The Perspective from Luxembourg: How Does The European Court Of Justice Respond To The Rule Of Law Crisis Within The Member States?

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Introduction

The rule of law crisis in the European Union (hereinafter, "the EU") is in full swing.[1] While scholars have pointed to rule of law deficiencies in a wide array of EU Member States, this Article will focus on the developments regarding Poland. Recent judgments of the European Court of Justice (hereinafter, "the CJEU" or "the Court") have given much food for thought for commentators.[2] In certain of its latest judgments, the CJEU has demonstrated a willingness to use the second subparagraph of Article 19 (1) of the Treaty on European Union (hereinafter, "TEU"), in order to protect the independence of the judiciary in Member States. Article 19 (1) TEU provides that Member States shall provide effective legal protection;[3] but these cases have led to questions as to whether judicial independence can be enforced via the CJEU. The preliminary reference by the High Court of Ireland in *Minister for Justice and Equality v LM* (hereinafter, "*LM*") has shown the importance of this question for the European legal order.[4]

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1 See Patrick Lavelle, 'Europe's Rule of Law Crisis: An Assessment of the EU's Capacity to Address Systemic Breaches of Its Foundational Values in Member States' (2019) 22 TCLR 35.

2 Respectively the judgments in Case C-619/18 *European Commission v Republic of Poland* [2019] OJ C-619/18; Case C-192/18 *European Commission v Republic of Poland* [2019] OJ C-192/18; Joined Cases C-585/18, C-624/18 and C-625/18 *AK and Others v Sąd Najwyższy* [2019] OJ C-585/18, C-624/18 and OJ C-625/18.

3 Consolidated Version of the Treaty on European Union [2012] OJ C326/ 001, Article 19. The relevant second subparagraph provides: "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."

4 In the *LM* decision, the CJEU found that in case of a European Arrest Warrant, Member States courts' are entitled to assess the independence of other Member States' courts in regard to fundamental right protection of the accused. Case C-216/18 *Minister for Justice and Equality v LM* [2018] ECR 586.

The rule of law crisis has also shed light on the use and applicability of the EU Charter of Fundamental Rights (hereinafter, "the Charter" or "CFR"). Namely, Article 47 of the Charter provides the right to an effective remedy and a fair trial – this is therefore an appropriate Article to protect the independence of the judiciary in the Member States. However, the application of the Charter is limited by Article 51 thereof.[5] Advocate General Tanchev (hereinafter, "AG Tanchev"), in his opinions regarding the reform of the Polish judiciary, has argued for a "constitutional passerelle" between the Treaty and the Charter, which is based on their common source in Article 6 TEU, to allow the Court of Justice to use the concepts of the Charter in non-Charter situations.[6] The idea of a "constitutional passerelle", which can be translated into English by 'overpass' or 'gangplank', stems notably from the Treaty establishing a Constitution for Europe in which the concepts was proposed in regard to the European Council to circumvent national parliaments in certain policy matters.[7]

Section I of this article will set out the principle of effective judicial protection in EU law, and the relevant Articles of the Treaties and the Charter. Section II will analyse the first rule of law case at the Court *Commission v Poland* (hereinafter, "*Commission v Poland I*") concerning the reform of the Polish Supreme Court. Section III will analyse the subsequent rule of law case concerning the reform of the Polish ordinary courts in *Commission v Poland* (hereinafter, "*Commission v Poland II*"). Both sections will take into account the respective Opinions written by AG Tanchev. Section IV will then assess to what extent the Court followed the Opinions of the AG and if the Court exercised a decisive shift regarding the scope of application of the Charter. It will also set out which approach from *Commission v Poland II* is preferable. The article will then conclude in Section V by highlighting the challenges and prospects of the Court in the impending rule of law cases.

I. The principle of effective judicial protection in EU law

[5] Charter of Fundamental Rights of the European Union [2000] OJ C 364/01, Article 51. The relevant paragraph provides: 'The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.'

[6] TEU, Article 6 (1) establishes that the EU Charter of Fundamental Rights shall have the same legal value as the Treaties, while Article 6 (3) provides that fundamental rights, as guaranteed by the European Convention of Human Rights, shall constitute general principles of European Union law.

[7] Jean-Claude Piris, *The Constitution for Europe: A Legal Analysis* (Cambridge University Press 2006).

This paper aims to map the response of the Court to the rule of law crisis in the EU by analysing the general principle of effective judicial protection in EU law. Specifically, it will explore the concept of a "constitutional passerelle" between the Treaty and the Charter in-depth and provide an analysis of its prospects, applicability and limits in EU law. It is important here to set out why the concept of a "constitutional passerelle" is of interest in relation to the rule of law crisis. Article 2 TEU lays out the values of the European Union, among them the rule of law. However, Article 2 TEU is a merely aspirational Article without direct legal force after Member States have joined the EU.[8] Therefore, the European Commission (hereinafter, "the Commission") is obliged to find a pathway to the effective protection of the values enumerated in Article 2 TEU through alternative avenues to the Article itself. The Commission has done so by a combined approach based on Article 19 (1) TEU, which provides that, 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'.[9] The Court followed this view from the Commission, affirming in *Associação Sindical dos Juízes Portugueses* (hereinafter, "*ASJP*") that Article 19 (1) TEU gives legal force to the value of the rule of law and incarnates the principle of judicial independence in the Treaty.[10]

