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HOW TO SAFEGUARD JUDICIAL INDEPENDENCE AS A CONSTITUTIONAL VALUE OF THE EUROPEAN UNION BASED ON THE RULE OF LAW[1]

-Keynote address-

I. The Commitment to Constitutional Values of the EU and its Member States

The European unification process has from the outset been a civilising project that is committed to constitutional values. The common constitutional values of the EU and its Member States are now set forth in Art. 2 TEU. Art. 49 (1) sentence 1 TEU expressly stipulates that only those European States which respect these values and are committed to promoting them can join the EU. In this respect, however, the Member States and the candidate countries are not obliged to establish any kind of uniformity, but only homogeneity. In conformity with Art. 4 (2) TEU, they are thus left with sufficient margin for realising the constitutional values in different forms, according to their respective national constitutional identity. At their core, however, the constitutional values of Art. 2 TEU are and remain inviolable. It is part of the judicial functions of the Court of Justice of the EU pursuant to Art. 19 (1) subparagraph 1 TEU to define that core.

II. The Special importance of the Rule of Law for European Integration: The EU as a "Union Based on the Rule of Law"

Of all the common constitutional values, the rule of law plays a prominent role at the Union and national levels, because the EU is defined as a "Union based on the rule of law". Already *Walter Hallstein*, one of the founding fathers of the EU, saw the decisive novelty of the post-World War II European integration project in the fact that European unity was not to be created by violence and subjugation, but by the intellectual and cultural force of the law.[2] The idea of "integration through law" has shaped the European unification project from the very beginning.[3]

The European Court of Justice (ECJ), now Court of Justice of the European Union (CJEU) has adopted this conception of a "Union based on the rule of law"[4] and ascribed to it the following three essential characteristics: firstly, the primacy of EU law over the law of the Member States;[5] secondly, the direct applicability of many EU law provisions;[6] and thirdly,

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[2] *Walter Hallstein*, Die Europäische Gemeinschaft, 5th ed. 1979, p. 53.

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

[4] ECJ/CJEU, Case 294/83, *Les Verts*, ECR 1986, 1339 margin note 23; Opinion 1/91, *EEA I*, ECR 1991, I-6079 margin note 21; Joined Cases C-402/05 P and C-415/05 P, *Kadi I*, ECLI:EU:C:2008:461 margin note 281; Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Kadi II*, ECLI:EU:C:2013:518 margin note 66; Case C-64/16, *Associação Sindical dos Juízes Portugueses*, ECLI:EU:C:2018:117 margin note 31; Case C-216/18 PPU, *LM*, ECLI:EU:C:2018:586 margin note 49.

[5] ECJ, Case 6/64, *Costa v. ENEL*, ECR 1964, 1251; confirmed by the Declaration (no. 17) concerning primacy in the annex to the Final Act of the Intergovernmental Conference of Lisbon of 13 Dec. 2007 (OJ C 306, p.256).

[6] ECJ, Case 26/62, *van Gend & Loos*, ECR 1963, 1.

the comprehensive judicial protection of natural and legal persons against acts of the EU institutions as well as national measures relating to the application to them of an EU act.[7]

III. The Courts as Integration Factors in the Multilevel System of the EU

In the "Union based on the rule of law", the courts both at the Union and the national levels have always been important integration factors.

The ECJ/CJEU has significantly advanced European integration through extensive interpretation and progressive development of the law. Two key judgments of the ECJ which set the course of European integration were those in the cases of *van Gend & Loos* and *Costa v. ENEL*.[8] In these judgments, the Court established that individuals were subjects of the European integration process alongside the Member States and that EU law had primacy over national law. Individuals enforce their rights emerging from EU law in the national courts that act as courts of the Union in the functional sense and cooperate with the CJEU in the preliminary ruling procedure under Art. 267 TFEU in order to implement those rights effectively.[9]

This utilisation of Member States' courts by the EU, in order to achieve effective enforcement of Union law *vis-à-vis* the Member States' executive and legislative branches of government, has broken open the national sovereignties: The classic international confrontation of the Member States and the EU has been replaced by a common supranational confrontation of the EU, Union citizens and national courts against the political branches of the Member States.[10]

At the same time, Art. 267 TFEU has also split up the judiciaries of the Member States: The lower instance national courts are supposed to use their comprehensive right of requesting preliminary rulings from the CJEU also in opposition to the higher instance national courts. With the help of the CJEU, the lower instance national courts can and should induce the national supreme courts to keep the national legal systems in conformity with Union law. It is important to note in this context that Art. 267 (2) TFEU guarantees to every court of a Member State the right to request a preliminary ruling from the CJEU, if it considers that a decision on a question of Union law is necessary to enable it to give judgment in a case pending before it. That right cannot be limited by national law.[11]

IV. The Copenhagen Rule of Law Criterion in Accession Negotiations

According to the Copenhagen criteria, the stability of the constitutional structures of a candidate country and in particular its respect for the rule of law, including the independence of its courts, is crucial for accession to the EU.[12] In the context of the EU's eastward and south-eastward enlargements, the rule of law came into focus because the candidate countries from the former Communist bloc had been dictatorships for decades, without independent courts, where political power could arbitrarily disregard the law.

