



## **Associação Sindical dos Juizes Portugueses: The Court of Justice and Athena's Dilemma**

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INSIGHT

## ASSOCIAÇÃO SINDICAL DOS JUÍZES PORTUGUESES: THE COURT OF JUSTICE AND ATHENA'S DILEMMA

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ABSTRACT: This *Insight* comments on the recent judgment of the Court of Justice in *Associação Sindical dos Juizes Portugueses* (judgment of 27 February 2018, case C-64/16). The Court took advantage of this case to emphasise the potential of EU law to consolidate and defend the rule of law structures in the Member States. The Court discovered a justiciable rule of law clause in Art. 19, para. 1, TEU, which enshrines the principle of effective judicial protection before national courts. This provision makes the enforcement of rule of law standards *vis-à-vis* the Member States more straightforward as compared to the enforcement of Art. 47 of the Charter of Fundamental Rights of the EU. In the future, Art. 19, para. 1, TEU could be enforced by means of infringement proceedings under Art. 268 TFEU to counteract the undermining of judicial independence at the national level.

KEYWORDS: rule of law – effective judicial protection – judicial system – national courts – judicial independence – the Court of Justice.

### I. ATHENA'S DILEMMA

In “Eumenides”, a part of Aeschylus’ trilogy, the “Oresteia”,<sup>1</sup> Athena was faced with a dispute between the deities, Apollo and the three Erinyes, over the fate of Orestes. Orestes killed his own mother to avenge his father, a good king, whom she had previously killed. Orestes was carrying out an order from Apollo. Hence, Apollo was defending Orestes against the Erinyes, more ancient guardians of primeval tribal laws, also known as the Furies. The Erinyes demanded Orestes’s death to enforce an ancient rule according to which the death of a relative must be ruthlessly avenged, regardless of the assassin’s motives. The conflicted deities submitted the dispute to Athena’s judgment. To decide the fate of Orestes, she also had to rule on the primacy of the modern or the

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<sup>1</sup> AESCHYLUS, *Eumenides*, in AESCHYLUS, *ORESTEA*, translated by A.H. SOMMERSTEIN, Harvard: Harvard University Press, 2014.

primeval legal order, represented respectively by Apollo and the Erinyes.<sup>2</sup> Athena was well aware that if the Erinyes did not get a victorious outcome, they could in revenge bring a plague on her city. Like many judges facing politically sensitive cases, at first Athena ascertained whether she could deny jurisdiction and, thus, get rid of the problem altogether.<sup>3</sup> Alas, the attempt to do so failed. In this case, Athena decided to establish an independent tribunal from among the most respected of her citizens. She also instructed her tribunal to break with the ancient judicial procedure based on the oaths submitted by the parties. Instead, she prescribed a fair procedure governed by the rules on evidence and equality of arms.<sup>4</sup> Thus, Athena became the first enforcer of the rule of law recorded in history.<sup>5</sup> Following the trial, the tribunal acquitted Orestes. This enraged the defeated Erinyes. Fortunately, Athena managed to convince them to give up their wrath, by offering them a place among deities worshipped in her city.

A similar dilemma was brought before the Court of Justice in the case *Associação Sindical dos Juizes Portugueses (ASJP)*.<sup>6</sup> The dispute before the referring court concerned the reduction of the Portuguese judges' remuneration in the framework of EU austerity measures. But the Court had to respond to far more important questions. Like Athena facing the dispute about the primacy of the new or the old laws, the Court had to decide whether the new legal order of the EU can interfere directly in the organisation of national judicial branch – an issue which has hitherto been perceived as a prerogative of national authorities, deeply embedded in the concept of national sovereignty. Notably, it has been a commonplace to see the ASJP case as an opportunity to lay the groundwork for future cases against Poland and its government's controversial judicial reforms.<sup>7</sup> On the one hand, the Court must have surely considered arguments of those who, like Apollo, argue in favour of the new legal order, demand the assertive enforcement of common European values and criticise the EU institutions for their poor response to the undermining of judicial independence in Poland or Hungary.<sup>8</sup> On the other hand, the Court must have

<sup>2</sup> C. MEIER, *The Greek Discovery of Politics*, translated by D. McLINTOCK, Harvard: Harvard University Press, 1990, pp. 82-138.

<sup>3</sup> AESCHYLUS, *Eumenides*, cit., pp. 416-417.

<sup>4</sup> C. MEIER, *The Greek Discovery of Politics*, cit.

<sup>5</sup> L. MAY, S. FYEE, *The Legitimacy of International Criminal Tribunals*, in N. HAYASHI, C.M. BAILLET (eds), *The Legitimacy of International Criminal Tribunals*, Cambridge: Cambridge University Press, 2017, p. 26.

<sup>6</sup> Court of Justice, judgment of 27 February 2018, case C-64/16, *Associação Sindical dos Juizes Portugueses*.