However, for the purposes of this article, what is relevant is that AG Tanchev in his Opinions in *Commission v Poland II* went even further by proposing that the concept of judicial independence under Article 47 CFR should be applied simultaneously under Article 19 (1) TEU. The second subparagraph of Article 47 CFR provides that, '[e]veryone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.'[11] This appears to be the epitome of the rule of law in the EU. However, the Charter is only applicable in situations in which Member States implement EU law. Article 51 (1) CFR provides that, '[t]he provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for

[8] Arguably, Article 2 TEU has legal force when Member States accede to the Union, as in the Copenhagen Criteria. However, the Commission lacks policing instrument regarding the values enumerated in Article 2 TEU. See, for example, Dimitry Kochenov, 'Biting Intergovernmentalism: The Case for Reinvention of Article 259 TFEU to Make It a Viable Rule of Law enforcement Tool' [2015] JMWP 11/15 Jean Monnet Working Paper Series.
[9] TEU, Article 19(1).
[10] Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* [2018] ECR 117.
[11] Charter of Fundamental Rights of the European Union [2000] OJ C 364/01, Article 47.

the principle of subsidiarity and to the Member States only when they are *implementing* Union law [emphasis added]'.[12] Therefore, it is questionable if the concept of judicial independence under Article 47 CFR can be used in tempering the rule of law crisis, as the ramifications of the rule of law crisis in the Member States are merely in areas in which the EU has no competence.[13] With the doctrine of a "constitutional passerelle", or a bridge between between Article 19 (1) TEU and Article 47, CFR, the AG proposes a revolutionary and an explorative method to apply the Charter's concept of judicial independence via Article 19 (1) TEU.

II. The Court's Judgment in *Commission v Poland I*: Distinguishing the Competence under the Charter from the Principle of Effective Judicial Protection

In 2017, the governing Polish Law and Justice party (hereinafter "PiS") continued to seek significant changes to the Polish judiciary system[14]; the party proposed the "New Law on the Supreme Court".[15] One measure of this new law was to enact mandatory retirement for Polish Supreme Court judges at the age of 65 starting on 4 July 2018. This would force the current Supreme Court's president Małgorzata Gersdorf to retire with immediate effect, along with 26 out of the 72 judges who hold tenure on the Supreme Court.[16] The other measure was to delegate a discretionary power to the President of Poland in prolonging the tenure of certain judges at the Supreme Court. The combined measures of lowering of the retirement age of judges and introducing a mechanism for the prolongation of judge's service under the President's discretion appeared to raise eyebrows in Brussels.[17]

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[12] ibid Article 51.

[13] See, for example, the expulsion of the Central European University from Hungary. See Shaun Walker, 'Classes move to Vienna as Hungary makes rare decision to oust university' *The Guardian* (London, 16 November 2019).

[14] The judicial reforms in the so-called 'July Coup' 2017 included a wide array of measure to "streamline" the Polish judiciary. See Paulina Pacula, 'Poland's 'July coup' and what it means for the judiciary' *EU Observer* (Brussels, 19 July 2017).

[15] See the english translation of the draft in the following OSCE opinion. Michèle Rivet and others, *OSCE/ODIGR Opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland (as of 26 September 2017) ANNEX II* (2017).

[16] See Marc Santora, 'Amid Growing Uproar, Poland to Remove 27 Supreme Court Justices' *The New York Times* (New York, 3 July 2017).

[17] Daniel Boffey, 'Donald Tusk warns of 'bleak outcome' from Polish judiciary reform' *The Guardian* (Brussels, 20 July 2017).

Specifically, eyebrows were raised due to the perceived attack on the rule of law enshrined in Article 2 TEU, and indeed the right to a fair and independent trial enshrined in Article 47 CFR. As a consequence, the judiciary reform was met with strong criticism from EU leaders, pointing to the apparent intention of the PiS government to gain influence over the judiciary and replace the Supreme Court's bench with judges loyal to the governing party.[18] However, it was unclear if Article 2 TEU and Article 47 CFR could be invoked over a national judicial reform, Article 2 TEU as being merely an aspirational provision without a clear enforcement mechanism, and Article 47 CFR as being limited to situations in which Member States implement EU law. Nevertheless, in September 2018, the Commission decided to bring infringement proceedings against Poland under Article 258 of the Treaty on the Functioning of the European Union (hereinafter, "TFEU").[19]

A. Background

The Commission based infringement proceedings on the failure of Poland to fulfil the combined provisions of the second subparagraph of Article 19 (1) TEU and Article 47 CFR.[20] At the oral hearing, the Commission sought a declaration that the second subparagraph of Article 19 (1) TEU, read in light of Article 47 CFR, had been infringed, emphasising that '[t]he concept of effective legal protection referred to in the second subparagraph of Article 19 (1) TEU must be interpreted having regard to the content of Article 47 of the Charter […].'[21] Thus, the Commission avoided a direct invocation of the Charter, which is limited by Article 51 thereof, and instead relied on an interpretation of the concept of "effective legal protection" under Article 47 CFR.