Some time ago, the Commission included judicial reform in its pre-accession strategy in order to ensure the independence, impartiality and effectiveness of the courts, bringing candidate countries closer to relevant EU standards even before the start of the actual accession negotiations. In the course of the accession negotiations, the establishment of an independent,

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[7] ECJ/CJEU, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Kadi II*, ECLI:EU:C:2013:518 margin note 66; Case C-64/16, *Associação Sindical dos Juízes Portugueses*, ECLI:EU:C:2018:117 margin note 31; Case C-216/18 PPU, *LM*, ECLI:EU:C:2018:586 margin note 49.

[8] See above notes 5 and 6.

[9] *Lenaerts* (note 3), 29 f.

[10] *Lenaerts* (note 3), 31.

[11] ECJ/CJEU, Joined Cases C-188/10 und C-189/10, *Melki*, ECR 2010, I-5667 margin notes 40 ff.; Case C-416/10, *Križan*, ECLI:EU:C:2013:8, margin notes 62 ff.; Case C-112/13, *A./. B u.a.*, ECLI:EU:C:2014:2195, margin notes 28 ff.; Case C-614/14, *Ognyanov*, ECLI:EU:C:2016:514, margin notes 14 ff.

[12] Presidency Conclusions, Copenhagen European Council, 21-22 June 1993, para. 7 A iii (https://www.europarl.europa.eu/enlargement/ec/pdf/cop_en.pdf [20 March 2020]).

impartial, professional and efficient court system of integrity plays a prominent role. Negotiations on other topics will be frozen until the candidate country has remedied shortcomings in this regard.[13] In support of the pre-accession strategy, association agreements with candidate countries now always include specific commitments regarding the further development of the rule of law, in particular the strengthening of the independence of the judiciary.[14] In the context of the decision opening accession negotiations with Albania and North Macedonia, the Council of the EU recently once more emphasised that "[t]he fundamental democratic, rule of law and economic reforms represent the core objective of the accession process."[15]

V. Independence as an Elementary Prerequisite of a Functioning Judiciary and its Protection under EU Law

1. The Requirement of Judicial Independence Cannot be Limited to Cases with EU Law Elements

The independence of the courts is an elementary prerequisite of a functioning judiciary. Judicial independence is not only a compulsory requirement of the separation of powers principle, but also a condition of the proper functioning of the Member States' courts in the EU: A national court cannot effectively enforce Union law *vis-à-vis* the national political branches, if it is dependent on them. A lower national court which is dependent on the national Supreme Court cannot effectively join forces with the CJEU to overcome the latter's resistance to Union law.

The independence of national courts must not only be protected against interferences by the political branches. Rather, the independence of courts and individual judges must not be jeopardised either by intra-judicial interferences such as those originating from court presidents, higher courts or self-governing bodies of the judiciary (e.g., supreme judicial councils). On the other hand, the integration of the judicial branch in the democratic system of government needs to be maintained, too, because judges deliver their decisions "in the name of the people". It is therefore important to ensure that the judiciary does not develop into a state within the state, but remains accountable to the public.[16] This amounts to a tightrope walk in any constitutional system that takes both democratic legitimacy and separation of powers seriously. Member States have a certain margin in achieving the proper balance between independence and accountability of their judiciary, but they must not at all jeopardise the independence of the courts and of individual judges which is at the core of the principle of the rule of law.

The independence of the courts has long explicitly been guaranteed by public international law as well as Union law. First and foremost, Art. 6 (1) ECHR that extends to civil and

[13] See *European Commission*, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A credible enlargement perspective for and enhanced EU engagement with the Western Balkans – COM(2018) 65 final, pp. 3 ff., 10, 17; European Commission, 2018 Communication on EU Enlargement Policy – COM(2018) 450 final, p. 2.

[14] See e.g. Art. 2, Art. 74 of the Stabilisation and Association Agreement between the European Communities and their Member States of the one part, and the former Yugoslav Republic of Macedonia, of the other part of 9 April 2001 (OJ 2004 L 84, p. 13); Art. 1 (2) lit. a, Art. 2, Art. 80 of the Stabilisation and Association Agreement between the European Communities and their Member States of the one part, and the Republic of Serbia, of the other part of 29 April 2008 (OJ 2013 L 278, p. 16); Art. 1 (2) lit. a, Art. 2, Art. 78 of the Stabilisation and Association Agreement between the European Communities and their Member States of the one part, and Bosnia and Herzegovina, of the other part of 16 June 2008 (OJ 2015 L 164, p. 2); Art. 1 (2) lit. a, Art. 3, Art. 83 of the Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo, of the other part of 27 October 2015 (OJ 2016 L 71, p. 3).

[15] Council conclusions on Enlargement and Stabilisation and Association Process – The Republic of North Macedonia and the Republic of Albania (7002/20) of 25 March 2020, para. 3.

[16] *Anja Seibert-Fohr*, European Standards for the Rule of Law and Independent Courts, Journal für Rechtspolitik 20 (2012), 161 (166 f.).

criminal proceedings comes to mind, as well as Art. 47 CFR, which covers all judicial proceedings concerning rights or freedoms guaranteed by Union law. The CJEU has meanwhile determined that judicial independence is part and parcel of the essence of the right to a fair trial enshrined in Art. 47 (2) CFR[17] so that any restriction in that regard is absolutely precluded, pursuant to Art. 52 (1) CFR.

