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From Portugal to Poland: The Court of Justice of the European Union as watchdog of judicial independence

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Abstract

In *Associação Sindical dos Juízes Portugueses,* the CJEU seized the occasion to uphold the principle of judicial independence as a primary obligation for the Member States under the second subparagraph of Article 19(1) TEU. This newly crafted interpretation of Article 19(1) has crystallized in *Commission v. Poland*, in which the CJEU declared that the reform of the Polish law on the Supreme Court lowering the retirement age of judges breached the obligation to respect judicial independence. The goal of this piece is to assess the bold interpretation given to the second subparagraph of Article 19(1) as a building block of the EU's constitutional order. First, the expansion of the substantive content of Article 19(1) TEU will be analysed. How did the CJEU justify the shift from an obligation to establish a system of remedies ensuring effective judicial review to an obligation of respect for judicial independence? Second, the scope of this obligation and its potential reach will be critically examined. I will argue that Article 19(1) may actually trigger the application of the Charter. Eventually, Article 19(1) TEU has the potential to become an open door for enforcing the Charter against the States regardless of its limited scope of application.

Keywords

Judicial independence, Court of Justice of the European Union, rule of law, Charter of Fundamental Rights of the EU, effective judicial protection

1. Introduction

On 24 June 2019, the Court of Justice of the European Union (CJEU) delivered its much-awaited judgment in *Commission v. Poland*,[1]declaring that Poland had failed to

fulfill its obligations under the second subparagraph of Article 19(1) of the Treaty of the European Union (TEU). This judgment was the outcome of an infringement proceeding initiated by the Commission against Poland in response to its reform of the Law on the Supreme Court that lowered the mandatory retirement age of judges. In a move without precedent, the CJEU suspended the application of the Law until the delivery of the judgment as an interim measure,[2] and eventually held that Poland had infringed the obligation to respect judicial independence. That the outcome was expected does not diminish the relevance of the judgment in the fight against retrogression of the rule of law in the EU.

This judgment was grounded on a bold reading of Article 19(1) TEU, which has become a powerful instrument to monitor respect for judicial independence in domestic legal systems. In that regard, *Associação Sindical dos Juízes Portugueses*(*ASJP*),[3] decided about a year earlier on 27 February 2018, represents the seminal case. *ASJP* was brought by an association of judges to challenge a law reducing the salaries of public sector workers in Portugal meant to reduce budget deficits to meet the requirements to qualify for EU financial assistance. The CJEU seized the occasion to uphold the principle of judicial independence as a primary obligation for the Member States under the second subparagraph of Article 19(1) TEU. As a result, evaluating the domestic judicial structure against the backdrop of judicial independence fell under the CJEU's jurisdiction.

This construction was later reaffirmed in cases such as *Minister for Justice and Equality(LM),*[4]*Achmea*,[5]*EscribanoVindel*,[6]reaching full momentum in *Commission v. Poland*, the first case in which the CJEU found a breach of judicial independence on grounds of the second subparagraph of Article 19(1) TEU. In *ASJP*, the CJEU had crafted a new instrument to monitor domestic legal systems at a moment when legislative reforms in Poland (among other countries) posed a major threat to judicial independence.[7]

While such a bold interpretation of Article 19(1) TEU can be celebrated from the perspective of the rule of law, it might be questioned from the standpoint of the Member States' procedural autonomy. At the same time, the EU Charter of Fundamental Rights (the Charter), which contains the right to an effective remedy and a fair trial in Article 47, was marginalized to the extent that it was merely used as a hermeneutic tool.

The goal of this piece is to assess the newly crafted interpretation of the second subparagraph of Article 19(1)as a building block of the EU constitutional order. I will

examine the content, scope and implications of Article 19(1) TEU and its interaction with the Charter.

First, the substantive content of Article 19(1) TEU will be analysed. Building upon previous case law, the CJEU claimed that Article 19(1) TEU enshrined a general principle of effective judicial protection. At the same time, the CJEU expanded its substantive content from an obligation to establish a system of remedies ensuring effective judicial review to an obligation of respect for judicial independence. How did the CJEU justify this move?

Second, I will critically examine the scope of the obligation to ensure judicial independence under Article 19(1) TEU and its potential reach. Eventually, Article 19(1) TEU has the potential to become an open door for enforcing the Charter against the States regardless of its limited scope of application.

2. A primary obligation to ensure judicial independence under EU law

ASJP represents a landmark decision for the interpretation of the second subparagraph of Article 19(1) TEU. The CJEU claimed that this Article enshrines the obligation of the Member States to ensure judicial independence under EU law; this, in turn brings judicial independence into the purview of the CJEU. How did the CJEU construct this obligation in the TEU? To what extent do Articles 19(1) TEU and 47 of the Charter overlap in terms of content?

2.1. From effective legal protection…

The expansive understanding of Article 19(1) TEU is heavily grounded on the rule of law as a fundamental value on which the EU is founded (Article 2 TEU).As a fundamental value, the rule of law requires that the legal system provide to individuals the right to challenge before a court acts of public authorities in the fields covered by EU law. Relatedly, the CJEU declared that Article 19 TEU 'gives concrete expression to the value of the rule of law stated in Article 2 TEU'[8] and that 'the very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law.'[9]

Moreover, the CJEU indicated that mutual trust between the Member States and in particular the respective courts derives from sharing the set of common values contained in Article 2 TEU. The mutual trust argument was not fully developed in *ASJP*, but it was key in the *LM* case,[10]which involved a European arrest warrant (EAW) requesting

the transfer of a person to Poland with a view to criminally prosecuting him. The person concerned was arrested in Ireland, and he claimed that, if surrendered, there was a real risk he would be denied his right to a fair trial as a consequence of the legislative reforms of the justice system in Poland. Indeed, he relied on the Commission's reasoned proposal of 20December 2017 submitted in accordance with Article7(1) TEU regarding the rule of law in Poland.