The Commission based the jurisdiction of the CJEU on the concept that every Member State national court is an EU law court. Therefore, every national court may at any time apply EU law and it is for the Member State '[t]o ensure that the national bodies which may rule on issues in relation to

[18] See Alexandra Brzozowski, 'Timmermans clashes with Polish MEPs on rule of law' *EURACTIV.com* (Brussels, 5 September 2019).
[19] European Commission, 'Rule of Law: Commission launches infringement procedure to protect the independence of the Polish Supreme Court' (Brussels, 2 July 2018).
[20] The relevant paragraph of Article 47 of the CFR provides: 'Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.'
[21] Case C-619/18 *European Commission v Republic of Poland* [2019] ECR 615.

the application or interpretation of EU law, meet the requirement in respect of judicial independence. […].'[22] Consequently, the Polish Supreme Court, as every other Member State court, has to fulfil the requirements of independence to ensure a fair trial as guaranteed by Article 47 CFR. The Commission's claim was essentially based on the two precedents of *ASJP* and *LM*.[2324]

B. The AG's Opinion

AG Tanchev stated in *Commission v Poland I*:

> '[A] combined application of those two provisions [Article 19 TEU and Article 47 CFR] in the absence of assessment under Article 51(1) of the Charter cannot be deduced from *ASJP*.'[25]

This was the AG's first Opinion on a case regarding the Polish judiciary reform.

Concerning the material scopes of the second subparagraph of Article 19 (1) TEU and Article 47 CFR, the AG took a restrictive stance. In fact, he opined in favour of the Polish side that the judicial independence requirements of the Charter may not be "imported" into the second subparagraph of Article 19 (1) TEU.[26] A contrary finding would undermine the current system of review, '[a]nd open the door for Treaty provisions such as Article 19 (1) TEU to be used as a "subterfuge" to circumvent the limits of the scope of application of the Charter as set out in Article 51 (1) thereof.'[27] According to the AG, the precedent of *ASJP* establishes that Article 19 (1) TEU constitutes an autonomous standard of review, which complements the Charter.[28] He therefore proposed that the material scope of Article 19 TEU and Article 47 CFR must be established independently.[29]

Accordingly, AG Tanchev affirmed the applicability of Article 19 (1) TEU while at the same time denying the applicability of Article 47 CFR, given that the Commission did not bring forward any arguments for the

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[22] ibid para 34.
[23] Case C-216/18 *Minister for Justice and Equality v LM* [2018] ECR 586.
[24] Case C-619/18 *European Commission v Republic of Poland* [2019] ECR 615, para 34.
[25] Case C-619/18 *European Commission v Republic of Poland (Opinion of the Advocate General)* [2019] ECR 325, para 56.
[26] ibid para 53.
[27] ibid para 57.
[28] ibid para 58.
[29] ibid para 60.

independent applicability of the Charter.[30] Instead, he proposed that the applicability of both Articles needs to be established independently because the two articles purport slightly different concepts of judicial independence. He stated that Article 47 CFR is more substantive and profound, taking inspiration from Article 6 of the European Convention on Human Rights (hereinafter, "ECHR") and the European Court of Human Rights's (hereinafter 'ECtHR') case law; the concept of Article 19 (1) TEU being more procedural, taking inspiration from the values enshrined in Article 2 TEU and the case law of the CJEU.[31]

Regarding the first complaint of the lowering of the retirement age for judges of the Polish Supreme Court, the AG argued that a Member State may well enact a reform of the national judiciary, however, it must be organised in a way respecting judicial independence pursuant to Article 19 (1) TEU. The Polish legislators did not respect these limits, and therefore, infringed upon Article 19 (1) TEU.[32] Regarding the second complaint, in relation to the discretion of the President to prolong the service of judges beyond the mandatory retirement age, the AG argued that the safeguards of independence brought forward by the Polish government were not sufficient to dispel the impression of the lack of objective independence of the Supreme Court resulting from the contested measures.[33] In conclusion, the AG advised the Court to strike down the Polish judicial reform. According to him, the contested reform had violated the general principle of irremovability and independence of judges which derives from Article 19 (1) TEU.[34]

C. The Court's judgment

The Court commenced by pointing out that according to the two precedent judgments of *ASJP* and *LM*, Article 19 TEU gives concrete expression to the value of the rule of law affirmed in Article 2 TEU.[35] Thus, the Court

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[30] ibid para 67.

[31] The distinction between a procedural and a substantive rule of law in EU law has been repeatedly emphasised in the literature. Scholars argue that the procedural rule of law is the "essence" of the rule of law in EU law. See Sacha Prechal, 'The Court of Justice and Effective Judicial Protection: What Has the Charter Changed?' in C Paulussen and others (eds), *Fundamental Rights in International and European Law* (Asser Press 2016).

[32] Case C-619/18 *European Commission v Republic of Poland (Opinion of the Advocate General)* [2019] ECR 325, para 83.

[33] ibid para 91.

[34] ibid para 95.

[35] Case C-619/18 *European Commission v Republic of Poland* [2019] ECR 615, para 47.

affirmed the concept that the express, but not legally invocable, values of Article 2 TEU are mirrored in other Treaty articles.

In regard to the material scope of the second subparagraph of Article 19 (1) TEU, and in response to the argument raised by Poland,[36] the Court highlighted that the expression of "fields covered by Union law" is not limited by the material scope of Article 51 (1) CFR.[37] It is indeed not necessary to prove an actual implementation of EU law to invoke Article 19 (1) TEU. The application of Article 19 (1) TEU in *ASJP* was in fact not invoked by the implementation of EU law of the measure in question. Instead, Article 19 (1) TEU was applicable as the national judicial body could rule on questions of application or interpretation of EU law and therefore fell within the concept of "fields covered by EU law".[38] The Polish Supreme Court falls under the notion of a "field covered by EU law" as, in its competence, it applies and interprets EU law. The "New Law on the Supreme Court" is potentially liable to impair the independence of the Polish Supreme Court. Further, 'that requirement that courts be independent, […], 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 […]'[39] for all rights which individuals derive under EU law.