It is true that Art. 47 CFR, like all fundamental rights of the Union, binds Member States only when they are implementing Union law.[18] However, courts cannot be independent with regard to proceedings pertaining to EU law, and dependent with regard to all the other proceedings. Only if the independence of the national courts is guaranteed in a comprehensive manner, Member States will fulfil the rule of law requirements of Art. 2 TEU, which are indivisible. This has been reconfirmed by the recent case-law of the CJEU that brought Art. 19 (1) subparagraph 2 TEU into play in this context.

2. Landmark Ruling of the CJEU on Independence of Portuguese Courts (Case C-64/16) Brings in Art. 19 (1) subparagraph 2 TEU

In its landmark ruling of February 27, 2018, the CJEU had to assess interference in the judiciary by the Portuguese legislature with potential relevance for the constitutional system as a whole. Although this interference was ultimately found to be in conformity with EU law, the detailed considerations of the Court are also relevant to the questionable interferences of the Polish legislature in the judiciary which threaten to undermine the constitutional system as a whole and which the CJEU obviously had in mind when deciding the Portuguese case. The importance of that judgment is due to the fact that it derives the duty of the Member States to ensure judicial independence from Art. 19 (1) subparagraph 2 TEU which requires Member States to ensure effective legal protection in the fields covered by Union law. The scope of application of Art. 19 (1) subparagraph 2 TEU is wider than that of Art. 47 CFR read together with Art. 51 (1) CFR. Art. 19 (1) subparagraph 2 TEU covers every Member State court which could be called upon to rule on questions concerning the application or interpretation of EU law. This is true for most, if not all, national courts, given the extensive penetration of EU law into the legal systems of the Member States.

VI. Mechanisms to Enforce the Rule of Law Requirement *vis-à-vis* the Member States

If there are reasonable doubts regarding respect for the rule of law by a Member State because it undermines the independence of its courts, two enforcement procedures must be distinguished – a political one pursuant to Art. 7 TEU in conjunction with Art. 354 TFEU and a judicial one before the CJEU, based on Art. 258 or Art. 267 TFEU.

1. Political Enforcement Mechanism pursuant to Art. 7 TEU in conjunction with Art. 354 TFEU

The first stage of the political enforcement procedure – the early warning procedure under Art. 7 (1) TEU – presupposes that there is a clear risk of a serious breach by a Member State of the values referred to in Art. 2 TEU. This stage of the procedure may be initiated by a reasoned proposal by one third of the Member States, by the European Parliament[19] or by the European Commission.

At the end of 2017 the Commission, acting on the basis of Art. 7 (1) TEU, submitted to the Council a reasoned proposal for a decision on the determination of a clear risk of a serious

[17] CJEU, Case C-216/18 PPU, *LM*, ECLI:EU:C:2018:586, margin notes 59, 63.
[18] Art. 51 (1) CFR.
[19] Pursuant to Art. 7 (5) TEU in conjunction with Art. 354 (4) TFEU, "the European Parliament shall act by a two-thirds majority of the votes cast, representing the majority of its component Members."

breach by Poland of the rule of law.[20] In short, the Commission accuses Poland of having degenerated the structure of its entire judicial system through a series of laws.[21] The executive and legislative branches are said to have been systematically empowered to exercise political influence over the composition, powers, administration and functioning of the judiciary. The Commission's view is shared by the Venice Commission of the Council of Europe, the OSCE Office for Democratic Institutions and Human Rights and the United Nations Special Rapporteur on the independence of judges and lawyers.[22] Recently, the Parliamentary Assembly of the Council of Europe has started a monitoring procedure with regard to Poland, mainly on the grounds of interference with the independence of the judiciary.[23]

The Council can only adopt that Commission proposal by a majority of four fifths of its members, with Poland, as the Member State concerned, not being entitled to vote. Consequently, such a Council Decision would currently require the approval of 21 of the 26 members of the Council entitled to vote. It also requires the approval of the European Parliament by a two-thirds majority. Whether and when it comes to this is currently not foreseeable.

To date, too little has been done by the Commission *vis-à-vis* Hungary, whose governing majority has been actively transforming the state into an "illiberal democracy" for years.[24] Recently, however, the European Parliament submitted a reasoned proposal for a decision pursuant to Art. 7 (1) TEU to the Council.[25] The reasoning of the proposal refers to the independence of the judiciary as only one of many concerns, the whole of which, in the opinion of the two-thirds majority of the European Parliament, poses a systemic threat to the fundamental values of the Union as set out in Art. 2 TEU and the clear risk of serious injury. Such concerns with regard to Hungary are also shared by other international bodies.[26] The Council has not taken any decision on Hungary either.

Although the two early warning procedures have been on the Council's agenda several times, it has not yet taken a decision. For this reason, the European Parliament expressed its regret on 16 January 2020 that the proceedings under Art. 7 (1) TEU against Poland and Hungary had not led anywhere, although the situation in both states had deteriorated since the proceedings were opened.[27]

The handling of the Art. 7 TEU procedures against Poland and Hungary proves that the political enforcement mechanism is a paper tiger. It is unlikely that the EU would move beyond the stage of the bogged-down early warning procedures to the sanction procedures

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[20] COM(2017) 835 final (https://ec.europa.eu/transparency/regdoc/rep/1/2017/DE/COM-2017-835-F1-DE-MAIN-PART-1.PDF [12 March 2020]).

