THE EVOLVING NARRATIVE OF THE COURT ON THE RULE OF LAW IN THE EU AND POTENTIAL FUTURE DIRECTIONS

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Abstract

This article reflects on the groundbreaking case law of the European Court of Justice concerning the progressive judicialization of the EU principle of the rule of law and aims to discern from it potential future directions. While one possible path could involve a further broadening of the reach of the Union's values by allowing Article 2 TEU to apply as a self-standing clause, more recent cases suggest that the Court is aware of the problems posed by an expanding body of case law in this domain. Consequently, it appears more inclined to exercise caution, stepping back from potential clashes with the national identities of the Member States.

Keywords

Article 2 TEU; Article 19 TEU; Article 4(2) TEU; rule of law; judicial independence; national identity.

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LA EVOLUCIÓN DE LA NARRATIVA DEL TRIBUNAL SOBRE EL ESTADO DE DERECHO EN LA UE Y POSIBLES DIRECCIONES FUTURAS

Resumen

Este artículo reflexiona sobre la innovadora jurisprudencia del Tribunal de Justicia de la Unión Europea relativa a la judicialización progresiva del principio del Estado de derecho de la UE con el objetivo de discernir de ella posibles direcciones futuras. Si bien un camino posible implicaría ampliar aún más el alcance de los valores de la Unión permitiendo la aplicación del art. 2 TUE como cláusula independiente, algunos casos más recientes sugieren que el tribunal es consciente de los problemas planteados por un creciente cuerpo de jurisprudencia en este ámbito. En consecuencia, parece más inclinado a ejercer precaución, retrocediendo de posibles choques con las identidades nacionales de los Estados miembros.

Palabras clave

Artículo 2 TUE; artículo 19 TUE; artículo 4(2) TUE; Estado de derecho; independencia judicial; identidad nacional.

L'ÉVOLUTION DE LA NARRATION DE LA COUR SUR L'ÉTAT DE DROIT DANS L'UE ET LES ORIENTATIONS FUTURES POTENTIELLES

Résumé

Cet article porte sur la jurisprudence novatrice de la Cour de justice de l'Union européenne concernant la judiciarisation progressive du principe de l'État de droit de l'UE et vise à discerner de ses orientations futures potentielles. Alors qu'une voie possible consisterait à élargir davantage la portée des valeurs de l'Union en permettant à l'article 2 du TUE de s'appliquer comme une clause autonome, les affaires plus récentes suggèrent que la Cour est consciente des problèmes posés par un corps croissant de jurisprudence dans ce domaine. En conséquence, il semble plus enclin à faire preuve de prudence, reculant de les conflits potentiels avec les identités nationales des États membres.

Mots clés

Article 2 TUE; Article 19 TUE; Article 4(2) TUE; État de droit, indépendance judiciaire; identité nationale.

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I. INTRODUCTION

The weakening of the rule of law by the governments of certain EU Member States, mainly but not only in Hungary and Poland, has in recent years been counteracted by a strengthening of the rule of law by the European Court of Justice (EU Court or Court) (Maduro and Menezes, 2020). In what can now be considered some of its most groundbreaking judgements of the last years, the Court has taken upon itself to protect the EU principle of the rule of law by infusing it with normative life (Spieker, 2023a). In this sense, the Court has made clear the justiciable nature of the rule of law in the EU, as well as progressively expanded its own jurisdiction over matters falling under its ample umbrella. The purpose of this paper, however, cannot be as overambitious as to extract from the vast number of cases on the principle of the rule of law that have reached the Court in recent years a substantive standard on its content. On the contrary, it is sufficient for our object of study, namely, to understand the progressive judicialization of the protection of the rule of law in the EU and its possible future directions, to select a sample of the most relevant decisions throughout this development as well as to focus on the most recent cases in which we might observe a certain "step back" from the "fundamental leap forwards" of some of the Court's rule of law decisions so far (Leloup *et al.*, 2021).

It is well known the first step taken by the Court to offset domestic rule of law backsliding was to connect Article 2 with Article 19(1)(2) TEU in the *Portuguese Judges* case (Sarmiento y Arnaldos Orts, 2022). This was considered revolutionary because up until then Article 2 had mostly been regarded as unjusticiable (Kochenov and Pech, 2015). Furthermore, the interpretation offered by the Court of Article 19(1) allowed it to protect the rule of law

beyond the restrictions stemming from Article 51(1) of the Charter, as under the former provision it was unnecessary that the contested legislation be implementing EU law. Thus, by upholding that the reach of Article 19—and, as a result, of the Court's jurisdiction over rule of law cases—was considerably broader than that of the Charter, the Court effectively opened the floodgates. There has since been an avalanche of preliminary references by national courts requesting the EU Court to protect them from all kinds of attacks to their judicial independence.

An ever-growing case law in this area could, however, prove problematic. Not only is it unsustainable for every national judge in every domestic procedure to remedy potential violations of the rule of law with a reference to the Court (Martín Rodríguez, 2020: 340), but it might also end up transforming the EU principle from a mere "framework of reference" to "one rule to rule them all" (Lenaerts, 2023). In other words, a continuously expanding body of jurisprudence on the rule of law would naturally raise ever growing concerns for the Member States' national identities protected by Article 4(2) TEU. As Iglesias remarks, the challenge is for the Court to combine its control of the *basic* limitations the principle of judicial independence and the rule of law places on the Member States with their institutional and procedural autonomy in an area closely related to their constitutional identity (Iglesias, 2022: 489-90).

This study concerns the most important cases for the developing justiciability of the principle of the rule of law, mostly in its judicial independence facet, while trying to discern, especially from more recent case law, a future pathway. Indeed, from the constant broadening of the Court's jurisdiction and the scope of this principle, one might be inclined to believe the Court could move towards the even broader application of Article 2 TEU as a self-standing clause (Bonelli and Claes, 2018). In this sense, some see in the Court's jurisprudential developments a promising path towards using other legal bases for assessing national measures beyond Article 19(1)(2) TEU or even towards relying on Article 2 alone as a freestanding clause (Spieker, 2021). Connected with the concerns set out above, a continuous broadening of the Court's purview in this sense could, however, prove even more problematic. In this sense, while von Bogdandy has always been one of the staunchest advocates of the justiciability of Article 2 (Ionnidis and von Bogdandy, 2014), he also warns against it becoming a clause of homogeneity through which the EU comes to establish the basic organization of the Member State's institutions, as it is not authorized to gradually outline an ever more detailed "common constitutional law" (von Bogdandy, 2020).

It is not impossible to conceive in some of the Court's most recent jurisprudence certain steps back that may be related to these concerns. In this

regard, the hitherto rather ignored national identity of the Member States makes its appearance in some later decisions. This may indicate that the Court, once its rule of law jurisprudence has become well-established, is ready to return certain issues to the Member States to avoid over-intruding into matters that are fundamentally of national competence (Spielmann, 2021: 19). Moreover, a tool that had been little used until now to exercise this "return" has also surfaced, as the Court has changed its approach to the admissibility of certain preliminary requests.

To follow the evolving narrative of the Court and reflect on its future direction, this paper is structured chronologically. It will address the most relevant decisions concerning not so much the material standards of the rule of law, which will only be referred to as a matter of context, but rather to developments concerning the jurisdiction of the Court, the scope of application of the principle of the rule of law, and a changing attitude towards the admissibility of preliminary rulings. It begins, thus, with a brief reminder of the first revolutionary move made by the Court towards a wide rule of law approach in the *Portuguese Judges* case (Section 2). It then goes on to examine how this new line of jurisprudence allowed the Court ample jurisdiction to continue to widen the possibility of invoking the EU principle of the rule of law through a first stream of cases that arrived via preliminary references and infringement procedures against the Polish government (Section 3). Next, it dedicates a section each to the novel non-regression principle (Section 4) and to the conditionality mechanism cases (Section 5). Both have had a vital role for the evolving legal nature of Article 2 TEU and its enforceability, while at the same time sparking the first appearances of the national identity clause. Finally, reference will be made to the most recent developments. In newer decisions, the Court has continued to admit national identity concerns, while also taking a firmer stance on admissibility. At the same time, however, a currently pending infringement procedure presents itself as the first time the Commission's claims have relied on Article 2 TEU as a self-standing clause (Section 6). Concluding remarks will serve to summarize and reflect on the current status of the Court's evolving case law and its future directions (Section 7).