The CJEU recalled that the EAW mechanism is based on mutual trust between Member States, which, in turn, is founded on the premise that the courts of other Member States meet the requirement of effective judicial protection, including independence and impartiality.[11]Thus, the obligation to ensure effective judicial protection stemming from Article 19(1) TEU is essential for securing mutual trust and the adequate functioning of the EAW. Eventually, the CJEU admitted that the existence of a real risk that the person in respect of whom a EAW has been issued would suffer a breach of his fundamental right to an independent tribunal would enable, exceptionally, the executing judicial authority to refrain from surrendering that person.[12]

The argument in *ASJP* regarding Article 19(1) TEU was complemented with a reference to the principle of sincere cooperation in Article 4(3) TEU.[13]The obligation to ensure judicial review applies not only to the CJEU, but also to national courts, as a joint enterprise.[14]Following the second subparagraph of Article 19(1) TEU, it is for the Member States to establish a system of legal remedies and procedures ensuring effective judicial protection for individual parties in the fields covered by EU law.[15]

Indeed, the States' obligation to provide effective remedies to ensure the rights conferred upon individuals by EU law under the principle of cooperation was already settled caselaw.[16] Still, the CJEU had acknowledged that the procedural rules regarding remedies were a matter for the domestic legal order of each Member State under the principle of procedural autonomy. At the same time, the CJEU required that the domestic remedies in place fulfill the principles of equivalence and effectiveness in order to secure the principle of effective judicial protection.[17]

The CJEU had also declared that effective judicial protection was a general principle of EU law enshrined in Articles 6 and 13 ECHR.[18] In *ASJP*, the CJEU took a step further by claiming that this principle was established in the second subparagraph of Article 19(1).[19]

The CJEU concluded that 'every Member State must ensure that the bodies which, as "courts or tribunals" within the meaning of EU law, come within its judicial system in

the fields covered by that law, meet the requirements of effective judicial protection.'[20] This same conclusion was reproduced in *Commission v. Poland*.[21]

This paragraph is key for the new interpretation of the second subparagraph of Article 19(1) TEU. If in the past it was understood that domestic courts, as European courts, had to provide remedies to guarantee the effectiveness of the rights of individuals under EU law, now the content of the Member States' obligation is expanded. The obligation under Article 19(1) TEU involves not only the effectiveness of the judicial remedies provided, but also that the 'courts or tribunals' themselves meet basic prerequisites for effective judicial protection.

At the same time, the competence of the CJEU also expands. If in the past the CJEU had examined specific procedural rules under the principles of equivalence and effectiveness to ensure the principle of effective judicial protection, now also the rules on the organization and structure of the judiciary are placed under the oversight of the CJEU from the perspective of the rule of law.

2.2. …to judicial independence

The next step taken by the CJEU was to claim that one of the requirements of effective judicial protection is judicial independence. In order to justify this move, in *ASJP*, the CJEU referred to the right to an effective remedy(Article 47of the Charter) and to the preliminary reference procedure(Article 267 TEU).[22]

With regard to the preliminary reference procedure, the CJEU claimed that the requirements of effective judicial protection include judicial independence since only independent courts can activate the preliminary ruling procedure. The CJEU argued that the independence of domestic courts is 'essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267 TFEU, in that […] that mechanism may be activated only by a body responsible for applying EU law which satisfies, inter alia, the criterion of independence.'[23]

There is, however, a flaw in this argument. It is one thing to say that only courts and tribunals can activate this mechanism, and that independence is an essential requirement of a body that aspires to serve as a court or tribunal. It is another thing altogether to say that judicial independence is an obligation that derives from the preliminary ruling mechanism. If a body is not independent, the consequence is that it does not qualify to make a preliminary reference.[24] In short, in the context of the preliminary reference, independence is a criterion in the determination of whether a body may make use of the

preliminary reference, not an obligation to be met, let alone a general obligation for all domestic adjudicatory bodies.

Moreover, substantiating an obligation of judicial independence based on the case law on Article 267 TFEU[25]presentsan additional problem. Indeed, the concept of independence has been interpreted leniently in the context of preliminary references in order to expand the range of bodies that can submit references to the CJEU.[26] As Tridimas argued, the CJEU is less concerned with substantive standards of fairness and independence, and more with making the preliminary reference available to all bodies dealing with EU law.[27]

For instance, in *Gabalfrisa*[28] the CJEU accepted a reference by a regional economic and administrative court from Spain, even though its members may be removed from office by the Minister of Economic Affairs and Finance.[29]More recently, however, the CJEU has shown a stricter attitude. For instance, in *TDC*[30]it argued that the referring body could not be regarded as independent since its members could be removed from office by the Minister, who also had the power to appoint them.[31]Furthermore, there is another strand of case law in which the CJEU has interpreted the concept of judicial independence in the context of Directives requiring the possibility of effective remedy before a court or tribunal.[32]In these cases, although the CJEU still refers to the case law surrounding the preliminary reference, the analysis becomes slightly more demanding.[33]In any event, the present contribution aims not at examining how the CJEU interpreted the requirement of judicial independence, but rather how the CJEU built an obligation to respect judicial independence on the grounds of Article 19(1) TEU.