<sup>7</sup> M. TABOROWSKI, *CJEU Opens the Door for the Commission to Reconsider Charges against Poland*, in *Verfassungsblog*, 13 March 2018, verfassungsblog.de; D. SARMIENTO, *On Constitutional Mode*, in *Despite Our Differences Blog*, 6 March 2018, despiteourdifferencesblog.wordpress.com; M. OVÁDEK, *Has the CJEU just Reconfigured the EU Constitutional Order?*, in *Verfassungsblog*, 28 February 2018, verfassungsblog.de.

<sup>8</sup> See, for instance, D. KOCHENOV, *The EU and the Rule of Law – Naïveté or a Grand Design?*, in M. ADAMS, A. MEUWESE, E.H. BALLIN (eds), *Constitutionalism and the Rule of Law: Bridging Idealism and Realism*, Cambridge: Cambridge University Press, 2017, pp. 419-455.

taken into account that reactions of these Member States' governments are, like those of the Erinyes, difficult to predict but potentially serious.

Perhaps surprisingly, the Court declared the question admissible. In the past, it had rather avoided the politically sensitive cases regarding the review of Portuguese austerity measures.<sup>9</sup> Even more surprisingly, the Court was not looking for a link between the impugned Portuguese measure and a concrete EU provision. Such a link would be necessary to trigger the applicability of Art. 47 of the Charter of Fundamental Rights of the EU (the Charter), which relates to the fundamental right to an effective remedy and a fair trial before an independent court. Instead, the Court relied solely on Art. 19, para. 1, TEU relating to the national obligation of ensuring effective judicial protection in the fields covered by EU law. Was it right to assert its jurisdiction and derive standards of judicial independence from Art. 19, para. 1, TEU?

In this *Insight*, I reflect on this question. After recalling the case's details (Section II), I propose a conceptualisation of the difference between legal norms stemming from Art. 19, para. 1, TEU and Art. 47 of the Charter. I argue that Art. 19, para. 1, TEU has turned out to be a judicially enforceable rule of law clause (Section III.1). Although it arguably expresses the same normative content as Art. 47 of the Charter, it has a different scope of application. As a result, Art. 19, para. 1, TEU makes the obligations of the Member States relating to the rule of law more easily enforceable before the Court of Justice (Section III.2). In conclusion, I argue that Art. 19, para. 1, TEU could be autonomously enforced within infringement proceedings against national governments which impair the independence of their judicial systems (Section IV).

## II. THE CASE OF *ASSOCIAÇÃO SINDICAL DOS JUÍZES PORTUGUESES*

### II.1. THE FACTS AND THE PRELIMINARY REFERENCE

The Portuguese legislature temporarily reduced the remuneration of certain categories of civil servants. Under implementing administrative measures, the remuneration of the Court of Auditors' judges was also reduced. The ASJP, an association of Portuguese magistrates, acting on behalf of the Court of Auditors' judges, brought an action for annulment against the implementing measures to the Supreme Administrative Court. The ASJP alleged a breach of the principle of judicial independence, enshrined in Art. 19, para. 1, TEU and Art. 47 of the Charter.<sup>10</sup> The Supreme Administrative Court agreed that the independence of judicial bodies depends on the guarantees that are attached to

<sup>9</sup> Court of Justice: order of 7 March 2013, case C-127/12, *Sindicato dos Bancários do Norte*, order of 26 June 2014, case C-264/12, *Sindicato Nacional dos Profissionais de Seguro v. Fidelidade Mundial*. See also C. KILPATRICK, *Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?*, in *European Constitutional Law Review*, 2014, pp. 393-421.

<sup>10</sup> *Associação Sindical dos Juizes Portugueses*, cit., para. 16.

their members' status, including terms of remuneration.<sup>11</sup> Hence, it referred to the Court of Justice a question of whether Art. 19, para. 1, TEU and Art. 47 of the Charter preclude the Portuguese measures reducing judicial remuneration.

## II.2. THE OPINION OF ADVOCATE GENERAL

Having considered the preliminary questions of admissibility and jurisdiction, the Advocate General noted that the scope of application of Art. 19, para. 1, TEU and Art. 47 of the Charter is laid out differently.<sup>12</sup> To assess whether Art. 19, para. 1, TEU is applicable to the situation of domestic judges, one needs to verify whether these judges "are likely to exercise their judicial activity in areas covered by EU law, and therefore to act as European judges".<sup>13</sup> The Advocate General then held that the judges of the Court of Auditors adversely affected by the impugned Portuguese measures may indeed be required to rule on cases falling within the scope of EU law. Subsequently, to hold that Art. 47 of the Charter was applicable to the situation of domestic judges, the Advocate General examined, in accordance with Art. 51 of the Charter governing its scope of application, whether the impugned Portuguese measure had implemented specific EU provisions.<sup>14</sup> The Advocate General found that such specific EU provisions were contained in the Council Implementing Decision 2014/234,<sup>15</sup> which obliged Portugal to rationalise remuneration policy across all careers in the public sector.<sup>16</sup>

As concerns the case's substance, the Advocate General stated that Art. 19, para. 1, TEU obliges the Member States to designate courts with jurisdiction to settle disputes arising under the EU law and to lay down relevant procedural rules, whereas this provision does not deal with judicial independence.<sup>17</sup> On the contrary, Art. 47, para. 2, of the Charter explicitly provides for the right to an independent tribunal. The Advocate General interpreted the concept of independence in Art. 47, para. 2, of the Charter in light of Art. 6, para. 1, of the European Convention on Human Rights<sup>18</sup> and various instruments of the Council of Europe.<sup>19</sup> He concluded that although the remuneration of judges must be commensurate with the importance of their function, it must also consider economic real-

<sup>11</sup> *Ibid.*, para. 17.

