The Role of the Court of Justice of the EU in Transition 2.0

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I. Introduction

Backsliding towards illiberal regimes is hardly an exclusively European phenomenon.[2] If anything, it may have appeared, until recently, the opposite, when looking at the general track record of the first 50 years of EU integration and its success in fulfilling its promise of keeping the Member States in peace — at least amongst themselves.[3] The last decade has however swept away any self-congratulatory temptation in the assessment of the political performance of the European Union. Several Member States are embarked on profound and long-lasting rule of law crises,[4] and EU institutional action to prevent and overturn this process has so far proven to be

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2 I.a. Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (New York: Crown Publishers 2018).

3 Nobel Peace Prize Lecture on behalf of the European Union, Herman Van Rompuy, President of the European Council and José Manuel Durão Barroso, President of the European Commission, Oslo, 10 December 2012, 'From war to peace: a European tale', https://www.consilium.europa.eu/media/26207/134126.pdf.

4 Among the very vast literature, i.a. Armin von Bogdandy and Pal Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Oxford: Hart Publishing 2015); Armin von Bogdandy, Piotr Bogdanowicz, Iris Canor, Christoph Grabenwarter, Maciej Taborowski and Matthias

insufficient and ineffective. However, underneath the critical state of mind towards the role of the EU in this crisis which has often been depicted as 'too little, too late'– there is an undercurrent of tectonic changes which have affected the understanding of the legal structure of the EU itself. The rule of law crisis has not only consolidated the role of the Court of Justice as a constitutional court, but it has also transformed the role of EU law and, in particular, of the foundational Treaties, as supra-constitutional safeguards.

The judicialisation of the rule of law crisis has provoked a breakthrough in the techniques of interpretation of the Treaties. This development has led to the groundbreaking interpretation of particular treaty provisions. The systemic transformations for the EU legal order go nevertheless beyond the isolated interpretative effects of the case-law on specific Treaty provisions: the 'rule of law case-law' has produced and consolidated a fine-tuned machinery involving the systematic interaction of several provisions of the Treaties, turning them into an EU constitutional safety net. The aim of this chapter is to dissect the different elements of this machinery and to put them back together in a context that goes beyond the ongoing rule of law crisis, in the scenario in which this project is based: that of re-transitioning to democratic standards in the Member States affected by the rule of law crisis.

For these purposes, after providing an overview of the context in which the abovementioned case-law developments have unfolded (II), this chapter will sketch some relevant elements of the 'rule of law case-law' of the Court of Justice in the field of judicial independence by looking at the interpretation of the most prominent legal tools contained in the Treaties: Articles 2 and 19 TEU and Article 267 TFEU (III). It will then focus on the resulting rule of law enforcement system operated through the judicial guarantee of the Court of Justice, which will serve as the framework in which future democratic transitions will unfold (IV). In the conclusion, it is posited that the judicial EU rule of law case-law provides for a solid and at the same time very flexible system of supranational judicial oversight for democratic transitions (V).

Schmidt (eds), *Defending Checks and Balances in EU Member States. Taking Stock of Europe's Actions* (Berlin: Springer 2021).

II. Context

The rule of law crisis and the need to protect judicial independence as an existential requirement to ensure the survival of the European project has served as an engine for the evolution of the EU legal order itself. In the recent past, it may have seemed that European integration and democratic development were parallel forward-looking processes. The structure of the EU Treaties relied somehow on this optimistic view of human progress. The tragic events that lie at the origin of the process of European integration itself make however the approach of the Treaties quite surprising: the one provision that was ever introduced to tackle the potential risk of democratic/rule of law backsliding, Article 7 TEU, did not only rely on an essentially political approach but it was also built upon the idea that regression would always be an individual process affecting an isolated Member State, therefore trapping the entire process into the unanimity requirement of all but the affected Member State.[5] The obvious way around the unanimity requirement – the joint activation of Article 7 TEU for several Member States simultaneously affected by a situation of Rule of Law backsliding[6] – has never been put in practice.

As a result, in spite of the potential of Article 7 TEU to offer an avenue for constitutional enforcement, the political practice has turned Article 7 TEU into a virtually useless legal provision,[7] being supplanted by a massive

5 On the negotiation of the different elements of that provision, Wojciech Sadurski, 'Adding Bite to a Bark: The Story of Article 7, EU Enlargement, and Jörg Haider', Columbia Journal of European Law, 16(3), (2010), 385–426.

6 Dimitry Kochenov, 'Busting the Myths Nuclear: A Commentary on Article 7 TEU', *EUI Working Paper* LAW 2017/10.

7 The 'preventive phase' of Article 7(1) TEU has been activated twice, but the Council has failed to follow up. See the Commission's reasoned proposal in accordance with Article 7(1) TEU: Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, COM(2017) 835 final and the Resolution of the European Parliament of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) TEU, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded, P8TA(2018)0340.

reliance in soft-law,[8] only recently complemented by the legislature through the so-called 'Rule of Law conditionality' Regulation.[9]

In turn, the failure of political institutions to enforce Article 7 TEU and the subsequent 'softening' of the approach towards rule of law violations has placed a burden on the legal system and more particularly, onto its ultimate judicial guardian — the Court of Justice of the EU. As it is well known, the Court of Justice took up the challenge in *Associação Sindical dos Juízes Portugueses* (*ASJP*), a case unrelated to the rule of law litigation,[10] but in which the Court laid the ground for its own jurisdiction, in order to be able to address in the near future the serious situation affecting the independences of the judiciary in other Member States, namely Poland. Barely a month after *ASJP* was rendered, the Commission started the first infringement case against Poland,[11] and the first preliminary ruling from a national court concerning judicial independence in Poland was sent to the Court.[12] Polish Courts followed shortly thereafter.[13]

The judicialisation of the rule of law crisis is one of the most significant developments in the evolution of the EU legal system in the last decades, and undoubtedly, one of the events that have more clearly contributed to

8 See, i.a., on the institutional approach, Laurent Pech, 'The Rule of Law in the EU: The Evolution of the Treaty Framework and Rule of Law Toolbox', Reconnect Working Pape*r* 7 (2020).

9 Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ 2000 L 433I/1.

10 ECJ, *ASJP*, judgment of 27 February 2018, case no. C-64/16, ECLI:EU:C:2018:117.

11 ECJ, *Commission v Poland (Independence of ordinary courts*), judgment of 5 November 2019, case no. C-192/18, ECLI:EU:C:2019:924, followed by ECJ *Commission v Poland (Independence of the Supreme Court*, judgment of 24 June 2019, C-619/18, ECLI:EU:C:2019:531 and ECJ *Commission v Poland (Disciplinary regime for judges*), judgment of 15 July 2021, case no. C-791/19, ECLI:EU:C:2021:596). See also ECJ, *Commission v Poland,* Opinion of AG Collins of 15 December 2022, case no. C-204/21, ECLI:EU:C:2021991.

