. That will be done by dividing the case law into types, based on what and how the Court reaches its result. Those categories will then be used as a basis to construct a generalised description of how the Court determines whether a measure is in breach of Article 19(1). This approach will therefore represent more of a prescriptive *ratio decidendi*,[344] and attempt to generalise the approaches taken so far as prescriptions for the future, rather than merely describe what the Court has said.

The case law on whether measures are in breach of the requirement of independence under Article 19(1) TEU so far can largely be divided into three types of cases, based on the result in the case and how the Court arrives there, which will be considered in turn below.

The first category of cases includes those cases where the Court finds that the measure in question does not create any issues of independence under Article 19(1) TEU, such that there is no need to consider any justification or balancing, and accordingly also that there is no breach Article 19(1). In other words, some measures do not sufficiently negatively affect judicial independence to come within the scope of Article 19(1).

---

[342] See, inter alia, C-132/20 [GC] *BN and Others* para 96 and the opinion of AG Bobek in Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 [GC] *AFJR* para 233.

[343] A famous statement by Lord Hewart in *Rex v. Sussex Justices* (1924) page 259. See also the opinion of AG Tanchev in Joined Cases C-585/18, C-624/18 and C-625/18 *A.K. and Others* para 120.

[344] *Ratio decidendi* is Latin for “the reasons of the decision” and refers to the part of the judgement underlying the operative part. *Descriptive ratio decidendi* is used about “describing” the actual reasons stated in the judgement, while *prescriptive ratio decidendi* refers to attempts to generalise the ratio, as a “prescription” for future cases. Cf. the comparable Norwegian term of “*konstruert ratio decidendi*”.

Many types of measures have been found by the Court not to create issues of independence. This includes measures which only have a very limited impact on the judiciary, like austerity measures lowering the remuneration of Portuguese public employees, including judges,[345] or a procedural irregularity where three judges were appointed from a list, when the public call had said that only two would be appointed.[346] Furthermore, the Court has also found that older irregularities that don't have clear consequences today create do not undermine independence, including a judge that had been originally appointed during the Soviet era,[347] and that judge had been originally appointed by a procedure later declared unconstitutional.[348] In addition to that, the Court finds no issue with the involvement of other branches if there are sufficient safeguards and restrictions, as was the with the involvement of the Maltese president in judicial appointments.[349]

The common theme of this category is that the measures either do not target the judiciary directly, that their scope and consequences are limited or that there are sufficient safeguards to preclude any undue influence. For a more exhaustive discussion of when measures, rules or actions create issues of independence, see chapter 4, which discusses more in depth when, and what type of, measures will give rise to issues of independence under Article 19(1) TEU.

The second category of cases includes those cases where the Court finds that the measure does give rise to issues of independence, without inherently undermining independence, such that the issues can be justified by the pursuit of other legitimate objectives. The ECJ has stated in several cases, with somewhat varying formulations, that measures affecting independence are only acceptable if justified by legitimate objectives,[350] or that existence of legitimate objectives

---

[345] See the cases C-64/16 [GC] *ASJP* and Case C-49/18 *Vindel*.

[346] See Joined Cases C-542/18 RX-II and C-543/18 RX-II [GC] *Simpson and HG*, which concerned irregularities in appointments to the European Union Civil Service Tribunal, in light of article 47 of the Charter.

[347] As was one of the issues in C-132/20 [GC] *BN and Others*, see paras 80-108.

[348] As was the other issue in C-132/20 [GC] *BN and Others* paras 109-132.

[349] See the case C-896/19 [GC] *Repubblika*.

[350] See C-619/18 [GC] *Commission v Poland (Disciplinary regime of judges)* paras 77 and 79, C-192//18 [GC] *Commission v Poland (Independence of the ordinary courts)* paras 113 and 115, and C-487/19 [GC] *W.Ż* paras 112 and 118. For disciplinary regimes the Court formulated it more concretely as thee justification having to relate "to the sound administration of justice", see Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 [GC] *AFJR* para 213 and 233, C-791/19 [GC] *Commission v Poland (Disciplinary regime of judges)* para 139, Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 [GC] *PM and Others* paras 239-240, and C-430/21 [GC] *RS* para 86. See also the opinion of AG Bobek in Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 [GC] *AFJR* para 295 where he formulates it as a requirement that the "justification is based on genuine and sufficiently weighty reasons, which must, moreover, be made apparent to the public in an unambiguous and accessible manner."

is something the referring Court can take account of in its consideration.[351] In other words, the second category includes those cases which create issues of independence, but can be justified when they are proportional in light of a legitimate objective

The Court has yet to decisively delve into what a "legitimate objective" entails. In *Commission v Poland (Independence of the Supreme Court)* the Court seemed to adopt a lenient approach to in what constitutes "legitimate objective". The Court accepted that employment policy objectives like the standardisation of retirement ages was a legitimate objective for lowering the retirement ages of Supreme court judges.[352] On the other hand, the Court has stated in many cases on disciplinary regimes that they must be justified by reasons specifically relating to the "sound administration of justice".[353]

The differences between the cases can indicate that the Court does not take a fixed view to what constitutes "legitimate objectives" but can take both a strict and a lenient approach depending on the measure or restriction in question. Retirement policy, like in *Commission v Poland (Independence of the Supreme Court)*¸ is clearly a political matter for the Member State democracies, which only tangentially affects the interests protected by Article 19(1) because retirement policy also concerns judges terms. The Court will therefore likely accord thos democracies a large room to pursue their own retirement policy goals, which can explain the lenient approach. The disciplinary regime for judges, on the other hand, very directly concerns core interests protected by Article 19(1), and the only reason to have a disciplinary regime for judges in a system governed by the rule of law is to ensure the accountability of judges, thereby ensuring that they can offer effective judicial protection. It is not a matter where it is appropriate to leave a large room for Member State political objectives , and the Court therefore takes a seemingly stricter interpretation of "legitimate objectives".

However, there must probably be some exceptions to what has been said so far, and to the statements of the Court that disciplinary liability must be justified specifically by the "sound administration of justice". Certain fundamental policy objectives like national security, or

---

[351] The Court stated that the referring Court could take account of the "the reasons and specific objectives alleged before it in order to justify the measures" in C-824/18 [GC] *A.B. and Others* paras 139 and 165.

[352] C-619/18 [GC] *Commission v Poland (Independence of the Supreme Court)* para 81.

[353] See above, note 350. One example of such objectives could be protecting the judiciary from undue pressure due to arbitrary actions and complaints, see the opinion of AG Bobek in see Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 *AFJR* para 297, cf. paras 286-287.

public health, will likely also be able to justify disciplinary action against judges that, in their conduct of their work, violate public health or national security requirements which leads to others being put in danger. These are simply objectives the Court has not had an opportunity to rule on yet, in its case law under Article 19(1) TEU. That said, the Court could still be expected to employ a stricter scrutiny of what is a legitimate aim in cases that very directly affects core interests protected by Article 19(1).

In addition to pursuing a legitimate objective, measures in this second category must also be proportional in light of that objective. Proportionality is a general principle of EU law,[354] which is supposed to act as a limitation on the exercise of Member States competences, when that exercise detracts or derogates from standards of EU law.[355] Proportionality is also codified in Article 52(1) of the Charter, meaning any legitimate restriction in the individual right to an independent Court under Article 47 of the Charter must be proportional.

There are only few cases where the ECJ has explicitly affirmed a principle of proportionality under article 19(1) TEU. In *Commission v Poland (Independence of the Supreme Court)*, on the Polish reform lowering the retirement age for Supreme Court judges, the ECJ stated that the measures, which removed judges before the end of their term, had to be proportional in light of the legitimate objective sought.[356] In that case, the ECJ found that the lowering of the retirement ages was neither appropriate to achieve the objective – as it did not actually standardise the rules – nor was the objective proportional in a strict sense to the damage done to independence.[357]

Furthermore, in *PM and Others* and *RS,* the Court, sems to conduct a limited analysis of proportionality, specifically of whether the measures were appropriate to achieve the legitimate objectives. The question in the cases was whether certain disciplinary liabilities were in breach of Article 19(1) TEU. The Court initially stated that disciplinary liability had to be limited to exceptional cases arising from requirements of the "sound administration of justice". It then

---

[354] See, e.g. C-482/17 [GC] *Czech Republic v Parliament and Council* para 76 and C-452/20 *PJ* para 36.

[355] See, e.g. C-544/19 *ECOTEX BULGARIA* paras 84-87.

[356] C-619/18 [GC] *Commission v Poland (Independence of the Supreme Court)* paras 76 and 79. Reiterated in See C-192/18 [GC] *Commission v Poland (Independence of the ordinary courts)* paras 113 and 115 and C-487/19 *W.Ż* [GC] para 112.

[357] See C-619/18 [GC] *Commission v Poland (Independence of the Supreme Court)*. Appropriateness is considered in paras 89-90, while paras 91-95, and the case law referenced, seem like a mixed consideration of necessity and proportionality in a narrow sense.

proceeded to find that liability for failing to comply with the decisions of a constitutional court,[358] was not an appropriate liability to ensure the "sound administration of justice". The judge risked being held liable solely for the content of their decisions, and that would divert the disciplinary regime from its legitimate purpose. In other words, the Court seems to find that the liabilities in the case were not proportional to the legitimate objective of the "sound administration of justice" because they were not appropriate or suitable to achieve that objective.[359]

From the case law analysed, it is clear that being justified by a legitimate objective means that the measure in question must be proportional in light of that objective. Furthermore, in considering the "appropriateness" of measures in addition to proportionality, the Court seems to use proportionality in a wide sense, which typically includes the appropriateness of the measure, the necessity of the measure and the proportionality *stricto sensu* of the measure. Such an interpretation would be in line with how the CJEU generally uses the principle of proportionality when considering restrictive Member State measures.[360]

In total and in summary, the common theme of the second category of cases is that the measure in question does create issues of independence, but that those issue can be justified by legitimate objectives, when the objective pursued is proportional in a wide sense.

The third category includes those cases where the Court finds that the restriction and its consequences for judicial independence either directly, or by the lack of safeguards or limitations, inherently undermine the independence of the judiciary. The ECJ has stated, in several cases, that Member States must refrain from adopting rules that would undermine the independence of the judiciary,[361] or that the judiciary must be protected from interventions or

---

[358] See Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 [GC] *PM and Others* para 242, and C-430/21 [GC] *RS* para 93.

[359] Alternative readings of the cases are certainly possible. For example, the Court seems clear that liability for the content of decisions is never allowed, meaning it could be seen as breaching minimum requirement. Alternatively, it is possible to read the cases such that no legitimate objective has been presented.

[360] See, inter alia, C-331/88 *Fedesa and Others* para 13, C-62/14 [GC] *Gauweiler and Others* para 67 and C-452/20 *PJ* paras 37-38.

[361] See C-791/19 [GC] *Commission v Poland (Disciplinary regime of judges)* paras 51 and 157 and C-896/19 [GC] *Repubblika* para 64.

pressure that is liable to influence its decisions.[362] While these are given as general statements, the cases in this category indicate that the Court uses them as sort of minimum requirements, where measures that are so serious or systematic that they breach the essence of those requirements automatically will be in breach of Article 19(1) TEU, without any justification.

Many types of restrictions have been found by the Court to inherently undermine judicial independence. That include the executive having too much discretion in judicial appointments, which was the case for the Polish President, who had too much discretion to authorise judges to sit beyond the new retirement age,[363] and the Polish Minister of Justice, who had too much discretion in initiating and terminating the secondment of judges to other courts.[364] The Court came to similar conclusions in a case where the President of the Disciplinary Chamber of the Polish Supreme court had discretionary power to decide which court had jurisdiction in the first instance. [365]

The Court has also found lacking safeguards in disciplinary systems to inherently undermine independence. Examples include the rights of the defence for judges not being adequately guaranteed in disciplinary proceedings, [366] and the Romanian government making interim appointments to disciplinary investigating bodies by disregarding the ordinary appointment procedure, without sufficient safeguards.[367]

The common denominator in these cases seems to be a lack of safeguards, which leaves the judicial system open to irregularities and undue influence. As discussed above, the ECtHR also approached such issues as a question of whether the lacking safeguards and irregularities were grave enough to find a breach, with no question of justification by legitimate objectives.[368] This

---

[362] See C-619/18 [GC] *Commission v Poland (Independence of the Supreme Court)* para 72, Joined cases C-585/18, C-624/19 and C-625/18 [GC] *A.K. and Others* para 145 and C-824/18 [GC] *A.B. and Others* para 12, and Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 [GC] *PM and Others* para 224.