i. Lowering the Retirement Age of Judges at the Supreme Court

In regard to the lowering of the retirement age of judges at the Supreme Court, the Court pointed out that there is a requirement of external independence,[40] and a requirement of internal independence in EU law.[41] These requirements were developed by the CJEU in the *Wilson* decision.[42] External independence in EU law requires that courts exercise their functions wholly autonomously, without being subjected to hierarchical constraint or outside pressure,[43] whereas internal independence requires that

[36] Poland had argued that the material scope of Article 19 (1) TEU, in accordance with the precedent case, is only applicable when Member States enact national legislation pursuant to EU law. Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* [2018] ECR 117, para 40.
[37] Case C-619/18 *European Commission v Republic of Poland* [2019] ECR 615, para 50.
[38] ibid para 51.
[39] ibid para 58.
[40] ibid para 72.
[41] ibid para 73.
[42] Case C-506/04 *Graham J. Wilson v Ordre des avocats du barreau de Luxembourg* [2006] ECR 587.
[43] ibid para 51.

judges are impartial in regard to the proceedings and interest before them and apply strictly the rule of law.[44] These requirements of independence demand rules which dispel any 'reasonable doubts in the minds of individuals as to the imperviousness of that body'.[45] In this way, the Court exhibits a conception of a court's independence similar to that of the case law of the ECtHR.[46] In the present case, the Court specifically highlighted the factor of a significant depreciation of external independence of judges at the Polish Supreme Court.[47] The Court observed that first, the doubts surrounding the judicial reform could not be dispelled by the arguments brought forward by Poland.[48] Hence, '[t]he Republic of Poland has not demonstrated that the measure being challenged constitutes an appropriate means for the purpose of reducing diversity of age limits […].'[49] Finally, the Court found that the objective brought forward by Poland is not legitimate, therefore, the Court declared a breach of the second subparagraph of Article 19 (1) TEU.

ii. Power of the President to Prolong the Service of Judges after their Mandatory Retirement

In regard to the discretionary power of the President of the Polish Republic to prolong the service of judges after they have reached the mandatory retirement age, the Court pointed to the test of 'imperviousness'[50] which has to be abided by in order to be in conformity with the principle of judicial independence.[51] While the first measure of the "New Law on the Supreme Court" had the aim of appointing new judges, the second had the aim of exercising significant influence on the end and progress of judicial careers at the Supreme Court. The Court stated that it is up to the Member States to

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[44] ibid para 52.
[45] Case C-619/18 *European Commission v Republic of Poland* [2019] ECR 615, para 74.
[46] The concept of internal and external independence of courts stem from the rich case law of the ECtHR on judicial independence. See Joost Sillen, 'The concept of 'internal judicial independence' in the case law of the European Court of Human Rights' (2019) 15 European Constitutional Law Review 104.
[47] Case C-619/18 *European Commission v Republic of Poland* [2019] ECR 615, para 76.
[48] ibid para 87. Poland argued that (a) some of the serving judges affected by the reform were appointed to that body when the retirement age was already set at 65 years of age; and, (b) that such judges retain their judicial titles, immunity and emoluments after retirement.
[49] ibid para 90.
[50] The imperviousness test requires that there are no reasonable doubts in the minds of individuals as to the imperviousness of the judicial body before them.
[51] Case C-619/18 *European Commission v Republic of Poland* [2019] ECR 615, para 108.

choose mechanisms for judicial appointment in national law, however, the conditions and the procedure have to abide by the principle of judicial independence.[52] Such mechanisms have to be designed in such a way that judges are protected from potential temptations to give in to external intervention.[53]

The Court concluded that the mechanism enacted by the "New Law" did not satisfy these requirements.[54] First, the decision of the President of the Republic is not subject to any judicial review.[55] Second, the argument by Poland that the President may follow the advisory opinion of the National Council of the Judiciary, is not sufficient to guarantee the independence of the decision.[56] Finally, the Court found that, therefore, the mechanism provided in the "New Law" fails the "imperviousness test" and, therefore, infringes upon the second subparagraph of Article 19 (1) TEU.

D. Comment

This is a stunning and clear-cut judgment by the Court. In this first infringement proceeding regarding the independence of the judiciary in a Member State, the Court follows a combined application of Treaty articles. First, to assume competence over the reform of a national judiciary, the Court distinguishes the competence limitation under Article 51 CFR from the notion of 'fields covered by European Union law' under Article 19 TEU. Second, the Court interprets Article 19 TEU in a way that requires Member States to respect and safeguard the independence of their judicial bodies which apply EU law.

Interestingly, and most importantly for this article, the Court and the AG differed in their route to these findings. While the AG denies the applicability of Article 47 CFR to the present proceedings given the limits of Article 51 thereof, the Court uses the concepts of Article 47 CFR to strike down the contested reform. The Court linked Article 19 (1) TEU to Article 47 CFR by highlighting that '[i]t follows from all of the foregoing that the second subparagraph of Article 19 (1) TEU requires Member States to provide remedies that are sufficient to ensure effective legal protection,

[52] ibid para 110.
[53] ibid para 112.
[54] ibid para 113.
[55] ibid para 114.
[56] ibid para 115.

within the meaning in particular of Article 47 of the Charter, in the fields covered by EU law.'[57]

The Court used Article 47 CFR to confirm the independence requirements of Article 19 (1) TEU, without clearly taking a stance on if Article 47 CFR would be independently applicable to the proceedings; 'to ensure that a body […] is in a position to offer such protection, maintaining its independence is essential, as confirmed by the second paragraph of Article 47 of the Charter, […].'[58] Therefore, the Court seemed much more willing to apply the concepts and case law developed under Article 47 CFR to proceedings under Article 19 (1) TEU. However, most importantly, the Court did not provide a clear-cut reasoning why the concepts of Article 47 CFR should apply under the material scope of Article 19 (1) TEU and despite the limitations of Article 51 CFR. As will be discussed, the AG appeared to take this as an invitation and subsequently provided his understanding of a "constitutional passerelle" between both Articles.