<sup>12</sup> Opinion of AG Saugmandsgaard Øe delivered on 18 May 2017, case C-64/16, *Associação Sindical dos Juízes Portugueses*, para. 36. Under Art. 19, para. 1, TEU, "Member States shall provide remedies sufficient to ensure effective legal protection *in the fields covered by Union law*" (emphasis added).

<sup>13</sup> Opinion of AG Saugmandsgaard Øe, *Associação Sindical dos Juízes Portugueses*, cit., para. 41.

<sup>14</sup> *Ibid.*, para. 43.

<sup>15</sup> Council Implementing Decision 2014/234/EU of 23 April 2014 amending Implementing Decision 2011/344/EU on granting Union financial assistance to Portugal, pp. 75-83.

<sup>16</sup> Opinion of AG Saugmandsgaard Øe, *Associação Sindical dos Juízes Portugueses*, cit., para. 52.

<sup>17</sup> *Ibid.*, paras 61-67.

<sup>18</sup> *Ibid.*, paras 72-75.

<sup>19</sup> *Ibid.*, para. 76.

ity.<sup>20</sup> Reductions of judicial remuneration are not prohibited as such but must pursue a legitimate public interest and be proportionate.<sup>21</sup> In conclusion, the Advocate General held that the challenged Portuguese measures were not contrary to EU law.

### II.3. THE JUDGMENT OF THE COURT

The Court agreed with the Advocate General regarding both the admissibility of preliminary reference and the scope of application of Art. 19, para. 1, TEU.<sup>22</sup> It highlighted that Art. 19 TEU operationalises the value of the rule of law enshrined in Art. 2 TEU.<sup>23</sup> However, unlike the Advocate General, the Court held that Art. 19, para. 1, TEU entails also an obligation to ensure that national courts adjudicating in the fields covered by EU law meet the requirements of independence.<sup>24</sup> Also in contrast to the Advocate General, the Court did not examine separately the applicability of Art. 47 of the Charter and based its reasoning mostly on Art. 19, para. 1, TEU.

Cases relating to EU own resources and the use of financial resources from the EU were within the jurisdictional remit of the Portuguese Court of Auditors. Hence, in the Court's view, Portugal must ensure that its judges enjoy a sufficient level of independence required under Art. 19, para. 1, TEU.<sup>25</sup> To interpret the concept of independence, the Court reached to the case-law developed under Art. 47 of the Charter<sup>26</sup> but the formal point of reference for the assessment of the impugned national measure remained Art. 19, para. 1, TEU. In particular, the Court of Justice held that an independent court is one that exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint and without taking orders from anybody, enjoying protection against external interventions and pressures.<sup>27</sup> The Court of Justice admitted that the receipt by judges of a level of remuneration commensurate with the importance of their function constitutes a guarantee essential to judicial independence.<sup>28</sup> Nonetheless, since the impugned measures applied to various groups of civil servants, were temporary, and aimed at Portugal's excessive budget deficit, they could not be considered to impair judicial independence.<sup>29</sup>

<sup>20</sup> *Ibid.*, para. 78.

<sup>21</sup> *Ibid.*, para. 79.

<sup>22</sup> *Associação Sindical dos Juizes Portugueses*, cit., para. 25.

<sup>23</sup> *Ibid.*, paras 31-32.

<sup>24</sup> *Ibid.*, paras 34-38.

<sup>25</sup> *Ibid.*, paras 39-40.

<sup>26</sup> *Ibid.*, paras 41-42.

<sup>27</sup> *Ibid.*, para. 44.

<sup>28</sup> *Ibid.*, para. 45.

<sup>29</sup> *Ibid.*, paras 46-51.

### III. ANALYSIS: THE RELATIONSHIP BETWEEN ART. 19, PARA. 1, TEU AND ART. 47 OF THE CHARTER

#### III.1. THE ENFORCEABLE RULE OF LAW CLAUSE IN THE EU TREATIES

The Court of Justice took the opportunity provided by the Portuguese Supreme Administrative Court to confirm that Art. 19, para. 1, TEU is a justiciable rule of law clause of the EU Treaties. Even before the ASJP judgment, Art. 19, para. 1, TEU has rightly been named “the most important provision of the Treaties in that it confirms that the Union in all its aspects is exclusively governed by the law”.<sup>30</sup> Doctrinal discussions about legal means to counteract the constitutional backsliding in Poland and Hungary have hitherto revolved around Art. 2 TEU. Opinions about whether this provision can be enforced within Art. 258 TFEU infringement proceedings have been divided.<sup>31</sup> Notwithstanding, the scholarly attention should now turn to Art. 19, para. 1, TEU.