[363] See the second question in C-619/18 [GC] *Commission v Poland (Independence of the Supreme Court)* paras 108 following. Cf. however how the similar issues in C-192/18 [GC] *Commission v Poland (Independence of the ordinary courts)* are considered. The Court conducted more of a combined consideration of the discretion of the Minister, and the lowering of the retirement ages, making it somewhat unclear whether the Court saw the statements on being justifiable by proportional objectives as also applying to the discretion of the Minister in authorisations.

[364] Joined Cases C-748/19 to C-754/19 [GC] *W.B. and Others* para 90.

[365] C-791/19 [GC] *Commission v Poland (Disciplinary regime of judges)* paras 164-176.

[366] C-791/19 [GC] *Commission v Poland (Disciplinary regime of judges)* paras 187-214.

[367] Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 [GC] *AFJR* para 207.

[368] See above, section 5.2, especially the contrasting of the test in *Ástráðsson* with that in *Grzęda*.

approach can possibly be explained by the fact that Member States simply have no legitimate need to disregard safeguards or limitations in their systems. Not ensuring proper safeguards is not a political choice that needs to be considered by the national democracies.

Alternatively, lacking safeguards and limitations will also often directly concern sensitive areas of the judicial system. The finding of an "automatic" breach in such cases can therefore be explained by it infringing the very essence of the obligation to uphold judicial independence,[369] under Article 19(1). Such an understanding is supported by the case in *RS*, where Court found a breach of Article 19(1) TEU because the ordinary courts of Romania had no jurisdiction to examine compatibility with EU law if the Constitutional court had already considered the question.[370] Depriving the national courts of their ability to independently consider questions of Union law can be said to have impaired the very essence of their independent function.

It seems likely that the Court does not consider justification by legitimate objectives for some restrictions both because certain restrictions are so damaging that it impairs the essence of independence under Article 19(1), and also because certain types of issues by their nature are not issues where the Member States are left a large room for national policy objectives, like lacking proper safeguards to combat irregularities and undue influence in proceedings.

In total, looking at the three types of cases we have analysed, the approach of the ECJ seems as follows: Initially, the Court will consider whether a measure or issue constitutes a restriction which systemically and negatively affects independence. However, not all restrictions lead to breach of Article 19(1) TEU, so in cases where it is relevant, the Court proceeds to consider three requirements a restriction must fulfil to not constitute a breach: (I) it must not undermine the very essence of independence and the functioning of the judiciary; (II) the restriction must be in pursuit of legitimate objectives; and (III) the restriction must be proportionate to those legitimate objectives pursued.

Of course, that description is only true as a description of the generalised approach of the ECJ in the totality of cases. The Court does not go through all steps in most cases. For example, in

---

[369] Cf. in that regard the discussion and test in *Grzęda* above. If a measure impaired the essence of the right in that case, the ECtHR found an automatic breach and did not consider whether the measures were justified.

[370] C-430/21 [GC] *RS* paras 56-78.

a case where the executive and legislative conspire to abolish the independence of the judiciary the Court would find a breach of Article 19(1) already when considering requirement (I) above.

Furthermore, the Court will in some cases find a breach already when it has determined that there is a restriction which systemically and negatively affects independence, because some restrictions by their nature cannot fulfil the requirements. That is especially the case for irregularities in procedures, and possibly lacking safeguards in procedures, which are not policy choices a Member State pursued for legitimate reasons. Because it is self-evident that irregularities and lacking safeguards will do not pursue legitimate objectives, the ECJ seems to concentrate its analysis on whether the issues are sufficiently grave to constitute a restriction, and find a breach of Article 19(1) TEU if they are.

The threshold for a measure, an issue or an irregularity being considered to constitute a restriction seems rather high. As analysed above in the first type of cases, there are many measures which do affect the judiciary but where the Court is clear that it is simply not sufficient to be a restriction of independence under Article 19(1) TUE. This makes sense when compared to the objective of Article 19(1), as it leaves a large room for Member States to organise their national judiciaries, and primarily takes aim at restrictions of independence of a more serious or systemic nature.[371]

Comparing the generalised approach of the ECJ here, it is remarkably similar to test applied by the ECtHR in *Grzęda*, discussed above,[372] first discussing a restriction and then the same three requirements. That is because the ECtHR there, similarly, discussed a fundamental value – access to courts – which needs to be upheld, but which Member States also can have legitimate reasons to, within limits, restrict or regulate.

The other test developed by the ECtHR, in *Ástráðsson*,[373] dealt with the type of irregularities and lacking safeguards in appointments, issues which as discussed do not pursue legitimate objectives. The test developed there can therefore seem like a more specialised test to designed to determine when irregularities are sufficiently serious to undermine independence. If that is the case, the ECtHR will automatically find a breach because the State Parties have no

---

[371] See above, section 4.2, on the objective of Article 19(1) TEU. See also above, section 5.3.1.

[372] See above, section 5.2

[373] See above, section 5.2.

justifiable reasons to allow such irregularities. In the approach of the ECJ described above, the *Ástráðsson*-test would therefore be comparable to the consideration of whether a measure or issue constitutes a restriction which systemically and negatively affects independence.

In total, the most likely generalisable test of the ECJ is a quite classic consideration of whether there is a restriction, and if so whether that restriction is justifiable by legitimate objectives to which it is proportional. To that is added another requirement, in that the restriction may cannot infringe on the very essence of judicial independence which the Member State must uphold under Article 19(1) TEU. This at best describes the overarching approach throughout the case law, and more detailed studies, or the development of tests, on specific issues could greatly help improve the foreseeability of the obligations under Article 19(1) TEU.

5.3.3 When is a "court or tribunal" independent.

The question in the section above was to consider when a specific legislative measures and other specific issues or actions were in breach of the requirements of independence under Article 19(1) TEU. That section detailed the approaches taken by the ECJ to such questions and tried to outlay a generalised approach.

In addition to considering specific measures, the ECJ is also occasionally faced with questions of whether a "court or tribunal" as such constitutes an independent body under Article 19(1), in light of the totality of measures affecting that body. The problem is comparable to how the ECJ considers independence under Article 267, where the question is whether the referring body is an independent "court or tribunal".[374]

Considering whether a whole body complies with the requirement of independence is a different consideration from whether a specific measure is compliant. For example, an irregular appointment of judges to a Supreme Court can be in breach of Article 19(1), but that cannot undermine the independence of the whole body and its legitimately appointed judges. That would undermine the legitimacy and finality of all judgements given by that court, even those given by legitimate judges, and be counterproductive to upholding the rule of law.

The ECJ has therefore been clear that a single measure might not be sufficient, and that that it must be considered whether all factors taken together are such as to indicate that the body lacks

---

[374] See above, section 3.3.

independence.[375] The Court has not generally clarified how that assessment is to be considered, and it seems closely tied to the circumstances of the specific case. That said, a closer look at the more detailed consideration in a few cases can at least give some guidelines on what facts the Court seems to take into account, and how high it sets the bar for a Court to be considered independent.

The first case is *Commission v Poland (Disciplinary regime of judges)*, where the ECJ had to consider whether the Disciplinary Chamber of the Polish Supreme court was independent.[376] The Court started by identifying worrying features of the Disciplinary Chamber: that it had been granted exclusive jurisdiction on disciplinary and social cases relating to judges; that it was adopted alongside the measure lowering the retirement age of supreme court judges which the Court had found to be in breach of Article 19(1) in earlier cases; that the Chamber had unusually high autonomy within the Supreme court; that the judges of the Chamber received substantially higher wages than their colleagues; and that it was made up of exclusively newly appointed judges, excluding previously appointed ones.[377]

Furthermore, the Court went on to analyse how all those new appointments were done, especially the central role of the National Council of the Judiciary in appointments, which itself was not sufficiently independent, and therefore could not guarantee the appointment process.[378] The Court therefore concluded that the totality of these issues was such as to give rise to reasonable doubt as to the independence of the Disciplinary Chamber.[379]

There are two specific takeaways from the case: Firstly, an issue which in itself likely would breach Article 19(1) – in this case the appointment procedure involving the National Council of the Judiciary[380] – is a strong argument for a court or a tribunal lacking independence, if it

---

[375] Joined Cases C-585/18, C-624/18 and C-625/18 [GC] *A.K. and Others* para 152.

[376] C-791/19 [GC] *Commission v Poland (Disciplinary regime of judges)*. The Court was faced with the same Disciplinary Chamber in Joined Cases C-585/18, C-624/18 and C-625/18 [GC] *A.K. and Others* as a preliminary question. Because *Commission v Poland (Disciplinary regime of judges)* was an infringement case, the Court could be more definitive in its answers.

[377] C-791/19 [GC] *Commission v Poland (Disciplinary regime of judges)* paras 88-94.

[378] C-791/19 [GC] *Commission v Poland (Disciplinary regime of judges)* paras 100-108. See also Joined Cases C-585/18, C-624/18 and C-625/18 [GC] *A.K. and Others* paras 143-145, and C-824/18 [GC] *A.B. and Others* paras 131-133.

[379] C-791/19 [GC] *Commission v Poland (Disciplinary regime of judges)* para 109-110 and 112.

[380] The ECJ has not found, in isolation, the appointment procedure of the NCJ to be in breach of Article 19(1) but has dealt with it as a preliminary point in larger cases, see note 302 above. However, it is highly likely that it

can be proven that the lacking safeguards have substantially affected the composition, work or judicial decisions of the Court. Secondly, the Court takes account of facts that in themselves do not give rise to issues of independence, if these can substantiate or be a part of the larger issue. The clearest example is the Court taking account of the higher wages of the judges in the Disciplinary Chamber. That was not a threat to their independence in isolation but could substantiate the executive having unusually high influence in that Chamber.

Another case where the ECJ found that the body in question was independent is the preliminary consideration of the independence of the Romanian Constitutional court in *PM and Others*. The ECJ firstly noted that it was unproblematic that the Constitutional court was not institutionally a part of the judiciary, as Union law did not impose specific constitutional models on Member States. Secondly, the Court noted that the members of the court being appointed by the executive and legislative was not in itself an issue, as long as there were sufficient safeguards, which the Court found to be the case. Thirdly, it was not an issue that the executive and legislative could refer cases to the court, as this was connected to its function as a Constitutional court.[381] In total, nothing indicated that the Romanian Constitutional court was not an independent court.

The case could possibly be said to align with what has been discussed elsewhere in this chapter, that the ECJ and Article 19(1) seems to grant Member States higher leeway when organising Constitutional Courts than they would have with their ordinary courts, because the special role of such courts and the need for democratic accountability.[382]

The last case that will be mentioned is *Land Hessen*, where the Court considered whether the Administrative Court of Wiesbaden was independent enough to be a "court or tribunal" under Article 267 TFEU. The main alleged issue was that the judges of that court were appointed by a Judicial Committee where the majority of members were appointed by the legislative, but the Court clearly found that this alone, with no indication that the appointment caused a relationship of subordination, was not sufficient to affect the independence of the Court.[383]

---

would have been a breach if considered independently as well, as that appointment procedure has been the basis for finding of a breach of Article 6 ECHR by the ECtHR in several cases, see *Reczkowicz v. Poland* [J], no. 43447/19 paras 225-282; *Dolińska-Ficek and Ozimek v. Poland* [J] no. 49868/19 and 57511/19.

[381] Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 [GC] *PM and Others* paras 231-236.

[382] See above, discussed variously in sections 2.3, 4.3.2 and 4.6.2.

[383] C-272/19 *Land Hessen* paras 51-60.

The case illustrates that a body will probably only be said to lack independence when affected by more systematic and inherent issues, and the result would likely have been the same under Article 19(1) TEU. The case is an interesting contrast to *Commission v Poland (Disciplinary regime of judges)* above, which also had an appointment procedure where the executive and legislative had heavy influence. In *Land Hessen* it was an isolated issue which did not indicate any undue influence, whereas in *Commission v Poland (Disciplinary regime of judges)* it was a part of systematic reforms and other substantiating factors, which when combined clearly indicated a relationship of subordination.