12 ECJ, *Minister for Justice and Equality (Deficiencies in the system of justice)*, judgment of 25 July 2018, case no. C-216/18 PPU, ECLI:EU:C:2018:586.

13 i.a., ECJ, *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, judgment of 19 November 2019, cases no. C-585/18, C-624/18 and C-625/18, ECLI.EU:C:2019:982. Later followed by ECJ, *A.B. and Others (Appointment of judges to the Supreme Court)* judgment of 2 March 2021, case no. C-824/18, ECLI:EU:C:2021:153; *Commission v Poland (Disciplinary regime for judges),* judgment of 15 July 2021, case no. C-791/19, ECLI:EU:C:2021:596), ECJ, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, judgment of 6 October 2021, case no. C-487/19, ECLI:EU:C:2021:798.

the consolidation of the EU Treaties as the *charte constitutionnelle d'une Union de droit*.

The legal tools available to undertake this task have been found in the Treaties, outside the legal/political devices designed to tackle potential democratic backsliding. After all, Article 7 TEU is not the only instrument that the Treaties had envisaged to successfully confront a deviation from democratic and rule of law standards.[14] Other horizontal provisions of general nature included in the first part of the TEU have been put to work as operative parameters of legality in the framework of the control of national legislation and practices. Following a longstanding claim put forward by part of the doctrine,[15] Article 19 TEU, together with Article 2 TEU — up to now provisions that skeptical observers would have taken for general provisions with little operational potential — have served as the main vehicles for the articulation and enforcement of autonomous EU standards for the protection of the rule of law. The joint use of both provisions in the existing case law begs however today still the question as to whether Article 2 TEU has an autonomous enforceable value.[16]

Thanks to the development of a growing precedent on the interpretation of rule of law standards by the Court of Justice, (re)transitioning back to acceptable democratic standards in the Member States affected by the rule of law crisis is therefore not only mediated through EU *integration*, but more particularly, through EU *law*. The judicialisation of the rule of law

14 Barbara Grabowska-Moroz, 'The Systemic Implications of the Supranational Legal Order for the Practice of the Rule of Law', Hague Journal on the Rule of Law 4 (2022), 331–347 (336).

15 On this debate, i.a., Armin von Bogdandy et al., 'Reverse Solange – Protecting the Essence of Fundamental Rights Against EU Member States', CML Rev 49 (2012), 489; Armin von Bogdandy et al., 'A European Response to Domestic Constitutional Crisis: Advancing the Reverse Solange Doctrine' in: von Bogdandy and Sonnevend (n. 4); Armin von Bogdandy, Carlino Antpöhler and Michael Ioannidis, 'Protecting EU Values: Reverse Solange and the Rule of Law Framework' in: Andras Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values* (Oxford: Oxford University Press 2017); Kim Lane Scheppele, Dimitry Kochenov and Barbara Grabowska-Moroz, 'EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union' Yearbook of European Law 39 (2020), 3–121.

16 Luke Dimitrios Spieker, 'Berlaymont is back: The Commission invokes Article 2 TEU as self-standing plea in infringement proceedings over Hungarian LGBTIQ rights violations', EU Law Live, 22nd February 2023. At length, Luke Dimitrios Spieker, *EU Values Before the Court of Justice* (Oxford: Oxford University Press 2023, forthcoming).

crisis and the ensuing case law from the Court of Justice means, in quite precise terms, that democratic recovery, at the very least, to the extent that it affects the judiciary, falls *within the scope of EU law*, in the classic understanding of the expression: the Court of Justice enjoys jurisdiction, and the Treaties offer a substantive legal yardstick to assess transitional developments.

III. Rediscovering the Treaties Through the Judicial Independence Case-Law

From the day of its delivery, it was obvious that *Associação Sindical dos Juízes Portugueses* was a pronouncement of wide repercussions. The impact of the case has proven nevertheless even broader than it may have appeared at the outset. That ruling already contains the 'DNA sequence' of the judicial approach to current and future threats to judicial independence (and potentially, other rule of law components) in the Member States. First and foremost, it proclaimed Article 19 TEU as a provision with broad material content and confirmed its 'invokability', turning it into the flagship of the judicial enforceability of the values enshrined in Article 2 TEU (1). Second, it enabled national jurisdictions to become the main characters in the protection of their own independence by admitting preliminary rulings as an admissible procedural avenue for bringing institutional national shortcomings before EU Courts (2).

1. Articles 2 and 19 TEU

The second subparagraph of Article 19(1) TEU, newly inserted by the Lisbon Treaty, reads: 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.' The provision first made an appearance in the draft Treaty — Establishing a Constitution for Europe. When the European Convention discussed this paragraph, the common understanding was that this was nothing revolutionary, but rather, a codification of the obligation of effective judicial protection already consolidated by decades of case-law.[17] The second subpara-

17 In particular, Oral presentation by M. Gil Carlos Rodríguez Iglesias, President of the Court of Justice of the European Communities, to the discussion circle on the Court of Justice on 17 February 2003, CONV 572/03, para 4, stating that 'Lastly, no specific

graph of Article 19(1) TEU seems to have entered the Treaties without much discussion, as a seemingly toothless provision, deprived of any innovative content. The second subparagraph of Article 19(1) TEU was however much more than just a reinstatement of preexisting case-law. It amounted to the constitutionalisation of the crucial role of national courts as the ordinary courts at the basis of the entire EU legal system.[18] Similarly to Article 20 TFEU[19] — establishing EU citizenship — the second subparagraph of Article 19(1) TEU may have been perceived as a mere symbolic exercise, but it was destined to be much more than just that.[20]

Since 2009, Article 19 TEU was cited several times in the case law, essentially as supporting argument for enhancing judicial protection by EU Courts.[21] Yet, the seminal case *ASJP* took the second subparagraph of Article 19(1) TEU to a higher level, by way of what could be described as a 'rediscovery' of the provision.[22]

The story is so well known that deserves little introduction.[23] It suffices here to recall that, in a case unrelated to the rule of law crisis, the Court

comment is called for from the Court on the suggestion that the Member States' obligation to ensure that there are effective legal remedies before their own courts – an obligation recognised in the case-law, should be written into the Treaty.'

18 In depth on this discussion, Sacha Prechal, 'Article 19 TEU and National Courts: A New Role for the Principle of Effective Judicial Protection?' in: Matteo Bonelli, Mariolina Eliantonio and Giulia Gentile (eds), *Article 47 of the EU Charter and Effective Judicial Protection*, vol. 1 (Oxford: Hard Publishing 2022), 11–25. Forecasting the potential of Article 19 TEU: Anthony Arnull 'The Principle of Effective Judicial Protection in EU Law: an Unruly Horse', European Law Review 36 (2011), 51–70.