[21] See the Commission's pertinent press release of 20 December 2017 (https://ec.europa.eu/commission/presscorner/detail/en/IP_17_5367 [12 March 2020]).

[22] European Commission for Democracy through Law (Venice Commission), Opinion No. 904/2017 of 11 December 2017 – CDL-AD(2017)031 (https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)031-e [2 March 2020]). Further references in the recitals of the Commission proposal. See also *Justine Stefanelli*, Venice Commission Publishes Urgent Opinion on Polish Draft Legislation, International Law in Brief, Jan. 16, 2020 (https://www.asil.org/ILIB/venice-commission-publishes-urgent-opinion-polish-draft-legislation [3 March 2020]).

[23] Parliamentary Assembly, Resolution 2316 (2020) "The functioning of democratic institutions in Poland" (provisional version) of 28 January 2020 (http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=28504&lang=en [3 March 2020]).

[24] *Dimitry Kochenov/Laurent Pech*, Better Late than Never? On the European Commission's Rule of Law Framework and its First Activation, Journal of Common Market Studies 54 (2016), 1062 (1067 ff.).

[25] P8_TA(2018)0340 (https://www.europarl.europa.eu/doceo/document/TA-8-2018-0340_EN.pdf [12 March 2020]).

[26] See the references in the recitals of the European Parliament's reasoned proposal.

[27] European Parliament resolution of 16 January 2020 on ongoing hearings under Article 7 (1) of the TEU regarding Poland and Hungary – P9_TA-PROV(2020)0014 (https://www.europarl.europa.eu/doceo/document/TA-9-2020-0014_EN.html [17 March 2020]).

pursuant to Art. 7 (2) – (4) TEU. On that stage, the European Council, acting by unanimity, would have to determine the existence of a serious and persistent breach by a Member State of the values referred to in Art. 2 TEU. That is practically inconceivable, not least because Hungary would veto a European Council decision against Poland and *vice versa.* The requirement of unanimity minus one in Art. 7 (2) TEU cannot be circumvented by combining any sanction proceedings against Poland and Hungary and classifying each of them as a Member State concerned within the meaning of Article 354(1) TFEU even in proceedings against the other State, leaving both without the right to vote.[28] If one tries to save the rule of law with such a procedural trick, one is more likely to damage it. Instead of taking this dubious path, one should rely on the judicial enforcement procedures to be discussed below.

2. Judicial Enforcement Procedures before the CJEU (Art. 258, 267 TFEU)

The apparent ineffectiveness of the political enforcement procedures draws the attention to the CJEU in order to protect the "Union based on the rule of law" and its judicial component, the independence of the judiciary. Both the infringement procedure pursuant to Art. 258 TFEU and the preliminary ruling procedure pursuant to Art. 267 TFEU can be and have been used.

a) Infringement Procedures Instituted by the Commission (Art. 258 TFEU)

For a long time, it was felt that the infringement procedure was appropriate for breaches of specific provisions of EU law by Member States only, but not for systemic infringements of the basic values referred to in Art. 2 TEU. Accordingly, the Commission initially charged Member States only with such specific infringements even in cases of systemic relevance for the common constitutional values.

aa) Infringement Procedure against Hungary in 2012: Too Narrowly Focussed on Age Discrimination

An example of this is the procedure which the Commission initiated against Hungary for the retrospective reduction of the mandatory retirement age of judges and prosecutors, which vacated a large number of posts in the Hungarian judiciary. This was a poorly disguised attempt by the Orbán Government to bring the judiciary under the control of the government by simultaneously appointing many politically reliable judges and prosecutors. Nevertheless, the Commission did not sue Hungary for this outright assault on the independence of the judiciary, but only for age discrimination contrary to the Directive 2000/78/EC.[29] The CJEU determined that Hungary had in fact violated this Directive, without commenting on the parallel violation of judicial independence – an aspect that had indeed been raised by the Advocate General.[30]

Hungary has complied with the CJEU ruling, but by offering generous compensation to the discrimination victims has ensured that most of the judges who were retired prematurely,

[28] *Frank Schorkopf*, in: Eberhard Grabitz/Meinhard Hilf/Martin Nettesheim (eds.), Das Recht der Europäischen Union, Art. 7 EUV margin note 21; *Klaus Bachmann*, Beyond the Spectacle: The European Parliament's Article 7 TEU Decision on Hungary, Verfassungsblog, 17 September 2018. But see *Alexander Thiele*, Art. 7 EUV im Quadrat?, Verfassungsblog, 24 July 2017; *Dimitry Kochenov/Laurent Pech/Kim Lane Scheppele*, The European Commission's Activation of Article 7: Better Late than Never?, EU Law Analysis, 23 December 2017 (http://eulawanalysis.blogspot.com/2017/12/the-european-commissions-activation-of.html [12 March 2020]); dagegen

[29] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

[30] CJEU, Case C-286/12, ECLI:EU:C:2012:687.

contrary to EU law, did not return to active service.[31] Thus, the calculation of the government ultimately worked out.

bb) Infringement Procedures against Poland: Inclusion of the Assault on the Independence of the Courts

In addition to the violations of specific provisions of EU law, a general attack on the fundamental values referred to in Art. 2 TEU should also be made the subject of infringement procedures. In recent proceedings against Poland, the Commission has used the template in the form of 19 (1) subparagraph 2 TEU, developed by the CJEU in its landmark ruling of 2018,[32] for this purpose.