Art. 19, para. 1, TEU, in the Court’s words, “gives concrete expression to the value of the rule of law stated in Article 2 TEU”.<sup>32</sup> The very existence of effective judicial review by independent courts designed to ensure compliance with EU law is of the essence of the rule of law.<sup>33</sup> For this reason, Art. 19, para. 1, TEU imposes on the Member States obligations regarding the organisation of their judicial systems, even though it leaves them considerable discretion in the choice of concrete institutional and procedural arrangements. Importantly, the principle of national authorities’ “procedural autonomy” – which is oftentimes understood as a national *prerogative* or an expression of national sovereignty<sup>34</sup> – in the ASJP judgment is rather a set of *obligations* regarding access to justice, fair procedures and judicial independence.<sup>35</sup>

<sup>30</sup> R. BARENTS, *EU Remedies and Procedures before the EU Courts*, Alphen aan den Rijn: Wolters Kluwer International, 2016, p. 116.

<sup>31</sup> M. DAWSON, E. MUIR, M. CLAES, *A Tool-box for legal and Political Mobilisation in European Equality Law*, in D. ANAGNOSTOU (ed.), *Rights and Courts in Pursuit of Social Change. Legal Mobilisation in the Multi-Level European System*, Oxford: Oxford University Press, 2014, p. 117; K.L. SCHEPPELE, *Enforcing the Basic Principles of EU Law through Systemic Infringement Actions*, in D. KOCHENOV, C. CLOSA, *Reinforcing the Rule of Law Oversight in the European Union*, Cambridge: Cambridge University Press, 2017; D. KOCHENOV, L. PECH, *Better Late than Never? On the European Commission’s Rule of Law Framework and its First Activation*, in *Journal of Common Market Studies*, 2016, pp. 1062-1074, p.1065.

<sup>32</sup> *Associação Sindical dos Juizes Portugueses*, cit., para. 32.

<sup>33</sup> *Ibid.*, paras 36-37.

<sup>34</sup> C.N. KAKOURIS, *Do the Member States Possess Judicial Procedural “Autonomy”?*, in *Common Market Law Review*, 1997, pp. 1389-1412; M. BOBEK, *Why There is No Principle of ‘Procedural Autonomy’ of the Member States*, in B. DE WITTE, H.-W. MICKLITZ (eds), *The European Court of Justice and the Autonomy of the Member States*, Cambridge: Intersentia, 2012, pp. 305-323.

<sup>35</sup> *Associação Sindical dos Juizes Portugueses*, cit., para. 34. See also, D.U. GALETTA, *Procedural Autonomy of EU Member States: Paradise Lost? A Study on the ‘Functionalised Procedural Competence’ of EU Member States*, Heidelberg: Springer, 2010; E. CANNIZZARO, *Sui rapporti fra sistemi processuali nazionali e diritto dell’Unione europea*, in *Il Diritto dell’Unione europea*, 2008, pp. 447-468; N. PÓLTORAK, *European*

That Art. 19, para. 1, TEU has such a huge potential for the defence and consolidation of rule of law standards in the Member States may be surprising in light of this provision's inconspicuous origin. Its story begins with the *Unión de Pequeños Agricultores* judgment, in which the Court refused to relax the admissibility criteria of annulment actions brought against EU measures of general application by private applicants.<sup>36</sup> As a result, such measures remained outside the scope of direct actions for judicial review, irrespective of their impact on legally protected interests of individuals. The issue was later discussed within the Convention for the Future of Europe.<sup>37</sup> The Member States decided to include in the Treaty what is now Art. 19, para. 1, TEU. They intended to highlight the obligation of Member States to ensure effective judicial protection of the rights enjoyed by individuals under EU law in the areas outside of the Court of Justice's jurisdiction, if necessary even by creating new legal avenues and remedies.<sup>38</sup>

Arguably, the consideration of authors' intentions underpins the careful approach to Art. 19, para. 1, TEU by the Advocate General, although the intentions of the Treaty authors are not formally binding on the Court.<sup>39</sup> The Advocate General proposed to interpret the provision as imposing only obligations relating to a complete system of remedies and procedures but not to judicial independence. In my view, this interpretation is very difficult to defend. The concept of effective judicial protection, enshrined either in Art. 19, para. 1, TEU or Art. 47 of the Charter, forms a logical and coherent whole. Even though its particular elements, such as access to justice, procedural fairness or judicial independence can be distinguished for analytical purposes, they are all together indispensable conditions for the rule of law. The concept of "remedies sufficient to ensure effective legal protection" presupposes and is inextricably linked to judicial independence. One could hardly talk of *effective*, or in fact any *legal protection* worthy of its name, if a legal avenue to apply for a remedy, for instance against an administrative act, was indeed available but the final decision rested in the hands of a judge subordinated to the administration being a defendant in the trial.