19 For an account of the initial literature, who saw the introduction of EU citizenship as symbolic or decorative, Dora Kostakopoulou, 'The Evolution of European Union Citizenship', European Political Sciences 7 (2008), 285–295.

20 Curiously, the fate of Article 19(1) TEU and of Article 20 TFEU was similar, in the sense that both turned out to become provisions closely related to fundamental rights that emancipated from the scope of application of the Charter. On this parallelism: Aida Torres Pérez 'From Portugal to Poland: The Court of Justice of the European Union as watchdog of judicial independence', Maastricht Journal of European and Comparative Law 27 (2020), 105–119.

21 On this discussion, Matteo Bonelli 'Effective Judicial Protection in EU Law: An evolving principle of a constitutional nature', Review of European Administrative Law 12 (2019), 35–62, 47.

22 Manuel Campos Sánchez-Bordona, 'La protección de la independencia judicial en el derecho de la Unión Europea', Revista de Derecho Comunitario Europeo 65 (2020), 11–31.

23 Among the many case notes: Matteo Bonelli and Monica Claes, 'Judicial Serendipity: How Portuguese Judges came to the Rescue of the Polish Judiciary', European Constitutional Law Review (14) 2018, 622–643; Laurent Pech and Sébastien Platon,

planted the seed for its own jurisdiction in the situation of Poland, by interpreting the second subparagraph of Article 19(1) TEU as a self-standing parameter of control for national rules connected to the independence of the judiciary, lacking any other connection with EU law. Significantly, the case marked the transition from a hands-off approach to the scope of EU rights in the economic crisis[24] to an all-hands-in approach in the rule of law crisis, using the occasion provided through the last attempt of Portuguese Courts to get an answer on the scope of application of EU law regarding austerity measures to plant the seed for an ambitions rule of law case-law. The interpretation of the second subparagraph of Article 19(1) TEU in the *ASJP* case is, therefore, a collateral effect of the strict interpretation of Article 51(1) of the Charter in the context of the financial crisis. Turning a case about austerity into a case exclusively related to judicial independence, the Court changed the news cycle, considerably expanding the reach and scope of EU law.[25]

The ruling in *ASJP* marked, more particularly, three important developments that are relevant for the purposes of this chapter.

'Judicial Independence under Threat: The Court of Justice to the Rescue in the ASJP case', Common Market Law Review 55 (2018), 1827–1854; María José García-Valdecasas Dorrego, 'El Tribunal de Justicia, centinela de la independencia judicial desde la sentencia Associação Sindical dos Juízes Portugueses (ASJP)', Revista española de Derecho Europeo (72) 2019, 75–96; Michal Krawesk, 'Associação Sindical dos Juízes Portugueses:The Court of Justice and Athena's Dilemma', European Papers 3 (2018), 395407; Aida Torres Pérez, 'From Portugal to Poland: the Court of Justice of the European Union as watchdog of judicial independence', Maastricht Journal of European and Comparative Law 27 (2020), 105–119.

24 ECJ, *Sindicato dos Bancários do Norte e.a*, order of 7 March 2013, case no. C-128/12, ECLI:EU:C:2013:149; ECJ *Sindicato Nacional dos Profissionais de Seguros e Afins,* order of 26 June 2014, case no. C-264/12, ECLI:EU:C:2014:2036; ECJ *Sindicato Nacional dos Profissionais de Seguros e Afins*, order of 21 October 2014, case no. C-665/13, ECLI:EU:C:2014:2327. On this case law, Gonçalo De Almeida Ribeiro, and Patricia Fragoso Martins, 'Portugal: Lukewarm Engagement with the Charter' in: Michal Bobek and Jeremias Adams-Prassl, *The EU Charter of Fundamental Rights in the Member States* (Oxford: Hart Publishing 2020). See, however, the more recent judgement ECJ, *BPC Lux 2 Sàrl* of 5 May 2022, case no. C-83/20, ECLI:EU:C:2022:347 and the commentary of Martinho Lucas Pires, 'Unforgivable Late Admissions: The Court of Justice Decides on Bank resolution in *BPC Lux 2 Sàrl* (C-83/20)', EU Law Live, 12 May 2022.

25 In this regard, Matteo Bonelli 'Effective Judicial Protection in EU Law: An Evolving Principle of a Constitutional Nature', Review of European Administrative Law 12 (2019), 35–62 (48).

First, the Court broke free from the scope of the Charter, making of Article 19(1) TEU a provision of general application for the Member States without the need of a secondary triggering element.[26] *ASJP* made clear that the jurisdiction of the Court was *only* tied to the fact that the Court of Auditors, the independence of which was the object of the case, was liable to rule 'as a court or tribunal' on questions that *may* concern the application or interpretation of EU Law.[27] This broad scope of application was confirmed in subsequent case law.[28] In the words of Advocate General Bobek: 'Since it would be rather difficult to find a national court or tribunal which could not, by definition, ever be called upon to rule on matters of EU law, it would appear that the second subparagraph of Article 19(1) TEU is limitless, both *institutionally* (with regard to all courts, or even bodies, which potentially apply EU law), as well as *substantively*.'[29] By breaking free Article 19(1) TEU from any link to EU law, the debate on the problematic relationship between effectiveness/effective judicial protection and the autonomy of the Member States reaches a whole new level. Indeed, the debate[30] on the existence and extent of a *domain reservé* for the Member States and their procedural rules receives closure here: there is none, nowhere, when it comes to judicial independence.

Second, the *ASJP* case thickened the interpretation of the second subparagraph of Article 19(1) TEU with a very developed legal content, provid-

26 On the notion of 'triggers' with regard to the applicability of the Charter: Daniel Sarmiento, 'Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe', Common Market Law Review 50 (2013), 1267–1304.

27 ECJ, *ASJP* (n. 10), para. 39.

28 ECJ, *Commission* v *Poland (Independence of the Supreme Court)* (n. 11), para. 51; ECJ, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (n. 13), para. 83; ECJ, *Miasto Łowicz and Prokurator Generalny*, judgment of 26 March 2020, cases no. C-558/18 and C-563/18, ECLI:EU:C:2020:234, para. 34.

29 Opinion of 23 September 2020 *Asociația 'Forumul Judecătorilor din România' and Others* (C-83/19, C-127/19, C-195/19, C-291/19 and C-355/19, ECLI:EU:C:2020:746, point 207).