Consequently, in two cases, one concerning the Supreme Court, the other one the lower courts in Poland, the Commission sought a ruling from the CJEU that Poland violated its obligation to set up independent courts pursuant to Art. 19 (1) subparagraph 2 TEU in conjunction with Art. 47 CFR by lowering the mandatory retirement age of judges by law and, at the same time, giving the executive discretionary powers to extend their tenure upon application. With this construction, the judges' tenure of office was placed in the unlimited discretion of a member of the executive branch. In the view of the Commission, this created a dependency that could cast doubt on the independent fulfilment of duties of judges approaching retirement age. That appearance alone was enough to violate rule of law principles, because justice must not only be done, but also be seen to be done.

On 24 June 2019, the CJEU determined that Poland had violated Art. 19 (1) subparagraph 2 TEU (to be interpreted in the light of Art. 47 CFR) with regard to the Supreme Court by disregarding the principles of the irremovability of judges and judicial independence.[33] While the Court recognised that the organisation of justice in the Member States fell within their competence, they were required to comply with their obligations deriving from EU law when exercising that competence, including those pursuant to Art. 19 (1) subparagraph 2 TEU.[34] It then underlined that the "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 Article 2 TEU, in particular the value of the rule of law, will be safeguarded …"[35] The Court also pointed out that by acceding to the EU, all Member States had "freely and voluntarily committed themselves to the common values referred to in Article 2 TEU".[36]

That judgment was to be expected, in view of the fact that the Court had issued an interim injunction pursuant to Art. 279 TFEU at the end of 2018 with retroactive effect, obliging Poland immediately to suspend not only the application of the pertinent national provisions but also any measures already taken pursuant to those provisions.[37]

In the parallel case concerning the lower courts in Poland, the CJEU unsurprisingly also found a violation of Art. 19 (1) subparagraph 2 TEU (to be interpreted in the light of Art. 47 CFR), as the challenged legal changes were incompatible with the principles of the irremovability of judges and judicial independence.[38]

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[31] *Andreas Kulick*, Rechtsstaatlichkeitskrise und gegenseitiges Vertrauen im institutionellen Gefüge der EU, Juristen Zeitung 2020, 223 (228).
[32] See above V. 2.
[33] CJEU, Case C-619/18, ECLI:EU:C:2019:531.
[34] Id., margin note 52.
[35] Id., margin note 58.
[36] Id., margin note 42.
[37] CJEU, Case C-619/18 R, ECLI:EU:C:2018:1021.
[38] CJEU, Case C-192/18, ECLI:EU:C:2019:924.

It is interesting to note that in both cases the CJEU rejected the argument by the Polish government that the challenged national provisions were similar to those in some other Member States and to Art. 253 TFEU concerning renewal of the term of office of a judge of the Court of Justice of the European Union. The Court referred to its settled case law according to which a Member State cannot justify or excuse its failure to fulfil its EU law obligations on the grounds that other Member States have allegedly also failed to comply with EU law. It further pointed out that the context of Art. 253 TFEU was completely different, in view of the fact that both the initial appointment as well as the reappointment of a retiring judge required the common accord of the Governments of the Member States, after consultation of the panel provided for in Art. 255 TFEU. With this, the Court apparently wanted to say that these procedural modalities effectively prevent manipulations by the political majority in a single Member State which could call into question the independence of the EU judges. The CJEU added that the conditions set by the Treaties with regard to judges of the CJEU could in any event not modify the scope of the obligations imposed on the Member States pursuant to Art. 19 (1) subparagraph 2 TEU.

A third treaty-infringement procedure against Poland concerning disciplinary proceedings against judges and the newly established Disciplinary Chamber of the Supreme Court is still pending.[39] The complaint concerns violations of Art. 19 (1) subparagraph 2 TEU and Art. 267 (2) and (3) TFEU. The Commission alleges violations of judicial independence, *inter alia*, because the content of court decisions could give rise to disciplinary offences committed by judges, the independence and impartiality of the disciplinary chamber of the Supreme Court was not guaranteed,[40] and the right of the Polish courts to refer questions to the CJEU for a preliminary ruling was unduly restricted by the possibility of initiating disciplinary proceedings against the judges involved in the reference order. On 14 January 2020, the Commission requested the CJEU to issue an interim order under Art. 279 TFEU suspending the activities of the Disciplinary Chamber until the Court has ruled on the substance of the case. A hearing on that application was held on 9 March 2020.