Looking at all the cases in combination, they illustrate that the threshold to determine that a court or tribunal lacks independence is rather high. This is shown by the clear dismissal of the accusations against the Romanian Constitutional court, whose manner of organisation was clearly within Romania's competence to organise its judicial system as it wanted to. Similarly in *Land Hessen*, the Court is clear that one potential avenue of influence for the legislative is not sufficient for a finding that a body or tribunal as such lacks independence.

Member States are meant to have a great degree of margin and discretion, in line with their national and constitutional identities, as enshrined in article 4(2) TEU. Therefore, it seems likely that courts or tribunals will only be considered in breach of the requirement of independence under Article 19(1) TEU when their independence undermined to a degree where it inhibits the function of that court or tribunal, especially its ability to ensure effective judicial protection.

In conclusion, the Court has not expanded greatly on how it considers whether a court or tribunal is independent under Article 19(1). It utilises a form of overall assessment, flexibly taking account of all the issues, and other substantiating factors and facts, affecting the body in question. The approach seems to mirror the one used by the Court under Article 267 TFEU and other questions on independence under the definition of "court or tribunal", but it is possible – even likely – that at least the threshold and facts considered might be different.

6 Judicial independence under Article 267 TFEU

6.1 Introduction and objective of Article 267

This paper has so far mostly looked at independence under Article 19(1) TEU. This section seeks to take a broader look and consider how the recent case law affects the notion of independence under Article 267 TFEU, which requires that the referring body be a "court or tribunal", something the ECJ has found to include a requirement of independence.[384] The question is whether the recent case law and how that defines independence under Article 19(1) TEU will set the standard also for how independence is understood under Article 267 TFEU. The question is interesting, because the objective of Article 267 TFEU is very different from that of 19(1) TEU. The latter seeks to uphold effective judicial protection and the rule of law.[385]

The purpose of Article 267 TFEU, on the other hand, is to ensure that the ECJ can give national courts the necessary guidance in interpreting cases on EU law, with the larger purpose of avoiding conflicting interpretations and ensuring the uniform application of EU law.[386] The preliminary ruling procedure is a part of a larger process of dialogue between the ECJ and the national courts, and between national courts themselves, termed the *dialogue des juges*.[387] The restriction of referrals to "courts or tribunals" can then be explained by the fact that it is meant to establish judicial cooperation between equals – between European and national judges. This also has the effect of limiting referrals to only those which are necessary for answering an actual case pending before a national judge, which means more efficient use of the capacity of the ECJ.

The rest of this chapter will analyse the case law so far and try to answer and discuss the link between these two provisions.

6.2 A link between independence in Article 19(1) TEU and Article 267

As discussed in chapter 3.4, the *ASJP* case initially seemed to create such a link between independence in the two provisions. In interpreting independence under Article 19(1) TEU, the

---

[384] See above, section 3.3.

[385] See, for that, section 4.2.

[386] Lenaerts et al. (2021) page 771.

[387] Dubout (2021) pages 47-48.

Court drew from case law on the definition of a "court and tribunal" under Article 267 TFEU,[388] which was taken by some to mean that the definition of independence was the same in the two provisions.[389] Because the recent case law under Article 19(1) arguably results in a stricter requirement of independence, adopting that case law under Article 267 could restrict the access to the preliminary reference procedure compare, in a departure from earlier case-law emphasizing broad access to ensure uniform application of Union law.[390]

An alternative way to read *ASJP* is that Court was just drawing inspiration rather than equating independence in the two provisions. This seems to be the viewpoint of AG Tanchev in his opinion in in *A.K and Others*. Tanchev argued that independence under Article 267 TFEU constituted a "*qualitatively different exercise* than the assessment of whether the requirement of judicial independence have been complied with under (…) Article 19(1) TEU".[391] This was because Article 267 served a very different purpose, in seeking to establish a dialogue between the ECJ and national courts.[392]

The ECJ first dealt with the problem in *Banco de Santander*. The Court ruled on the admissibility of a case from the Spanish Central Tax Tribunal, and found that the requirement of independence had to be "re-examined notably in the light of the most recent case-law of the Court concerning, in particular, the criterion of independence".[393] This clearly meant case-law under Article 19(1), as the Court referred to both *ASJP* and *Commission v Poland (Independence of the Supreme Court)*.[394] With this stricter requirement of independence, the Court found that the Tax Tribunal was not sufficiently independent, departing from earlier case law.[395]

---

[388] See above, section 3.4.

[389] See e.g. Lenaerts et al. (2021) page 774.

[390] Bonelli and Claes (2018) page 638.

[391] Opinion of AG Tanchev in Joined Cases C-585/18, C-624/18 and C-625/18 *A.K. and Others* para 111.

[392] Opinion of AG Tanchev in Joined Cases C-585/18, C-624/18 and C-625/18 *A.K. and Others* paras 112-113. Similar viewpoints had also been raised by AG Wahl in his opinion in Joined Cases C-58/13 and C-59/13 *Torresi* para 49.

[393] C-274/14 [GC] *Banco de Santander* para 55, this followed the recommendation of AG Hogan in his opinion in the same case, see para 15.

[394] C-274/14 [GC] *Banco de Santander* paras 56-59. See also C-272/19 *Land Hessen* which reiterates *Banco de Santander* and similarly cites Article 19(1) case-law to define independence under Article 267.

[395] C-274/14 [GC] *Banco de Santander* paras 64-80. This overruled the earlier Joined Cases C-110/98 to C-147/98 *Gabalfrisa* where the court had accepted a reference from a similar body.

This equating of independence under Article 267 TFEU and Article 19(1) TEU faced quite immediate criticism. The ruling seemed to risk the rather absurd situation where a court, whose independence was under attack in breach of Article 19(1), would no longer be able to seek the aid of the ECJ by way of a preliminary ruling because it might no longer comply with the requirements of independence under Article 267.[396] This could risk depriving both the ECJ and the national courts of one of their central tools to combat rule of law issues in Member States – the preliminary ruling mechanism.[397]

Interestingly, a critical response to *Banco de Santander* also came from the EFTA Court, in *Scanteam*. The EFTA Court had to rule on the admissibility of a reference from the Norwegian Complaints Board for Public Procurements (KOFA) under Article 34 SCA, the provision corresponding to Article 267 TFEU. The EFTA Court declined to adopt the stricter line in in *Banco de Santander*, stating that it could "render administrative boards ineligible to request an advisory opinion", which was contrary to the purpose of Article 34 SCA, in establishing a system of cooperation and ensuring homogenous interpretation.[398]

The ECJ got an opportunity to address the criticism and revisit the issue in *BN and Others*. The Court had to rule on the admissibility of reference from a chamber of the Polish Supreme Court, composed of a single judge, who had been appointed by a procedure which both the ECJ and the ECtHR had found to be in breach of requirements of independence in *W.Ż.* and *Advance Pharma*, respectively.[399]

The proposed solution of AG Bobek would see the Court, at least to a degree, depart from *Banco de Santander*. Bobek opined, like *Santander*, that there was only "one and the same" principle of independence. However, Bobek differed in that the actual examination and intensity of review would vary in accordance with the function and objectives of the different

---

[396] Several authors voiced this criticism, see Andrés Sáenz de Santa María (2021) pages 178-179, Pech and Platon (2018) page 1842, and Reyns (2021) pages 39-40.

[397] This has been used actively and deliberately by Polish judges to resist attacks on their independence, see Łętowska: "*Defending the Judiciary – Strategies of Resistance in Poland's Judiciary*", VerfBlog 27th Sep. 2022.

[398] E-8/19 *Scanteam* paras 44-47, conclusion in para 54. The more lenient interpretation of the EFTA Court can also be explained by the fact that this Court has often been referred insufficient cases, and by allowing a wide range of bodies to refer cases it more so ensures its own continued position. Its case law was arguably more lenient than the ECJ even before this.

[399] C-487/19 [GC] *W.Ż.* and *Advance Pharma v. Poland* [J] no. 1469/20.

provisions.[400] According to Bobek, Article 267 TFEU had a "functional nature", in serving to identify the national bodies that can become interlocutors of the Court. The review would be "not that" intensive, focusing on structural issues at the general level, and the function of the body in question, rather than the individual judges.[401]

The consequence of that view was that the Polish Supreme Court, as a body, still complied with the requirements under Article 267 TFEU, even where the individual judge making the reference had been appointed in breach of the requirements in Article 19(1) TEU.[402]

The judgement of the ECJ seems to follow the logic and result of Bobek, but takes a different path to get there. Rather than basing itself on a difference in the examination and intensity of review, the Court states that national courts enjoy a presumption of independence when making references to the Court.[403] That presumption was unique to Article 267 TFEU, and it could not be inferred from a reference being admissible that the requirements of Article 19(1) TEU or Article 47 of the Charter were met.[404]

That presumption can be rebutted if the judge which constitutes the referring court has been the subject of a final decision which has found a breach of Article 19(1) TEU.[405] Furthermore, the ECJ distinguished, like AG Bobek, between circumstances only affecting the personal situation of the individual judge, and those which affect the function of the referring court. Issues of the latter type could rebut the presumption.[406]

The referring judge in *BN and Others* had, in fact, been the subject of such a final decision finding a breach of Article 19(1) TEU, in *W.Ż.*[407] However, because that judgement came after the close of the oral hearing in *BN and Others*, the ECJ stated that it could not lead to the

---

[400] See Opinion of AG Bobek in C-132/20 *BN and Others* paras 36, 42 and 101-102.

[401] See Opinion of AG Bobek in C-132/20 *BN and Others* paras 49-79, see also his opinion in C-748/19 to C-754/19 *WB and Others* paras 161-170.

[402] See Opinion of AG Bobek in C-132/20 *BN and Others* para 79.

[403] C-132/20 [GC] *BN and Others* para 69.

[404] C-132/20 [GC] *BN and Others* para 74.

[405] C-132/20 [GC] *BN and Others* para 72.

[406] C-132/20 [GC] *BN and Others* para 75.

[407] C-487/19 [GC] *W.Ż.*

inadmissibility of the case.[408] The Court therefore concluded that the request for a preliminary ruling was admissible.

6.3 Discussing the solution of the ECJ

The solution of the Court, in giving referring courts a presumption of independence, seems to solve many of the criticisms of *Banco de Santander* without creating too many new problems. It will allow the ECJ to accept references from national courts even in situations where, for example, the executive attempts to stack the court, or otherwise undermine its independence.

On the other hand, because the ECJ adopted Bobek's distinction between issues affecting the individual judge, and issues affecting the function of the referring court, it can rebut the presumption of innocence where the referring Court clearly does not have an independent function. This lets the Court deny admissibility where it is in doubt whether the national court can even independently consider and apply a preliminary ruling, and lets the Court take a clear stance against, and avoid legitimising, national courts clearly lacking independence.

Lastly, because the presumption of independence only applies to "a national court or tribunal", the Court leaves itself room for a more intensive review for bodies which it has not yet considered, if it is unsure of whether the referring body is a court or an administrative organ.

However, the problems of *Banco de Santander* are not totally gone. Because the presumption of independence can be rebutted if a final decision has found a breach of Article 19(1) TEU relating to specific judge, those judges will then not be able to make future references for preliminary rulings. On the one hand, this could still risks giving judges less tools with which to resists attacks on their independence by the other branches, making the issues worse rather than better.

On the other hand, judges that have been the subject to such a final decision will presumably be unduly under the influence of the executive or legislative. The admissibility of references from such judges could open up the floodgates for references that in reality come from the executive or legislative, something which arguably was the case in *BN and Others*.[409] Such a

---

[408] C-132/20 [GC] *BN and Others* para 73.

[409] The case seems like a part of a "conflict" between judges friendly to, and opposed to, the government, and an attempt by a judge appointed by the government, having had their own independence questioned, to question the independence of oppositional judges.

situation is clearly not in line with the spirit and purpose of the *dialogue des juges* and could at worst risk lending legitimacy to illegitimate judges. In fact, both the opinion of AG Bobek and the final judgement have been criticised for giving too much leeway for such illegitimate judges to refer cases to the court.[410]

In total then, the Court has seemingly tried to strike a balance between different concerns, and has landed on a solution which seems to take into account both the specific objectives of Article 267 TFEU, the necessity of avoiding illegitimate references and wanting to keep the notion of independence "one and the same" in Articles 267 TFEU, 19(1) TEU and 47 of the Charter.