30 I.a., Constantinos N. Kakouris, 'Do the Member States Posses Judicial Procedural "Autonomy"?', Common Market Law Review 34 (1997), 1389–1412; Michal Bobek, 'Why there is no Principle of Procedural Autonomy of the Member States' in: Bruno de Witte and Hans W. Micklitz (eds), *The European Court of Justice and the Autonomy of the Member States* (Cambridge: Intersentia 2012), 305–324 or Daniel Halberstam, 'Understanding National Remedies and the Principle of National Procedural Autonomy: A Constitutional Approach', Cambridge Yearbook of European Legal Studies 23 (2021), 128–158.

ing it with the same legal content of Article 47 of the Charter — by far, and similarly as to its ECHR counterpart, the most litigated provision of the Charter.[31] The idea of 'absorption' of the content of Article 47 of the Charter into Article 19(1) TEU that was latent in *ASJP* was consistently confirmed by the case law issued thereafter.[32] The second subparagraph of Article 19(1) TEU has become the first clear constitutional clause for general 'incorporation' of a Charter right with regard to the Member States.[33]

Third, the *ASPJ* judgment put forward not only an innovative interpretation of the second subparagraph of Article 19(1) TEU, but also had important methodological consequences, as it created an entire new avenue to enforce judicially different elements of the rule of law principle by EU Courts: the 'pairing-method', which consists in using Article 2 TEU together with a 'concretising' provision – the second subparagraph of Article 19(1) TEU in this case. The possibilities to recreate this 'pairing' with other 'concretising' provisions of the Treaty has not only been immediately advanced by scholarship (identifying the clear potential of Article 10(3)TEU and the democratic principle),[34] but by the Court itself in its response to the constitutional challenge mounted by Poland and Hungary against the rule of law conditionality Regulation, by stating that 'that Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which, as noted in paragraph 127 above, are an integral part of the very identity of the European Union as a common legal order, values which are given

31 ECJ, *ASJP* (n. 10), paras. 35 and 41. See, generally Herwig Hofmann, 'Article 47' in: Steve Peers et al. (eds), *The EU Charter of Fundamental Rights: A Commentary* (Oxford: Hart Publishing 2014), and for its national application, Kathleen Gutman, 'Article 47: The Right to an Effective Remedy and to a Fair Trial' in: Bobek and Addams-Prassl (note 24).

32 See, for the first cases. ECJ, *Commission v Poland (Independence of the Supreme Court)* (n. 11) para. 49; and ECJ, *Commission v Poland (Independence of Ordinary Courts*) (n. 11), para. 100 and the many other preliminary references thereafter.

33 See on the parallel with the doctrine of incorporation of the Federal Bill of Rights through the due process clause of the Fourteenth Amendment of the US Constitution, Aida Torres Pérez, 'Rights and Powers in the European Union: Towards a Charter that is Fully Applicable to the Member States?', Cambridge Yearbook of European Legal Studies 22 (2020), 279–300.

34 See the chapter by Pál Sonnenfeld in this volume, as well as John Cotter 'To Everything there is a Season: Instrumentalising Article 10 TEU to Exclude Undemocratic Member State Representatives from the European Council and the Council', European Law Review 46 (2021), 69–84.

concrete expression in principles containing legally binding obligations for the Member States'.[35]

The next crucial development came later in the *AB* case, where the Court expressly confirmed that the second subparagraph of Article 19(1) TEU was, moreover, endowed with direct effect.[36] In that way, the rule of law crisis has also influenced the approach of the case law towards the direct effect of Treaty provisions and general principles. It has confirmed that principles and primary law provisions can fulfil the conditions of being sufficiently precise and unconditional 'by reference' to connected provisions and their interpretation,[37] in that case, the principle of effective judicial protection as enshrined in Article 47 of the Charter and its interpretation by the Court.[38] The consolidation of the direct effect of a component of the rule of law principle is not a development isolated to Article 19 TEU. In the Romanian Rule of Law litigation, direct effect was expanded to the benchmarks in the annex of the MCV Decision,[39] which also contained very vague references to rule of law elements and could have been easily considered as mere programmatic provisions.[40]

35 ECJ, *Hungary v Parliament and Council*, judgment of 16 February 2022, case no. C-156/21, ECLI:EU:C:2022:97, para. 232 and ECJ, *Poland v Parliament and Council*, judgment of 16 February 2022, case no. C-157/21, ECLI:EU:C:2022:98, para. 264.

36 ECJ, *A.B. and Others (Appointment of judges to the Supreme Court)* (n. 13).

37 See, e.g., regarding the direct effect of the principle of proportionality, ECJ, Opinion *NE v Bezirkshauptmannschaft Hartberg-Fürstenfeld*, Opinion of Advocate General Bobek of 23 September 2021, case no. C-205/20, ECLI:EU:2021:759.

38 Article 47 of the Charter had already been declared directly effective in judgments of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, para. 78, and of 29 July 2019, *Torubarov*, C-556/17, EU:C:2019:626, para. 56.

39 Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption (OJ 2006 L 354, 56).

40 ECJ, *Asociația 'Forumul Judecătorilor din România' and Others*, judgment of 18 May 2021, cases no. C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, ECLI:EU:C:2021:393 and ECJ, *Euro Box Promotion and Others,* judgment of 21 December 2021, cases no. C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, ECLI:EU:C:2021:1034. Some of those benchmarks are: to 'ensure a more transparent, and efficient judicial process notably by enhancing the capacity and accountability of the [Supreme Council of the Judiciary] Report and monitor the impact of the new civil and penal procedures codes' or 'building on progress already made, continue to conduct professional, non-partisan investigations into allegations of high-level corruption' and 'take further measures to prevent and fight against corruption, in particular within the local government.'

The declaration of the second subparagraph of Article 19(1) TEU as a directly effective provision is a development the constitutional relevance of which can hardly be overstated: it is as revolutionary as the declaration of its role as a self-standing parameter of scrutiny for Member States' action. Without direct effect, the transformative potential of the second subparagraph of Article 19(1) TEU would have been very limited. Direct effect, which is essentially a national-court-empowering tool, is the key development in the transformative role of the court's case law, by giving the key to national courts for the disapplication of national provisions that conflict with EU standards related to judicial independence. What is more, one of the outrageous episodes of judicial independence infringements has led the Court for the first time to go beyond the mandate of disapplication to instruct a referring court to consider a national ruling null and void.[41] Even though the scope of this remedy remains to be clarified beyond the circumstances of the particular case,[42] it is apparent that the rule of law litigation has reinvigorated the interpretation of the primacy principle.[43]

2. National courts as enforcers of judicial independence – Article 267 TFEU

The landmark ruling *ASJP* is also at the origin of the structure of the judicial enforcement strategy for the protection of the rule of law. First, by developing the material meaning of Article 19(1) TEU as a legal rule and providing it with the function of a parameter of the legality of national acts, the Court of Justice provided the Commission (and arguably, other Member States),[44] with a tool to launch the EU law enforcement mechanism by excellence: infringement proceedings. By doing so, the Court saved the

41 ECJ, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, (n. 13), para. 160.

42 See on the ongoing debate the chapter by Maciej Taborowski in this volume as well as Michael Dougan, 'The Primacy of Union Law over Incompatible National Measures: Beyond Disapplication and Towards a Remedy of Nullity?', Common Market Law Review 59 (2022), 1301–1332; and Rafał Mańko and Przemysław Tacik, 'Sententia non Existens: a New Remedy under EU Law? -Case C-487/19, Waldemar Żurek (W. Ż.)', Common Market Law Review 59 (2022), 1169–1194.