On 8 April 2020, the CJEU granted the interim measures requested by the Commission in full: Poland has firstly been ordered to suspend, pending the final judgment, the application of the provisions constituting the basis of the jurisdiction of the Disciplinary Chamber of the Supreme Court to rule, both at first instance and on appeal, in disciplinary cases concerning judges. Secondly, it has been ordered to refrain from referring the cases pending before the Disciplinary Chamber before a panel whose composition does not meet the requirements of independence, as defined by the CJEU in its judgment of 19 November 2019.[41] Finally, Poland has been ordered to communicate to the Commission, at the latest one month after notification of the present order of the CJEU, all the measures that it has adopted in order comply in full with that order.[42] The background to this last injunction is the Commission's intention to submit an additional request for the imposition of a penalty payment on Poland if the information provided to it indicates that it is not fulfilling its obligations under the interim injunction.[43]

In order to justify the interim measures, the CJEU referred in particular to the recent preliminary ruling it issued on the request from the Polish Supreme Court.[44] Concerning urgency of the measure, it pointed out that guaranteeing the independence of the Disciplinary Chamber was essential to safeguard the independence of the Supreme Court and the ordinary

[39] Case C-791/19.

[40] See on this issue the CJEU's preliminary ruling in the Joined Cases C-585/18, C-624/18 and C-625/18, ECLI:EU:C:2019:982 (see below under b) bb)).

[41] See note 40.

[42] Case C-791/19 R, ECLI:EU:C:2020:277.

[43] See margin note 2 of the Order of the CJEU (note 42).

[44] See below b) bb).

courts. Any impairment of the independence of the Supreme Court in particular could cause serious and irreparable damage to the Union legal order and thus to the rights which citizens derive from Union law as well as to the values enshrined in Art, 2 TEU, in particular the rule of law.
This recent case law proves that violations of fundamental constitutional values of the EU enshrined in Art. 2 TEU are not only enforceable in the political procedure under Art. 7 TEU, but also in the judicial infringement procedure under Art. 258 TFEU. It is true that Art. 269 TFEU largely excludes the jurisdiction of the CJEU in proceedings pursuant to Art. 7 TEU. However, that does not mean that the Court of Justice would be prevented from exercising jurisdiction in relation to Art. 2 TEU in the infringement procedure. Yet, Art. 269 TFEU may be the reason why the Commission has not charged any Member State directly with violating Art. 2 TEU as such and the CJEU has not made any such determination.

b) Reference Procedures (Art. 267 TFEU)

The CJEU has also rendered several preliminary rulings under Art. 267 TFEU concerning the independence of national courts. Those references were made by courts of other Member States in the context of the enforcement of European Arrest Warrants issued by Polish courts as well as by Polish courts regarding the re-allocation by law of judicial competences to bodies whose independence and impartiality was doubtful.

aa) Reference by High Court of Ireland Concerning European Arrest Warrant Issued by Polish Court

The High Court of Ireland referred to the CJEU the question whether the executing judicial authority could refuse all surrenders on the basis of European Arrest Warrants to a Member State on account of systemic or generalised deficiencies so far as concerns the independence of that Member State's judiciary, as indicated by a reasoned proposal of the Commission under Art. 7 (1) TEU, or whether it had to determine in each particular case whether there was a real risk of breach of the fundamental right to a fair trial of the person in respect of whom the particular European arrest warrant had been issued.[45] The CJEU, referring to the 10th recital in the preamble of the Framework Decision on the European Arrest Warrant,[46] decided that such a concrete determination was required as long as the European Council, in accordance with Art. 7 (2) TEU, had not determined the existence of a serious and persistent breach of the rule of law in the issuing Member State.

bb) References by Polish Supreme Court and other Polish Courts

The requests for a preliminary ruling by the Polish Supreme Court concerned the newly established Disciplinary Chamber at that Court, which was given exclusive competence for proceedings concerning the retirement of judges of the Supreme Court.[47] Two of the judges affected by the reduction in the retirement age for sitting judges, which the CJEU has since declared to be contrary to Union law,[48] were seeking a declaration that their active service was continuing. The Chamber for Labour and Social Security Matters of the Supreme Court, which was responsible for such proceedings until the new Disciplinary Chamber was established and where the proceedings were instituted, referred to the CJEU *inter alia* the questions "whether Article 2 and the second subparagraph of Article 19(1) TEU, Article 267 TFEU and Article 47 of the Charter must be interpreted as meaning that a chamber of a

[45] CJEU, Case C-216/18 PPU, ECLI:EU:C:2018:586.
[46] Council Framework Decision (2002/584/JHA) of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ L 190, p. 1), amended by Council Framework Decision (2009/299/JHA) of 26 February 2009 (OJ L 81, p. 24).
[47] CJEU, Joined Cases C-585/18, C-624/18 and C-625/18, ECLI:EU:C:2019:982.
[48] CJEU, Case C-619/18, ECLI:EU:C:2019:531 (see above under VI. 2. a) bb).

supreme court in a Member State, such as the Disciplinary Chamber, which is called on to rule on cases falling within the scope of EU law, satisfies, in the light of the circumstances in which it was formed and its members appointed, the requirements of independence and impartiality required by those provisions of EU law. If that is not the case, the referring court asks whether the principle of the primacy of EU law must be interpreted as meaning that that court is required to disapply the provisions of national law which reserve jurisdiction to rule on such cases to that chamber of that court."[49]