II. A NEW BEGINNING: *THE PORTUGUESE JUDGES* CASE

In the Hungarian general elections of 2010, Viktor Orbán and his Fidesz party won an overwhelming majority in parliament, allowing the new government to implement a huge overhaul of the Hungarian constitutional order which not only undermined the impartiality of the Hungarian judicial system by putting the judiciary under political control, but removed checks

and balances to the point that there were virtually no independent officials left in office (Bánkuti, M. *et al.*, 2012). Similarly, the rule of law crisis in Poland began with the 2015 general election when Kaczyński's Law and Justice Party (PiS in the Polish acronym) won majorities in both houses of the Polish Parliament. Their first move was to pass a number of laws disempowering the Polish Constitutional Tribunal to the point where it would later refrain from halting the adoption of a wholesale reform of the judiciary blatantly aimed at its control by the executive (Pérez Bernárdez, 2016).

In comparison to the severity of this situation in which two Member States were swiftly declining into autocracy, the European institutions' early response was meagre at most (Scheppele, 2023). In two infringement procedures initiated by the Commission, the Court declared that by lowering the retirement age of judges[2] and firing its data protection officer[3], Hungary had violated specific provisions of EU secondary law, namely, of the Non-Discrimination Directive and the Data Protection Directive. The EU's initial reaction thus ignored that these damaging measures clearly called for an infringement procedure to be launched on the more general legal basis of the principle of the rule of law as they were but pieces of a much wider illiberal pattern by which Hungary was seriously and systematically violating the Union's fundamental values enshrined in Article 2 TEU (Scheppele, 2014). In the case of Poland, it wasn't until the EU Court sprung the European Commission into action that such controversial judicial reforms were finally assessed in light of the rule of law (Baquero Cruz, 2022).

In this context, the Court's 2018 ruling in *Associação Sindical dos Juízes Portugueses (ASJP)*[4], informally known as the *Portuguese Judges* case, was groundbreaking as regards the operationalization of the principle of the rule of law in the EU legal system as a primary legal basis applicable as law to a judicial dispute (Ovádek, 2018). Indeed, this judgment marked "a new beginning for the rule of law as a fundamental and enforceable value of the EU legal order" (Pech and Kochenov, 2021). In this case, the Trade Union of Portuguese Judges had brought an action before a national court seeking the annulment of salary reduction measures. The Portuguese court then asked the Court of Justice whether the reductions infringed EU law, specifically,

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2 Judgement of the Court of 6 November 2012, *European Commission v Hungary*, C-286/12, EU:C:2012:687

3 Judgement of the Court of 8 April 2014, *European Commission v Hungary,* C-288/12, EU:C:2014:237

4 Judgment of the Court of 27 February 2018, *Associação Sindical dos Juízes Portugueses v Tribunal de Contas,* C-64/16, EU:C:2018:117.

Article 19(1)(2) TEU which requires Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law, and Article 47 of the Charter of Fundamental Rights which enshrines the right to an effective remedy and to a fair trial. The EU Court, however, reformulated the question in order to concentrate exclusively on the principle of judicial independence contained in Article 19 TEU and avoid any discussion on the Charter's difficult applicability. To this effect, the Court considered that the scope of application of Article 19 TEU was broader than that of Article 51 of the Charter and that it was enough that a national court had competence to decide on the interpretation or application of "fields covered by Union law" to come within the material scope of the second subparagraph of Article 19(1) TEU, irrespective of whether it was "implementing Union law" as required by Article 51(1) of the Charter (Bogdanowicz and Taborowski, 2020). Thus, both the Portuguese court's framing and the EU Court's reframing of the preliminary question are at the basis of the revolutionary contribution of *ASJP*. On the one hand, the Court takes a clear stance in favour of the justiciability of the rule of law (Martín y Pérez de Nanclares, 2019:137) while, on the other hand, it also dispels uncertainties as to whether the principle of judicial independence—which gives concrete expression to the value of the rule of law stated in Article 2 TEU—[5] can be upheld against a Member State in situations where a national court is not implementing Union law. According to the Court's answer in this judgement, it is enough that the case concerns a national court dealing generally with EU law matters which, as Rosas points out, "probably all national courts are!" (Rosas, 2023: 924).

Thus, despite the Court concluding in *ASJP* that the second subparagraph of Article 19(1) TEU did not preclude general salary reduction measures such as those at issue, its novel reading of this provision has had profound consequences for the protection of the rule of law in the EU. In fact, it was considered at the time that with this ruling the Court was creating an opportunity for itself to assess the controversial judicial reforms being carried out by the Polish Parliament, as several aspects of those legislative changes would not otherwise come in the scope of EU law as traditionally understood (Bonelli and Claes, 2018). Sure enough, with *ASJP* the Court placed itself at the centre stage of an EU judiciary entrusted with the constitutional task of scrutinizing any national attempt at undermining the independence of domestic judges and with it that of the EU judicial system. After all, these courts were not just national courts but were also competent to rule on matters of EU law. At the

[5] Id., paragraph 32.

same time, along with the general task of the EU Court of guaranteeing that EU law is observed, the Member States were now called upon to do the same[6]. In other words, the Court was empowering national courts to contest domestic measures that might undermine their independence by recourse to an Article 267 TFEU preliminary procedure on the basis of Article 19(1)(2) TEU. Furthermore, the *Portuguese Judges* case spelled out to the European Commission that it too had the power to enforce the rule of law and judicial independence in the Member States when they failed to do so by launching infringement procedures directly on the basis of that same provision (Mangas Martín, 2022).

Both national judges—especially in Poland—and the European Commission—especially against Poland—were duly inspired to use this newly operationalised rule of law principle in its judicial independence facet to protect national courts under attack from national governments. The Court has since applied Article 19(1)(2) with regard to a panoply of national rules that could adversely affect the independence of national courts. Those rules have related, *inter alia*, to the composition, appointment, promotion, length of service, recusal, secondment, dismissal, and retirement of the members of a court or tribunal, as well as to judicial review, disciplinary regimes, and involuntary transfer of judges (Martín y Pérez de Nanclares, 2022). It has even delved into more "subtle" attacks, such as the online publication of judges' political affiliations (Leichsenring, 2023). Along the way, the Court has constructed its fundamental case law on the application of Article 2 TEU, primarily in combination with Article 19(1)(2), while also establishing a set of common criteria that different national judicial systems must meet to comply with Union law (Magaldi, 2022). Criteria, one might add, that inevitably represent European limits to the "constitutional" identity of the Member States (García-Valdecasas Dorrego, 2022).

III. FIRST STREAM OF PRELIMINARY RULINGS AND INFRINGMENT PROCEDURES: FROM C-619/18, *COMMISSION V POLAND*, TO *GETIN NOBLE BANK*

After the Court's landmark decision in *ASJP*, the Commission brought its first infringement actions on the legal basis of Article 19(1)(2) against the executive's attacks being carried out on the Polish courts (Bonelli, 2022). In C-619/18, *Commission v Poland*[7], the Court did not accept Poland's argument

[6] Id., paragraph 34.

[7] Judgement of the Court of 24 June 2019, *Commission v Poland*, C-619/18, EU:C:2019:531

that judicial reform fell outside EU competence due to the lack of a general EU legislative competence in the field of justice. On the contrary, if such reforms were incompatible with the basic tenets of the rule of law, they could be reviewed on the basis of EU law and, in particular, the principle of judicial independence (Pech and Platon, 2018: 1848). Thus, this time the Court was able to declare that by lowering the retirement age of the judges of the Polish Supreme Court, the Republic of Poland had failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU because the independence of the judiciary requires freedom of judges from all external intervention or pressure. In this case, the new retirement age was exercised with insufficient guarantees, giving rise to reasonable doubts as to the imperviousness of the judges to political factors. More importantly for the growing scope of application of the rule of law, this ruling was only possible due to the Court's consideration that, although the organisation of justice in the Member States did fall within their competence, "the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law"[8].

This case law on the newfound scope of application of Article 19(1)(2) was repeated in subsequent judicial decisions situated within the context of the reform of the Polish justice system. Another infringement procedure launched by the Commission on the basis of Article 19 TEU resulted in ruling C-192/18, *Commission v Poland*[9], in which the Court found that the lowering of the retirement age of the judges of the Polish ordinary courts was also in violation of the EU rules on the independence of the judiciary (Becerril Atienza, 2020). *A.K. and Others v. Sad Najwyższy*[10], on the other hand, was one of the first preliminary references showing how the Polish national courts were also inspired by *ASJP* to use a combination of Articles 267 TFEU, 2 and 19(1) TEU, and 47 of the Charter to challenge domestic actions that undermined their independence. In this case, the Court was asked, in essence, whether the newly established Disciplinary Chamber (DC) of the Supreme Court (in Polish, Sad Najwyższy), recently put in charge of the early retirement decisions of the judges party to the main case, could be considered an independent court within the meaning of EU law, especially in light of its candidates having been nominated by the newly constituted

8 Id., paragraph 52.

9 Judgement of the Court of 5 November 2019, *Commission v Poland*, Case C-192/18, EU:C:2019:924.

10 Judgment of the Court of 19 November 2019, *A. K. and Others v Sąd Najwyższ,* joined cases C-585/18, C-624/18 and C-625/18, EU:C:2019:982.