43 See, in particular, ECJ, *RS*, judgment of 22 February 2022, case no. C-430/21, ECLI:EU:C:2022:99.

44 Pointing at the potential role of Article 259 TFEU, Dimitry Kochenov, 'Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool,' Hague Journal on the Rule of Law 7 (2015),

Commission more than a headache trying to build its infringement cases on solid or more 'traditional' ground.[45] Once the Court had made clear the enforceable nature of the second subparagraph of Article 19(1) TEU, it has ever since remained true to the promise of *ASJP*, declaring the infringement of that provision repeatedly.[46]

Second, *ASJP* also confirmed the crucial relevance in the field of the rule of law of the traditional system of 'double vigilance'[47]: enforcement of the rule of law is not only limited to infringement proceedings. That task also falls onto national courts through their function as ordinary courts of EU law, and in this context, they may raise preliminary questions to the Court of Justice.

Both procedural avenues — preliminary rulings and infringement actions — have limitations and advantages. Infringement proceedings are a privileged avenue to assess generally and in the abstract a violation of EU law through an adversarial procedure.[48] However, procedural legitimation to initiate such proceedings is monopolised by actors that operate not only under legal, but often predominantly, according to political considerations. Preliminary rulings, on the contrary, present the major drawback of being tied to a specific national case, with regard to which admissibility must be assessed.[49] Moreover, preliminary references are an indirect procedure before the Court, where the parties are only parties to national proceedings

153–174 and Guillermo Íñiguez, 'The Enemy Within? Article 259 TFEU and the EU's Rule of Law Crisis', German Law Journal 23 (2022), 1104–1120.

45 See ECJ, *Commission v Hungary*, case no C-286/12, ECLI:EU:C:2012:687, where the Court relied on Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation OJ L 303, 2.12.2000, 16. The first infringement ruling of the Court with regard to the situation of Poland and judicial independence was also partially based on that directive. ECJ *Commission* v *Poland (Independence of the Supreme Court)*, (n. 11).

46 ECJ, *Commission v Poland (Independence of ordinary courts*) (n. 11) (technically on Article 47 of the Charter), followed by judgments *Commission v Poland (Independence of the Supreme Court* (n. 11) and *Commission v Poland (Disciplinary regime for judges)*, (n. 11). See also ECJ, *Commission* v *Poland,* C-204/21 (n. 11).

47 Koen Lenaerts, 'El Tribunal de Justicia de la Unión Europea y la independencia judicial', Revista de Derecho Comunitario Europeo 72 (2022), 351–368.

48 At length, Luca Prete, *Infringement Proceedings in EU Law* (The Hague: Kluwer 2017).

49 Pointing at the technical difficulties of the preliminary ruling procedure: Pablo Martín Rodríguez, *El Estado de Derecho en la Unión Europea* (Madrid: Marcial Pons 2021), 128.

and where the Court of Justice has limited inquisitorial capacities.[50] Despite these limitations, preliminary rulings present the indubitable advantage of providing for an avenue of decentralised legal enforcement that may circumvent political inactivity, precisely guaranteed by the independent character of the national judges that raise the preliminary questions. They also guarantee, through the division of tasks between national judges and the Court of Justice, more flexibility to the latter when pointing the former towards a declaration of incompatibility.[51] Even though the eminently casuistic approach of preliminary rulings makes them very much dependent on the attitudes of the national judiciary, recent experience also shows that the cumulative effect of many preliminary rulings coming from one Member States in 'waves' may play also an important part in giving the Court sufficient elements to infer a systematic situation, as has been the case not only in Poland but also of Romania.[52]

The different nature of both procedural avenues has led some authors to express some preferences for one procedure or the other.[53] The truth is however that there is neither need nor possibility to choose between them. Once Article 19(1) TEU is interpreted as an enforceable legal provision, it must be interpreted and applied through whatever legal avenue is available.[54]

50 In this sense, Ondřej Kadlec and David Kosař, 'Romanian version of the rule of law crisis comes to the ECJ: The AFJR case is not just about the Cooperation and Verification Mechanism', Common Market Law Review 59 (2022), 1823–1852 (1843), pointing at the fact that moreover, in cases related to judicial independence, where judges are under attack, they may no longer be 'impartial thirds'.

51 On this discussion Sébastien Platon, 'Preliminary References and Rule of Law: Another Case of Mixed Signals from the Court of Justice Regarding the Independence of National Courts: Miasto Lowicz', Common Market Law Review 57(2020), 1863–1865.

52 It is particularly noticeable that how many of the Romanian cases have indeed been joined and, therefore, made possible a consideration of the 'full' picture painted by different courts in the framework of different national proceedings. ECJ, *Asociaţia 'Forumul Judecătorilor din România' and Others* (n. 41), paras 158 and 178). See also, *Euro Box Promotion and Others,* (n. 40) as well as ECJ, *RS (Effects of the decisions of a constitutional court)* (n. 43). Further cases remain pending, ECJ, *R.I. v Inspecţia Judiciară, N.L.*, Opinion of 26 January 2023, AG Collins, C-817/21, ECLI:EU:C:2023:55.

53 Sara Iglesias Sánchez, 'La independencia judicial como principio constitucional en la UE: los límites del control por el Tribunal de Justicia de la UE', Teoría y Realidad Constitucional 50 (2022), 487-516 (499).

54 See also, in the framework of annulment proceedings, General Court, *Sped-Pro v Commission*, judgment of 9 February 2022, case no. C-791/19, ECLI:EU:T:2022:67.

IV. Putting the Mix Back Together After the Rule of Law Crisis

How will the case law of the Court of Justice play out in a scenario of democratic transition? This is of course a hypothetical question that the Court itself would declare inadmissible. Indeed, the future role of the Court in such a scenario would not so much depend on itself and past case law, as on the future cases that will arrive at it. However, the existing framework laid down by the 'rule of law' case-law issued to date may help us to undertake a tentative assessment of the future performance of the EU legal framework and to elaborate on how the EU law rule of law constraints, as they have emerged in the 'judicial independence case law', will perform in a scenario of overcoming the rule of law crisis, both during the transition and once things are 'officially' back to 'normal'.