*Union Rights in National Courts*, Alphen aan den Rijn: Wolters Kluwer, 2015; A. WALLERMAN, *Towards an EU Law Doctrine on the Exercise of Discretion in National Courts? The Member States' Self-Imposed Limits on National Procedural Autonomy*, in *Common Market Law Review*, 2016, pp. 339-360.

<sup>36</sup> Court of Justice, judgment of 25 July 2002, case C-50/00 P, *Unión de Pequeños Agricultores*.

<sup>37</sup> A. ARNULL, *Judicial Review in the European Union*, in D. CHALMERS, A. ARNULL (eds), *The Oxford Handbook of European Union Law*, Oxford: Oxford University Press, 2015, pp. 377-401, p. 390.

<sup>38</sup> Court of Justice, judgment of 13 March 2007, case C-432/05, *Unibet*, para. 41. See also Court of Justice: judgment of 3 October 2013, case C-583/11 P, *Inuit Tapiriit Kanatami*, paras 91-94; judgment of 28 April 2015, case C-456/13 P, *T&L Sugars*, para. 45.

<sup>39</sup> However, *travaux préparatoires* may be helpful in interpreting Treaty provisions. See for instance, Opinion of AG Kokott delivered on 17 January 2013, case C-583/11 P, *Inuit Tapiriit Kanatami*, paras 33-47.



### III.2. THE OBJECTIVE PRINCIPLE OF JUDICIAL INDEPENDENCE AND THE SUBJECTIVE RIGHT TO AN INDEPENDENT JUDGE

One could ask why the Court opted for a novel solution and based its judgment on Art. 19, para. 1, TEU instead of following a well-established path of Art. 47 of the Charter. This is even more surprising as first the Court chose Art. 19, para. 1, TEU but later it linked its content with that of Art. 47 of the Charter. The latter has a prominent role in the Court's case-law, whereas Art. 19, para. 1, TEU had never served as an autonomous standard for the review of national laws. What first comes to mind is that the Court aimed at laying the groundwork for possible future cases against Poland. Unlike the ASJP case, the majority of changes in the organisation of judicial system contested in the Polish case have no link with any specific EU provision. Hence, the application of Art. 47 of the Charter to a Polish case would be difficult.<sup>40</sup>

One commentator asked rhetorically whether the Court, with the ASJP judgment, had reconfigured the EU constitutional order.<sup>41</sup> In fact, the Court did not invent any new legal norm, that would not have already existed in the EU legal order. Rather, it enhanced the enforceability of the rule of law standards *vis-à-vis* the EU Member States. In the aftermath of the ASJP judgment, it seems that the legal obligations stemming from Art. 19, para. 1, TEU or Art. 47 of the Charter overlap. However, what differs is their scope of application (*ratione materiae*) and, consequently, the manner in which they can be enforced.

Art. 47 of the Charter is interpreted by case-law in accordance with the dominant paradigm of fundamental rights as subjective rights.<sup>42</sup> Art. 47 of the Charter expresses a subjective right: a permission to demand from public authorities specific actions – providing a legal avenue, fair procedure before an independent tribunal, etc. – and the corresponding obligation of the latter to satisfy this demand.<sup>43</sup> The scope of application of this subjective right is set out by the same Art. 47 and also Art. 51 of the Charter, which governs the Charter's scope of application in general. It follows from these two provisions that one can exercise the right in question before national courts, if she can make a reasonable claim that she has suffered a "violation" of her "rights and freedoms" which are protected by EU norms.<sup>44</sup>

<sup>40</sup> See further, M. TABOROWSKI, *The Commission takes a step back in the fight for the Rule of Law*, in *Verfassungsblog*, 3 January 2018, [verfassungsblog.de](http://verfassungsblog.de).

<sup>41</sup> M. OVÁDEK, *Has the CJEU just Reconfigured the EU Constitutional Order?*, cit.

<sup>42</sup> See the case-law origins of the right to effective judicial protection, Court of Justice: judgment of 15 May 1986, case 222/84, *Johnston*, para. 18; judgment of 15 October 1987, case 222/86, *Heylens*, para. 14.

<sup>43</sup> See, R. ALEXY, *Theory of Constitutional Rights*, translated by J. RIVERS, Oxford: Oxford University Press, 2010, pp. 111-120.