National Council of the Judiciary (in Polish, Krajowa Rada Sądownictwa, KRS). Once again, Poland claimed that the EU Court lacked jurisdiction to rule on this case because the provisions of national law at issue did not implement EU law or fall within the scope thereof and therefore could not be assessed under EU law. The Court, however, recalled the broad scope of the second subparagraph of Article 19(1) TEU, as that provision aimed to guarantee effective judicial protection in "the fields covered by Union law", irrespective of whether the Member States were implementing Union law within the meaning of Article 51(1) of the Charter. Furthermore, it was irrelevant for the conclusion reached in *ASJP* concerning the Court's jurisdiction that the salary reduction measures were adopted withing the context of an EU financial assistance programme. On the contrary, Article 19(1) was applicable because the national court at issue could rule on questions concerning the application or interpretation of EU law. In other words, it was sufficient that the domestic court called on to dispose of the actions in the main proceedings was required to rule on questions concerning alleged infringements of rules of EU law. Nonetheless, the Court also found in this case that Article 47 of the Charter applied because in the actions in the main proceedings, the applicants were relying on infringements of the prohibition of discrimination in employment on the grounds of age provided for by Directive 2000/78. Hence, as the case was governed by EU law it allowed the applicants to assert their right to effective judicial protection afforded by Article 47 of the Charter. It was therefore unnecessary for the Court to resort to the broader scope of Article 19 TEU but, by coupling a specific provision of EU law, namely, Article 9(1) of the Non-Discrimination Directive, with Article 47 of the Charter, it still allowed the Court to go way beyond the limited scope of its objection to age-based discrimination regarding the similar Hungarian scheme lowering the age of compulsory retirement of judges resolved in the aforementioned case C-286/12. Today, it is astounding to think that case was concluded without any reference to the principle of the rule of law. In another vital shift to the Court's approach, *A.K. and Others* also sets out detailed factors and findings that needed to be considered in order to assess whether the DC was or not independent—for example, that the KRS, as newly composed, was formed by reducing the ongoing four-year term in office of the members of that body at that time and that the new members were not elected by their peers as previously but by a branch of the legislature. Thus, although the final assessment was ultimately made the responsibility of the referring court, the "delegation" was a mere formality as the Court clearly led the referring court to the inescapable conclusion that the DC was not a court due to manifest shortcomings of judicial independence, while the KRS did not offer sufficient

independence from the executive and legislative authorities (Krajewski and Ziółkowski, 2020).

In immediate response to this judgement, the Polish Parliament adopted new legislation, informally known as the "muzzle law", prohibiting Polish courts from questioning the legitimacy of state institutions or the validity of judicial appointments and including disciplinary procedures against judges who made such assessments[11]. As would be expected, the lawfulness of these disciplinary procedures would then end up before the EU Court. *Miasto Łowicz*[12] concerned two district courts in Poland that had to rule on cases where the State was a party in the proceedings and had concerns that disciplinary actions might be taken towards them if they were to rule against the State. Thus, they asked the Court whether this new regime for disciplinary proceedings against judges in Poland met the requirements of judicial independence under the second subparagraph of Article 19(1) TEU in view of the Minister for Justice and the KRS's influence over the proceedings. The main interest for the present analysis of this case is that, despite repeating its case law on the broad scope of application of Article 19(1) TEU and considering it had jurisdiction to interpret its second subparagraph as the two referring courts came under the Polish judicial system in the "fields covered by Union law", the Court ultimately concluded that the requests were inadmissible. In this sense, *Miasto Łowicz* laid out limits to the admissibility of judicial independence cases by barring requests that presented no connecting factor between the main dispute and the provision of EU law whose interpretation was sought. In effect, the Court recalled that Article 267 served to provide the national courts with points of interpretation of EU law needed to rule on the substance of the disputes before them. However, the main disputes in these joined cases concerned matters relating to public expenditure and criminal law and were not therefore connected to Article 19(1)(2) TEU. In other words, Article 19(1) TEU could not be construed in such a way as to change the functions of the Court of Justice in the context of the preliminary reference mechanism (Lenaerts, 2023: 36). Given that the Court's answer to the questions referred could not serve the purpose of the preliminary ruling, namely, of allowing the referring courts to resolve their cases at home, they were considered inadmisible (Platon, 2020).

In light of both the broad jurisdiction of the Court—which covered any preliminary reference arriving from any national body which might rule on

[11] Polish Act of 20 December 2019 on Amendments to the Act-Law on the System of Ordinary Courts, the Act on the Supreme Court, and Certain Other Acts.

[12] Judgment of the Court of Justice of 26 March 2020*, Miasto Łowicz*, Joined Cases C-558/18 & C-563/18, EU:C:2020:234.

questions concerning the application or interpretation of EU law—and the material scope of Article 19(1)(2) TEU—which simply required a connection with such a broad concept as "judicial independence"—the question of admissibility arises as a crucial filter to contain what could easily become a potentially boundless area of case law (Iglesias, 2023: 55). *Miasto Łowicz* however, would for a long time fly solo, as the Court would progressively tend towards a more generous (and at times creative) interpretation of its admissibility criteria. Thus, in *I.S.*[13], although of the three preliminary questions connected to Article 19(1) TEU, only one was declared admissible, the fact that both the Commission and the Advocate General contended that, at least from a strictly legal point of view, this question was also inadmissible, shows how "tenuous" the Court's grounds for admissibility were. Indeed, by his fifth question, the referring judge asked, in essence, whether the second subparagraph of Article 19(1) TEU, Article 47 of the Charter and Article 267 TFEU must be interpreted as precluding disciplinary proceedings from being brought against a national judge on the ground that they had made a request for a preliminary ruling. Admissibility could have easily been refused in this case because said disciplinary proceedings had subsequently been withdrawn and closed, thus making them irrelevant for the purposes of resolving the criminal dispute in the main proceedings. In fact, the referring judge itself argues in favour of the admissibility of his questions by contrarily giving reasons for their dismissal, as he states that, notwithstanding the withdrawal of the disciplinary proceedings against him, his question remained relevant since it stems from the very fact that disciplinary proceedings *may* be brought in such circumstances and is, therefore, *independent* of the continuation of those proceedings. This could have easily proven enough for the Court to have ruled, in line with the Advocate General, that the question did "not concern an interpretation of EU law which meets a need inherent in the determination of the main case, and an answer to that question would result in the Court delivering an advisory opinion on general or hypothetical questions, such as the possible psychological reaction of Hungarian judges to the disciplinary proceedings brought on the basis of the [Hungarian Supreme Court] judgment in terms of the future referral of questions for a preliminary ruling".[14] However, the Court decided to hold on to what the Advocate General himself calls "tenuous means by which the fifth question could be considered admissible", and understood that it could be included as a whole

[13] Judgement of the Court of 23 November 2021, *I.S.*, C-564/19, EU:C:2021:949.

[14] Opinion of Advocate General Pikamäe of 15 April 2021 in *I.S.*, C-564/19, EU:C:2021:292, paragraph 97.

alongside the fourth question, restructuring them both into one single referral by which the referring judge sought to ascertain whether he may, under EU law, disapply the Supreme Court's judgment so as to rule on the substance of the main case taking into account the preliminary ruling without having to fear the *resumption* of disciplinary proceedings against him. This possibility under national legislation was ultimately considered a procedural obstacle which the judge had to address before he could decide the main proceedings without external interference. All in all, the Court has since mostly followed what the Advocate General calls its "wish to allow certain flexibility in interpreting the criterion of necessity arising from Article 267 TFEU"[15].