In that respect, the main argument relies on Article 47 of the Charter. In *ASJP*, the CJEU claimed that judicial independence was essential in order to ensure the right to an effective remedy by referring to Article 47 of the Charter.[34]This was a point of contention in *ASJP* between Advocate General Saugmansgaard Øe and the CJEU. Indeed, the Advocate General had claimed that the 'the concept of "effective judicial protection" within the meaning of the second subparagraph of Article19(1) TEU must not be confused with the "principle of judicial independence."'[35]The Advocate General argued that the purpose and wording of Articles 19(1) TEU and 47 of the Charter differed. He also pointed out that the right to effective judicial protection and the right to an independent judge were stated separately in Article 47 of the Charter, a distinction that resembles the way that Article 13 ECHR protects the right to an effective remedy

while Article 6 ECHR the right to a fair trial. The Advocate General distinguished between the obligation of the Member States to provide a system of remedies as related to the right to effective judicial protection and to the right to a fair trial before an independent court.[36]

Contrariwise, the CJEU argued that Article 47 'refers to the access to an "independent" tribunal as one of the requirements linked to the fundamental right to an effective remedy.'[37]Indeed, the text of Article 47 of the Charter connects the right to an effective remedy with the requirement of judicial independence when it states that: 'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.'[38]

Moreover, earlier in the judgment, the CJEU claimed that Article 19(1) TEU established effective judicial protection as a general principle of EU law stemming from the constitutional traditions common to the Member States, enshrined in Articles 6 and 13 ECHR, and reaffirmed by Article 47 of the Charter.[39]

Does it follow that the content of Article 19(1) is equivalent to the content of Article 47of the Charter? Or can a distinction be made between judicial protection as a general principle of EU law and as a fundamental right? Ultimately, what is the relationship between Article 19(1) TEU and Article 47 of the Charter as regards of their content? The judgment in *Commission v. Poland* has not provided additional clarification regarding the relationship between Article 19(1) TEU and Article 47of the Charter. Advocate General Tanchev clearly distinguished between one and the other in terms of their scope of application[40] and claimed that Article 19(1) applied to the case, whereas Article 47 of the Charter did not. According to the Advocate General, the relationship was one of complementarity.[41]

Notwithstanding the above discussion, the CJEU did not develop a separate analysis. The judgment focuses on Article 19(1) TEU as the parameter of control. At the same time, following *ASJP*, the CJEU interprets Article 19(1) by making reference to Article 47 of the Charter.[42] Indeed, if anything, in *Commission v. Poland*, the CJEU reinforces the connection between Article 19(1) TEU and Article 47 of the Charter from the perspective of individual rights. In order for the right of individuals to obtain effective judicial protection, courts ought to be independent:

That requirement that courts be independent, which is inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article2 TEU, in particular the value of the rule of law, will be safeguarded[43]

Hence, the CJEU assigned a new role to Article 19(1) TEU by drawing a link between the rule of law (Article 2 TEU) and the right to an effective remedy and to a fair trial (Article 47of the Charter). The obligation to provide remedies that ensure the effective protection of the rights conferred upon individuals by EU law has given rise to an obligation to ensure the independence of domestic courts.

As a result, the content of Article 47 of the Charter has been inserted into Article 19(1) TEU. One could object that if the Charter does not apply, but the rights contained in Article 47 do through Article 19(1) TEU, the limited scope of application of the Charter will have been circumvented. The CJEU could have attempted to distinguish between the individual right to a fair trial and the institutional safeguard of judicial independence. Article 19(1) TEU would then be taken to contain a structural principle linked to the rule of law rather than a fundamental right. This structural principle would enshrine the obligation of Member States to guarantee judicial independence from an institutional perspective. Nonetheless, in *Commission v. Poland* a fusion of Articles 19(1) and 47 of the Charter is carried out.

In this regard, one might wonder whether all aspects of the right to an effective remedy and to a fair trial enshrined in Article 47 of the Charter are now protected by virtue of Article 19(1) TEU. May any individual claim that the right to trial within a reasonable time has been infringed on the grounds of Article 19(1) TEU? Or the right to be advised, defended and represented, or to legal aid? The same reasoning as in *ASJP* could be followed: in order to ensure effective judicial protection to individuals, justice must be administered in due time, and individuals ought to be represented by a lawyer. Indeed, all tenets of Article 47 of the Charter might be considered relevant in ensuring judicial protection in terms of Article 19(1) TEU. As a result, Article 19(1) could provide grounds to challenge not only rules undermining the independence of the judiciary from a structural perspective, but also any rules or acts undermining the rights protected by Article 47 of the Charter. That is, unless the CJEU limits the potential

reach of this interpretation in future cases. Indeed, Advocate General Tanchev has argued in several opinions concerning pending Polish cases that the content of the second subparagraph of Article 19(1) TEU ought to be confined to 'structural breaches which compromise the essence of judicial independence.'[44], whereas individual or particular breaches of the independence of judges are to be dealt under Article 47of the Charter, when that applies. Nonetheless, the CJEU has not circumscribed the content of Article 19(1) TEU in terms of the severity or the extent of the breach so far.