III. The Court's Judgment in *Commission v Poland II*: A Combined Approach to the Principle of Effective Judicial Protection in EU law

On 24 July 2017, the Polish President signed the amendments on the law on the ordinary courts in Poland.[59] These laws, with the apparent aim of reforming the ordinary courts included paragraphs suspected of altering the independence of the judiciary in Poland. Again, the law included a two-fold mechanism. First, it lowered the retirement age of judges and in so doing, it controversially prescribed different retirement ages for male and female judges. Second, it vested in the Minister for Justice (as opposed to the President as in the case of the "New Law") a discretion to prolong an individual judge's mandate.[60] The Commission acted swiftly and brought a case under Article 258 TFEU.[61]

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[57] ibid para 54.
[58] ibid para 57.
[59] Wojciech Sadurski, 'How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding' (2018) 18/01 Legal Studies Research Paper Series 42.
[60] For a translation of the 'law on the ordinary courts' see the following report by the Venice Commission. *Opinion 904/2017 (CDL-AD(2017)031) (ACT ON THE ORGANISATION OF THE ORDINARYCOURTS)* (2017).
[61] European Commission, 'European Commission launches infringement against Poland over measures affecting the judiciary' (Brussels, 29 July 2017).

A. Background

The new law was challenged on two grounds by the Commission. First, on the ground that the new law prescribed mandatory retirement ages for female judges, by the age of 60, and male judges, by the age of 65, whereas those age limits were both previously set at 67 years.[62] According to the Commission, this infringed the principle of non-discrimination based on sex in primary EU law, under Article 157 TFEU[63], and secondary EU law in the "Equal Pay for Equal Work" Directive 2006/54.[64]

Second, the Commission challenged the discretionary power of the Minister for Justice to prolong the tenure of judges of the ordinary courts to 65 for female and 70 for male judges. The Commission argued that this discretionary power awarded to a member of the executive amounted to an infringement of the principle of effective legal protection which derives from Article 19 (1) TEU, read in combination with Article 47 CFR. Further, the Commission argued that the discretionary power of the Minister for Justice to extend the tenure of judges without clear criteria, timeframe, motivation, and without the possibility of appeal for the respective judge infringed the principle of judicial independence in EU law. For the present article, the second claim of the Commission is of primary importance in relation to the rule of law, and therefore, the first claim of the Commission will be omitted from this article's analysis.

B. The AG's Opinion

AG Tanchev stated in *Commission v Poland II*:

> 'A constitutional passerelle exists, therefore, between Article 47 of the Charter and Article 19 (1) TEU, given that the same sources are relevant to determining the content of the right to "an independent and

[62] Case C-192/18 *European Commission v Republic of Poland* [2019] ECR 924, para 47.
[63] Consolidated Version of the Treaty on the Functioning of the European Union, Article 157 (1), providing that 'Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.' That principle was claimed to be infringed since longer serving members of courts subsequently gain a higher salary.
[64] Council Directive 2006/54/EC of 5 July 2006, implementing the principle of equal treatment between men and women in EU labour law; was enacted pursuant to Article 157 TFEU.

impartial tribunal previously established by law" under Article 47 of the Charter.'[65]

In his second Opinion, delivered on 20 June 2019, relating to the independence of the judiciary, AG Tanchev interestingly pursued a different approach than before. The AG once again broached the idea of whether the concepts and the case law of Article 19 (1) TEU and Article 47 CFR could be used interchangeably. It is in this part of the Opinion that the AG brings forward the idea of a "constitutional passerelle" between those two provisions which would allow the Court to use the case law under Article 47 CFR when applying Article 19 (1) TEU.

Regarding the admissibility of the complaints brought forward by the Commission, the AG opined that there is a clear distinction between the applicability of Article 19 (1) TEU and Article 47 CFR. While Article 19 (1) TEU is clearly applicable to the present proceedings, Article 47 CFR is not. In fact, the Commission, according to the AG, had again failed to tie its arguments independently to Article 47 CFR.[66] The AG further reiterated that Article 19 (1) TEU cannot be the gateway to an application of Article 47 CFR[67] referring, on this point, to the Opinion of Advocate General Øe in *SEGRO*.[68] Advocate General Øe argued in that Opinion that the infringement of an Article of the Treaties may not be used as a gateway for a full application of the Charter, since this would open the floodgates of Charter claims.[69] He specified, '[c]ontrary, to the ECtHR, the Court does not have a specific mandate to penalise all fundamental rights violations committed by the Member States'.[70]

Thus, the AG makes a clear distinction between Article 19 (1) TEU and Article 47 CFR in their material scope. Specifically, Article 47 CFR cannot be used as a general means to protect the values in Article 2 TEU.[71] This is an interesting point – the AG clearly differentiates the scope of

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[65] Case C-102/18 *European Commission v Republic of Poland (Opinion of the Advocate General)* [2019] ECR 529, para 97.
[66] ibid para 69.
[67] ibid para 70.
[68] For a full discussion of the case see Xavier Groussot, Niels Kirst and Patrick Leisure, 'SEGRO and its Aftermath: Between Economic Freedoms, Property Rights and the 'Essence of the Rule of Law' (2019) 4 NJEL 2.
[69] *SEGRO Kft v Vas Megyei Kormányhivatal Sárvári Járási Földhivatala and Günther Horváth v Vas Megyei Kormányhivatal (Opinion of the Advocate General)* [2018] ECR 410, para 119
[70] Case C-102/18 *European Commission v Republic of Poland (Opinion of the Advocate General)* [2019] ECR 529, para 70.
[71] ibid para 72.

application of Article 19 (1) TEU and Article 47 CFR to keep the floodgates of Charter claims closed in the future, and, perhaps, to preserve the coherence of EU law.