If *BN and Others* is the last word in this saga, it must be concluded that the notion of independence under Article 267 TFEU will be affected by the recent and stricter case law under Article 19(1) TEU, but that the consequences of that are lessened because national courts will benefit from a presumption of independence.

---

[410] Pech and Platon, VerfBlog 28th July 2021, criticised the solution proposed by AG Bobek. Filipek, VerfBlog 13th May 2022, was critical of the final judgement.

7 Judicial independence as a principle of EEA law

7.1 Introduction

This paper has so far dealt with questions relating to judicial independence under Article 19(1) TEU, as a requirement of Member States and Union law. This last chapter seeks to take a broader look and consider whether this recent case law on Article 19(1) TEU will have consequences also for the EEA Agreement and the Contracting Parties of Iceland, Liechtenstein and Norway. The question, then, is whether EEA law provides for a comparable obligation, to the requirement under Article 19(1) TEU, for the Contracting Parties to ensure and establish an independent judiciary.

To answer that question section 7.2 will fist take a look at the characteristics of the EEA agreement and the status of the rule of law and effective judicial protection in that Agreement. Thereafter, section 7.3 will conclude on whether there is a basis in EEA law to establish a requirement that corresponds to that which the ECJ, in recent case law, has established under Article 19(1) TEU.

7.2 The Rule of Law and effective judicial protection under the EEA Agreement

This section will look at what requirements for the rule of law and effective judicial protection exist in the EEA Agreement. The Agreement itself has no provisions on the rule of law, or in fact any matter of fundamental rights, and therefore no parallels neither to the shared values and objectives in Articles 2 and 3 TEU, nor to effective judicial protection in Article 19(1) TEU. The Charter is also not binding on the Contracting Parties of the EEA.

However, the preamble indicates that some rule of law principles are important under the EEA Agreement. The first recital states that a Europe based on “peace, democracy and human rights” is something the establishment of the EEA will contribute to. The fourth recital states that the EEA should provide “for the adequate means of enforcement, including at the judicial level”. The eighth recital highlights the “judicial defence” of the rights conferred on individuals by the EEA agreement. Lastly, the fifteenth recital states that a uniform interpretation of EEA and Union law is central, “in full deference to the independence of the Courts”, in order to arrive at an “equal treatment of individuals and economic operators as regards the four freedoms and the conditions of competition.”.

The preamble indicates that the Contracting Parties saw the establishment of the EEA as contributing to general larger goals of peace and democracy, and that they were cognisant for the need of the rule of law and judicial defence of rights, at least in so far as it was necessary to ensure that individuals end economic operators could have the same protection of their rights in the EEA as they enjoyed in the EU.

The EEA Agreement contains mechanisms to ensure that individuals all the EEA Contacting parties[411] can enjoy the same protection of their EEA rights. First among those is the First of those is the principle of homogeneity, which requires that EEA law must be interpreted homogenously with EU law.[412] This is clearest where the EEA Agreement and EU Treaties have identically worded principles but applies beyond this as well.[413]

Secondly, the EEA Agreement also contains general principles. That refers to legal principles that are common to the Contracting Parties, and that can be employed both directly as a legal source or indirectly for matters of interpretation. EEA law directly adopted all general principles which had been found by the CJEU prior to when the EEA agreement was signed, see Article 6 EEA.

The EFTA Court has used general principles, homogeneity and the statements of the preamble to actively expand the EEA repertoire on the rule of law and judicial independence. Interpretation in line with fundamental rights, like Articles 6 and 13 ECHR, have been a part of EU law for a long time, and the EFTA Court has confirmed that this is the case for provisions of the EEA Agreement as well, based on references to the eight recital of the preamble and the principle of homogeneity. [414]

It has also confirmed that fundamental rights can, and do, constitute general principles of EEA law. In that regard the Court has found that the ECHR – as in Union law[415] – constitutes a source of general principles of EEA law, because it represents common values of the

[411] This includes both the EU Member States and the EFTA States that signed the EEA Agreement.

[412] As enshrined in Article 1(1) EEA, cf. recitals four and fifteen and Articles 6 EEA and 3 SCA.

[413] see E-14/11 *DB Schenker v ESA* para 78.

[414] E-2/02 *Bellona and others* para 36, reiterated in E-2/03 *Ásgeirsson and Others* para 23.

[415] Se above, section 1.4.2.

Contracting Parties.[416] The EFTA-Court has furthermore made references to the Charter, even if it is not binding on EEA Contracting Parties.[417]

Building on Article 6 ECHR, the EFTA-Court has also found that the principle of effective judicial protection, which is the principle that is codified in Article 19(1) TEU, constitutes a general principle of EEA law.[418]

This case law has the consequence of making the "fair trial" standard of Article 6 ECHR and Article 47 of the Charter applicable in EEA law, both via homogenous interpretation and as sources for general principles of EEA law, something the EFTA-Court has confirmed in several cases.[419] This gives a basis for requirements on judicial independence in EEA law, and the recent case law of the ECJ under Article 19(1) TEU will likely be a useful reference point in defining the various elements of judicial independence also under EEA law.

In total then, while EEA Agreement itself does not regulate neither the rule of law or judicial independence, mentions in the preamble, along with the principle of homogeneity and general principles of EEA law, have served as a basis to interpret the procedural guarantees existing in EU law into EEA law, including judicial independence as a procedural guarantee. This has ensured that individuals and economic operators have the same access to judicial defence of their rights on both the EEA side and the EU side of the common market.

7.3 Is there an obligation to ensure independent judiciaries in EEA law

As discussed in the previous section, EEA law contains a corresponding general principle to Article 6 ECHR, which means there is a procedural guarantee of judicial independence largely similar to Article 47 of the Charter. EEA law also ha a general principle of effective judicial protection, which is the principle enshrined in Article 19(1) TEU.

---

[416] See E-4/11 *Clauder* para 49. See also Björgvinsson (2014) pages 266-280 on the relevance of the ECHR.

[417] See E-4/11 *Clauder* para 49 and E-15/10 *Posten Norge* para 86. Though, it is unclear whether the EFTA-Court really references the Charter because it sees it as a relevant source of EEA principles, or rather just as inspiration, see Wennerås (2018) pages 231-233. For a discussion of this question, see Wahl (2014).

[418] See E-15/10 *Posten Norge v Esa* para 86, reiterated in E-12/20 *Telenor v ESA* para 75. See also Eriksen and Fredriksen (2019) pages 63-65.

[419] See E-10/04 *Piazza* para 43; E-5/10 *Kottke* para 26 and E-3/11 *Sigmarsson* para 29.

The purpose of this section is the recent ECJ case law on effective judicial protection in Article 19(1) TEU should be reflected in the interpretation of the EEA principle of effective judicial protection. As discussed above,[420] the ECJ read an obligation for Member State to ensure the independence of their judiciaries into Article 19(1) TEU. This was done to allow the Court to address Polish and Hungarian reforms damaging the judiciary, even when those reforms were not "implementing EU law" so that Article 47 of the Charter would apply.[421]

Fredriksen and Mathisen states that it can be "safely assumed" that the requirements of independence in recent ECJ case law under Article 19(1) TEU will apply also within EEA law, because the requirements are comparable to those under Article 6 ECHR which EEA law must also follow.[422] On the one hand, it is true that the way in which the ECJ defines the elements of independence will likely have relevance for interpreting the existing requirements of independence under EEA law. On the other hand, Fredriksen and Mathisen do not seem to account for the differences that do exist between Article 19(1) TEU and the narrower scope of Article 6 ECHR or Article 47 of the Charter. The ECJ needed to rely on Article 19(1) TEU precisely the larger scope gave allowed it increased supranational oversight of judicial independence in the Member States.

If effective judicial protection as an EEA principle was interpreted in accordance with recent Article 19(1) TEU case law, it would allow ESA and the EFTA Court to have jurisdiction to directly, and on a general basis, evaluate the judicial organisation in Iceland, Liechtenstein and Norway, even when that judicial organisation is not implementing EU law or related to the effective judicial protection of the EEA rights of an individual or an economic operator. This section will therefore specifically consider whether there is a basis in EEA law to adopt such a wide-reaching requirement of independence under the principle of effective judicial protection.

In answering that question, the differences and similarities in purpose and objective of the agreements must be considered. This is because the principle of homogeneity and the use of

[420] See especially sections 3.4 and 3.5

[421] See Article 51(1) of the Charter.

[422] Fredriksen and Mathisen (2022) page 288.

general principles of EEA law must necessarily be limited by the characteristics and objective of the EEA Agreement. [423]

The shared objectives and values of the EU were central to the recent ECJ case law. The ECJ based itself on a combined reading of Article 19(1) TEU as an expression of the more general value of the rule of law, enshrined in Article 2 TEU.[424] As discussed above, this justified extending the objective of Article 19(1) from merely ensuring effective judicial protection of Union rights, to also upholding shared Union values, like the rule of law.[425] This must also be seen in line with the more extensive political and integrationist objective of the Union,[426] and the ultimate goal of an "ever closer union", see article 1(2) TEU.[427]

The EEA Agreement, on the other hand primarily seeks to integrating the Contracting Parties into the common market of the European Union, while at the same time maintaining the sovereignty of the non-EU Contracting Parties, namely Liechtenstein, Iceland and Norway.[428] There is a lower depth of integration and no objective of an "ever closer union". This dichotomy between the more economically focused objectives of the EEA agreement, and the wider political goals of the European Union, with the ultimate goal of ending in European Unity, was pointed out already by the ECJ in its Opinions on the EEA draft agreement.[429]

Furthermore, there is no corresponding provision to Article 2 TEU in the EEA Agreement, nor is the rule of law mentioned and reflected as a general value in the preamble.[430] In fact, the

---

[423] See Fredriksen (2018) page 132 who states that general principles must have their limit when they are irreconcilable with the provisions and characteristics of the EEA Agreement. Graver (2002) page 86 states that changes and differences in the objective of the EU and the EEA is one of the things that could affect homogenous interpretation and cause a gap in the case law. Sejersted et al. (2011) page 107 also presumes that, to the degree that human rights are a part of the EEA Agreement, they are so where it is necessary to achieve a homogenous interpretation of other provisions. See also the discussion in Fredriksen (2013) pages 285-289 on the extent to which the Charter can create EEA rights and obligations.

[424] See above, section 3.4 and 3.5

[425] See above, section 4.2

[426] In seeking to "promote peace, its values and the well-being of its peoples", through both economic and social means, see Article 3 TEU. Cf. also the eighth and ninth recital of the TFEU.

[427] See also recital thirteen TEU, and the first recital TFEU.

[428] See Article 1 EEA and the third to fifth recital. See also Björgvinsson (2014) page 264. The EFTA Court has also stated that the principal aim is the internal market, see E-1/03 *ESA v Iceland* para 27

[429] See Opinion 1/91 *Draft agreement on the EEA I* paras 15-18 and Opinion 1/92 *Draft agreement on the EEA II* paras 17-18. See similarly in C-452/01 *Ospelt* para 29 and C-897/19 PPU [GC] *I.N.* para 50 where the Court reiterates that integration into the internal market is the principal aim of the EEA Agreement.

[430] Cf. however E-21/16 *Nobile* para 16: "judicial independence was one of the fundamental values of the administration of justice", but that came as an off-hand remark in the context of the SCA.

EFTA Court has rejected using the common values in Article 2 TUE for interpreting EU law in a previous case. The Norwegian Government had referred to the shared value of gender equality in Article 2 TEU and certain other provisions that did not exist in the EEA Agreement[431] to support its interpretation of a directive.[432] The EFTA Court rejected this, stating that these provisions were not part of EEA law and "do not provide a legal basis to decide the present application either directly or by analogy".[433] However, it did not close the door entirely, by stating that "Inevitably, the interpretation of the Directive will reflect both the evolving legal and societal context in which it operates».[434]

The justifications, objectives, and legal basis for the wide interpretation the ECJ gave Article 19(1) TEU therefore do not seem to exist in EEA law, so there is no independent basis in EEA law to interpret the principle of effective judicial protection to the same extensive scope.