A.B. and Others v the KRS[16] is another important ruling when it comes to the meaning of the principle of the rule of law in the EU. In this case, the referring court asked the Court of Justice, in essence, whether EU law made it necessary to maintain judicial review with regard to resolutions of the KRS appointing judges to the Polish Supreme Court, as such appeals had been annulled under the new Polish law. Once again, the Court delegated on the referring court the responsibility of making the final assessment, but it is quite clear that the referring court is being told to conclude that Polish authorities had violated the second subparagraph of Article 19(1) TEU by preventing effective judicial review of the appointments made by the new KRS (Pech, 2021). Indeed, the Court strongly suggests that the Polish legislative had deliberately undermined the rule of law by preventing any possibility of exercising judicial review of the aforementioned appointments and that this violated the Member State's obligation to respect EU requirements relating to judicial independence which are likewise present when it decides to change the rules governing the process of appointing judges and connected rules governing the review of those appointments. Thus, the case and the jurisdiction of the Court were resolved on the same basis: Member States are required to comply with their obligations deriving from EU law as regards national rules relating to the substantive conditions and procedural rules governing the adoption of decisions appointing judges and, where applicable, rules relating to the judicial review that applies in the context of such appointment procedures. It is thus an area falling withing the scope of EU law and the jurisdiction of the Court, as well as the reason why such rules might be found contrary to the principle of judicial independence. Furthermore, although the Court had indicated in earlier cases that the referring court

[15] Id., paragraph 99.

[16] Judgement of the Court of 2 March 2021, *A.B. and others v the KRS*, C-824/18, EU:C:2021:153.

should disapply those provisions of national law it found contrary to the principle of the rule of law as interpreted by the Court on the basis of the principle of primacy of EU law, *A.B. and Others* was the first judgment to recognise that the second subparagraph of Article 19(1) TEU had direct effect. Indeed, paragraph 146 of the ruling states that "the second subparagraph of Article 19(1) TEU imposes on the Member States a clear and precise obligation as to the result to be achieved and […] that obligation is not subject to any condition as regards the independence which must characterise the courts called upon to interpret and apply EU law". Thus, the direct effect of the second subparagraph of Article 19(1) TEU essentially implied that it could be directly invoked by the parties to a case before a national court, necessarily resulting in an even larger number of cases concerning the rule of law to be brought before the Court (Martín Rodríguez, 2020).

In this context of a continuing deterioration of Poland's judicial institutions, it was only a matter of time before the Court found itself dealing with a preliminary question sent by one of those national courts or judges whose independence was being questioned. *Getin Noble Bank*[17] was a request for a preliminary ruling submitted by a Supreme Court judge who had been appointed in 2018 on the recommendation of the KRS. Sure enough, during the hearing at the EU Court, the Polish Ombudsman raised serious concerns regarding the referring judge's appointment to the Supreme Court as well as his independence and impartiality. In response, the Court recognized that it was its task to determine whether a body making a reference fulfils the necessary requirements—including being independent—to qualify as a "court or tribunal" within the meaning of Article 267 TFEU and decide on that basis whether a request for a preliminary ruling is admissible. However, it then went on to presume that the Sąd Najwyższy met these requirements without making any autonomous assessment of the independence as regards to the individual judge constituting the referring court (Grabowska-Moroz, 2023). Thus, the Court established a formal presumption that a national court or tribunal sending a preliminary request satisfies the necessary requirements irrespective of its actual composition. However, it was also possible to rebut this presumption if there existed a final judicial decision handed down by a national or international court or tribunal concluding that the judge constituting the referring court was not an independent and impartial tribunal previously established by law for the purposes of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter. Unfortunately, as the Court

[17] Judgement of the Court of 29 of March 2022, *BN and Others v Getin Noble Bank S.A*, C-132/20, EU:C:2022:235.

itself admits, it was not aware at the time of the close of the oral part of the procedure of the fact that the judge constituting the referring court was the subject of such a final judicial decision. Coincidently, the hearing in this case took place on 2 March 2021, the same day the Court of Justice ruled in *A.B. and Others* that multiple (fake) judges (Pech, 2020) had been unlawfully appointed to the Supreme Court. It might also have been too much to ask the Court to be aware of the *Advance Pharma*[18] case delivered a month earlier on 3 February 2022 in which the ECtHR found a violation of Article 6 ECHR in the appointments of judges to the Polish Supreme Court mainly on the grounds of the involvement of the KRS as it could no longer be considered an independent body (Szwed, 2022). In any case, at the date of the EU Court's ruling in *Getin Noble*, the *Advance Pharma* judgment was not yet final, a condition specifically (deliberately?) included by the Court[19]. Thus, it has been argued that had the Court been aware of the ECtHR case (and had it been final), it would have declared the request for a preliminary ruling in *Getin Noble* inadmissible (Smulders, 2022: 126). This, however, is debatable, given that there also existed at the time a 2020 ruling by the Polish Supreme Court itself concluding that when its composition included a person appointed on recommendation of the new KRS such a court's formation was unlawful[20]. The fact that the Resolution of the Polish Supreme Court had been adopted two years before and was legally binding and final did not detain the Court from considering in *Getin Noble Bank* that "the possible flaws that may have vitiated the national procedure for the appointment of that judge are not capable of leading to the inadmissibility of the present request for a preliminary ruling".[21]

IV. MOVING IN CIRCLES: THE PRINCIPLE OF NON-REGRESSION V. NATIONAL IDENTITY CONCERNS

Beyond Poland, there are other national courts that have also turned to the EU Court raising fundamental judicial independence issues. In

[18] Judgement of the European Court of Human Rights of 3 February 2022, *Advance Pharma Sp. z o.o v Poland*, 1469/20, ECHR:2022:0203JUD000146920.

[19] Judgement of the Court of 29 of March 2022*, BN and Others v Getin Noble Bank S.A*, paragraph 72.

[20] Resolution of the Civil, Criminal and Labour & Social Insurance Chambers of the Supreme Court of 23 January 2020 (Poland).

[21] Judgement of the Court of 29 of March 2022, *BN and Others v Getin Noble Bank S.A*, paragraph 73.

C-896/19, *Repubblika v. Il-Prim Ministru*[22], a Maltese court gave the EU Court another important opportunity to grow its case law in this field by asking whether Article 19(1)(2) and Article 47 of the Charter could be used to review the procedure for the appointment of judges laid down in the Constitution of Malta which had been reformed to that effect in 2016. Repubblika, an association whose purpose is to promote the protection of justice and the rule of law in Malta, had launched a so-called *actio popularis* before the national courts to argue the non-conformity with EU law of amended constitutional provisions pursuant to which judge appointments were made in the country. However, as Repubblika was not actually invoking any infringement arising from those appointments of a right conferred on it under a provision of EU law, the Court ruled that, in accordance with Article 51(1) of the Charter, this instrument was not, as such, applicable to the dispute in the main proceedings. Instead, the Court employed its broad reading of the scope of application of Article 19(1) to resolve the case on this legal basis. In essence, its second subparagraph was interpreted as not precluding national provisions such as those in the Maltese Constitution, even when they conferred on the Prime Minister decisive power in the process for appointing members of the judiciary, because they also provided for the involvement of an independent body and other numerous procedural caveats. However, while it reiterated pre-established case law, the Court chose this time to go beyond the principle of judicial independence enshrined in Article 19 TEU which is but one—albeit very significant—element of the rule of law and put the focus on the fact that Malta had acceded to the EU on the basis of the provisions of the Constitution in force prior to the reform of 2016. In this sense, the Court emphasized that the compliance of national laws with all EU values proclaimed in Article 2 TEU was not only a condition for accession under Article 49 TEU, but also a condition for the enjoyment of all of the rights deriving from the application of the Treaties to the Member States during membership. As a consequence, Article 2 TEU had to be read in light of the principle of non-regression, meaning a Member State was prohibited from adopting post accession any national rules, including constitutional provisions, which could reduce the protection of those values. Admittedly, *Repubblika* concerns the specific obligation to refrain from adopting rules which would undermine the independence of the judiciary so the legal basis for the case was still Article 19(1)(2) but, by newly identifying the principle of non-regression

[22] Judgment of the Court of Justice of 20 April 2021, *Repubblika v. Il-Prim Ministru,* Case C-896/19, EU:C:2021:311.

and anchoring it within the relationship between Article 2 TEU and Article 49 TEU, the ruling seems to imply that its scope goes beyond national rules affecting judicial independence and extending to all principles falling under the rule of law umbrella. Indeed, given that the Court's case law had so far been contained within the margins of judicial independence by using Article 19 TEU to trigger Article 2 TEU, it was considered that this new ruling could become an important bridge towards other aspects of the rule of law (Leloup *et al.*, 2021) and maybe even to all Article 2 values in general (Łazowski, 2022) in what could be called a significant upgrade to the "legal value of values" (Rossi, 2020).