3. The scope of application of Article 19(1) TEU and the Charter: diverging or converging?

The obligation to ensure judicial independence stemming from the second subparagraph of Article 19(1) TEU applies 'in the fields covered by Union law.' In *ASJP*, the CJEU clearly distinguished this clause from 'implementing Union law' within the meaning of Article 51(1) of the Charter.[45] Hence, Article 19(1) may apply even if the Charter does not.[46]First, I will elucidate the material scope of Article 19(1) TEU according to CJEU case law and its potential reach. Next, I will develop an argument as to how Article 19(1)might become a trigger for the application of the Charter.

3.1. 'In the fields covered by Union law'

According to the CJEU, in order to determine the scope of application of Article 19(1) TEU what needs to be ascertained is whether a court may rule 'on questions concerning the application or interpretation of EU law.'[47] In the Portuguese case in question, although the CJEU held that the domestic court was to verify applicability, the CJEU also understood that 'questions relating to EU own resources and the use of financial resources from the European Union may be brought before the "Tribunal de Contas,"'[48] and that such questions may address the application or interpretation of EU law.

In *Commission v. Poland*, the CJEU clearly stated the grounds for the application of the second subparagraph of Article 19(1) TEU: 'In the present case, it is common ground that the Sąd Najwyższy (Supreme Court) may be called upon to rule on questions concerning the application or interpretation of EU law and that, as a "court or tribunal", within the meaning of EU law, it comes within the Polish judicial system in the "fields covered by Union law" within the meaning of the second subparagraph of Article19(1) TEU, so that that court must meet the requirements of effective judicial protection.'[49]

The Polish government had contested the applicability of Article 19(1) TEU. Its argument was grounded on the principle of conferral and claimed that the organization of the national justice system constituted a competence reserved exclusively to the Member States.[50]Moreover, the government argued that this case differed from *ASJP* in that it did not involve domestic legislation that was passed to reduce an excessive budget deficit as part of an agreement for financial assistance by the EU.[51]

In its ruling, the CJEU distinguished the allocation of competences from the scope of application of EU law and it maintained that although the organization of the justice system falls within the competences of the States, the States must comply with the obligations deriving from EU law when exercising that competence.[52]

At the same time, the CJEU pointed out that the fact that the austerity measures in *ASJP* had been adopted due to requirements linked to the elimination of the excessive budget deficit in the context of an EU financial assistance programme was irrelevant for the applicability of Article 19(1) TEU.[53]

Hence, the fact that courts may potentially rule on questions concerning the application or interpretation of EU law is enough to bring them into the field covered by EU law, thereby making the obligation to respect judicial independence enforceable. Indeed, there is no need to show that the referring court is applying EU law in the specific case or that it has applied EU law in the past.[54]

As a result, the scope of application of Article 19(1) TEU has great potential for expansion. Nearly all domestic courts might ultimately be bound by the EU principle of judicial independence, given that EU law has penetrated different areas of the law. Even constitutional courts may well come under the supervisory powers of the CJEU, since they might encounter questions regarding the interpretation of EU law, as attested by the preliminary references that have been submitted to the CJEU by several constitutional courts.[55]

As such, reforms of the judicial system that undermine the structural conditions for judicial independence may fall within the remit of the CJEU. Under the second subparagraph of Article 19(1) TEU, the CJEU becomes competent to monitor the domestic rules on the organization of the judiciary against the backdrop of not only judicial independence, but also potentially any of the contents of Article 47 of the Charter, as argued above.

The cases might reach the CJEU through direct challenges by the Commission, such as in *Commission v. Poland*, at a moment in which legal reforms not only in Poland, but

also in Hungary, Romania or Bulgaria threaten judicial independence. Indeed, the Commission lodged an infringement procedure on the grounds of Article 19(1) TEU against Poland targeting the reform of the law on Ordinary Courts that lowered the retirement age of judges,[56]in addition to the ongoing infringement procedure regarding the new disciplinary regime for Polish judges.[57] Hence, Article 19(1) TEU is becoming a powerful tool to fight against the backsliding of the rule of law.

The CJEU might also be called to intervene through the preliminary reference procedure for an interpretation of Article 19(1) TEU, as long as the referring court might potentially apply or interpret EU law. The question arises whether a preliminary reference regarding the requirements of judicial independence would be admissible in cases where the substance is wholly unrelated to EU law. In *ASJP*, the dispute in the main proceedings concerned whether the salary-reducing measures adopted in the context of the crisis could undermine judicial independence. This was also the case in *Escribano Vindel*, in which a Spanish judge claimed that the salary cuts adopted to reduce public deficit infringed the principle of judicial independence, as well as the right to non-discrimination on grounds of age. Hence, the dispute in the main proceedings involved the compatibility between domestic legislation on judges' salaries and the principle of judicial independence. But what about those cases before domestic courts that concern the application of domestic law where doubts emerge regarding the independence of the court? Would a preliminary reference be admissible then?

According to settled case law, the CJEU may refuse to issue a ruling on a question referred by a national court only 'where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.'[58] If the substance of the case is not connected with EU law, it could be argued that the interpretation of Article 19(1) TEU bears no relation to the actual facts of the main action or its purpose, since this Article is aimed at ensuring effective judicial protection of the rights granted by EU law.