<sup>44</sup> In practice, it arguably suffices that an individual relies on an EU provision the application of which can provide her with an advantage or can cause her a harm of hardship. See the recent judgment of the Court of Justice of 16 May 2017, case C-682/15, *Berlioz Investment Fund*, paras 45-52. See however, opinion of AG Bobek delivered on 7 September 2017, case C-403/16, *El-Hassani*, para. 74 *et seq.*

Thus, Art. 47 of the Charter is geared towards the protection of individuals who wish to take advantage of specific EU provisions. It enables the Court within the preliminary reference procedure<sup>45</sup> to review particular procedures before domestic courts used to enforce EU law in concrete cases. Examples include procedures for the judicial review of abusive clauses in consumer contracts,<sup>46</sup> asylum<sup>47</sup> or public procurement decisions,<sup>48</sup> just to name a few. The range of issues already considered by the CJEU covers the rules on access to justice,<sup>49</sup> procedural rights of the parties,<sup>50</sup> rules on evidence,<sup>51</sup> jurisdiction<sup>52</sup> and powers of courts,<sup>53</sup> or even judicial independence,<sup>54</sup> and also this list is not exhaustive. However, in all of these cases, the Court's scrutiny was necessarily limited to one concrete type of domestic judicial procedure used by the applicant in the main case. At the same time, Art. 47 of the Charter – due to the manner of its application – is ill-suited to enable the Court to scrutinise the design of a national judicial system as a whole.

Although the Court's reasoning suggests that Art. 19, para. 1, TEU expresses the same normative requirements as Art. 47 of the Charter,<sup>55</sup> its scope of application is set out differently. Art. 19, para. 1, TEU is applicable to courts and procedures functioning "in the fields covered by Union law". Such courts may be called, under domestic provisions marking out their jurisdiction, to interpret and apply EU law. The application of Art. 19, para. 1, TEU to review the organisation of domestic courts and procedures is

<sup>45</sup> However, EU standards of effective judicial protection were also enforced within infringement proceedings to a specific type of national procedure. Court of Justice, judgment of 13 February 2014, case C-530/11, *Commission v the UK*.

<sup>46</sup> Court of Justice, judgment of 17 July 2014, case C-169/14, *Juan Carlos Sánchez Morcillo*.

<sup>47</sup> Court of Justice, judgment of 26 July 2017, case C-348/16, *Moussa Sacko*.

<sup>48</sup> Court of Justice, judgment of 15 September 2016, joined cases C-439/14 and C-488/14, *Star Storage*.

<sup>49</sup> Court of Justice: judgment of 8 November 2016, case C-243/15, *Lesoochrannárske zoskupenie*; judgment of 6 October 2015, case C-61/14, *Orizzonte Salute*; judgment of 22 December 2010, case C-279/09, *DEB*.

<sup>50</sup> Court of Justice, judgment of 4 June 2013, case C-300/11, *ZZ*.

<sup>51</sup> Court of Justice, judgment of 27 September 2017, case C-73/16, *Peter Puškár*, paras 87-98.

<sup>52</sup> Court of Justice, judgment of 6 September 2012, case C-619/10, *Trade Agency*.

<sup>53</sup> Court of Justice, judgment of 14 March 2013, case C-415/11, *Mohamed Aziz*.

<sup>54</sup> Court of Justice: judgment of 19 September 2006, case C-506/04, *Wilson*; judgment of 31 January 2013, case C-175/11, *H.I.D. & B.A.*

<sup>55</sup> What could also be helpful in interpreting the requirements of effective judicial protection is the case-law regarding the concept of the "court or tribunal" under Art. 267 TFEU – see the ASJP judgment, para. 44 and the case-law cited. The question remains, though, what is the relationship between effective judicial protection and the more senior principle of effectiveness, which next to the principle of equivalence frames the procedural autonomy of the Member States. See, Court of Justice, judgment of 5 November 2014, case C-166/13, *Makarubega*. See further, J. KROMMENDIJK, *Is there light on the horizon? The distinction between Rewe-effectiveness and the principle of effective judicial protection in Article 47 of the Charter after Orizzonte*, in *Common Market Law Review*, 2016, pp. 1395-1418; M. SAFJAN, D. DÜSTERHAUS, *A Union of Effective Judicial Protection: Addressing a Multi-level Challenge through the Lens of Article 47 CFREU*, in *Yearbook of European Law*, 2014, pp. 3-40. See also, Opinion of AG Kokott delivered on 30 March 2017, case C-73/16, *Puškár*, paras 50-51.

therefore “abstract”, whereas Art. 47 of the Charter is usually applicable within concrete proceedings involving the application of substantive EU provisions.<sup>56</sup>

In other words, Art. 47 of the Charter expresses a subjective right and Art. 19, para. 1, TEU expresses the same normative requirements in the form of an objective legal principle. Such a principle abstracts from the question of right-holders and their concrete cases and is intended to “radiate” on the organisation of domestic judicial systems.<sup>57</sup> Any reform of these systems should take account of obligations stemming from Art. 19, para. 1, TEU. As it has turned out, by introducing this provision to the TEU, the Member States have authorised the Court of Justice – perhaps unwittingly – to review the organisation of their judicial systems, in procedural and institutional aspects alike, outside the context of specific EU provisions or concrete legal disputes. The only condition is that the parts of national judicial systems concerned are likely to deal with EU law cases. It should be emphasised however that arguably Art. 19, para. 1, TEU does not impose any legal obligations that could not have been inferred from the pre-Lisbon general principle of effective judicial protection and effectiveness, or from Art. 47 of the Charter. The enshrining of effective judicial protection in the Treaty as both a fundamental subjective right and as an objective legal principle is perfectly justified in light of the importance of this legal norm for the rule of law.