The non-regression principle has since been applied to other cases concerning not only Poland's rule of law breakdown[23] but also the similarly wide-ranging reform in the field of justice undertaken in Romania. Concerning the Romanian situation, *Asociația "Forumul Judecătorilor din România" and Others (AFJR)*[24] arose in the context of certain legislative amendments to laws that had been previously adopted in 2004 as part of the country's accession requirements to improve the independence and efficiency of its judicial system. Unfortunately, the common thread across these new amendments was to increase the executive's involvement in the country's judicial organisation and accountability regimes (Selejan-Gutan, 2018). Romanian courts, prompted largely by national associations of judges and prosecutors and inspired by the Polish judges, addressed a first wave of preliminary questions to the Court in an attempt to defend their judicial independence (Călin, 2021). In essence, the applicants disputed the compatibility of some of those amendments with Articles 2 and 19(1)(2) TEU, in particular concerning the organisation of the Judicial Inspectorate with its wide powers in disciplining judges, the establishment of the Section for the Investigation of Offences committed inside the judiciary within the Public Prosecutor's Office (the "SIIJ"), and the rules governing the personal liability of judges. However, the first issue these six joined preliminary references raised was that of the nature and binding effect of the Cooperation and Verification Mechanism (CVM)[25]. This post-accession oversight tool

[23] Judgment of the Court of Justice of 15 July 2021, *Commission v Poland*, C-791/19, EU:C:2021:596.

[24] Judgment of the Court of Justice of 18 May 2021, *Asociația 'Forumul Judecătorilor din România' and Others*, Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393.

[25] Decision 2006/928/EC establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, OJ L 354/56.

applies to Romania and allows the Commission to assess certain benchmarks the country has to attain in the area of judicial reform. And although the Court held that the CVM was binding EU law, in this case it did not follow the Advocate General's recommendation to assess the Romanian laws in light of the more specific CVM in combination with Article 47 of the Charter (Moraru and Bercea, 2022). Instead of following this advice, the Court has since shunned the option of combining a specific legal basis with the Charter as it did in *A.K. and Others.* The current tendency of the Court is to apply the more general Articles 19(1) and 2 TEU as its main framework of analysis in rule of law cases. This approach allows the Court to contribute to universally applicable (minimum?) rule of law standards governing all judiciaries across the EU instead of limiting its decisions to the legal context at hand (Kadlec and Kosar, 2022).

Just as importantly, the context of the case which referred to Romania's recent accession to the EU governed as it was by the need to make certain reforms to its judicial system, necessarily placed a stronger focus on Article 2 TEU and further decoupled the provision from Article 19 TEU by reiterating that the Member States are required to prevent any regression of their laws on the organisation of justice regarding their compliance with the rule of law at the time of accession. Among its numerous conclusions, it's interesting to highlight that Articles 2 and 19(1)(2) TEU and Decision 2006/928 were considered by the Court to preclude national legislation providing for the creation of the SIIJ with exclusive competence to conduct investigations into offences committed by judges and prosecutors, when it was not justified by objective and verifiable requirements relating to the sound administration of justice nor accompanied by specific guarantees[26]. Likewise, the Court also stated that "[t]he principle of the primacy of EU law must be interpreted as precluding legislation of a Member State having constitutional status, as interpreted by the constitutional court of that Member State, according to which a lower court is not permitted to disapply of its own motion a national provision falling within the scope of Decision 2006/928, which it considers, in the light of a judgment of the Court, to be contrary to that decision or to the second subparagraph of Article 19(1) TEU".[27] These two judicial conclusions are especially significant because, connected to both of them, the following month the Curtea Constituțională

[26] Judgment of the Court of Justice of 18 May 2021, Asociația 'Forumul Judecătorilor din România' and Others, Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, para 223.

[27] Id., para 252.

(Constitutional Court of Romania) dismissed an objection that the provisions of national law on the establishment and functioning of the SIIJ were unconstitutional[28]. The Romanian constitutional court noted that in previous rulings it had held that the provisions in question were constitutional and stated that it saw no reason to depart from those rulings notwithstanding the judgment of the EU Court in *AFJR*. In other words, the Romanian Court sharply refused to acknowledge the primacy of EU law over the Romanian Constitution. As was to be expected, this as well as other controversial judgements handed down by the Curtea Constituțională necessarily caused more preliminary requests to be addressed to the EU Court, some of which are also worth briefly mentioning in the context of the EU Court's evolving narrative on the justiciability of the EU principle of the rule of law.

Among the seven waves of preliminary questions that have reached the Court during the so-called Romanian rule of law saga (Moraru and Bercea, 2023), Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, *Euro Box Promotion*[29], arose from a number of national courts asking the EU Court whether the principle of judicial independence allowed them to disapply a decision of the Romanian Constitutional Court given that such an act under Romanian law constituted a disciplinary offence. Throughout its judgement, the EU Court repeats established case law that the second subparagraph of Article 19(1) TEU applies in respect of the referring courts given that they are judicial bodies capable of ruling on questions relating to the application or interpretation of EU law and, therefore, falling within areas covered by EU law. It also included its new "no backsliding" principle by which regression with regards to the values enshrined in Article 2 TEU must be prevented as compliance with them is a necessary condition for the enjoyment of all of the rights deriving from the application of the Treaties to the Member States. However, the Court also makes ECtHR case law its own and, while it had previously referred to Article 6 of the ECHR as interpreted by that Court in *A. K. and Others*, the EU Court now states that not only Article 6 of the Charter but "neither Article 2 TEU nor the second subparagraph of Article 19(1) TEU, nor any other provision of EU law, requires Member States to adopt a particular constitutional model governing the relationship and interaction between the various branches of the State, in particular as regards the definition and delimitation of their competences".[30]

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[28] Constitutional Court of Romania, Decision No 390/2021, 8 June 2021.

[29] Judgement of the Court of Justice of 21 December 2021, *Euro Box Promotion and Others*, Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034.

[30] Id., paragraph 229.

This new insight provided by the Court regarding its rule of law jurisprudence, meaning essentially that value alignment should not be confused with constitutional modelling (Lenaerts, 2023: 53), might represent a first step back in what until now had been mostly big strides forwards. However, the step isn't a terribly big one; the Court then goes on to clarify that Member States must comply with the requirements of judicial independence stemming from those provisions of EU law when choosing their constitutional model[31]. The result, in this case, was that Article 2 TEU and the second subparagraph of Article 19(1) TEU, as well as the principle of primacy, precluded national rules under which national ordinary courts would always commit a disciplinary offence if they disapplied, on their own authority, the decisions of the national constitutional court (for example, when they were of the view that such case law was contrary to EU law).

The Court came to a similar conclusion in C-430/21, *RS*[32]. The applicant's wife had lodged a complaint alleging offences of abuse of process and abuse of office committed in the course of criminal proceedings against *RS*. Since that complaint concerned the judiciary, under Romanian law its examination fell within the competence of the controversial SIIJ. Later, when *RS* brought a new action before the Craiova Court of Appeal seeking to challenge the excessive duration of those criminal proceedings, this court considered that, in order to rule on that action, it must assess the compatibility with EU law of the national legislation establishing the SIIJ. However, in light of the abovementioned Decision 390/2021 of the Curtea Constituțională, the Court of Appeal did not in fact have jurisdiction to carry out such an examination of compatibility. It is no wonder the referring court was increasingly confused as, ultimately, it had to choose between applying EU law as interpreted by the Court in the judgment in *AFJR* and this opposing judgement by the Romanian Constitutional Court. Furthermore, if the judge chose to disapply the latter, he could be subject to disciplinary proceedings according to Romanian law, which seemingly interfered with his judicial independence. In that context, the Court of Appeal decided to refer the matter to the Court of Justice in order to clarify, in essence, whether a practice of subjecting to disciplinary proceedings a judge who, on the basis of the judgment in *AFJR*, took the view that the national provisions relating to the SIIJ were contrary to EU law, was consistent with the second subparagraph of Article 19(1) TEU, read in

[31] *Ibid.*

[32] Judgement of the Court of Justice of 22 February 2022, *RS*, C430/21, EU:C:2022:99.

conjunction with Article 2 TEU and Article 47 of the Charter. Once again, the Court would decide that although the latter was inapplicable in light of its Article 51(1), the case could be resolved with regards to Articles 19(1)(2) and 2 TEU. However, when the Court repeats here its *Euro Box Promotion* reasoning that no provision of EU law requires Member States to adopt a particular constitutional model, it now declares that such an imposition would be contrary to the principle of national identity enshrined in Article 4(2) TEU[33]. This reference to Member State identity might be considered an even bigger step back from the "fundamental leap forwards" of some of the Courts rule of law decisions so far (Leloup *et al.*, 2021). Indeed, whereas the national identity card had until now not been capitalised on by national governments—a cursory reference to Article 4(2) by Poland in *A.B. and Others* was entirely disregarded—the Court has acknowledged that value alignment has to be offset by the Member States' freedom to choose their own political and constitutional structures.