Regarding the second complaint, the AG affirms that any court which qualifies as a court or tribunal in EU law must fulfil the standards of judicial independence under Article 19 (1) TEU.[72] This scope of application of Article 19 TEU derives from the argument that any national court or tribunal which applies EU law thus qualifies as European court which must adhere to the standard of judicial independence set out in the Treaty. However, after the latest Court ruling in *Commission v Poland I*, it appears that it was an open question whether the standard of Article 47 CFR applies simultaneously.

In answering this question, the AG enters new ground by proposing that pursuant to Article 6 (3) TEU,[73] which provides that fundamental rights constitute general principles of the Union's law, Article 19 (1) TEU is in fact determined pursuant to the concepts of the ECHR.[74] Therefore, he proposes, a "constitutional passerelle"[75] exists between Article 47 CFR and Article 19 (1) TEU since they both have the same source in Article 6 TEU.[76] He specifies that a '[c]onstitutional passerelle exists, therefore, between Article 47 of the Charter and Article 19 (1) TEU, given that these same sources are relevant to determining the content of the right to 'an independent and impartial tribunal previously established by law' under Article 47 of the Charter.'[77] The AG does not go as far as proposing an independent application of Article 47 CFR to the case, however, he brings forward the idea that the concepts of an independent judiciary of Article 47 CFR are the same as under Article 19 (1) TEU.

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[72] ibid para. 95

[73] TEU, Article 6 (1), providing that the '[r]ights, freedoms and principles set out in the Charter [...], shall have the same legal value as the Treaties.'; Article 6 (3) providing that 'Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms [...], shall constitute general principles of the Union's law.'

[74] Case C-102/18 *European Commission v Republic of Poland (Opinion of the Advocate General)* [2019] ECR 529, para 96.

[75] The idea of a "constitutional passerelle", which can be translated into English by "overpass" or "gangplank", stems notably from the Treaty establishing a Constitution for Europe in which the concepts was proposed in regard to the European Council to circumvent national parliaments in certain policy matters. See Jean-Claude Piris, *The Constitution for Europe:a Legal Analysis* (Cambridge University Press 2006).

[76] Case C-102/18 *European Commission v Republic of Poland (Opinion of the Advocate General)* [2019] ECR 529, para 97.

[77] ibid.

Consequently, and unsurprisingly, the AG proposed that the second complaint of the Commission is well founded.[78] In the last paragraphs of his opinion he emphasises on the correct legal instruments to deal with individual deficiencies in the rule of law in contrast to systemic deficiencies.[79] According to him, individual deficiencies in the rule of law should be dealt with under Article 47 CFR, insofar as a Member State is implementing EU law, while systemic deficiencies should fall under Article 19 (1) TEU.[80] In principle, however, the sources of both Articles are the same – Article 6 TEU and the "constitutional passerelle" which exists between both articles.

C. The Court's judgment

Regarding the second complaint, the Commission argued that this power will infringe the principle of "effective legal protection" which derives from Article 19 (1) TEU, read in conjunction with Article 47 CFR. The Commission, countering the Polish arguments,[81] further argued that the mechanism of prolongation of service is not in compliance with the principle of judicial independence which is inherent in a system of legal remedies ensuring effective judicial protection in EU law.[82]

Regarding the applicability of Article 19 (1) TEU, the Court followed its reasoning from the previous case; effective judicial protection is required by every court which potentially applies EU law.[83] The Court found that the mechanism of prolongation of service under the discretion of the Minister for Justice threatens this effective judicial protection as it actively undermines the external and internal judicial independence of the relevant courts. It was stated that the measure:

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[78] ibid para 117.

[79] The concept of systemic deficiencies in the rule of law describes a structural weakness of a Member State regarding the abidance of the fundamental values of the European Union. See Armin von Bogdandy and Michael Ioannidis, 'Systemic Deficiency in the Rule of Law: What it is, What has been done, What can be done' (2014) 51 CMLR 59.

[80] Case C-102/18 *European Commission v Republic of Poland (Opinion of the Advocate General)* [2019] ECR 529, para 115 .

[81] ibid para 93. Poland contested the reading of the mechanism by the Commission. Poland invoked the principle of procedural autonomy in its defense by arguing that the national system of justice does not fall within the competence of EU law, therefore, Article 19 TEU should not apply to the national laws in question.

[82] Case C-192/18 *European Commission v Republic of Poland* [2019] ECR 924, para 87.

[83] Since the ordinary courts in Poland potentially apply EU law, they are within the material scope of Article 19 TEU. This requires that the courts meet the standard of effective judicial protection required by the article.

> '[i]s such as to create, in the minds of individuals, reasonable doubts regarding the fact that the new system might actually have been intended to enable the Minister for Justice, acting in his discretion, to remove, […], certain groups of judges serving in the ordinary Polish courts while retaining others of those judges in post.'[84]

This threatens the imperviousness of the judges concerned to any external pressure which might influence their internal judging in cases to come.