Therefore, the contribution of Art. 19, para. 1, TEU is rather procedural in nature and consists in making the enforcement of the rule of law standards before the Court easier and more straightforward. To enforce Art. 47 of the Charter within the action for infringement under Art. 258 TFEU, the Commission must indicate a precise provision of substantive EU law which cannot be effectively enforced at the national level due to the lack of independent courts or fair procedures. Alternatively, the EU institutions can wait for an individual to initiate litigation before a national court and to invoke her rights under Art. 47 of the Charter. In this case, the EU institution can only hope that the national judge will decide to refer the case to the Court of Justice under Art. 267 TFEU. In both cases, the impact of the Court’s judgment will be limited to this particular type of procedure before national courts within which the indicated provisions of substantive EU law are being enforced. Therefore, Art. 47 of the Charter is ill-suited to remedy systemic violations of the rule of law, which permeate the entire national judicial system, and not only concern selected remedies and procedures. Meanwhile, Art. 19, para. 1, TEU relieves the EU institutions from the formal restraints of Art. 51 of the Charter. It requires only to demonstrate that, in abstract, i.e. irrespective of any concrete case, potential cases involving the application of EU law are in the jurisdiction of domestic courts con-

<sup>56</sup> However, the Court’s preliminary reference judgments regarding Art. 47 of the Charter responding to the questions by a specific referring court are also binding in all similar future cases, or may hypothetically lead to legislative changes of procedural systems.

<sup>57</sup> On objective constitutional principles, as opposed to subjective rights, and on the “radiation thesis”, see R. ALEXY, *Theory of Constitutional Rights*, cit., pp. 352-354.

cerned. Art. 19, para. 1, TEU can thus serve as an autonomous basis for actions for infringement by the Commission. Arguably, also a national court could invoke Art. 19, para. 1, TEU to ask the Court of Justice about the independence of another State's courts, while hearing the case regarding the mutual recognition of judicial decisions.<sup>58</sup>

The way the Court of Justice interpreted the scope of application of Art. 19, para. 1, TEU finds also support in teleological considerations. Effective judicial protection through judicial review plays in the EU legal order a two-fold function: subjective and objective. As concerns the subjective function, it ensures the legal protection of rights and freedoms guaranteed to individuals by EU law. Judicial independence is not a matter of the judge's privilege but an aspect of the citizen's right to have her case settled objectively and impartially. As concerns the objective function, effective judicial protection enables the effective enforcement of EU provisions and their uniform interpretation in national legal orders. By accepting to review the independence of national courts, the Court of Justice secures the conditions for fulfilling both functions of effective judicial protection.<sup>59</sup> Not only does the Court thus protect the rights and freedoms of EU citizens but also what it has traditionally called the "autonomy" of EU law.<sup>60</sup> As the Court has recalled in its recent *Achmea* judgment, the Member States are obliged to ensure in their respective territories the uniform and consistent application of EU law. In accordance with Art. 19, para. 1, TEU, it is for the national courts and the Court of Justice to ensure the full application of EU law in all Member States and to ensure judicial protection of the rights of individuals under that law. The keystone of the judicial as thus conceived is the preliminary ruling procedure.<sup>61</sup> In other words, only by dint of the cooperation between independent domestic judges, willing to make preliminary references, can the Court of Justice effectively fulfil its mandate, which is to maintain the uniform application of EU law across the Member States.<sup>62</sup> By impairing the independence of their own courts, Member States automatically compromise the Court of Justice's ability to receive preliminary references.

The Court was therefore right to assert its jurisdiction, under Art. 19, para. 1, TEU, to review the Portuguese provisions on the remuneration of judges. Art. 19, para. 1, TEU allowed the Court to overcome the limitations inherent in Arts 47 and 51 of the Charter and

<sup>58</sup> See judgment of the Irish High Court of 12 March 2018, Record No. 2013 EXT 295, 2014 EXT 8, 2017 EXT 291, *The Minister for Justice and Equality v Artur Celmer*, which invoked however Art. 6 of the European Convention of Human Rights and Art. 2 TEU, and not Art. 19, para. 1, TEU. Moreover, one could even imagine a situation in which a national judge asks the Court of Justice, on the basis of Art. 19, para. 1, TEU, about the requirements of independence applicable to her own judicial system, for instance having received an appeal from a lower-level judge dismissed by a member of the executive power.

<sup>59</sup> Art. 19, para. 1, TEU, first sentence: "The Court of Justice [...] shall ensure that in the interpretation and application of the Treaties the law is observed".

<sup>60</sup> Court of Justice, judgment of 28 March 2017, case C-72/15, *Rosneft*, paras 66-75.

<sup>61</sup> Court of Justice, judgment of 6 March 2018, case C-284/16, *Achmea BV*, paras 32-37.