Nonetheless, the Court is also quick to limit the power of the national identity argument by reminding the Romanian Constitutional Court that it in no way authorises it to automatically disapply EU law. On the contrary, if the constitutional court should consider that a provision of EU law infringes the obligation to respect the national identity of its Member State, it must stay the proceedings and make a reference to the Court for a preliminary ruling in order to assess the validity of that provision in the light of Article 4(2) TEU, given that the EU Court alone has jurisdiction to interpret EU law and declare EU acts invalid[34]. The Court then goes on to conclude that the second subparagraph of Article 19(1) TEU, read in conjunction with Article 2 and Article 4(2) and (3) TEU, with Article 267 TFEU and with the principle of the primacy of EU law, preclude national rules and practice under which the ordinary courts of a Member State have no jurisdiction to examine the compatibility with EU law of national legislation which the constitutional court of that Member State has found to be consistent with a national constitutional provision. Furthermore, these same provisions preclude national rules under which a national judge may incur disciplinary liability on the ground that they have applied EU law, as interpreted by the Court, thereby departing from case-law of the constitutional court of the Member State concerned that is incompatible with the principle of the primacy of EU law.

[33] Id., paragraph 43.
[34] Id., paragraphs 70-71.

V. ARTICLE 2 CONTAINS "LEGALLY BINDING OBLIGATIONS": THE *CONDITIONALITY JUDGEMENTS*

The core issues raised in C-156/21, *Hungary v Parliament and Council*[35], and C-157/21, *Poland v Parliament and Council*[36], concerned the validity of the rule of law conditionality mechanism established by Regulation 2092/2020[37]. This new instrument was designed to allow the Council, acting by qualified majority on a proposal by the Commission, to suspend payments of EU funds when a Member State's rule of law breaches affected the sound financial management of the Union budget or the protection of the financial interests of the Union (López Escudero, 2023). Aware that the mechanism was likely to affect their access to EU money in the near future, Poland and Hungary each brought an annulment action before the Court on the grounds that the EU lacked competence to adopt the contested regulation while also arguing that it breached the principle of legal certainty given the impossibility of upholding a uniform definition of the concept of the rule of law throughout the Union (Hoxhaj, 2022). Regarding the first argument, the main reasoning of the applicants was that the conditionality mechanism circumvented the procedure laid down in Article 7 TEU which, they submitted, was the exclusive EU procedure for the protection of the values contained in Article 2. The Court thus turned to its by now rich body of case law and recalled that the Member States should continue to comply with the common values that were a prerequisite for their accession to the Union and that such compliance is in fact a condition for the enjoyment of all the rights deriving from the application of the Treaties to that Member State. Thus, the Court stated that the EU was very much able to defend its values within the limits of its powers and that, in addition to Article 7 TEU, numerous provisions of the Treaties granted the EU institutions the capacity to protect the rule of law against breaches committed in a Member State, including Article 19(1)(2). So long as they relied on a sufficient legal basis and were different in terms of their aim and their subject matter from the procedure laid down in Article 7 TEU—such was the case of the conditionality mechanism—it remained possible for the EU legislator to establish other procedures relating to the values of Article

[35] Judgement of the Court of Justice of 16 February 2022, *Hungary v Parliament and Council*, C-156/21, EU:C:2022:97.

[36] Judgement of the Court of Justice of 16 February 2022, *Poland v Parliament and Council*, C-157/21, EU:C:2022:98.

[37] Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433I.

2 TEU[38]. Once again, the Court seems to confirm that not only Article 19(1) protects the values of the Union, but they could also be connected with other articles of the Treaties whose compliance would also be subject to review by the Court (Erlbacher and Herrmann, 2022). At the same time, any remaining discussions surrounding the compatibility of Article 7 TEU with other mechanisms of protection of the rule of law have also been answered in the affirmative (González Alonso, 2021).

The second argument is especially compelling as Hungary unwittingly paved the way for the Court to openly confirm the obligational nature of Article 2 TEU and effectively put an end to any remaining discussion regarding the binding status of the EU's values and the rule of law (Zemskova, 2022). Indeed, according to the applicant states, it was incompatible with the principle of legal certainty that the concept of the rule of law contained in the contested regulation and which would determine the activation of the conditionality mechanism could not be precisely defined nor given a uniform interpretation throughout all of the Member States. In fact, it was the opinion of both Hungary and Poland that "the values of Article 2 TEU inspire political cooperation within the European Union, but do not have their own legal content"[39]. To this the Court answered that the concept of the EU rule of law can be assessed through uniform criteria in as much as its elements have been developed in the case-law of the Court on the basis of the EU Treaties, are recognised and specified in the legal order of the Union—notably, in recital 3 of the contested regulation—and have their source in common values which are also recognised and applied by the Member States. Thus, the Court found that the Member States were in a position to determine with sufficient precision the essential content and the requirements flowing from that principle. Then, in what can only be considered a groundbreaking paragraph, the Court confirmed that "Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which […] are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States"[40].

Despite, however, burying once and for all any remaining arguments against the justiciability of Article 2 TEU, the Court then also clarified a bit further the role of Article 4(2) TEU in its rule of law case-line. As expected,

[38] Judgement of the Court of Justice of 16 February 2022, *Hungary v Parliament and Council,* C-156/21, paragraphs 159 to 163.

[39] Id., paragraph 205.

[40] Id., paragraph 232.

the applicants clung to the Courts previous admission that the EU needed to respect the national identity of the Member States and used it to argue against a regulation which, in their view, didn't allow for the rule of law to be assessed differently in each of the Member States[41]. Thus, the Court also took the opportunity to heed growing calls to avoid a "one-size fits all" approach (Prechal, 2020), by stating that EU law did in fact allow for a "certain degree of discretion in implementing the principles of the rule of law", although this did not extend in any way to their "obligation as to the result to be achieved" which, on the contrary, may not "vary from one Member State to another"[42]. In other words, Member States may, in the context of their separate national identities, make their own constitutional choices, but these must always fall inside a common framework provided by a common rule of law concept stemming from the values contained in Article 2 TEU. Of course, the problem remains that the more bloated the common framework, the smaller the degree of discretion of the Member States[43].

VI. MORE RECENT (DE) EVOLUTIONS

There have recently been interesting developments with regards to admissibility in rule of law cases. The findings of the Court in *YP and Others*, Joined Cases C-615/20 et C-671/20[44], was predictable: national provisions granting a disciplinary chamber without guaranteed independence and impartiality the power to authorize criminal proceedings against judges and suspend their functions are contrary to Article 19(1)(2) TEU. The judgment deserves attention, however, as it revisits the admissibility of preliminary rulings (Gentile, 2023). Indeed, the questions submitted by the referring court did not concern the substance of a pending case before it, but referred to the legality of the new formation that was to take over the cases removed from the duties of a judge that had been suspended pending criminal proceedings initiated against him by the Polish Disciplinary Chamber. As the Polish government argued against admissibility of the preliminary reference, the main proceedings that were stayed concerned a number of criminal cases that were assigned to the judge and later prevented from continuing given his suspension. The questions

41 Id., paragraph 211.
42 Id., paragraph 233.
43 Id., paragraph 233.
44 Judgement of the Court of Justice of 13 July 2023, *YP and Others and MM*, 615/20 and 671/20, EU:C:2023:562.

referred to the EU Court, however, did not refer to the compatibility of the national criminal law applicable to those cases and EU law, but rather were of a procedural nature seeking to determine whether the judge who had been suspended from his duties was still justified in continuing the examination of the cases in the main proceedings, given that the Chamber that had removed them from under his jurisdiction did not meet the requirements of judicial independence. The Court determined that questions referred for a preliminary ruling seeking to enable a referring court to settle procedural difficulties relating to its own jurisdiction regarding a case pending before it, or which concerned the legal effects of a decision which potentially precluded the continuation of the examination of such a case by that court, were in fact admissible. In other words, the Court did not only have jurisdiction to decide via a preliminary ruling on the compatibility with EU law of the substantive law applicable to the case in the main proceedings but could also be questioned concerning the national procedural rules governing the referring court's competence. As we anticipated above, the Court's admissibility criteria have until recently been quite generous, allowing for a broad reach of the EU Court's jurisdiction over rule of law cases that could extend, as we have seen in this case, to the shielding of national courts from domestic rules and decisions affecting procedural matters, such as their jurisdiction over a specific case, even when it was materially unrelated to EU law.