In concluding, the Court followed the Commission's argument entirely and found that the mechanism for prolongation under the discretion of the Minister for Justice fails to fulfil the obligations deriving under Article 19 (1) TEU, as it impedes the principle of effective judicial protection.[85] Concerning Article 47 CFR, the Court affirmed the reading by the AG that the principle of effective judicial protection of individuals' rights under EU law is a general principle affirmed in Article 47 CFR.[86] Therefore, it is not necessary to establish the applicability of the Charter since "effective judicial protection" is protected by Article 19 (1) TEU in the same tenor as under Article 47 CFR. The Court did not, however, broach the AG's concept of a "constitutional passerelle" between both Articles, as established by Article 6 TEU.

D. Comment

To determine the meaning of Article 19 (1) TEU, the Court relied on the concepts of Article 47 of the Charter without actively affirming its applicability to the present proceedings. Rightly, the Court is cautious in applying the Charter directly to a rule of law proceeding, since the scope of the Charter is limited by Article 51 thereof. However, the Court follows a combined reading which allows the Court to use the concepts of the Charter as general principles when applying Treaty articles. Consequently, there is a threefold layer of application concerning the principle of effective judicial protection in EU law: via Article 19 (1) TEU, via the general principles, and via Article 47 CFR.[87] Without mentioning a "constitutional passerelle"

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[84] Case C-192/18 *European Commission v Republic of Poland* [2019] ECR 924, para 127.
[85] ibid para 126.
[86] ibid para 100.
[87] The complex multiple-layer protection of fundamental rights in the Europe has been emphasized in the literature. See Federico Fabbrini, *Fundamental rights in Europe:*

which establishes this reading, the Court is effectively applying the concepts of Article 47 CFR concurrent under Article 19 (1) TEU.

The Court follows this combined reading to find that the mechanism of the Minister for Justice is infringing the principle of judicial independence. It is submitted that this argument is plausible, as judges would be under the arbitrary power of the Minister for Justice after they reach the mandatory retirement age. Under these circumstances, it is not verifiable if a judge makes independent judgments. As the Commission highlights, '[t]he provision at issue thus undermines the personal and operational independence of serving judges.'[88] Reading between the lines, the Court found that the mechanism supports the appearance of a judicial system which only formalistically follows the rule of law, while it is influenced by the executive and builds upon patrimonialism.[89]

IV. The Combined Reading of Treaty Articles or a "Constitutional Passerelle"

Koen Lenaerts, President of the CJEU, highlighted that '[the Court] elevated the principle of judicial independence to the apex of EU legal norms, holding that it is part of the "essence" of the right to a fair trial enshrined in Article 47 of the Charter.'[90] This followed from the Court's decision in LM.[91] However, the crucial question the Court had to answer in the aftermath of *LM* was how to ground the principle of judicial independence in the EU legal order.

The approaches taken by AG Tanchev and the CJEU in *Commission v Poland II* differed in how to ground this principle. The approach of the Court seems to be based upon existing European legal doctrine, namely the general principles of EU law. By contrast, the approach of the AG stems from the Treaty establishing a Constitution for Europe. He establishes a theoretical ground upon which the scope of both Articles shall be the same.

Challenges and transformations in comparative perspective (1st edn, Oxford University Press 2014).

[88] Case C-192/18 *European Commission v Republic of Poland* [2019] ECR 924, para 90.

[89] Scholars have argued that some post-communist states in Europe exhibit a formalistic rule of law which displays the semblance of the rule of law, while lacking the independent institutions which necessary for the function of the rule of law. See Martin Krygier, 'The Challenge of Institutionalisation: Post-Communist 'Transitions', Populism, and the Rule of Law' (2019) 15 European Constitutional Law Review 544.

[90] Koen Lenaerts, 'New Horizons for the Rule of Law Within the EU' (2020) 21 German Law Journal 29.

[91] Case C-216/18 *Minister for Justice and Equality v LM* [2018] ECR 586, para 48.

By neither denying nor affirming this underlying Constitutional theory the Court leaves the door open as to whether this concept could be adopted in the future. If the Court affirmed the theory of the AG, that would have yielded potential controversy, as a "constitutional passerelle" would run the risk of being understood as a "new" competence acquired by an activist Court. This in turn could open floodgates to further constitutional passerelles in other fields of EU law. It is argued that this experimentation would not be in the Court's interest.

Commission v Poland I is a clear-cut judgment, but one which obviates the question of whether Article 47 CFR is applicable. Article 47 CFR is mentioned as a source of the status of the rule of law in the EU's legal system but is not referred to in the conclusion of the judgment. The second judgment, *Commission v Poland II* affirms this reading. Article 47 CFR is not independently invoked to strike down a reform of the national judiciary, however, the Court applies a combined reading of the concepts of Article 47 CFR and Article 19 (1) TEU. Therefore, the applicability of Article 47 CFR is not strictly necessary since the Court can rely on Article 19 (1) TEU.

AG Tanchev in his Opinion in *Commission v Poland II* seeks to find a new theoretical basis for the Court's reasoning. For an independent reader of the judgments and Opinions, it seems like AG Tanchev first took a relatively strict stance in *Commission v Poland I* in relation to the applicability of Article 47 CFR. It may be that he was astonished by the clear-cut judgment of the Court in *Commission v Poland I*, which, against his Opinion, affirmed the combined reading of the Charter and the Treaty. Thereafter, he changed his doctrine and in *Commission v Poland II* provided a underlying theoretical basis for the reasoning of the Court. His doctrine of a "constitutional passerelle" is, it is submitted, revolutionary, but a needlessly experimental way to apply the Charter to non-Charter situations.[92] The AG factually sidesteps the limitation of Article 51 CFR by proposing a "constitutional passerelle" between Article 19 (1) TEU and Article 47 CFR.