Following *ASJP*, however, one could argue that the obligation stemming from Article 19(1) TEU always applies to courts that might potentially apply or interpret EU law. Therefore, even in cases wholly unrelated to EU law from a substantive perspective, if the court has doubts about the fulfillment of the requirements of judicial independence under EU law, then a reference may be admitted. The referring court should show how

the interpretation of the rules on independence is relevant for it to hand down its judgment in the case at hand.[59]

Taking a more nuanced perspective, it could be argued that referrals ought to be admitted only when the concern regarding the independence of the court bears a structural quality, rather than a flaw affecting only the case at hand (such as the impartiality of one of the judges because of a previous relationship with one of the parties). A structural shortcoming would undermine the capacity of the court to ensure effective judicial protection also in cases in which EU law would apply.

Case in point, the admissibility of two preliminary references submitted by two Polish district courts regarding the new disciplinary regime of judges has been contested.[60] The substance of the cases was not connected to EU law since one concerned the civil liability of the State Treasury and the other organized crime. In both, the referring courts were afraid that, in the event of a particular decision, disciplinary proceedings would be initiated against the members of the formation ruling in that case. Indeed, in the oral hearing, the CJEU specifically requested that the parties address the issue of admissibility in light of paragraph 40 of the *ASJP* judgment.[61]

In his Opinion, Advocate General Tanchev concluded that the requests for a preliminary ruling were inadmissible because the Court cannot issue advisory opinions on general orhypotheticalproblemsunderArticle267TFEU, a position shared by the Commission. On the one hand, the Advocate General held that the situation in the main proceedings fell within the material scope of the second subparagraph of Article 19(1) TEU.[62] In particular, he argued that the scope of this Article 'is not linked in any way to whether the substantive dispute in which judicial independence is being challenged concerns EU law.'[63]

On the other hand, he argued that the orders for reference did not contain sufficient explanation, both in terms of law and fact, to assess whether a breach of judicial independence had occurred.[64] He claimed that 'on the basis of the orders for reference, the referring courts have merely a subjective fear which has not crystallized into disciplinary proceedings and remains hypothetical.'[65] The lack of sufficient information in terms of Article 94 of the Rules of Procedure was the reason to consider the references to be inadmissible. In the forthcoming judgments, the CJEU will need to clarify the scope of application of Article 19(1) TEU.

In any event, the interpretation of the second subparagraph of Article 19(1) TEU in *ASJP* represents a building block for the federalization of the judiciary in the

EU.[66]Domestic courts ought to be regarded as European courts not only because they must apply EU law, but also because they need to meet the EU principle of judicial independence. Furthermore, Article 19(1) TEU makes the CJEU a monitor of the judicial independence of domestic courts thatapply or potentially apply or interpret EU law.

3.2. Article 19(1) TEU as the trigger for the application of the Charter

Neither in *ASJP* nor in *Commission v. Poland* did the CJEU try to elucidate whether the Charter was applicable. The controlling parameter was Article 19(1) TEU, while the Charter played a merely hermeneutic role. The Advocates General, however, developed a much deeper analysis regarding the scope of application of the Charter in terms of Article 51(1).

In *ASJP*, Advocate General Saugmansgaard Øe, reached the conclusion that the Charter was indeed applicable. He struggled with the scarce information submitted by the referring court regarding the EU legislative framework under which the national legislation had been adopted, yet, he argued that the Council's implementing decisions that granted financial assistance to Portugal included measures of a specific nature – including the adoption of a single wage scale targeting the rationalization and consistency of remuneration policy across all public sector careers.[67] In the end, he concluded that the legislation containing the public sector salary-reducing measures constituted implementation of EU law within the meaning of Article 51(1) of the Charter.[68] The CJEU, however, failed to specify whether the Charter was applicable to the case and missed an excellent opportunity to rule on the application of the Charter in the context of austerity measures and financial assistance conditionality, and in particular to enable judicial scrutiny of national austerity measures adopted in the context of the European Financial Stabilization Mechanism.[69]

In *Commission v. Poland*, Advocate General Tanchev developed a separate analysis of the scope of application of the second subparagraph of Article19(1) TEU and Article47 of the Charter.[70] He argued that those provisions differed in material scope and that while the latter was inapplicable since the Commission had not provided information demonstrating that the contested measures implemented EU law, the former applied. As in *ASJP*, the CJEU focused on Article 19(1) TEU, but failed to develop a separate assessment of Article 47.

In addition, several scholars have indicated the need for caution regarding the scope of the Charter in this field[71] since rules on the organization of the judiciary fall within the competences of the Member States. Notwithstanding, one could argue that once Article 19(1) TEU applies, and precisely by virtue of Article 19(1) TEU, then the Charter also applies because the application of Article 19(1) TEU brings the situation within the field of EU law.

This argument is supported by *Åkerberg Fransson*, the leading case in this field, in which the CJEU interpreted Article 51(1) of the Charter in broad terms.[72] Implementation within the meaning of Article 51(1) of the Charter is not limited to measures transposing directives or applying regulations, but includes more generally state measures that fall within the scope of EU law. In the words of the CJEU:

Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.[73]

If the applicability of EU law entails applicability of the Charter, the applicability of Article 19(1) TEU entails the applicability of Article 47 of the Charter. A situation in which a Member State falls under the obligation of judicial independence enshrined in Article 19(1) TEU becomes a situation 'governed by EU law.'[74]In that regard, as *Åkerberg Fransson* also showed, the Charter applies when the States fulfil obligations under EU law, even if national legislation was not adopted tothat end. If there is an obligation under EU law to ensure the judicial independence of domestic courts that might potentially apply or interpret EU law, domestic legislation that undermines judicial independence falls within the remit of EU law. As such, Article 19(1) TEU becomes the trigger for the application of the Charter.