Three essential elements can be identified, which are expected to determine the role of the EU law framework that has been uncovered by recent case law. First, the Court has jurisdiction to look at the national developments, at least for what they affect the situation of national courts and their independence (1). Second, national courts have consolidated their role as 'vigilantes' even though their access to the Court is mediated through complex admissibility requirements (2). Third, the case law of the Court offers a deferential material framework towards the Member States and their institutional autonomy, but it has also made clear that EU law draws solid material red lines that both the Court of Justice and national courts will be willing to enforce (3).

1. Jurisdiction: overarching supranational judicial oversight

As noted above, ever since *Associação Sindical dos Juízes Portugueses,* there is no need for a specific connection with any other provision of EU law in order for a case to fall within the scope of application of Article 19 TEU, and therefore, to trigger the jurisdiction of the Court of Justice in a case regarding the interpretation of that provision. The second subparagraph of Article 19(1) TEU makes of the principle of effective judicial protection one self-referential legal principle of general application.

The general rule becomes, therefore, that judicial independence falls within the jurisdiction of the Court. Indeed, through this operation, the Court ensures its ultimate supervisory role: by procuring very broad jurisdiction, it ensures that it will be in a position to oversight all cases that may arrive before it. Whether the cases are admissible, or eventually, whether

a breach of material standards is found, are relegated to a further step in the examination. But the fact that jurisdiction is confirmed in a very broad manner at the initial stage, is a rather crucial element in the assessment of the future performance of the rule of law case-law. By consolidating a very broad jurisdiction, the Court places itself in a position that enables it to perform a controlling role also in the context of a situation of transitioning towards democratic standards, since jurisdiction is not tied to any kind of '*de minimis*' requirement, nor linked to the alleged systemic character of infringements or the content or type of provisions infringed.

This extremely broad approach towards jurisdiction has important advantages from a systematic point of view. It ensures a coherent approach towards all types of cases and all types of situations in the different Member States, since any test that would tie jurisdiction to a '*de minimis*' or 'systemic violation' situation would *de facto* oblige the Court to have recourse to legal prejudices or pre-conceptions. In fact, the broad jurisdiction of the Court of Justice has already been tested through several cases that have been posed before it through preliminary rulings coming from national courts, where prima facie there was not a situation of systemic rule of law backsliding. This has been the case in the Maltese case *Repubblika*,[55] but also of the German case *Land Hessen*[56] or the Austria case *Maler und Anstreicher*.[57] The latter, even if declared inadmissible by the Court, was clearly declared to fall under the jurisdiction of the Court.[58]

The broad interpretation of the scope of the second subparagraph of Article 19(1) TEU is complemented by the position of the Court with regard to the concept of 'court or tribunal' enshrined in Article 267 TFEU in the context of the rule of law crisis. A first development – *Banco Santander*[59]–

55 ECJ *Repubblika,* judgment of 20 April 2021 case no. C-896/19, ECLI:EU:C:2021:311.

56 ECJ, *Land Hessen,* judgment of 9 July 2020, case no. C-272/19, ECLI:EU:C:2020:535. See, for another pending case questioning about the compliance of the German system with the standards of Article 19 TEU, the request for a preliminary ruling send by the Landgericht Erfurt, Case C-276/20, pending.

57 ECJ, *S.A.D. Maler und Anstreicher OG*, Order of 2 July 2020, case no. C-256/19, ECLI:EU:C:2020:523, para. 40.

58 That was also the case in ECJ, *Miasto Łowicz and Prokurator Generalny* (n. 28) and ECJ, *M.F. and J.M.*, judgment of 22 March 2022, case no. C-508/19, ECLI:EU:C:2022:201, where, despite declaring the cases inadmissible, the Court confirmed its jurisdiction.

59 ECJ, *Banco de Santander*, judgment of 21 January 2020, case no. C-274/14, ECLI:EU:C:2020:17. See also ECJ *CityRail a.s.*, judgment of 3 May 2022, case no. C-453/20, ECLI:EU:C:2022:341.

lead to the impression that the interpretation of the material standards of judicial independence in the framework of its case law related to the rule of law crises would lead to a tightening of the requirements of 'independence' traditionally requested, in order for national jurisdictions to be regarded as 'courts or tribunals' for the purposes of Article 267 TFEU.

However, *Getin Noble Bank* made the Court confront the dilemma face to face: what if one of the judges whose independence raises doubts according to the rule of law case-law of the Court refers a preliminary question to the Court? Unlike the principled solution proposed by Advocate General Bobek – who argued that, for different reasons, the channels of communication through preliminary rulings should stay open[60] – the Court opted for leaving the door open in principle, but reserving itself the possibility to close it eventually by establishing a 'presumption of independence' which can be rebutted, *inter alia,* by final judicial decisions establishing that a court is not independent.[61] The next case – *L.G.* v *Krajowa Rada Sądownictwa* – pushes the Court further, since the question comes from a chamber that the European Court of Human Rights has declared as not constituting a tribunal established by law.[62] Advocate General Rantos has invited the Court to further flexibilise *Getin Noble Bank*, by considering that 'any irregularities in the appointment of the members of a judicial formation can deprive a body of the status of "independent court or tribunal" for the purposes of Article 267 TFEU only if they affect the very ability of that body to judge independently.'[63]

Considering jointly the broad interpretation of the scope of the second subparagraph of Article 19(1) TEU and the flexible interpretation of Article 267 TFEU leads to a reality in which the Court asserts jurisdiction over a very important new area of law, and, at the same time, it is able to control the potentially negative consequences of its own findings on national judicial independence over judicial dialogue. First, the case law ensures that

60 ECJ, *Getting Noble Bank*, Opinion of AG Bobek of 8 July, case no. C-132/20, ECLI:EU:C:2021:557.

61 ECJ, *Getin Noble Bank*, judgment of 29 March 2022, case no. C-132/20, ECLI:EU:C:2022:235.

62 The reference comes from the Izba Kontroli Nadzwyczajnej i Spraw Publicznych (Chamber of Extraordinary Control and Public Affairs; 'the Chamber of Extraordinary Control') of the Sąd Najwyższy (Supreme Court, Poland). See ECtHR, 8 November 2021, *Dolińska-Ficek and Ozimek v. Poland,* ECLI:CE:ECHR:2021:1108JUD004986819.