Furthermore, the use of the principal homogeneity and dynamic interpretation by the EFTA Court has expressly been justified by the need for citizens and economic operators to rely on the same rights and access to justice,[435] i.e. in line with the objectives of the EEA Agreement of integrating the Contracting Parties into the internal market.

For that objective, it is not necessary for EEA law adopt the wide interpretation of effective judicial protection in recent ECJ case law. The EFTA Court has already clarified that EEA law requires judicial independence as a procedural requirement, in line with Article 47 of the Charter or Article 6 ECHR, to ensure and safeguard the implementation of EU law. The objectives of the EEA the objectives of the EEA Agreement do not seem to necessitate an understanding of the principle which leads to the EEA law containing wider obligation on how Contracting Parties organise their judiciaries, when that has no relation to upholding EEA rights of citizens and economic operators.

---

[431] At the time, Article 2 TEC. Gender equality was added with the Treaty of Amsterdam.

[432] See E-1/02 *ESA v Norway – Report for the Hearing* para 59 for the Norwegian arguments.

[433] E-1/02 *ESA v Norway* para 55. The Court does not explicitly reject the Norwegian argument about Article 2 TEC here as well, but it is quite clear that the statements of the Court apply to all the non-EEA provisions the Norwegian government alleged in support, including Article 2 TEC. See, e.g. Sejersted et al. (2011) page 115.

[434] E-1/02 *ESA v Norway* para 56. See also E-1/01 *Einarsson* paras 43-45, where the EFTA Court explicitly rejected an analogous application of (now) Article 4(2) TEU on respecting national identities.

[435] See E-14/11 *DB Schenker* para 118 and E-15/10 *Posten Norge* para 109-110.

It is not decisive that this would result in effective judicial protection in EU and EEA law being defined differently, if that is because the principle serves a different purpose under the two agreements. It would create a "gap" between EU and EEA law in the sense that ESA and the EFTA Court would not have the same tools of oversight and control over judicial reforms, when those reforms are not implementing EU law, nor affecting the rights of an individual or economic operator, as those enjoyed by the ECJ and the Commission. This might leave the EEA side with weaker tools to combat rule of law backsliding than is the case on the EU side, but that would seem entirely according to more limited purpose of the EEA Agreement, which has no basis to give the EFTA Court and ESA a role in upholding not just the function of the internal market and the equal rights of operators in it, but also shared political values.

The EFTA Court has already, in *Scanteam,* declined to follow the recent ECJ case law when interpreting independence as a requirement for preliminary references in Article 34 SCA, emphasising its power to independently determine the relevance of ECJ case law.[436]

Therefore, while the principle of homogenous interpretation is a strong argument for interpreting the principle of effective judicial protection the same way in EEA law as in EU law, it can be argued that doing so would go beyond what is necessary to achieve harmonious rules for the internal market and represent an interference in the judicial systems of the EEA states. The ECJ case law would therefore not be relevant for the more limited objectives of the EEA Agreement.

[436] See E-8/19 *Scanteam* paras 45-47. This was said in the specific context of Article 34 SCA, which resembles Article 267 TFEU but is specific for references to the EFTA Court, which could explain the bolder approach.

8 Closing remarks

Rule of law-backsliding has been a subject of intense academic and political debate within the European Union in recent years, specifically as related to attacks on the independent judiciary.

This paper first set out to detail the judicial response to these issues. First taking a theoretical approach to the Rule of law, and why it necessitates and independent judiciary, it then proceeded to detail how the ECJ took the shared value of Rule of law in Article 2 TEU and operationalised it through the principle of effective judicial protection in Article 19(1) TEU, by a combined reading of the provisions. This created a standalone and general obligation for Member States to ensure the independence of national judiciaries, in so far as they had jurisdiction to rule on matters of Union law – which all national courts generally have.

This gave the ECJ and Union law the basis it needed to deal with Rule of law-backsliding, which the Court, and national courts, took active advantage of. Within a short span the Court developed an extensive case law detailing many different standards and requirements that are necessary for the judiciary to be independent, for example obliging Member states to ensure proper appointments, to limit their disciplinary regimes, to ensure the irremovability of judges and to ensure their lawful establishment. Furthermore, the paper has detailed that Member States can have a legitimate room for restricting these requirements, where it is proportional to legitimate objectives pursued.

Lastly, the paper analysed certain consequences of the case law under Article 19(1) for other areas of law, finding that it likely will affect how interpretation is defined also under Article 267 TFEU, but that the provisions still pose quite different requirements. Furthermore, the case law can affect how judicial independence is interpreted in the EEA Agreement, where for example the fair trial standard in Article 6 ECHR is seen as a general principle. However, I contend that there is no basis in the EEA Agreement for finding an obligation to uphold independence of an equally wide scope to Article 19(1). Such a wide scope is not necessary to uphold a homogenous interpretation of rules relating to the internal market, and the EFTA-Court and ESA are not given the same mandate, nor legitimacy, to act as the guardians of the common values when compared to the CJEU and the Commission. It would represent an interference with the competences of the Contracting parties to organise their own judiciaries if an obligation of a similar scope was adopted under the EEA Agreement.

As for future research, this paper has primarily focused on how the ECJ has acted as a guardian of the Rule of law and common values in a “thin” sense, i.e. in seeking to uphold judicial independence. However, Because Rule of law-backsliding is inherently related to democratic backsliding in general, and lacking protections of fundamental rights, it is not unlikely that the combined reading of Article 2 TEU and Article 19(1) TEU could give impetus for the ECJ to act as a guardian of Rule of law in a “thick” sense. This could for example include seeking to uphold democratic norms or other fundamental rights, even outside the scope of the Charter, which could be an area of future research. [437]

This is therefore case law with a huge potential for integrationist effects, and which potentially is defining for the role and purpose of the federal level of the Union vis-à-vis the Member States. Research on the existing and potential integrationary consequences is therefore needed.[438]

In conclusion, the issues of Rule of law-backsliding, democratic backsliding and judicial independence are likely to be a part of the academic debate for a long time, and to equally take its place on the docket of the ECJ. This paper has analysed a quite expansive set of case law, but there are a large number of future cases and applications on judicial independence before both the ECJ and the ECtHR, and that is before considering the potential spill over into other issues and areas. This is therefore a field of Union law – and of Human rights law – in drastic expansion going forward.

---

[437] Coghlan “One fattened, six starved”, *European Law Blog* 15th March 2022, criticises the ECJ for only focusing Rule of law in the narrow sense, ignoring the other values of Article 2 TEU. Dubout (2021) page 437 compares the recent ECJ case law, reading Article 2 TEU-values into effective judicial protection in Article 19(1) TEU, with the reading of substantive rights into the *due process clause* of the 14th Amendment of the US constitution, which has been the basis many rights established by the SCOTUS.

[438] Pech and Platon (2018) page 1845 considers the case law a “quasi-federal” move. Van Elsuwege and Gremmelprez (2020) page 10 sees the ECJ acting more like a Constitutional Court. Dubout (2021) page 199 states that the constitution of Member States is now effectively split between a national and a European level.

9 Bibliography

9.1 Literature

Andrés Sáenz de Santa María (2021)	Andrés Sáenz de Santa María, Paz: Rule of Law and Judicial Independence in the Light of CJEU and ECtHR Case Law *In Izquierdo-sans, Cristina, Carmen Martínez-Capdevila and Magdalena Nogueira-Guastavino (eds. 2021): Fundamental Rights Challenges Cham: Springer* pages 167-187.
Arnull (2013)	Arnull, Anthony: Article 19 [The Court of Justice of the European Union] *in Blanke, Hermann-Josef and Stelio Mangiameli (eds. 2013) The Treaty on European Union – A Commentary* Heidelberg: Springer pages 759-783.
Baudenbacher (2016)	Baudenbacher, Carl: The EFTA Court: Structure and Tasks page 139 *in Baudenbacher, Carl (ed. 2016): The Handbook of EEA Law Cham: Springer* pages 139-178.
Beck (2016)	Beck, Gunnar (2016): The Macro Level: The Structural Impact of General International Law on EU Law: The Court of Justice of the EU and the Vienna Convention on the Law of Treaties *Yearbook of European Law 35(1)*: 484-512.
Bingham (2010)	Bingham, Tom (2011 [2010]): *The Rule of Law* London: Penguin Books.
Björgvinsson (2014)	Björgvinsson, Davíð Thór: Fundamental Rights in EEA Law *in EFTA Court (ed. 2014): The EEA and the EFTA Court: Decentered Integration London: Hart Publishing* pages 263-280.
Bonelli (2019)	Bonelli, Matteo (2019): Effective Judicial Protection in EU Law: an Evolving Principle of a Constitutional Nature *Review of European Administrative Law 12(2)*: 35-62.

Bonelli and Claes (2018)	Bonelli, Matteo and Monica Claes (2018): Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary *European Constitutional law Review 14(3)*: 622-643.
Borger-De Smedt (2008)	Borger-De Smedt, Anne (2008): La Cour de Justice dans les négociations du traité de Paris instituant la CECA *Journal of European Integration History 14(2)*: 7-33.
Bragdø-Ellenes (2020)	Bragdø-Ellenes, Sunniva Cristina: An Introduction to French Legal Culture *in Koch, Sören and Jørn Øyrenhagen Sunde (eds. 2020) Comparing Legal Cultures 2nd ed. Bergen: Fagbokforlaget* pages 471-510.
Castillo-Ortiz (2020)	Castillo-Ortiz, Pablo (2020): The Dilemmas of Constitutional Courts and the Case for a New Design of Kelsenian Institutions *Law and Philosophy 39(6)*: 617-655.
Chen and Fu (2020)	Chen, Weitseng and Hualing Fu (eds. 2020): *Authoritarian Legality in Asia – Formation, Development and Transition* Cambridge: Cambridge University Press.
Chevallier (2017)	Chevallier, Jaques (2017): *L'État de droit 6e édition* Paris: LGDJ.
Comella (2004)	Comella, Victor Ferres (2004): The Consequences of Centralizing Constitutional Review in a Special Court: Some Thoughts on Judicial Activism *Texas Law Review 82(7)*: 1705-1736.
Dubout (2021)	Dubout, Edouard (2021): *Droit Constitutionnel de l'Union européenne* Brussels: Bruylant.
Eriksen and Fredriksen (2019)	Eriksen, Christoffer Conrad and Halvard Haukeland Fredriksen (2019): *Norges europeiske forvaltningsrett* Oslo: Universitetsforlaget.

Fredriksen (2018)	Fredriksen, Halvard Haukeland: EEA law in and beyond the text of the Main Part of the EEA Agreement *in Arnesen, Finn, Halvard Haukeland Fredriksen, Hans Petter Graver, Ola Mestad and Christopher Vedder (eds. 2018): Agreement on the European Economic Area – A Commentary Oslo: Universitetsforlaget* pages 124-143.
Fredriksen (2013)	Fredriksen, Halvard Haukeland (2013): Betydningen av EUs pakt om grunnleggende rettigheter for EØS-retten *Jussens Venner 48(6)*: 371-399.
Fredriksen and Mathisen (2022)	Fredriksen, Halvard Haukeland and Gjermund Mathisen (2022): *EØS-Rett 4. utg*. Bergen: Fagbokforlaget.
Gerangelos (2009)	Gerangelos, Peter (2009): *The Separation of Powers and Legislative Interference in Judicial Process – Constitutional Principles and Limitations* Portland: Hart Publishing.
Glenn (2014)	Glenn, H. Patrick (2014): *Legal Traditions of the World – fifth edition* Oxford: Oxford University Press.
Graver (2002)	Graver, Hans Petter (2002): Mission Impossible: Supranationality and National Legal Autonomy in the EEA Agreement *European Foreign Affairs Review 7(1)*: 73-90.
Grote (2014)	Grote, Rainer: The German Rechtsstaat in a Comparative Perspective *in Silkenat, James R., James E. Hickey Jr. and Peter D. Barenboim (eds. 2014) The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat) Cham: Springer* pages 193-207.
Heuschling (2007)	Heuschling, Luc: Why Should Judges Be Independent *in Ziegler, Katja S., Denis Baranger and Anthony W. Bradley (2007): Constitutionalism and the Role of Parliaments Portland: Hart Publishing*: pages 199-223.