This argument is similar to the evolution of the notion of 'citizenship' as a trigger for the application of the Charter after *Ruiz Zambrano*. In that case, even though the relevant national legislation was not implementing EU law, the CJEU ruled that 'Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union.'[75]The CJEU specified that the refusal to grant a

residence permit to a third country national with dependent minor children who were EU citizens would have such an effect, since the children would be forced to leave the territory of the Union. While the Charter was not mentioned in *Ruiz Zambrano*, in later cases the CJEU acknowledged that those situations fall within the scope of EU law and therefore the Charter applies.[76]

Hence, although in the above-mentioned situations there is no cross-border element and the legislation falls within Member States' competences, Article 20 TFEU imposes an obligation upon the Member States and brings the situation within the field of EU law. Once that step is taken, by virtue of Article 20 TFEU, the Charter also applies. Nonetheless, the reach of Article 20 TFEU in this context has been interpreted in a very limited manner, since citizens must find themselves in a situation in which they would be obliged in practice to leave the whole of the territory of the EU.[77]

Similarly, while the organization of the judiciary is a subject attributed to the competence of the Member States, the second subparagraph of Article 19(1) TEU imposes an obligation to ensure the judicial independence of courts that might potentially deal with EU law. Once a situation falls within the scope of EU law, then the Charter also applies.

There might have been prudential and strategic reasons not to enforce the Charter in *ASJP* and *Commission v. Poland*. The Charter's disregard might be understood as a strategic move strengthening Article 19(1) TEU to confront threats to the rule of law in situations in which the application of the Charter might be contested. However, once the link with EU law is established through Article 19(1) TEU, the application of the Charter cannot be contested without the risk of inconsistencies arising with previous CJEU case law, unless the CJEU chooses to circumscribe the situations in which Article 19(1) TEU may apply. For instance, the potential reach of Article 19(1) TEU could be limited by arguing that only structural reforms by which the basic tenets of judicial independence are at risk may trigger the application of Article 19(1) TEU. Indeed, Advocate General Tanchev has suggested to interpret Article 19(1) TEU in those restrictive terms.[78] And yet, such a move would undermine the strength of Article 19(1) TEU at a moment in time in which it is most needed.

In the end, why would the application of the Charter be relevant if Article 19(1) TEU already enables to scrutinize the domestic judiciary against the backdrop of judicial independence? Firstly, should Article 47 of the Charter be held applicable, there would

be no doubt as to the enforceability of all its contents to any court that might potentially apply or interpret EU law.

Furthermore, Article 19(1) TEU might open the door for the application of all Charter rights to the Member States, along the lines of the due process clause in the United States (US).[79]The US Supreme Court relied on the due process clause of the Fourteenth Amendment, which prohibits a state from depriving 'any person of life, liberty, or property, without due process of law', to enforce the Bill of Rights against the individual states.

Originally, the Bill of Rights was only binding upon federal authorities,[80] as the Supreme Court confirmed in *Barron v. Baltimore*.[81] After the Civil War and the passing of the Fourteenth Amendment, the Supreme Court held, on a case-by-case basis, that nearly all the rights enshrined in the Bill of Rights were among the personal rights and liberties protected by the due process clause from undue impairmentby the states.[82] The so-called incorporation process significantly transformed the constitutional model of individual rights' protection in a federal direction[83] and strengthened the power of the Supreme Court to monitor the action of state authorities.[84]

Relatedly, the obligation to ensure effective judicial protection of the rights conferred by EU law stemming from Article 19(1) TEU could be interpreted as including the rights enshrined in the Charter. It could be argued in the same vein that the protection of the rights conferred by the EU would not be effective– in terms of Article 19(1) TEU – if domestic courts did not adequately remedy the violation of Charter rights. In the US, incorporation was a gradual and incremental process that took place case by case and right by right between the 1920s to the 1980s.For all the differences between the two traditions, could we imagine a similar development taking place in the EU? While the political moment may very well not be ready for such a federal overhaul, the seed has been planted.

4. Concluding remarks

In *ASJP*, the CJEU laid down the foundation for a primary EU law obligation on the Member States to ensure judicial independence that crystallized in *Commission v. Poland*, one that will play a prominent role in other pending cases regarding judicial reforms in Poland.As surprising as the bold interpretation of the second subparagraph of Article 19(1) TEU in *ASJP* was, itwas not coincidental. The threat to the rule of law through judicial reforms in several Member States requires new instruments to ensure

the protection of EU fundamental values, in addition to the existing political mechanisms and potential sanctions under Article 7 TEU.[86] The CJEU has stepped in and revealed a legal route to contest the judicial reforms that undermine the independence of domestic courts. Article 19(1) TEU then becomes the source of the obligation for the Member States to ensure judicial independence as well asthe source of the CJEU's jurisdiction.[87] Rather than coming up with a new interpretation in cases against Poland, which might have undermined its legitimacy, the CJEU paved the way for an obligation to guarantee domestic judicial independence with its innovative understanding of the second subparagraph of Article 19(1) TEU in a Portuguese austerity case.

The marginalization of the Charter represents collateral damage. Granted, there may have been strategic or prudential reasons not to enforce the Charter, given the risks of political backlash in other Member States in the context of Brexit and growing Euroscepticism. Also, to give it a more positive reading, one could say that the Charter has been enforced hermeneutically. However, these judgments did pay lip service to the Charter..Once the Member States are under the obligation to ensure judicial independence by virtue of Article 19(1) TEU, it has been contended here that their actions are governed by EU law and hence the Charter becomes applicable.