63 See ECJ, *L.G.* v *Krajowa Rada Sądownictwa*, Opinion of AG Rantos of 2 March 2023, case no. C-718/21, ECLI:EU:C:2023:150.

the Court enjoys jurisdiction over the institutional change in democratic transitions, at the very least for what concerns the standards of judicial independence. Second, not only virtually all matters related to judicial independence fall within its purview, but essentially all courts, even some of those which may not fulfil the material independence requirements, are part of the dialogue. The fact that in *Getin Nobel Bank* the Court adopted a flexible position over the impact of the criterion of independence on the concept of what is a 'court or tribunal' means in practice that, in potential transitional scenarios, the new 'old' judges (today often referred to as 'neo-judges', 'non-judges' or 'fake judges'), as long as they remain in office, will also have access to preliminary rulings to put to test the solutions that transitional or future governments may come up with, to put a remedy to the problems identified by the case-law of the Court. In such a context the upcoming judgment in *L.G. v Krajowa Rada Sądownictwa* will determine whether the possibilities of rebuttal of the presumption established in *Getin Noble Bank* are real and, therefore, likely to progressively exclude 'neo-judges' from the preliminary rulings procedure, or whether their status as partners in judicial dialogue will remain until a national transitional system is put in place in order to substitute them or ratify their status.

The oversight of a transitional process by a supranational court with full jurisdiction is quite some novelty. Whether this jurisdiction may or may not be activated remains within the realm of futuristic conjectures. However, the mere fact that such a transition will happen with a consolidated system of oversight in place with a clearly established jurisdiction, plays certainly a role in determining the leeway with which the future political elite will act, having the certainty that any national judge may raise a controversial point before the Court of Justice. The system of diffuse enforcement through preliminary rulings together with the broad jurisdiction of the Court makes of the supranational court a latent player in transitional processes, with the shadow of EU rule of law which is already performing an influential role.

2. Admissibility: selective role of national courts as 'vigilantes'

The rule of law case-law of the Court has consolidated the role of national courts in policing the admissible legal reforms which affect judicial independence. This consolidation has however come at the cost of national judges risking internal retaliation often in the form of disciplinary procedures. National judges have also not always successfully reached the Court of Justice as desired, since admissibility requirements have proven partic-

ularly convoluted in the preliminary rulings concerning judicial independence.

When *Miasto Łowicz*,[64] one of the first preliminary questions related to judicial independence presented by Polish Courts, was declared inadmissible, it was easy to jump to the conclusion that the very broad jurisdiction of the Court was going to be compensated through a strict approach towards admissibility. Admissibility could therefore play the role of gatekeeper in this new area of litigation. The fact that *Miasto Łowicz* was declared inadmissible through a Grand Chamber ruling, and after an opinion of the Advocate General, made moreover apparent that the issue of admissibility was of key importance in this new field of EU law.

The judgment in *Miasto Łowicz* was supposed to bring clarity about the applicability of the admissibility criteria in cases related to judicial independence. Cases would be admissible where they have a substantive connection to the second subparagraph of Article 19(1) TEU (e.g. in cases such as *ASJP*); where they refer to the interpretation of EU procedural law provisions; or where the question aims to resolve procedural questions in *limine litis* before being able to rule on the substance.[65] Indeed, after *Miasto Łowicz*,[66] *Maler und Anstreicher*[67] and *Prokuratura Rejonowa w Słubicach*,[68] made clear that the Court was going to police strictly the 'relevance admissibility criterion', according to which 'the question referred for a preliminary ruling must be 'necessary' to enable the referring court to 'give judgment' in the case before it'.

However, subsequent cases soon showed that things were not as easy as that. Two cases, *AK* and *Prokuratura Rejonowa w Mińsku*, made apparent that admissibility is very much dependent on the way the question is

64 ECJ, *Miasto Łowicz and Prokurator Generalny* (n. 28).

65 Ibid, paras 49 to 51.

66 ECJ, *Miasto Łowicz and Prokurator Generalny* (n. 28).

67 A case concerning the national provisions relating to the allocation of cases in Austrian Courts and the powers of court presidents, ECJ, *S.A.D. Maler und Anstreicher OG*, Order of 2 July 2020, case no. C-256/19, ECLI:EU:C:2020:523. It is debatable whether the case would have fit into the situation of a question of EU law being raised 'in *limine litis*'. The Court however considered 'the referring judge will not be able, in the dispute in the main proceedings, to rule on the question whether that case was allocated to him lawfully, since the issue of an alleged infringement of the provisions governing the allocation of cases within the referring court is not the subject of that dispute and the question of the jurisdiction of the referring judge will, in any event, be reviewed by the superior court in the event of an appeal' (para. 49).

68 ECJ Order of 6 October 2020, C-623/18, ECLI:EU:C:2020:800.

posed. This may be true about any kind of preliminary reference, indeed. But in the context of the judicial independence case law, the complexity of admissibility criteria raises to a whole new level: since the object of the preliminary questions themselves are often judicial remedies, judicial practices, or elements that appertain to the status of judges, admissibility becomes very malleable by nature. Preliminary questions concerning the independence of other courts, of the referring court, or of some of its members, can be admissible or not depending on the way in which or how it is explained to the Court of Justice, what the referring court can do with its answer: a question is admissible not only because of its material content, but because it is presented in a way that is linked to a procedural remedy the creation of which may be disputed, uncertain, or even the very object of the question.

For example, in *AK*, the question was – essentially and *inter alia* – whether in a situation where the court designated by national law is not an independent court, the referring court should disregard the national provisions and assert jurisdiction over itself.[69] Similarly, in *Prokuratura Rejonowa w Mińsku*,[70] the referring judge asked about the secondment of judges that affected her own bench, and the Court admitted the question as one that requires an answer 'in order to enable the referring court to settle a question raised in limine litis'.[71] These two cases would give the impression that any question would be admissible if the national court phrases the question in possibilistic terms, that is to say, by presenting the procedural solution or remedy that it envisages to apply as something possible or as the object of the question itself, therefore, surrendering the key of admissibility to a great extent to national courts.

Even though the Court appears to have marked the limits of this approach in *M.F. and J.M*,[72] all the above shows how the role of national courts in transitional scenarios may have been eased through a first complex and difficult era of rule of law litigation. The existence of a still convoluted but already quite developed case law on admissibility will make it possible for national courts to present their potential new questions after having had the possibility of going through a steep learning curve over the

69 ECJ, *A. K. and Others* (n. 13).

70 ECJ, *Prokuratura Rejonowa w Mińsku Mazowieckim and Others*, judgment of 16 November 2021, cases no. C-748/19 to C-754/19, ECLI:EU:C:2021:931. The issue of admissibility is explored in depth in the Opinion of AG Bobek in the case.

71 Para 49.

72 ECJ, *M.F. and J.M.* (n. 58).

past few years. Unlike in the first phase of judicialization of the rule of law crisis, national courts now have a vast methodological material to operate with, which will guide them to select and construe the 'right' questions in the 'admissible' way.