Hirschl (2011)	Hirschl, Ran: The Judicialization of Politics *in Goodin, Robert E. (ed. 2011): The Oxford Handbook of Political Science Oxford: Oxford University Press*: pages 253-275.
Hirschl (2008)	Hirschl, Ran (2008): The Judicializaton of Mega-Poltiics and the Rise of Political Courts *Annual Review of Political Science 11(1)*: 93-118.
Hirschl (2000)	Hirschl, Ran (2000): The Political Origins of Judicial Empowerment Through Constitutionalizations: Lessons from Four Constitutional Revolutions *Law & Social Inquiry 25(1)*: 91-149.
Holmøyvik (2012)	Holmøyvik, Eirik: Nokre historiske utviklingslinjer for domstolane sitt sjølvstende i Noreg *In Engstad, Nils Asbjørn, Astrid Lærdal Frøseth and Bård Tønder (2012): Dommernes Uavhengighet – Den Norske Dommerforening 100 år Bergen: Fagbokforlaget*: pages 99-125.
Jiang (2011)	Jiang Yongling (2011): *The Mandate of Heaven and The Great Ming Code* Seattle: University of Washington Press.
Kelsen (1929)	Kelsen, Hans (1929): The Nature and Development of Constitutional Adjudication *in, and translated by Vinx, Lars (2015): The Guardian of the Constitution – Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law Cambridge: Cambridge University Press* pages 22-78.
Klamert and Schima (2019)	Klamert, Marcus and Bernhard Schima: Article 19 TEU *in Kellerbauer, Manuel, Marcus Klamert and Jonathan Tomkin (eds. 2019): The EU Treaties and the Charter of Fundamental Rights: A Commentary Oxford: Oxford University Press* pages 172-188.
Koch (2020)	Koch, Sören: An Introduction to German Legal Culture *in Koch, Sören and Jørn Øyrenhagen Sunde (eds. 2020)*

	Comparing Legal Cultures 2nd ed. Bergen: Fagbokforlaget pages 221-272.
Kosař and Šipulová (2018)	Kosař, David and Katarína Šipulová (2018): The Strasbourg Court Meets Abusive Constitutionalism: Baka v. Hungary and the Rule of Law *Hague Journal on the Rule of Law 10(1)*: 83-110.
Laquièze (2007)	Laquièze, Alain: État de Droit and National Sovereignty in France *in Costa, Pietro and Danilo Zolo (eds. 2007): The Rule of Law – History, Theory and Criticism Cham: Springer* pages 261-291.
Lenaerts (2020)	Lenaerts, Koen (2020): New Horizons for the Rule of Law within the EU *German Law Journal 21(1):* 29-34.
Lenaerts (2007)	Lenaerts, Koen (2007): Rule of law and the Coherence of the Judicial System of the European Union *Common market Law Review 44(6)*: 1625-1660.
Lenaerts et al. (2021)	Lenaerts, Koen, Piet van Nuffel and Tim Corthaut (2021): *EU Constitutional Law* Oxford: Oxford University Press
Lenaerts and Gutiérrez-Fons (2020)	Lenaerts, Koen and José A. Gutiérrez-Fons (2020): *Les méthodes d'interprétation de la Cour de justice de l'Union européenne* Brussels: Bruylant.
Lønning (2012)	Lønning, Inge: Demokrati, rettsstaten og menneskerettighetene *In Engstad, Nils Asbjørn, Astrid Lærdal Frøseth and Bård Tønder (2012): Dommernes Uavhengighet – Den Norske Dommerforening 100 år Bergen: Fagbokforlaget*: pages 79-97.
Loughlin (2010)	Loughlin, Martin (2010): *Foundations of Public Law* New York: Oxford University Press.
Montesquieu (1748)	Montesquieu, Charles de Secondat, Baron de (2015 [1748]): *De l'esprit des lois* Ligaran Éditions.

Nugent (2017) — Nugent, Neil (2017): *The Government and Politics of the European Union 8th ed.* London: Palgrave Macmillan.

Pech and Platon (2018) — Pech, Laurent and Sebastien Platon (2018): Judicial Independence under Threat: The Court of Justice to the Rescue in the ASJP Case *Common Market Law Review 55(6)*: 1827-1854.

Pech and Scheppele (2017) — Pech, Laurent and Kim Lane Scheppele (2017): Illiberalism within: Rule of Law Backsliding in the EU *Cambridge Yearbook of European Legal Studies 19*: 3-47.

Reuterskiöld (1918) — Reuterskiöld, Carl Axel (1918): Vår rättsordnings omvandling *Statsvetenskaplig Tidskrift 21(2):* 69-97.

Reyns (2021) — Reyns, Charlotte (2021): Saving Judicial Independence: A Threat to the Preliminary Ruling Mechanism? *European Constitutional Law Review 17(1)*: 26-52.

Santoro (2007) — Santoro, Emilo: The Rule of Law and the "Liberties of the English": The Interpretation of Albert Venn Dicey *in Costa, Pietro and Danilo Zolo (eds. 2007): The Rule of Law – History, Theory and Criticism Dordrecht: Cham: Springer* pages 153-199.

Schmitt (1932) — Schmitt, Carl (2004 [1932]): *Legality and Legitimacy – translated by Jeffrey Seitzer* Durham: Duke University Press.

Schmitt (1931) — Schmitt, Carl (1931) The Guardian of the Constitution *in, and translated by, Vinx, Lars (2015): The Guardian of the Constitution – Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law Cambridge: Cambridge University Press.*

Schütze (2015) — Schütze, Robert (2015): *An Introduction to European Law – second edition* Cambridge: Cambridge University Press.

Sejersted et al. (2011) Sejersted, Fredrik, Finn Arnesen, Ole-Andreas Rognstad and Olav Kolstad (2011): *EØS-Rett 3. utg.* Oslo: Universitetsforlaget.

Streinz (2021) Streinz, Rudolf: Interpretation and Development of EU Primary Law *in Reisenhuber, Karl (ed. 2021) European Legal Methodology 2nd. ed. Cambridge: Intersentia* pages 157-180.

Tiedeman (2014) Tiedeman, Paul: The Rechtsstaat-Principle in Germany: The Development from the Beginning Until Now *in Silkenat, James R., James E. Hickey Jr. and Peter D. Barenboim (eds. 2014) The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat) Cham: Springer* pages 171-192.

Togeby et al. (2004) Togeby, Lise, Jørgen Goul Andersen, Peter Munk Christiansen, Torben Beck Jørgensen and Signild Vallgårda (2004): *Magt og Demokrati I Danmark – Hovedresultater fra Magtutredningen* Aarhus: Aarhus universitetsforlag.

Tömmel (2014) Tömmel, Ingeborg (2014): *The European Union – What it is and how it works* New York: Palgrave Macmillan.

Van Elsuwege and Gremmelprez (2020) Van Elsuwege, Peter and Femke Gremmelprez (2020): Protecting the Rule of Law in the EU Legal Order: A Constitutional Role for the Court of Justice *European Constitutional Law Review 16:* 8–32.

Wahl (2014) Wahl, Nils: Uncharted Waters: Reflections on the Legal Significance of the Charter under EEA Law and Judicial Cross-Fertilisation in the Field of Fundamental Rights *in EFTA Court (ed. 2014): The EEA and the EFTA Court: Decentered Integration London: Hart Publishing* pages 253-262.

Watson (1964) Watson, Burton (1964): *Han Fei Tzu, Basic Writings – Translated by Burton Watson* New York: Columbia University Press.

Wennerås (2018) Wennerås, Pål: Article 6 [Homogeneity] *in Arnesen, Finn, Halvard Haukeland Fredriksen, Hans Petter Graver, Ola Mestad and Christopher Vedder (eds. 2018): Agreement on the European Economic Area – A Commentary Oslo: Universitetsforlaget* pages 209-248.

Widershoven (2019) Widershoven, Rob (2019): National Procedural Autonomy and General EU Law Limits Constitutional Nature *Review of European Administrative Law 12(2)*: 5-34.

Østerud (2012) Østerud, Øyvind: Domstolmakt og rettsrevolusjon *In Engstad, Nils Asbjørn, Astrid Lærdal Frøseth and Bård Tønder (2012): Dommernes Uavhengighet – Den Norske Dommerforening 100 år Bergen: Fagbokforlaget*: pages 425-442.

Østerud et al. (2003) Østerud, Øyvind, Fredrik Engelstad and Per Selle (2003): *Makten og Demokratiet – En sluttbok fra Makt- og Demokratiutredningen* Oslo: Gyldendal akademisk.

9.2 Court cases

Court of Justice of the European Union

Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*,
EU:C:1963:1.

Case 6/64 *Flaminio Costa v E.N.E.L*,
EU:C:1964:66.

Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland*,
EU:C:1976:188.

Case 101/78 *Granaria BV v Hoofdproduktschap voor Akkerbouwprodukten,*
EU:C:1979:38.

Case 14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen*,
EU:C:1984:153.

Case 294/83 *Parti écologiste "Les Verts" v European Parliament*,
EU:C:1986:166.

Case 222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*,
EU:C:1986:206.

Case C-14/86 *Pretore di Salò v Persons unknown*,
EU:C:1987:275.

Case 222/86 *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v Georges Heylens and others*,
EU:C:1987:442.

Case 374/87 *Orkem v Commission of the European Communities*,
EU:C:1989:387.

Case 109/88 *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss*,
EU:C:1989:383.

Case C-331/88 *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others*,
EU:C:1990:391.

Joined cases C-297/88 and C-197/89 *Massam Dzodzi v Belgian State,*
EU:C:1990:360.

Opinion 1/91 *Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area*,
EU:C:1991:490.

Opinion 1/92 *Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European*

Economic Area,
EU:C:1992:189.

Case C-24/92 *Pierre Corbiau v Administration des contributions*,
EU:C:1993:118.

Joined cases C-74/95 and C-125/95 *Criminal proceedings against X*,
EU:C:1996:491.

Case C-54/96 *Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH*,
EU:C:1997:413.

Case C-249/96 *Lisa Jacqueline Grant v South-West Trains Ltd*,
EU:C:1998:63.

Case C-103/97 *Josef Köllensperger GmbH & Co. KG and Atzwanger AG v Gemeindeverband Bezirkskrankenhaus Schwaz*,
EU:C:1999:52.

Joined Cases C-110/98 to C-147/98 *Gabalfrisa SL and Others v Agencia Estatal de Administración Tributaria (AEAT)*,
EU:C:2000:145.

Case C-17/00 *François De Coster v Collège des bourgmestre et échevins de Watermael-Boitsfort*,
EU:C:2001:651.

Case C-50/00 P *Unión de Pequeños Agricultores (UPA) v Council of the European Union*,
EU:C:2002:462.

Case C-452/01 *Margarethe Ospelt and Schlössle Weissenberg Familienstiftung*,
EU:C:2003:493.

Case C-540/03 [GC] *European Parliament v Council of the European Union*,
EU:C:2006:429.

Case C-506/04 [GC] *Graham J. Wilson v Ordre des avocats du barreau de Luxembourg*, EU:C:2006:587.

C-432/05 [GC] *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern*, EU:C:2007:163.

Case C-244/06 *Dynamic Medien Vertriebs GmbH v Avides Media AG*, EU:C:2008:85.

Case C-63/08 *Virginie Pontin v T-Comalux SA*, EU:C:2009:666.

Case C-517/09 *RTL Belgium SA*, EU:C:2010:821.

Order C-434/11 *Corpul Naţional al Poliţiştilor v Ministerul Administraţiei şi Internelor and others*, EU:C:2011:830.

Order C-128/12 *Sindicato dos Bancários do Norte and Others v BPN – Banco Português de Negócios SA*, EU:C:2013:149.

Order C-134/12 *Ministerul Administraţiei şi Internelor and others v orpul Naţional al Poliţiştilor – Biroul Executiv Central*, EU:C:2012:288.

Order C-264/12 *Sindicato Nacional dos Profissionais de Seguros e Afins v Fidelidade Mundial — Companhia de Seguros SA*, EU:C:2014:2036.