In these cases, the CJEU applied primarily Art. 47 CFR, because the plaintiffs in the main proceedings claimed, *inter alia*, violations of the prohibition of age discrimination laid down in Directive 2000/78/EC.[50] Art. 9 of that Directive required the Member States to ensure that in such cases the persons concerned could effectively pursue their claims. Therefore, the original cases fell within the scope of Union law and Art. 47 CFR was applicable under Art. 51 (1) CFR.[51] Art. 2 and Art. 19 (1) subparagraph 2 TEU were not examined separately by the CJEU because, in view of their close connection with Art. 47 CFR, they could not give rise to different answers to the questions referred.[52]

With reference to Art. 52 (3) CFR, the CJEU determined that when interpreting the right of every person under Art. 47 (2) CFR to have an independent and impartial tribunal previously established by law to decide on possible violations of his or her rights and freedoms under Union law, it was required to at least maintain the level of protection guaranteed by the corresponding provision in Art. 6 (1) of the ECHR, as interpreted by the European Court of Human Rights.[53] Whether a body such as the Disciplinary Chamber fulfilled these requirements of independence and impartiality, having regard to its powers, its composition and the arrangements for appointing the judges working within it, was a matter for the national court to decide, having regard to the context in which that Chamber was created and its members appointed. But the CJEU would assist the national court by interpreting the relevant precepts of Union law in the light of the ECHR.[54]

The CJEU ultimately ruled that "Article 47 of the Charter of Fundamental Rights of the European Union … must be interpreted as precluding cases concerning the application of EU law from falling within the exclusive jurisdiction of a court which is not an independent and impartial tribunal, within the meaning of the former provisions. That is the case where the objective circumstances in which that court was formed, its characteristics and the means by which its members have been appointed are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of that court to external factors, in particular, as to the direct or indirect influence of the legislature and the executive and its neutrality with respect to the interests before it and, thus, may lead to that court not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society must inspire in subjects of the law. It is for the referring court to determine, in the light of all the relevant factors established before it, whether that applies to a court such as the Disciplinary Chamber …"[55]

The CJEU further held that if that was the case, the principle of the primacy of EU law must be interpreted as requiring the referring court to disapply the provision of national law which reserved jurisdiction to hear and rule on the cases in the main proceedings to the Disciplinary Chamber, so that those cases might be examined by a court which met the abovementioned

[49] CJEU, Joined Cases C-585/18, C-624/18 and C-625/18, ECLI:EU:C:2019:982, margin note 72 (reformulation of the questions by the CJEU).
[50] See above note 29.
[51] CJEU (note 47), margin notes 78 ff.
[52] Id., margin notes 167 ff.
[53] Id., margin notes 116 ff.
[54] Id., margin notes 131 f.
[55] Id., margin note 171.

requirements of independence and impartiality and which, were it not for that provision, would have jurisdiction in the relevant field.[56]
In its ruling of 5 December 2019, the Polish Supreme Court drew the conclusions from that preliminary ruling and, applying the EU standards clarified by the CJEU, decided that the Disciplinary Chamber did not meet the requirements of independence and impartiality under Union law. It therefore denied the Disciplinary Chamber the status of a court in the sense of EU law. It further held that the newly established exclusive competence of the Disciplinary Chamber was irrelevant due to the primacy of EU law and that, consequently, the previous competence of the Chamber for Labour and Social Security Matters of the Supreme Court persisted. Only a few days later, the Polish legislature further strengthened the power of the Disciplinary Chamber and classified it as a disciplinary offence for a judge to challenge its statutory competence or to refer a question in this regard to the CJEU for a preliminary ruling.[57] These new rules are the subject of the aforementioned infringement procedure instituted by the Commission against Poland.[58]
In another case, the CJEU has meanwhile rejected as inadmissible two requests by Polish regional courts for preliminary rulings that also concerned the possibility of initiating disciplinary proceedings against judges for having decided against the government. The Court held that there was no connecting factor between the disputes in the main proceedings and the provision of EU law whose interpretation was sought (Art. 19 (1) TEU), by virtue of which that interpretation was objectively required for the decision to be taken by the referring courts.[59] But the CJEU found it necessary to underline clearly that provisions of national law which exposed national judges to disciplinary proceedings as a result of the fact that they submitted a reference to the Court for a preliminary ruling were incompatible with both Art. 267 TFEU and judicial independence.[60]

3. Enforcement of the Constitutional Values of the Union by Financial Means of Coercion?

Every year, Poland and Hungary receive billions of Euros from the EU funds.[61] Therefore, the question arises as to whether financial means of coercion could be used against them to remedy their violations of fundamental constitutional values of the Union.

a) Penalty Payment pursuant to Art. 260 (2) TFEU and Possible Set-off

If the CJEU found in an infringement procedure that a Member State had violated its obligation under the Treaties to maintain the independence of its judiciary and that Member State did not take the necessary measures to comply with the judgment pursuant to Art. 260 (1) TFEU, the Commission could initiate an enforcement procedure and request the CJEU to impose a penalty payment on it according to Art. 260 (2) TFEU.
If the Member State also refused to pay the imposed penalty, the EU could set off its claim against that Member State's pecuniary claims arising under EU law. Since set-off is recognized as a method of reciprocal settlement of claims in the legal systems of all Member States, one can infer that a corresponding unwritten general principle of EU law exists.