<sup>62</sup> Court of Justice, opinion 2/13 of 18 December 2014, paras 174-176.

the paradigm of subjective rights. The Court demonstrated an understanding of the current challenges to judicial independence in several Member States and their seriousness, which requires using the full remedial potential of EU law. In this respect, the Court's attitude resembles the approach adopted by the Grand Chamber of the European Court of Human Rights in the case *Baka v Hungary* of 2016. That case was brought by a former president of the Hungarian Supreme Court. He had been removed from office by means of an amendment to the constitution and deprived of the right to judicial review.<sup>63</sup> The European Court of Human Rights showed that traditional juristic concepts, such as subjective rights and the distinction between official and private actions, cannot freeze the dynamic interpretation of the Convention and force the European Court of Human Rights to ignore the proliferation of challenges to the rule of law in Europe. With the judgment in ASJP, the Court of Justice – just like the European Court of Human Rights in *Baka v Hungary* – embraced firmly the role of a European constitutional court.<sup>64</sup>

#### IV. ENFORCING THE RULE OF LAW TOWARDS EU MEMBER STATES

Undoubtedly, the ASJP judgment underscores the potential of EU law to consolidate and defend the rule of law structures in EU Member States. It proves that the Court is determined to take the rule of law seriously. Arguably, this is not the first reminder. The Court's determination to defend the rule of law was already observed within the infringement proceedings against Poland regarding the Białowieża Forest.<sup>65</sup> The Court showed readiness to impose under Art. 279 TFEU, for the first time, a periodic penalty payment on a Member State that had failed to comply with the Court's interim measure. The Court relied in this respect on the rule of law value enshrined in Art. 2 TEU.<sup>66</sup>

The ASJP judgment should also serve as a reminder to the Commission about its duties as the guardian of the Treaties and, consequently, the guardian of the rule of law. Since Art. 19, para. 1, TEU provides for an objective principle of effective judicial protection binding upon the Member States, it can be enforced by means of infringement proceedings autonomously, i.e. without the Commission having to rely on other, more precise EU provisions. As observed by Pech and Kochenov, the main deficiency of infringement proceedings lies in the approach of the Commission.<sup>67</sup> It has hitherto interpreted its powers under Art. 258 TFEU as confined to areas where specific EU provisions

<sup>63</sup> European Court of Human Rights, judgment of 23 June 2016, no. 20261/12, *Baka v Hungary*.

<sup>64</sup> See, European Court of Human Rights, judgment of 23 June 2016, no. 20261/12, *Baka v Hungary*, joint concurring opinion of judges Pinto de Albuquerque and Dedov, p. 90.

<sup>65</sup> D. SARMIENTO, *Provisional (and Extraordinary) Measures in the Name of the Rule of Law*, in *Verfassungsblog*, 24 November 2017, [verfassungsblog.de](http://verfassungsblog.de).

<sup>66</sup> Court of Justice, order of 20 November 2017, case C-441/17 R, *Commission v Poland*, paras 102-104.

<sup>67</sup> D. KOCHENOV, L. PECH, *Better Late than Never?*, cit.

have been breached by a Member State.<sup>68</sup> The ASJP judgment has proven the Commission to be wrong. It has confirmed that Art. 19, para. 1, TEU operationalises the rule of law value enshrined in Art. 2 TEU and gives it the form of a perfectly justiciable legal norm. Hence, the Commission can now be sure that it has at its disposal a potentially effective legal tool that it can use to consolidate and defend the rule of law structures at the national level. Whether the Commission, a guardian of the rule of law, will successfully use this tool depends now largely on its political will.

The Court of Justice will have to deal with the remaining part of the Athena's dilemma in future cases regarding the controversial "reform" of the Polish judicial system.<sup>69</sup> Will the Court, like Athena, prescribe the standards of judicial independence and fair trial, embracing the role of the rule of law enforcer? If so, how will it appease enraged governments and how will the EU institutions ensure the effectiveness of the judgment? Will the threat of financial sanctions under Art. 260 TFEU suffice? In "Eumenides", Athena chose instead the strategy of persuasion and inclusion. In fact, the Aeschylus' drama was the metaphor of political situation in Athens, where the old aristocracy, represented by the Erinyes, was losing their power to the people who, like Apollo, wished to create a new and more just legal order. The Aeschylus's message was that, despite inevitable changes, the rising people must convince the old aristocracy that the latter still have a place in the common *polis*.<sup>70</sup>

<sup>68</sup> Communication COM(2014) 158 final of 11 March 2014 from the Commission to the European Parliament and the Council, *A New Framework to Strengthen the Rule of Law*, p. 5.

<sup>69</sup> Rule of Law: European Commission acts to defend judicial independence in Poland, European Commission press release of 20 December 2017. See also, Court of Justice, case C-216/18 PPU, *Minister for Justice and Equality (Défaillances du système judiciaire)*, still pending.

<sup>70</sup> C. MEIER, *The Greek Discovery of Politics*, cit.