Order C-369/12 *Corpul Naţional al Poliţiştilor – Biroul Executiv Central v Ministerul Administraţiei şi Internelor and others*, EU:C:2012:725.

Opinion 2/13 [Full Court] *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, EU:C:2014:2454.

Joined Cases C-58/13 and C-59/13 *Angelo Alberto Torresi and Pierfrancesco Torresi v Consiglio dell'Ordine degli Avvocati di Macerata*,
EU:C: 2014:2088.

Case C-222/13 *TDC A/S v Erhvervsstyrelsen*,
EU:C:2014:2265.

Order C-665/13 *Sindicato Nacional dos Profissionais de Seguros e Afins v Via Directa — Companhia de Seguros SA*,
EU:C:2014:2327.

Case C-62/14 [GC] *Peter Gauweiler and Others v Deutscher Bundestag*,
EU:C:2015:400.

Case C-203/14 *Consorci Sanitari del Maresme v Corporació de Salut del Maresme i la Selva*,
EU:C:2015:664.

Case C-258/14 [GC] *Eugenia Florescu and Others v Casa Judeţeană de Pensii Sibiu and Others*,
EU:C:2017:448.

Case C-262/14 *Sindicatul Cadrelor Militare Disponibilizate în rezervă și în retragere (SCMD) v Ministerul Finanțelor Publice*,
EU:C:2015:336.

Case C-274/14 [GC] *Proceedings brought by Banco de Santander SA*,
EU:C:2020:17.

Case C-503/15 *Ramón Margarit Panicello v Pilar Hernández Martínez*,
EU:C:2017:126.

Case C-64/16 [GC] *Associação Sindical dos Juízes Portugueses v Tribunal de Contas (ASJP)*,
EU:C:2018:117.

Case C-403/16 *Soufiane El Hassani v Minister Spraw Zagranicznych*,
EU:C:2017:960.

Case C-482/17 [GC] *Czech Republic v European Parliament and Council of the European Union*,
EU:C:2019:1035.

Case C-49/18 *Carlos Escribano Vindel v Ministerio de Justicia*,
EU:C:2019:106.

Case C-192/18 [GC] *European Commission v Republic of Poland (Independence of the ordinary courts)*,
EU:C:2019:924.

Case C-216/18 PPU [GC] *LM*,
EU:C:2018:586.

Case C-311/18 [GC] *Data Protection Commissioner v Facebook Ireland Limited and Maximillian Schrems (Schrems II)*,
EU:C:2020:559.

Joined Cases C-558 and C-563/18 [GC] Miasto *Łowicz and Prokurator Generalny zastępowany przez Prokuraturę Krajową, formerly Prokuratura Okręgowa w Płocku v Skarb Państwa – Wojewoda Łódzki and Other*,
EU:C:2020:234.

Joined Cases C-585/18, C-624/18 and C-625/18 [GC] *A. K. and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy*,
EU:C:2019:982.

Case C-619/18 [GC] *European Commission v Republic of Poland (Independence of the Supreme Court),*
EU:C:2019:531.

Order C-623/18 *Prokuratura Rejonowa w Słubicach v BQ*,
EU:C:2020:800.

Case C-824/18 [GC] *A.B. and others v Krajowa Rada Sądownictwa and Others,*
EU:C:2020:1053.

Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 [GC] *Asociaţia 'Forumul Judecătorilor din România' (AFJR)*,
EU:C:2021:393.

Case C-272/19 *VQ v Land Hessen*,
EU:C:2020:535.

Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 [GC] *Criminal proceedings against PM and others*,
EU:C:2021:1034.

Case C-487/19 [GC] *Proceedings brought by W.Ż*,
EU:C:2021:798.

Case C-544/19 *„ECOTEX BULGARIA" LTD v Teritorialna direktsia na Natsionalnata agentsia za prihodite,*
EU:C:2021:803.

Case C-564/19 [GC] *Criminal proceedings against IS*,
EU:C:2021:949.

Joined Cases C-748/19 to C-754/19 [GC] *Criminal proceedings against WB and Others*,
EU:C:2021:931.

Case C-791/19 [GC] *European Commission v Republic of Poland (Disciplinary regime of judges)*,
EU:C:2021:596.

Case C-896/19 [GC] *Repubblika v Il-Prim Ministru*,
EU:C:2021:311.

Case C-897/19 PPU [GC] *Ruska Federacija v I.N.*,
EU:C:2020:262.

Case C-132/20 [GC] *BN and Others v Getin Noble Bank S.A*,
EU:C:2022:235.

Case C-338/20 *D.P.*,
EU:C:2021:805.

Case C-452/20 *PJ v Agenzia delle dogane e dei monopoli - Uff.icio dei monopoli per la Toscana and Ministero dell'Economia e delle Finanze*,
EU:C:2022:111.

Case C-156/21 [GC] *Hungary v European Parliament and Council of the European Union*,
EU:C:2022:97.

Case C-157/21 [GC] *Republic of Poland v European Parliament and Council of the European Union,*
EU:C:2022:98.

Case C-430/21 [GC] *Proceedings brought by RS,*
EU:C:2022:99.

Opinions of Advocates General of the European Union

Opinion of AG Darmon in Case C-24/92 *Pierre Corbiau v Administration des contributions*,
EU:C:1993:59.

Opinion of AG Saggio in Case C-103/97 *Josef Köllensperger GmbH & Co. KG and Atzwanger AG v Gemeindeverband Bezirkskrankenhaus Schwaz*,
EU:C:1998:433.

Opinion of AG Saggio in Joined Cases C-110/98 to C-147/98 *Gabalfrisa SL and Others v Agencia Estatal de Administración Tributaria (AEAT)*,
EU:C:1999:489.

Opinion of AG Wahl in Joined Cases C-58/13 and C-59/13 *Angelo Alberto Torresi and Pierfrancesco Torresi v Consiglio dell'Ordine degli Avvocati di Macerata*,
EU:C:2014:265.

Opinion of AG Hogan in Case C-274/14 *Proceedings brought by Banco de Santander SA*,
EU:C:2019:802.

Opinion of AG Saugmandsgaard Øe in Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*,
EU:C:2017:395.

Opinion of AG Bobek in Case C-89/17 *Secretary of State for the Home Department v Rozanne Banger*,
EU:C:2018:225.

Opinion of AG Mengozzi in Case C-380/17 *K and B v Staatssecretaris van Veiligheid en Justitie*,
EU:C:2018:504.

Opinion of AG Tanchev in Case C-192/18 *European Commission v Republic of Poland (Independence of the ordinary courts),*
EU:C:2019:529.

Opinion of AG Tanchev in Joined Cases C-558 and C-563/18 Miasto *Łowicz and Prokurator Generalny zastępowany przez Prokuraturę Krajową, formerly Prokuratura Okręgowa w Płocku v Skarb Państwa – Wojewoda Łódzki and Other,*
EU:C:2019:775.

Opinion of AG Tanchev in Joined Cases C-585/18, C-624/18 and C-625/18 *A. K. and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy*,
EU:C:2019:551.

Opinion of AG Tanchev in Case C-619/18 *European Commission v Republic of Poland (Independence of the Supreme Court),*
EU:C:2019:325.

Opinion of AG Bobek in Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 *Asociaţia 'Forumul Judecătorilor din România' and Others (AFJR) v Inspecţia Judiciară and Others,*
EU:C:2020:746.

Opinion of AG Bobek in Joined Cases C-748/19 to C-754/19 *Criminal proceedings against WB and Others*,
EU:C:2021:403.

Opinion of AG Tanchev in Case C-791/19 *European Commission v Republic of Poland (Disciplinary regime of judges)*,
EU:C:2021:366.

Opinion of AG Hogan in Case C-896/19 Repubblika v Il-Prim Ministru,
EU:C:2020:1055.

Opinion of AG Bobek in Case C-132/20 *BN and Others v Getin Noble Bank S.A.*,
EU:C:2021:557.

Opinion of AG Collins in Case C-430/21 *Proceedings brought by RS,*
EU:C:2022:44.

General Court of the European Union

Joined Cases T-27/03, T-46/03, T-58/03, T-79/03, T-80/03, T-97/03 and T-98/03 *SP SpA and Others v Commission of the European Communities*,
EU:T:2007:317.

T-791/19 *Sped-Pro S.A. v European Commission*,
EU:T:2022:67.

Court of Justice of the European Free Trade Association (EFTA Court)

Case E-1/01 *Hörður Einarsson v The Icelandic State*, judgement of 22nd February 2002,
EFTA Ct. Rep. 1

Case E-1/02 *EFTA Surveillance Authority v Norway*, judgement of 24th January 2003,
EFTA Ct. Rep. 1.

Case E-1/02 *EFTA Surveillance Authority v* Norway, Report for the Hearing.

Case E-2/02 *Technologien Bau- und Wirtschaftsberatung GmbH and Bellona Foundation v EFTA Surveillance Authority*, judgement of 19th June 2003,
EFTA Ct. Rep. 52.

Case E-1/03 *EFTA Surveillance Authority v Iceland*, judgement of 12th December 2003,
EFTA Ct. Rep. 145.

Case E-2/03 *Ákæruvaldið (The Public Prosecutor) v Ásgeir Logi Ásgeirsson, Axel Pétur Ásgeirsson and Helgi Már Reynisson*, judgement of 12th December 2003,
EFTA Ct. Rep. 185.

Case E-10/04 *Paolo Piazza v Paul Schurte AG*, judgement of 1st July 2005,
EFTA Ct. Rep. 76

Case E-5/10 *Dr. Joachim Kottke v Präsidial Anstalt and Sweetyle Stiftung*, judgement of 17th December 2010,
EFTA Ct. Rep. 320.

Case E-15/10 *Posten Norge AS v EFTA Surveillance Authority*, judgement of 18th April 2012, EFTA Ct. Rep. 246.

Case E-3/11 *Pálmi Sigmarsson v Seðlabanki Íslands*, judgement of 14th December 2011, EFTA Ct. Rep. 430

Case E-4/11 *Arnulf Clauder*, judgement of 26th July 2011,
EFTA Ct. Rep. 216

Case E-14/11 *DB Schenker v EFTA Surveillance Authority*, judgement of 21st December 2012,
EFTA Ct. Rep. 1178.

Case E-18/11 *Irish Bank Resolution Corporation Ltd v Kaupþing hf*, judgement of 28th September 2012,
EFTA Ct. Rep. 592.

Case E-21/16 *Pascal Nobile v DAS Rechtsschutz-Versicherungs AG*, decision of 14th February 2017.

Case E-8/19 *Scanteam AS v The Norwegian Government*, judgement of 16th July 2020.

Case E-12/20 *Telenor ASA and Telenor Norge AS v EFTA Surveillance Authority*¸ judgement of 5th May 2022.

European Court of Human Rights

Absandze v. Georgia [A], no. 57861/00, CE:ECHR:2002:1015DEC005786100.

Advance Pharma sp. z o.o v. Poland [J], no. 1469/20, CE:ECHR:2022:0203JUD000146920.

Agrokompleks v. Ukraine [J], no. 23465/03, CE:ECHR:2011:1006JUD002346503

Belilos v. Switzerland [P], no 10328/82, CE:ECHR:1988:0429JUD001032883.

Campbell and Fell v. The United Kingdom [J], no. 7819/77 and 7878/77, CE:ECHR:1984:0628JUD000781977.

Çıraklar v. Turkey [J], no. 19601/92, CE:ECHR:1998:1028JUD001960192.

Baka v. Hungary [GC], no. 20261/12, CE:ECHR:2016:0623JUD002026112.

Beaumartin v. France [J], no. 15287/89, CE:ECHR:1994:1124JUD001528789.

Broda and Bojara v. Poland [J], no. 26691/18 and 27367/18, CE:ECHR:2021:0629JUD002669118.

Denisov v. Ukraine [GC], no. 76639/11, CE:ECHR:2018:0925JUD007663911.

Dolińska-Ficek and Ozimek v. Poland [J], no. 49868/19 and 57511/19, CE:ECHR:2021:1108JUD004986819.

Ettl and Others v. Austria [J], no. 9273/81, CE:ECHR:1987:0423JUD000927381.

Findlay v. The United Kingdom [J], no. 22107/93, CE:ECHR:1997:0225JUD002210793.

Grzęda v. Poland [GC], no. 43572/18,
CE:ECHR:2022:0315JUD004357218.