[56] Id.
[57] *Ulrich Karpenstein/Roya Sangi*, Polexit vom Rechtsstaat?, Europäische Zeitschrift für Wirtschaftsrecht 2020, 140 (141 f.).
[58] Pending Case C-791/19. See above VI. 2. a) bb).
[59] CJEU, Joined Cases C-558/18 and C-563/18, ECLI:EU:C:2020:234, margin notes 48 ff.
[60] Id., margin notes 55 ff.
[61] In the period of 2014-2020, Poland received more than € 86 billion from various EU funds (http://ec.europa.eu/regional_policy/sources/policy/what/investment-policy/esif-country-factsheet/esi_funds_country_factsheet_pl_en.pdf [12 March 2020]); Hungary received € 25 billion (http://ec.europa.eu/regional_policy/sources/policy/what/investment-policy/esif-country-factsheet/esi_funds_country_factsheet_hu_en.pdf [12 March 2020]).

Ultimately, this is the only way to ensure the effectiveness of CJEU rulings, without which the EU's character as Union based on the rule of law would be lost.
No proceedings that could lead to the imposition of a penalty payment are currently pending against Poland because that Member State has so far implemented the CJEU rulings in the infringement proceedings.[62] In any case, financial pressure built up in that way would probably come too late to save the independence of the Polish courts.

b) Rule of Law Conditionality of Financial Allocations from EU Funds?

In order to have a faster-acting sanctioning instrument, it has been suggested that disbursements from EU funds should generally be made subject to a rule of law conditionality. For that purpose, the Commission should continuously monitor the state of the rule of law in all Member States and if necessary suspend payments, if a Member State failed to meet certain standards. The substantive justification for such an approach lies in the fact that Member States with rule of law problems cannot ensure that financial resources allocated by the EU are properly used and that possible fraud is effectively combated.[63]
This approach is promising because it can quickly build up financial pressure. Art. 142 (1) (a) of Regulation (EU) No. 1303/2013, which lays down common rules for the administration of the various EU funds, already provides a previously unused legal basis for this.[64] According to that provision, the Commission may suspend payments if "there is a serious deficiency in the effective functioning of the management and control system of the operational programme, which has put at risk the Union contribution to the operational programme and for which corrective measures have not been taken". If a Member State eliminates the independence of its courts, there no longer is an effective national control system that could ensure the proper use of EU funds.
The Commission, however, for reasons of legal clarity and certainty considers it as necessary to create a specific legal basis for the suspension of payments to Member States with shortcomings concerning the rule of law. It has therefore submitted a proposal for a new regulation based on Art. 322 (1) lit. a TFEU[65] which would have to be adopted in accordance with the ordinary legislative procedure.[66] It is uncertain, if and when that regulation will be adopted, because it is politically linked to the multiannual financial framework for the years 2021 – 2027 whose adoption, according to Art. 312 (2) TFEU, requires unanimity in the Council.

VII. Conclusion: The Defence of European Constitutional Values Is a Common Obligation of the Friends of Constitutionalism in Europe

We must not permit the destruction of the common constitutional values of the EU and its Member States from within the Union and the (re-)establishment of a system of government beyond effective judicial control. This requires the determined cooperation of the friends of constitutionalism at all levels of the European multi-level system. First and foremost, we must join forces to ensure that only those States can become members of the EU that credibly and sustainably fulfil the political accession criteria in accordance with Art. 49 (1) sentence 1 read together with Art. 2 TEU. In addition, we have an ongoing duty to defend respect for common

[62] See *Lenaerts* (note 3), 34.
[63] See, e.g., *Jasna Šelih/Ian Bond/Carl Dolan,* Can EU funds promote the rule of law in Europe?. 2017 (https://www.cer.eu/sites/default/files/pbrief_structural_funds_nov17.pdf [12 March 2020]).
[64] Consolidated version including later amendments in https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1584026469816&uri=CELEX:02013R1303-20190511 (20 March 2020).
[65] Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, COM(2018) 324 final of 2 May 2018 (https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018PC0324&from=EN [20 March 2020]).
[66] Art. 294 TFEU.

constitutional values at the Union and Member States levels by all available means, both political and legal. In this regard, the rule of law and the independence of the courts as its core element are particularly essential, as their impairment at one level endangers the constitutional system as a whole at all levels. The effective control of political power is also and particularly necessary in democratic systems, where this power is supported by the majority of the voters. The tyranny of the majority is no better than the tyranny of one dictator.

It is true that the EU, as a community of constitutional values, thrives on conditions that it cannot guarantee itself,[67] namely on the consensus of the vast majority of Union citizens on those values. However, such a consensus can erode, if the competent institutions of the EU and the Member States do not fend off attacks on common constitutional values, giving the impression that they are either unwilling or unable to defend them. That is why the recent resolute steps taken by the Commission and the CJEU against Poland and the European Parliament against Hungary should be welcomed. Equally welcome is the Commission's push to introduce an effective financial sanctioning mechanism. Hopefully, we will not one day have to consider seriously whether EU law permits or even requires the exclusion of a Member State for betrayal of the fundamental civilizational values of European integration.

[67] See *Ernst-Wolfgang Böckenförde*, Die Entstehung des Staates als Vorgang der Säkularisation, in: id., Recht, Staat, Freiheit, 1991, p. 92 (112).