The more prudent approach of a combined reading serves the same outcome without engaging in a speculative Constitutional theory. Instead, the Court relied on an autonomous interpretative method of EU law which are the general principles. Article 47 CFR is the flesh on the bones of the principle of judicial independence in EU law, which is incorporated in the

[92] This is the first time that the concept of a "constitutional passerelle" is mentioned or applied in any judgment, opinion or document of the CJEU.

Treaty by Article 19 (1) TEU. As President Lenaerts further pointed out, '[the principle of judicial independence] is thus an autonomous concept of primary EU law that draws on the constitutional traditions common to the Member States.'[93] The approach by the Court therefore transfers competence back to the Member States by using a general principle which derives from the common constitutional traditions of the Member States. On balance, the author would put forward that a combined reading of Treaty and Charter is more promising than the "constitutional passerelle". It allows the Court to apply Article 47 in cases where Member States' courts' fail to uphold the autonomous concept of judicial independence. This approach is rooted in the legal tradition of EU law.

Conclusion

By taking an in-depth look at these two judgments in the rule of law crisis at the CJEU, it is apparent that the Court is willing to use a full toolbox of the Treaties to protect judicial independence in the Member States. Commentators have argued that the Court might not be the right place to enforce the rule of law in the Member States. It has been argued that the Court may not be properly equipped to deal with "systemic deficiencies" in the rule of law, as they are found in some Member States.[94] Further, the legal justification of those judgments might be questioned by the Member States. Hence, the CJEU judgments could be perceived as a tyranny of values.[95] However, these latest judgments indicate that the Court has the competence and, indeed, willingness to provide clear-cut decisions vindicating judicial

[93] Koen Lenaerts, 'New Horizons for the Rule of Law Within the EU' (2020) 21 German Law Journal 29, 32.

[94] Scholars have argued that infringement proceedings under Article 258 TFEU may not reach the core of the conflict and that the Commission could be seen as instrumentalising the law for political purposes. See Patrick Lavelle, 'Europe's Rule of Law Crisis: An Assessment of the EU's Capacity to Address Systemic Breaches of Its Foundational Values in Member States' (2019) 22 TCLR 35. See also Armin von Bogdandy and Michael Ioannidis, 'Systemic Deficiency in the Rule of Law: What it is, What has been done, What can be done' (2014) 51 CMLR 59.

[95] The term "tyranny of values" has been coined by Carl Schmitt as a defence of values which destroys the very values it aims to protect. Armin Von Bogdandy, 'Fundamentals on Defending European Values' Rule of Law in the EU: lost and found?' (Verfassungsblog, 12 November 2019) <https://verfassungsblog.de/fundamentals-on-defending-european-values/>accessed 22 February 2020.

independence in national courts.[96] As long as the respective Member States follow the judgments of the Court, it seems possible for it to become a prominent non-political actor in the current rule of law crisis. Member States may indeed be more willing to follow a court order from Luxembourg than a political demand from Brussels. Politicians in the affected Member States have previously seen calls from Brussels as politically-motivated, even with the aim of expanding the federal competencies of the EU.[97]

These judgments may be an indication of the wider trajectory of the Charter in the EU legal order, even towards the application of the Charter as a ubiquitous instrument, not restricted in its application by Article 51 CFR. Specifically, in regard to the very fundamental principles of the EU in Article 2 TEU, the Charter could gain constitutional importance as the legal instrument which puts flesh on the bones of Article 2 TEU. An inconsistency between the Opinions in *Commission v Poland I* and *Commission v Poland II* is incontestable. However, the author proposes that this inconsistency be seen rather as an evolution of legal doctrine. The AG's change of opinion might be due to the clear-cut judgment in *Commission v Poland I,* which demonstrated the willingness of the Court to use the combined reading of Treaty and Charter to protect the judicial independence in the Member States. On the one hand, the concept of the "constitutional passerelle" could become an instrument to invoke the Charter in cases of grave infringements of the EU values in Article 2 TEU. On the other hand, the combined approach followed by the Court seems equally strong in protecting the rule of law in the Member States. Therefore, the author would think that the concept might be superfluous and increases the Court's vulnerability towards arguments of judicial activism. At the time of writing, the concept of a "constitutional passerelle" has not been taken up by the Court, nor mentioned again in the Opinions of the Advocate Generals. The coming rule of law cases may indicate if the concept of a "constitutional passerelle" will be resurrected, or, perhaps, become a footnote in the Court's history.[98]

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[96] The values of the European Union are found in Article 2 TEU; however, they are merely aspirational and not legally applicable. The rule of law is one of the values enumerated in Article 2 TEU.

[97] In 2016, Polish Prime Minister Beata Szydlo called the Commission recommendations on the rule of law in Poland as politically motivated. Aleksandra Eriksson, 'Poland defies EU on rule of law' *EU Observer* (Brussels, 27 October 2016).

[98] Currently pending rule of law cases at the CJEU, which could shed light on the prospects of a "constitutional passerelle", are i.a. the following: Joined Cases C-558/18 & 563/18, *Miasto Łowicz* (pending); Joined Cases C-83/19, 127/19 & 195/19, *Asociația*

"Forumul Judecătorilor Din România" (pending); Case C-272/19 *Land Hessen* (pending); and Case C-564/19 *IS* (pending).