In a judgement handed down in December 2023, the Court also revisited its case law in *Getin Noble Bank* concerning the admissibility of preliminary requests from so-called "fake judges". The referring body in *LG*, C-718/21[45] was a panel of three judges of the Chamber of Extraordinary Control and Public Affairs of the Sąd Najwyższy (Polish Supreme Court), which questioned the compatibility with Article 19(1) TEU of national legislation subjecting a judge's intention to exercise their functions beyond their age of retirement to authorisation by the KRS and, furthermore, laying down an absolutely preclusive time limit for that declaration. Beyond the substance of the case, however, this request for a preliminary ruling raised, at the outset, new doubts expressed by the Commission as to whether the referring panel of judges met the requirements that there be a tribunal previously established by law in order for it to be a "court or tribunal" within the meaning of Article 267 TFEU. The Court recalled in this sense its presumption that the Polish Supreme Court met such requirements but it also stated that said presumption could be rebutted "where a final judicial decision handed down by a court or

[45] Judgement of the Court of Justice of 21 December 2023*, LG v Krajowa Rada Sądownictwa*, C-718/21, EU:C:2023:1015.

tribunal of a Member State or an international court or tribunal leads to the conclusion that the judge constituting the referring court is not an independent and impartial tribunal previously established by law for the purposes of the second subparagraph of Article 19(1) TEU, read in the light of the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union"[46]. Thus, whereas in *Getin Noble* there was, according to the Court, no rebuttal possible as at the time it wasn't aware of any judicial decision finding that the referring judge's appointment to the Supreme Court was neither independent not impartial, in C-718/21 the Court decided to examine the findings in *Dolińska-Ficek and Ozimek v. Poland* of the ECtHR, the judgment of the Naczelny Sąd Administracyjny (Polish Supreme Administrative Court) of 21 September 2021, and its own case law, mainly *A.B. and Others.* From all of them it necessarily concluded that the panel of judges requesting the preliminary ruling did not have the status of an independent and impartial tribunal previously established by law for the purposes of the Article 19(1)(2) TEU read in the light of the second paragraph of Article 47 of the Charter. Consequently, the previous presumption that the Sąd Najwyższy satisfied all the necessary requirements to be considered an independent court established by law was rebutted, the referring panel could not therefore constitute a court or tribunal within the meaning of Article 267 TFEU, and the preliminary request was declared inadmissible.

In January 2024, the Court rejected a preliminary ruling on the grounds of inadmissibility and which we might connect to the previous two cases mentioned above. *G*, Joined cases C-181/21 and C-269/21[47], concerned two national disputes regarding consumer protection law that had reached the Regional Courts of Katowice and Kraków (Poland) on appeal. These same courts had doubts as to the compatibility with EU law of the three-judge formations that had been assigned to the cases and thus their capacity to rule on the matters at hand. The reason was the manner in which one of the judges of each of those formations had been appointed and thus the other judges decided to refer their doubts to the EU Court. The preliminary questions, in essence, concerned the compatibility with Articles 2, 19(1)(2) TEU and 47 of the Charter, of certain aspects of the Polish judicial reforms in the context, this time, of the procedures for the appointment of judges to the ordinary courts in Poland. More precisely, the referring courts asked the EU Court to rule on whether the regional courts involved in the disputes at hand fulfilled

[46] Id., paragraph 44.

[47] Judgement of the Court of 9 January 2024, *G*, Joined Cases C-181/21 and C-269/21, EU:C:2024:1.

the requirements of a "tribunal established by law" within the meaning of those provisions of EU law. The real difference between abovementioned C-718/21 and these Joined cases does not lie, however, in the fact that the former concerns the appointment to judicial posts within the Supreme Court and the latter within the ordinary Polish courts. The actual contrast lies in the different use being made by the referring courts of the preliminary procedure. Thus, in the *LG* case, the question was ruled inadmissible because it was referred by the Polish Supreme Court which, in eyes of the EU Court, did not meet the requirements to be considered a court or tribunal for the purpose of 267 TFEU. In these new cases, on the other hand, there were no original questions referring to the subject matter being dealt with in the original proceedings before the referring courts. On the contrary, these were directly questioning whether the panels of judges dealing with said proceedings had been correctly appointed in light of Articles 2, 19(1)(2) TEU and 47 of the Charter. In this sense, the case is closer to *IS* and *YP and Others,* but the outcome was the same as in *Miasto Łowicz*. As clearly exemplified by the Advocate General Collin's dismissal of all of Poland's objections as to the admissibility of the questions referred, the Court could have easily gone the other way. According to Collins, admissibility was justified because the Court's answer regarding whether the formation of the referring courts complied with the requirement of being a "tribunal established by law" had necessary consequences for the deliverance of their rulings in the main proceedings[48]. In other words, and similar to those used in other cases by the Court itself, such procedural matters could also warrant a preliminary ruling if they sought a necessary clarification before the referring courts were able to rule on the disputes before them.

In this case, however, the Court took a firmer stance in regard to the admissibility of the questions (Zemskova, 2024) by returning to its once isolated *Miasto Łowicz* jurisprudence. After recalling that preliminary references require a connecting factor between the dispute in the main proceedings and the provisions of EU law whose interpretation is sought in order to make the EU Court's decision necessary to resolve the domestic case, the Court considers that in C-181/21 the referring judge had in fact no power to follow up on any answers given by the Court and thus they could have no effect on the main proceedings. In a similar vein, in Case C-269/21, the contested panel of judges had already handed down a decision which was no longer subject to appeal and thus the referring judge no longer had competence to

[48] Opinion of Advocate General Collins of 15 December 2022 in *G*, Joined Cases 181/21 and C-269/21, EU:C:2022:990, paragraph 41.

examine its conformity with EU law—as expressed in a potential preliminary ruling by the EU Court—as the procedure had been definitively closed. In sum, it was the Court's opinion that the referring courts were simply seeking to obtain from the Court a general assessment, disconnected from the requirements of the main dispute, of the procedure for the appointment of ordinary judges in Poland. This was not consistent with the functions of the Court under Article 267 TFEU and thus both requests were declared inadmissible[49] in what can be considered an important deviation from its prior more generous approach.

The last infringement procedure concluded by the Court on rule of law matters at the time of writing—though far from the last to be launched—*is Commission v Poland*, C-204/21[50]. This case is relevant for the developing justiciability of the principle of the rule of law in at least three directions. The first is that it gave rise to a series of interim measures entailing penalty payments of up to the unprecedented sum of EUR 1 million per day. These periodic penalties came after Poland refused both to suspend the application of national laws and decisions that had been found contrary to the principle of judicial independence in previous judgments and to pay the sums ordered in prior interim measures. However, the justification for such a hefty fine was the need to avoid Poland from continuing to cause serious and irreparable harm to the EU legal order and, consequently, to the rights which individuals derive from EU law and the values, set out in Article 2 TEU, on which that Union is founded, in particular that of the rule of law. Thus, the rule of law has also played an important role in the context of the jurisprudence on interim measures. Indeed, this decision recognises the need to guarantee another essential component of the rule of law in Article 2 TEU: the effective application of EU law (Ladenburger et al, 2023). The second important dimension of Case C-204/21 is the use of the Court's conditionality judgements to recall that Article 2 TEU is not merely a statement of policy guidelines or intentions but contains values which are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States[51]. Furthermore, the Court considers that such a reading does not in any way affect the national identity of a Member State within the meaning of Article 4(2) TEU. Indeed, this provision "which must be read

[49] Judgement of the Court of 9 January 2024, *G*, Joined Cases C-181/21 and C-269/21, paragraphs 60-81.

[50] Judgement of 5 June 2023, *Commission v Poland*, C-204/21, EU:C:2023:442.

[51] Id., paragraph 67.

taking into account the provisions, of the same rank, enshrined in Article 2 and the second subparagraph of Article 19(1) TEU, cannot exempt Member States from the obligation to comply with the requirements arising from those provisions"[52]. One such requirement, in particular, is to prevent any regression of their laws on the organisation of justice by refraining from adopting rules which would undermine the independence of judges[53]. Thus, even though the Commission doesn't actually use Article 2 TEU to substantiate its claims, the Court continues to frame the case within its rule of law jurisprudence, finding all the controversial points raised by the Commission against Poland's muzzle law and Disciplinary Chamber to effectively undermine the independence of Polish judges in connection to Article 19(1)(2). Finally, this case also paves the way towards a more comprehensive understanding of the rule of law that may encompass not only direct legal assaults but also indirect encroachments on the independence of the judiciary (Leichsenring, 2023). In this sense, the Court found that national provisions requiring certain judges to submit a written declaration concerning their membership of an association, a non-profit foundation or a political party, as well as the positions held therein, which would later be published online, was contrary to the right to respect for private life and the right to protection of personal data guaranteed by Articles 7 and 8 of the Charter of Fundamental Rights as well as by the GDPR. Again, although the Court was constrained by the legal provisions utilized by the Commission in its proceedings and, therefore, resolved the cases based on the Charter and the GDPR, the overall framing of the issues withing its rule of law case law could lend the case greater significance. In this regard, the Court opined that these national provisions were actually adopted to harm the professional reputation and stigmatize the affected judges. It is undeniable that this could, in turn, affect judicial independence. Consequently, the possibility of considering that other less legal tactics, such as stigmatization or public intimidation, may also be designed to undermine judicial independence, thus violating the rule of law obligations in a more general sense, could also lead to a broader scope of application of Article 2 TEU in future cases and a more detailed development of its content.