Guðmundur Andri Ástráðsson v. Iceland [GC], no. 26374/18,
CE:ECHR:2020:1201JUD002637418.

Kleyn and Others v. the Netherlands [GC], no. 39343/98,
CE:ECHR:2003:0506JUD003934398.

Incal v. Turkey [GC], no. 22678/93,
CE:ECHR:1998:0609JUD002267893.

Maktouf and Damjanović v. Bosnia and Herzegovina [GC], no. 2312/08 and 34179/08,
CE:ECHR:2013:0718JUD000231208.

Miracle Europe KFT v. Hungary [J], no. 57774/13,
CE:ECHR:2016:0112JUD005777413.

Oleksandr Volko v. Ukraine [J], no. 21722/11,
CE:ECHR:2013:0109JUD002172211.

Ramos Nunes de Carvalho e Sá v. Portugal [GC], no. 55391/13,
CE:ECHR:2018:1106JUD005539113.

Reczkowicz v. Poland [J], no. 43447/19,
CE:ECHR:2021:0722JUD004344719.

Sacilor Lormines v. France [J], no. 65411/01,
CE:ECHR:2006:1109JUD006541101.

Şahiner v. Turkey [J], no. no. 29279/95,
CE:ECHR:2001:0925JUD002927995.

Siglfirðingur ehf. v. Iceland [A], no. 34142/96,
CE:ECHR:1999:0907DEC003414296.

Siglfirðingur ehf. v. Iceland [J], no. 34142/96,
CE:ECHR:2000:0530JUD003414296.

Sramek v. Austria [P], no. 8790/79,
CE:ECHR:1984:1022JUD000879079.

Svilengaćanin and Others v. Serbia [J], no. 50104/10,
CE:ECHR:2021:0112JUD005010410.

Thiam v. France [J], no 80018/12,
CE:ECHR:2018:1018JUD008001812.

Xero Flor w Polsce sp. Z o.o v. Poland [J], no. 4907/18,
CE:ECHR:2021:0507JUD000490718.

Yurtayev v. Ukraine [J], no. 11336/02,
CE:ECHR:2006:0131JUD001133602.

Zubko and Others v.Ukraine [J], no. 3955/04,
CE:ECHR:2006:0426JUD000395504.

Żurek v. Poland [J], no. 39650/18,
CE:ECHR:2022:0616JUD003965018.

International Court of Justice

Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment,
I.C.J. Reports 2010, p. 639.

Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Preliminary Objections, Judgement, General List no. 172, 4th February 2021.

UN Human Rights Committee

Gabriel Osío Zamora v. Venezuela (2017), Comm. No. 2203/2012,
CCPR/C/121/D/2203/2012.

General Comment no. 32 (2007) - *Article 14: Right to equality before courts and tribunals and to a fair trial*,
CCPR/C/GC/32.

General Comment no. 33 (2009) – *The Obligations of State Parties Under the Optional Protocol to the International Covenant on Civil and Political Rights*,
CCPR/C/GC/33.

Inter-American Court of Human Rights

Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador, judgement of 23rd August 2013,
Series C No. 266.

Domestic cases

R v Sussex Justices, ex. p. McCarthy [1924],
1 KB 256.

9.3 Treaties and legislation

Treaties

African Charter	African Charter on Human and People's Rights (Banjul charter), Nairobi June 1981. Effective 21st Oct. 1981.
ACHR	American Convention on Human Rights (Pact of San José), San José 22nd Nov. 1969. Effective 18th July 1978.
ASEAN Declaration	Association of Southeast Asian Nations (ASEAN) Human Rights Declaration, Phnom Penh 18th Nov. 2010.
Charter	Charter of Fundamental Rights of the European Union, OJ C 202 7.6.2016, p. 389.
Constitutional Treaty	Treaty establishing a Constitution for Europe, Rome 29th October 2004. Never went into force. OJ C 310, 16.12.2004, p. 3.

ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), Rome 4th November 150. Effective 3rd September 1953.
EEA Agreement	Agreement on the European Economic Area, Porto 2nd May 1992. Effective 1st January 1994.
ICCPR	International Covenant on Civil and Political Rights, New York 16th December 1966. Effective 23rd March 1976. 999 UNTS 171.
SCA	Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (Surveillance and Court Agreement), Porto 2nd May 1992, effective 1st January 1994.
TEC	Treaty Establishing the European Community (consolidated version), OJ C 321E, 29.12.2006, p. 37.
TEU	Consolidated version of the Treaty on European Union, OJ C 202 7.6.2016, p. 13.
TFEU	Consolidated version of the Treaty on the Functioning of the European Union, OJ C 202 7.6.2016, p. 47.
Treaty of Lisbon	Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, Lisbon 13th December 2007. Effective 1st. January 2009. OJ C 306, 17.12.2007, p. 1.
Treaty of Rome (EEC)	Traité instituant la Communauté Economique Européenne, Rome 25th March 1957. Effective 1st January 1958.

National Legislation

Grundgesetz	Grundgesetz für die Bundesrepublik Deutschland in der im Bundesgesetzblatt Teil III, Gliederungsnummer 100-1, veröffentlichten bereinigten Fassung, das zuletzt durch Artikel 1 des Gesetzes vom 28. Juni 2022 (BGBl. I S. 968)

French Constitution	Constitution de la République française. Constitution du 4 octobre 1958 instituant la Ve République.

Travaux préparatoires

Constitutional Treaty	*Document du Praesidium: projet d'articles du titre IV de la partie I de la Constitution concernant les institutions (23 avril 2002)* https://www.cvce.eu/en/obj/document_from_the_praesidium_draft_articles_for_title_iv_of_part_i_of_the_constitution_relating_to_the_institutions_23_april_2003-en-b793ea40-9a4a-4faa-a2cc-b3f5c1034c4b.html [Last accessed 11th sept. 2022]
Charter	Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14.12.2007 p. 17.

9.4 Studies and reports

European Commission

COM(2022) 500	Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *2022 Rule of law Report, the rule of law situation in the European Union*, Luxembourg 13.7.2022.
COM(2021) 700	Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *2021 Rule of law Report, the rule of law situation in the European Union*, Luxembourg 20.7.2021.
SWD(2022) 517	Commission Staff Working Document, *2022 Rule of Law Report, Country Chapter on the rule of law situation in Hungary*, Luxembourg 13.7.2022.

SWD(2022) 521 Commission Staff Working Document, *2022 Rule of Law Report, Country Chapter on the rule of law situation in Poland*, Luxembourg 13.7.2022.

Venice Commission

Venice Commission (1997) The Composition of Constitutional Courts, Science and technique of democracy, No. 20, CDL-STD(1997)020.

Venice Commission (2000) Opinion on the Draft Law of Ukraine on the Judicial System, CDL-INF(2000)005.

Venice Commission (2007) Judicial appointments - Report adopted by the Venice Commission at its 70th Plenary Session (Venice, 16-17 March 2007), Opinion No. 403/2006, CDL-AD(2007)028.

Venice Commission (2009) Report on the Rule of Law - Adopted by the Venice Commission at its 86th plenary session (Venice, 25-26 March 2011), Study No. 512/2009, CDL-AD(2011)003rev.

Venice Commission (2010) Report on the Independence of the Judicial System Part I: The Independence of Judges – Adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010), Study No. 494/2008, CDL-AD(2010)004.

Venice Commission (2016a) Rule of Law Checklist – Adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016), Study No. 711/2013, CDL-AD(2016)007rev.

Venice Commission (2016b)	Republic of Moldova – *Amicus Curiae* Brief for the Constitutional Court – On the Right of Recourse by the State Against Judges - Adopted by the Venice Commission at its 107th Plenary Session (Venice, 10-11 June 2016), Opinion No. 847/2016, CDL-AD (2016)015.
Venice Commission (2020)	Compilation of Venice Commission Opinions, Reports and Studies on Constitutional Justice (updated), CDL-PI(2020)004.

Others

Special 500 Eurobarometer	Special Eurobarometer 500, 2021, *Future of Europe*, Report. Survey conducted by Kantar at the request of the European Commission and the European Parliament, Survey coordinated by the European Commission, Directorate-General for Communication (DG COMM "Media monitoring and Eurobarometer Unit") and the European Parliament, Directorate-General for Communication (DG COMM "Public Opinion Monitoring Unit" (POMU))
Eurobarometer 95	Standard Eurobarometer 95, Spring 2021, *Public Opinion in the European Union*, Data annex. Survey requested and coordinated by the European Commission, Directorate-General for Communication.
WSJ index 2021	World Justice Project, Rule of Law Index 2021, available at https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2021 [last accessed 30. Sep. 2022]

9.5 Opinions and news articles

Opinions

Coghlan, European Law Blog 15th March 2022	Coghlan, Niall: *One fattened, six starved? The Article 2 TEU values after the rule of law conditionality judgements*, European law Blog 15/4/222, https://europeanlawblog.eu/2022/03/15/one-fattened-six-starved-the-article-2-teu-values-after-the-rule-of-law-conditionality-judgments/ [last accessed 1st Oct. 2022]
Filipek, VerfBlog 13th May 2022	Filipek, Paweł: *Drifting Case-law on Judicial Independence*, Verfassungblog 13/5/2022, https://verfassungsblog.de/drifting-case-law-on-judicial-independence/ [last accessed 29th Sep. 2022].
Koncewicz, VerfBlog 30th June 2022	Koncewicz, Tomasz Tadeusz: *The Core of the European Public Space*, Verfassungblog 30/6/2022 https://verfassungsblog.de/the-core-of-the-european-public-space/ [last accessed 29th Sep. 2022].
Łętowska, VerfBlog 27th Sep. 2022	Łętowska, Ewa: Defending the Judiciary – Strategies of Resistance in Poland's Judiciary, Verfassungblog 27th September 2022 https://verfassungsblog.de/defending-the-judiciary/ [last accessed 29th Sep. 2022].
Ovádek, VerfBlog 28 Feb. 2018	Ovádek, Michal: *Has the CJEU just Reconfigured the EU Constitutional Order?*, Verfassungblog 28/2/2018, https://verfassungsblog.de/has-the-cjeu-just-reconfigured-the-eu-constitutional-order/ [last accessed 29th Sep. 2022].
Pech and Platon, VerfBlog 28th July 2021	Pech, Laurent and Sébastien Platon: *How Not to Deal with Poland's Fake Judges' Requests for a Preliminary Ruling*, Verfassungblog 28/6/2021 https://verfassungsblog.de/how-not-to-deal-with-polands-fake-judges-requests-for-a-preliminary-ruling/ [last accessed 29th Sep. 2022].

Reid, VerfBlog 17th June 2022	Reid, Emily: *The UK's anti-legal populism*, Verfassungblog 17/6/2022 https://verfassungsblog.de/the-uks-anti-legal-populism/ [last accessed 29th Sep. 2022].
Taborowski, Verfblog 13th March 2018	Taborowski, Maciej: *CJEU Opens the Door for the Commission to Reconsider Charges against Poland*, Verfassungblog 13/3/2018 https://verfassungsblog.de/cjeu-opens-the-door-for-the-commission-to-reconsider-charges-against-poland/ [last accessed 29th Sep. 2022].
Volou, VerfBlog 13th July 2022	Volou, Aristi: *When National Laws and Human Rights Standards Are at Odds*, Verfassungblog 13/7/2022 https://verfassungsblog.de/at-odds/ [last accessed 29th Sep. 2022].

News Articles

The Guardian, 10th Aug. 2022	*UK must curb influences of European human rights rules, says Braverman* https://www.theguardian.com/law/2022/aug/10/uk-must-curb-influence-of-european-human-rights-rules-says-suella-braverman [last accessed 29th Sep. 2022].
The Guardian, 4th July 2022	*Senior Council of Europe official urges UK not to repeal Human Rights Act* https://www.theguardian.com/law/2022/jul/04/senior-council-of-europe-official-urges-uk-not-to-repeal-human-rights-act [last accessed 29th Sep. 2022].
The Guardian, 21st June 2022	*No 10 to set out sweeping plans to override power of human rights court* https://www.theguardian.com/law/2022/jun/21/uks-new-bill-of-rights-will-curtail-power-of-european-human-rights-court [last accessed 29th Sep. 2022].