In any case, in a hypothetical future, admissibility will still play a major role. The criteria that flow from the case law, far from offering mathematical clarity, show a quite complex case-by-case approach, not always entirely foreseeable for national courts, and in constant evolution. The rather complex approach towards admissibility shows how the Court still struggles to maintain a balance between the openness to cases perceived as 'deserving', and cases where the Court should not step in. And with such a case-depending approach, given the variety and complexity of the procedural constellations through which rule of law related questions come before the Court, it is to be expected that admissibility will continue to play a variable role, helping to keep the gates half open.

Against that backdrop, even if the learning curve on admissibility may mean that admissibility will be less of an absolute gatekeeping tool for the Court, it is to be expected that judicial independence cases will reach a certain 'plateau' at the Court level, as the progressive development of case-law, as well as the multiplication of cases that move away from serious our systematic situations will make possible that rulings are rendered by smaller chambers, or even the adoption of reasoned orders on the basis of Article 99 of the rules of procedure.[73] The existence of an already well-established body of case law to which refer through smaller chamber rulings or even orders will enable the Court in the future to rationalise its intervention and 'pick its battles'.

3. EU Law and the material redlines of renewed democracies

The case law of the Court of Justice has deployed an important role in identifying and systematising European standards of judicial independence as an essential component of the rule of law principle. The cases that so far have arrived at the Court have enabled it to interpret the standards that emanate from the requirements of judicial independence with regard to

73 See, e.g. ECJ, *Corporate Commercial Bank,* order of 15 November 2022, case no. C-260/21, ECLI:EU:C:2022:881 or ECJ, *FX and others (effet des arrêts d'une Cour constitutionnelle III)*, order of 7 November 2022, cases no C-859/19, C-926/19 and C-929/19, ECLI:EU:C:2022:878.

different components of judicial organization and status, such as retirement of judges; judicial appointments; secondments; the role of judicial councils; disciplinary judicial procedures and actors involved in disciplinary proceedings; criminal and civil liability of judges; or even the composition and roles of constitutional courts.[74] This is of course not the place to analyse the vast standard-consolidation process that flows from the case law.[75] It is however noteworthy that, despite this colossal development of material standards, the Court has only found infringements of the requirements of the second subparagraph of Article 19(1) TEU in extremely serious situations which could well amount to systemic deficiencies situations, even if the Court has never put it in those terms. The Court has often resorted to cumulative approaches that would combine a complex assessment of the law, but also of the practice, and has in general demonstrated its readiness to be deferential towards the particularities of national systems, outside the situations of systemic rule of law backsliding.

Deference towards national autonomy and strict policing of red lines are the two boundaries that mark the material imprint of the rule of law case-law for democratic transitions. On the one hand, it is not to be expected that a given model of the judiciary will be imposed by EU law. On the other hand, the material boundaries that already ensue from the case law must be abided by. In a way, the existence of a well-nurtured case law on material standards, even if providing a considerable degree of flexibility to national authorities, can prove to be a benefit rather than a constraint in a transitional scenario. By providing with a legal framework and some answers about 'what not to do', EU law may help to depoliticize some elements of the transition which become settled by legal mandate at the supranational level. Case law may guide, to a certain extent, political reform and in many aspects, contains already a mandate for transition. Where the Court has already found an infringement of the second subparagraph of Article 19(1) TEU, doing nothing is just not a possibility. New developments

74 The list of all the cases, closed and pending, is available here: https://euruleoflaw.eu/rule-of-law-dashboard-new/.

75 See, e.g. Rafael Bustos Gisbert, Independencia Judicial e Integración Europea (Valencia: Tirant lo Blanch 2022) or by the same author, 'Judicial Independence in European Constitutional Law', European Constitutional Law Review 18 (2022), 591–620; or Paz Andrés Sáenz de Santamaria, 'Rule of Law and Judicial Independence in the light of the CJEU and ECtHR Case Law' in: Cristina Izquierdo Sanz, Carmen Martínez Capdefila and Magdalena Nogueira Guastavino, *Fundamental Rights Challenges: Horizontal Effectiveness, Rule of Law and Margin of National Appreciation* (Berlin: Springer 2021).

would need to ensue on several fronts where further litigation is of course not excluded, such as the effects of judgments rendered by flawed courts, the potential mechanisms for revision of rulings, the status of non-independent judgments, or a whole range of new organisational arrangements and appointment systems. That means that just keeping in place tainted judicial reforms, institutions or practices connected to the judiciary that the case-law has identified as infringing Article 19(1) TEU is not an option for a future transitional government. The extremely delicate situation in which a democratic transition will unfold may advice against a strict judicialization of new political solutions, and in fact, if the judicialization of the transition ensues, a wider leeway for political institutions is to be expected on the side of the Court of Justice. The approach taken by the Court in its rule of law case-law, by relying not only on the legal provisions but also on their practical application and on the broader legal and political context has already created a useful framework to factor in the particular and complex scenario of a transition 2.0.

V. Conclusion

The judicialisation of the rule of law crisis has consolidated both the role of the Court of Justice and national courts as protectors and interpreters of essential elements of the European rule of law through judicial dialogue. This role will not be easily put to rest with a change of circumstances, and cases will likely continue to reach the Court of Justice in a hypothetical transitional future, through the decentralised mechanism of preliminary rulings. The rule of law crisis has, therefore, contributed to the development of a new area of EU law where the jurisdiction of the Court clearly covers the entire field of judicial independence, and where some key elements of the democratic national institutional design may also be brought within its purview through future litigation.

The preliminary ruling procedure is potentially the most relevant procedural avenue in a context of democratic transition. This is due to two main reasons. First, because the case law of the Court has opted for a flexible interpretation of the concept of judicial independence with regard to the judges that may be considered a court or tribunal within the meaning of Article 267 TFEU. Second, because the evolution of the approach of the Court of Justice to the issue of admissibility has also been more flexible and in any case, national courts now dispose of very useful guidance to present

their preliminary questions in a way that is admissible. The progressive clarification of admissibility criteria is likely to play an essential role in making courts more confident in bringing judicial independence/rule of law related cases to the Court of Justice related to future reforms in the justice system, in the context of a hypothetical democratic transition.

Furthermore, the existence of an already vast body of case law on judicial independence provides invaluable guidance (and a mandate) for reform. Some of the red lines of what the EU legal order admits or existentially requires have already been laid down by the case law and may continue to be developed in the future. Despite the deference that it is to be expected from the Court of Justice, future democratic transitions will take place in quite a peculiar scenario, and for the first time in history, the hard law limits of political transition have been and will continue to be judicially established at the supranational level. National and supranational courts dispose of solid procedural and material tools offered by the EU Treaties, newly found in the legally enforceable elements of the EU rule of law principle.