Finally, it is worth mentioning one last infringement procedure currently in progress before the Court, C-769/22[54], given that it is the first time that a Member State is referred for a potential breach of Article 2 TEU as a

[52] Id., paragraph 72.

[53] Id., paragraph 74.

[54] Application of 27 of January 2023, *Commission v Hungary,* C-769/22 (case in progress).

self-standing clause. Indeed, in the Commission's application to the Court in an infringement action against Hungary, it claims that by adopting a new Anti-LGBTI+ law prohibiting or limiting access of minors to content that portrays so-called "divergence from self-identity corresponding to sex at birth, sex change or homosexuality", Hungary has not only infringed several EU provisions, including of the Charter of Fundamental Rights, but has also infringed Article 2 TEU more generally. As we have seen, this clause always tends to be combined with other provisions, mainly Article 19(1)(2) TEU, but here the Commission has given the Court the opportunity to directly apply Article 2 TEU, not only in its rule of law facet, but even possibly with regards to other values enshrined therein, especially human dignity, equality and respect for human rights.

While it is a highly anticipated judgment for those who see in it a possible step towards the operationalization of Article 2 TEU as a provision directly and autonomously applicable by the Court (Kaiser, 2023), I believe it is unlikely at this stage that the Court will take this opportunity to progress so fundamentally in its rule of law jurisprudence. In this sense, its case law thus far has clearly attributed legal effects to Article 2 TEU, but it should be noted that this does not equate to its direct and autonomous application to a case—a step the Court has yet to take despite hopes in this regard existing since *Reppublika*. Following from our explanations so far, such a solution would be potentially transformative in the expansion of the Court's control over national policies and legislation (Spieker, 2023b). In other words, the scope of the principle of the rule of law detached from the already broad material content of other provisions such as Article 19(1) TEU, could end up covering virtually all of the Member States' most constitutionally sensitive activities. However, taking into account the current trend in which we have observed a certain sense of caution on the part of the Court, it is unlikely that it will use this opportunity to apply Article 2 as a source of autonomous obligations. It cannot ignore, in this sense, its more recent case law warning that such overreach would go against Article 4(2) TEU. Consequently, it is more likely, that it will choose to protect its legitimacy vis-à-vis the Member States and apply Article 2 TEU in conjunction with certain provisions of the Charter (Bonelli and Claes, 2023).

Be that as it may, this infringement procedure is currently one of three that, taken together, are an important reflection of how far the Court's jurisprudence has advanced in the normativisation of Article 2 TEU and its functionality within the Union's constitutional framework, as the European Commission has "placed this provision, once considered too vague and merely programmatic, at the centre of the infringement proceedings" (Iglesias, 2023:97). Thus, although an infringement action launched against

Poland in June 2023 prompted by the so-called "lex Tusk"—a new Polish law aiming to investigate alleged Russian influences on the Polish political system but ultimately giving the government power to deprive individuals of the right to hold public office and run for elections—has become irrelevant after the general election results of October 2023, it is still interesting how the Commission's foremost claim was the violation of the "principle of democracy" in Articles 2 and 10 TEU[55]. In this sense, the Commission seems to be endorsing the view found already in scholarship (Sonnevend, 2023) that Article 2 can also be combined with Treaty provisions beyond Article 19(1) as a source of concrete obligations for the Member States which can likewise be enforced before the Court (Feisel, 2023). And although it escapes the scope of this article to make an appraisal of the similar possibilities Article 10 TEU could offer the protection of democracy in the Member States that Article 19(1) TEU has provided for the rule of law, it is worth mentioning one last infringement procedure the Commission has initiated against Hungary for its new law on the Defence of National Sovereignty[56]. This case could indeed reach the Court which will then have to decide whether the Sovereignty Protection Office this law sets up, with powers to investigate activities carried out in the interest of another State or a foreign body if they could harm or threaten the sovereignty of Hungary, violates, according to the Commission's claims, the "democratic values of the Union". It could thus prove to be another revolutionary step in the judicialization of the Union's founding values and open up a whole new avenue for the Court to tackle antiliberal trends in the EU through the principle of democracy.

VI. CONCLUSIONS

This paper has followed the most important developments recently made by the Court in the progressive judicialization of the protection of the rule of law in the EU. In a series of revolutionary "leaps forwards", the Court has infused the rule of law with normativity and equipped national courts with the means to protect their judicial independence through the combination of

[55] Commission launches infringement procedure against Poland for violating EU law with the new law establishing a special committee, *Press Release*, 8 June 2023. Available at: https://tinyurl.com/4588d4wn.

[56] Commission decides to launch infringement procedure against Hungary for violating EU law on the Defence of Sovereignty, *Press Release*, 7 February 2024. Available at: https://tinyurl.com/mwkxett4.

Articles 2, 19(1) TEU and 267 TFEU. However, the broad jurisdiction of the Court that arose from *ASJP* quickly inundated the Court with preliminary references alongside an equally growing number of infringement procedures. As Advocate General Bobek already warned in his Opinion to *AFJR*, both from an institutional point of view of the national bodies authorised to refer questions and from a material point of view of the number of questions that could be raised concerning judicial independence, the volume of cases that could reach the Court was apparently limitless[57].

Initially, the Court did not seem too preoccupied with the difficulty of containing an ever-growing case law within the margins of universal minimum standards that should not spill over into the competence of the Member States and pre-empt them from organising their justice systems. Rather, the Court seemed to focus on the alarming fact that certain constitutional systems were incapable of shielding themselves from attacks by the executive branch and on how this could weaken the foundations of the Union's entire judicial system (Lenaerts, 2022). It was this "regrettable scenario" (López Escudero, 2023) that might have justified a certain transfer of the safeguarding role of fundamental constitutional structures from the Member States to the Union (Iglesias, 2023). The result, however, is that there now exists a vast and continuously expanding body of jurisprudence on the basis of the general framework of Articles 2 and 19(1) TEU that risks transitioning from baseline criteria to harmonization.

Acknowledgment of the concerns this naturally raises in the Member States might be read into more recent decisions. Thus, although the Court has always recognised that the organisation of justice in the Member States falls within the competence of those Member States, it has now also acknowledged that an overreach of the value of the rule of law contained in article 2 TEU would be contrary to the principle of national identity enshrined in Article 4(2) TEU which disallows EU law from obliging Member States to adopt a particular constitutional model. To that end, it has qualified these two provisions as being "of the same rank" and has balanced them out by recognising a certain degree of discretion in implementing the principle of the rule of law even when there is no margin concerning the result that must be achieved. This "step back" might also be perceived in the Court's evolving position on admissibility, resulting in its refusal to entertain a series of procedural questions in a clear departure from its previously more generous approach in this regard.

[57] Opinion of Advocate General Bobek of 23 December 2020 in *Asociația 'Forumul Judecătorilor din România' and Others*, Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2020:746, paragraph 222.

This "misuse" of the preliminary reference procedure may prove to be a way out for the Court from an unforgiving and ongoing avalanche of rule of law cases. To this we might also add the possibly earthshaking consequences of its recent refusal to admit preliminary references from "fake judges", even those sitting on the supreme courts of certain Member States.

Thus, I believe any hopes for the Court to apply Article 2 TEU as a self-standing clause are misguided. The tendency is quite the opposite: there has not yet been a paring of Article 2 TEU beyond Article 19 TEU and the broad reach of this combination is beginning to be constrained by balancing it against the newly introduced Article 4(2) TEU. Likewise, I believe the Court will necessarily tend towards returning the protection of the rule of law and judicial independence to the national courts where possible. The even broader scope of Article 2 TEU if it were to become directly enforceable would be a leap too far for what might already be considered a sufficiently detailed and somewhat intrusive case law of the Court.¡

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