In any event, the second subparagraph of Article 19(1) TEU holds great promise for expansion in the future, potentially enabling the enforcement of all contents of Article 47 of the Charter(not only judicial independence) on every domestic court, since virtually all of them might possibly apply or interpret EU law. Moreover, Article 19(1) TEU might open the door for application of all the rights contained in the Charter to the Member States, similarly to the due process clause in the US. Such a move would make the Charter enforceable irrespective of whether the States are implementing EU law and entail a major transformation for the EU constitutional model.

In the end, the second subparagraph of Article 19(1) TEU has become an instrument for judges to defend their independence against threats coming from the respective national government or parliament. It is still to be seen how far the CJEU is ready to take Article 19(1) TEU in terms of both its content and scope.

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1. Case C 619/18 *Commission v. Poland*, EU:C:2019:531.

2. Case C-619/18 *Commission v. Poland*, Order of the Court.

3. Case C-64/16 *Associação Sindical dos Juízes Portugueses*, EU:C:2018:117.

4. Case C-216/18 PPU *Minister for Justice and Equality (Deficiencies in the system of justice)*, EU:C:2018:586.

5. Case C-284/16 *Achmea*, EU: C:2018:158.

6. Case C-49/18 *Carlos Escribano Vindel*, EU: C:2019:106.

7. L. Pech and S. Platon, 'Judicial independence under threat: the Court of Justice to the rescue in ASJP', 55 *Common Market Law Review* (2018), p. 1827-1854, 1849.

8. Ibid., para. 32.

9. Case C-64/16 *Associação Sindical dos Juízes Portugueses*, para. 36.

10. Case C-216/18 PPU*Minister for Justice and Equality (Deficiencies in the system of justice)*, para. 46-59.

11. Ibid., para. 58.

12. Ibid., para. 59.

13. Case C-64/16 *Associação Sindical dos Juízes Portugueses*, para. 34

14. Ibid., para. 33.

15. Ibid., para. 34.

16. Already in 1976, in Case C-33/76*Rewe*, EU:C:1976:188, para. 5, the CJEU declared: 'Applying the principle of cooperation laid down in Article 5 of the Treaty, it is the national courts which are entrusted with ensuring the legal protection which citizens derive from the direct effect of the provisions of Community law.' See also, Case C-432/05 *Unibet*, EU:C:2007:163, para. 38.

17. Case C-168/05 *Mostaza Claro*, EU:C:2006:675, para. 24: 'According to settled case-law, in the absence of relevant Community rules, the detailed procedural rules designed to ensure the protection of the rights which individuals acquire under Community law are a matter for the domestic legal order of each Member States, under the principle of procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of

equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness).'

18. Case C-432/05 *Unibet*, para. 37

19. Case C-64/16 *Associação Sindical dos Juízes Portugueses*, para. 35.

20. Ibid., para. 37.

21. Case C-619/18 *Commission v. Poland*, para. 55.

22. In contrast, in *Commission v. Poland*, the obligation to respect judicial independence is grounded solely on Article 47 of the Charter, while the reference to the preliminary ruling procedure is moved to the general reasoning pertaining to the principle of effective judicial protection. Case C-619/18 *Commission v Poland*, para. 45

23. Case C-64/16 *Associação Sindical dos Juízes Portugueses*, para. 43.

24. M. Bonelli and M. Claes, 'Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary', 14 *European Constitutional Law Review* (2018), p. 622-643, 633.

25. Case C-64/16 *Associação Sindical dos Juízes Portugueses*, para. 44.

26. M. Bonelli and M. Claes, 14 *EuConst* (2018), p. 638.

27. T. Tridimas, 'Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure', 40 *Common Market Law Review* (2003), p. 9-50, 28.

28. Case C-110/98 to 147/98 *Gabalfrisa SL and Others*, EU:C:2000:145.

29. Ibid. para. 23.

30. Case C-222/13 *TDC A/S*, EU:C:2014:2265.

31. Ibid. para. 34-36.

32.Case C-506/04 *Graham J. Wilson*, EU:C:2006:587; Case C-175/11 *D. and A.*, EU:C:2013:45.

33. Kosar has claimed these two conceptualizations of judicial independence need to be merged into one workable standard, see D. Kosař, 'The CJEU Has Spoken Out, But the Show Must Go On', *VerfBlog*(2018), https://verfassungsblog.de/the-cjeu-has-spoken-out-but-the-showmust-go-on/.

34. Case C-64/16 *Associação Sindical dos Juízes Portugueses*, para. 41.

35. Opinion of Advocate General Saugmansgaard Øe in Case C-64/16 *Associação Sindical dos Juízes Portugueses*, EU:C:2017:395, para. 64.

36. Ibid., para. 66-67.

37. Case C-64/16 *Associação Sindical dos Juízes Portugueses*, para. 41.

38. Emphasis added.

39. Ibid. para. 35.

40. See Section 3.2.below.

41. Opinion of Advocate General Tanchev in Case C-619/18 *Commission v. Poland*, EU:C:2019:325, para. 58.

42. Case C-619/18 *Commission v. Poland*, para. 54, 57.

43. Ibid., para. 58.

44. Opinion of Advocate General Tanchev in Joined Cases C-558/18 and C-563/18 *Miasto Łowicz*, EU:C:2019:775, para. 125; Opinion of Advocate General Tanchev in Case C-192/18 *Commission v. Poland*, EU:C:2019:529, para. 115-116; Opinion of Advocate General Tanchev in Joined Cases C-585/18, C-624/18 and C- 625/18 *AK*, EU:C:2019:551, para. 145-152.

45. Case C-64/16 *Associação Sindical dos Juízes Portugueses*, para. 29.

46. See Section 3.2.below regarding the scope of application of the Charter.

47. Case C-64/16 *Associação Sindical dos Juízes Portugueses*, para. 40.

48. Ibid., para. 39.

49. Case C-619/18 *Commission v Poland*, para. 56.

50.Ibid., para. 38

51. Ibid., para. 40

52. Ibid., para. 52.

53. Ibid., para. 51.

54. L. Pech and S. Platon, 55 *CMLRev* (2018), p. 1840.

55. M. Dicosola, C. Fasone and I. Spigno (eds.),'Special issue – Preliminary References to the Court of Justice of The European Union by Constitutional Courts', 16(6) *German Law Journal* (2015).

56. Case C-192/18 *Commission v. Poland*, EU:C:2019:924.

57.https://ec.europa.eu/commission/presscorner/detail/en/IP_19_418958. Case C-62/14 *Gauweiler*, EU:C:2015:400, para. 25; Case C 399/11 *Melloni*, EU:C:2013:107, para. 29.

59. L. Pech and S. Platon, 55 *CMLRev* (2018), p. 1842.

60.Case C-558/18 *Miasto Łowicz* (pending); and Case C-563/18 *Prokuratura Okręgowa w Płocku* (pending).

61.P. Wachowiec, ‘Disciplinary regime under ECJ review: a dispute over admissibility’, *Rule of Law* (2019), https://ruleoflaw.pl/disciplinary-regime-under-ecj-review-a-dispute-over-admissibility/.
62. Opinion of Advocate General Tanchev in Joined Cases C-558/18 and C-563/18 *Miasto Łowicz*, para. 86.
63. Ibid., para. 94.
64. Ibid., para. 99-119.
65. Ibid., para. 118.
66. M. Bonelli and M. Claes, 14 *EuConst* (2018), p. 643.
67. Opinion of Advocate General Saugmansgaard Øe in Case C-64/16 *Associação Sindical dos Juízes Portugueses*, para. 45-52.
68. Ibid., para. 53.
69. M. Markakis and P. Dermine, ‘Bailouts, the legal status of Memoranda of Understanding, and the scope of application of the EU Charter: Florescu’, 55 *Common Market Law Review* (2018), p. 643-672, 664-665.
70. Opinion of Advocate General Tanchev in Case C-619/18 *Commission v. Poland*, para. 52-67.
71. L. Pech and S. Platon, 55 *CMLRev* (2018).
72. D. Sarmiento, ‘Who’s Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe’, 50 *Common Market Law Review* (2013), p. 1267-1304, 1277; X. Groussot and I. Olsson, ‘Clarifying or Diluting the Application of the EU Charter of Fundamental Rights?—The Judgments in Åkerbergand Melloni’, II *Lund Student EU L. Rev.* (2013), p. 7-35, 12-13.
73. Case C-617/10 *ÅkerbergFransson*,EU:C:2013:105, para. 21.
74. Ibid., para. 19. According to settled case law, EU fundamental rights are binding upon the Member States ‘in all situations governed by EU law.’
75. Case C-34/09 *Ruiz Zambrano*, EU:C:2011:124, para. 42.
76. Case C-165/14 *Rendón Marín*, EU:C:2016:675, para. 81: ‘in so far as Mr Rendón Marin’s situation falls within the scope of EU law, assessment of his situation must take account of the right to respect for private and family life, as laid down in Article 7 of the Charter, an article which, as has been pointed out in paragraph 66 above, must be read in conjunction with the obligation to take into consideration the child’s best interests, recognised in Article 24(2) of the Charter.’
77. Case C-256/11 *Dereci and Others*, EU:C:2011:734, para. 66.

78. Opinion of Advocate General Tanchev in Joined Cases C-558/18 and C-563/18 *Miasto Łowicz*, para. 125: 'substantively speaking and in terms of EU competence, I take the position that, in the context of judicial independence, the second subparagraph of Article 19(1) TEU is confined to structural breaches which compromise the essence of judicial Independence'.

79. L. Pech and S. Platon, 55 *CMLRev* (2018), 1847-1848.

80. A.R. Amar, *The Bill of Rights* (Yale University Press, 1998); P. Finkelman, 'James Madison and the Bill of Rights: A Reluctant Paternity', 9 *The Supreme Court Review* (1990), p. 301-249.

81. Barron v Mayor and City of Baltimore, 32 US 243 (1833).

82. R.C. Cortner, *The Supreme Court and the Second Bill of Rights. The Fourteenth Amendment and the Nationalization of Civil Liberties* (University of Wisconsin Press, 1981).

83. W.J. Brennan, 'The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights', 61 *New York University Law Review* (1986), p. 536, 543.

84. A. Torres Pérez, 'The federalizing force of the EU Charter of Fundamental Rights', 15 *ICON* (2017), p. 1080-1097, 1082.

85. D. Kochenov and L. Pech, 'Better late than never: On the European Commission's Rule of Law Framework and its first activation', 54 *Journal of Common Market Studies* (2016), p. 1062-1074.

86. M. Bonelli and M. Claes, 14 *EuConst* (2018), p. 642.