ERA Forum (2019) 20:113–127
https://doi.org/10.1007/s12027-019-00551-3

ARTICLE

Judicial independence in the Member States of the Council of Europe and the EU: evaluation and action

Lorena Bachmaier Winter[1]

Published online: 26 February 2019

Abstract This article analyses some of the challenges in implementing and strengthening the principle of judicial independence at European level. It first highlights the difficulties in assessing the level of compliance with the principle of judicial independence and shows the approaches taken by the Council of Europe and the European Union. Next, it discusses some of the most recent decisions of the CJEU regarding Article 47 of the Charter and argues how infringements of the rule of law can undermine the whole principle of mutual recognition. Finally, it will be advocated that the actions taken in strengthening judicial independence need the joining of efforts of the European Union and the Council of Europe.

Keywords Judicial independence · Rule of law · European Court of Justice · Council of Europe · Mutual recognition

The present paper is mainly based on the oral presentation the author made during the ERA Conference 'The independence of judges in their judicial and social context' that took place at the *Cour de Cassation* in Paris on 14 September 2018. I want to reiterate my thanks to the organisers and participants for the fruitful event, which undoubtedly made us reflect on judicial independence which is permanently under threat. My gratitude also goes to all those judges who every day face, with courage and professionalism, the difficult task of being independent and decide only subject to the law, which act for us thus protecting democracy and the human rights of all of us.

✉ L. Bachmaier Winter
L.Bachmaier@der.ucm.es

[1] Full Professor of Law, Madrid Complutense University, Madrid, Spain

1 Introduction

Judicial independence is one of the crucial elements, if not the cornerstone, of the principle of the rule of law.[1] Its importance is beyond all discussion and this is reflected in the most important international instruments for the protection of human rights and in most of the Constitutions since the 19th century. Its objective could be summarised, following Council of Europe Rec(2010)12, paragraphs 3 and 4, like this:

> 3. 'The purpose of independence, as laid down in Article 6 of the Convention, is to guarantee every person the fundamental right to have their case decided in a fair trial, on legal grounds only and without any improper influence.'
> and,
> 4. 'The independence of individual judges is safeguarded by the independence of the judiciary as a whole. As such, it is a fundamental aspect of the rule of law.'

Judicial independence is the most important guarantee of the impartiality—both of the judiciary as a branch of power and in the specific case of litigation between two parties—and at the individual level it is only sufficiently guaranteed if each judge feels fully free to decide exclusively according to the law. The concept is easy to define, however what is more difficult is to agree on how to implement such principle so that the judiciary as a whole and every individual judge are guaranteed that independence in a real way. It is clearly not enough that their independence is recognised in legal instruments: there must also be a solid institutional framework that supports judicial independence. There are countless studies on judicial independence addressing this principle from many different points of view, such as legal theory, political science, procedural law, history, constitutional law, administrative law, or studies focused on the protection of human rights and the rule of law. My aim here is not to revisit those opinions, definitions and analysis, as this would be both, impossible and meaningless: I do not intend to reiterate what is already well known and has already been analysed in depth. Nor will I here deal with compiling or systematising the case law of the European Court of Human Rights (ECtHR),[2] and the Court of Justice of the European Union (CJEU).[3]

[1] See, for example, the United Nations Rule of Law Indicators of 2011, available at http://www.un.org/en/events/peacekeepersday/2011/publications/un_rule_of_law_indicators.pdf, or the Venice Commission Rule of Law Checklist of 2016, available at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e, inspired both in the list of elements elaborated by Lord Bingham in the Sixth David Willliams Lecture, given at Cambridge on the 16 November 2006.

[2] See, *inter alia*, *Sutter v. Switzerland*, Appl. no. 8209/78, 1 March 1979; *Campbell and Fell v. United Kingdom*, Appl. nos. 7511/76; 7743/76, 28 June 1984; *Sramek v. Austria*, Appl. no. 8790/79, 22 October 1984; *Belilos v. Switzerland*, Appl. no. 10328/83, 29 April 1988; *Langborger v. Sweden*, Appl. no.11179/84, 22 June 1989; *McGonnell v. United Kingdom*, Appl. no. 28488/95, 8 February 2000; *Pescador Valero v. Spain*, Appl. no. 62435/00, 17 June 2003; *Salov v. Ukraine*, Appl. no. 65518/01, 6 September 2005; *Stojakovic v. Austria*, Appl. no. 30003/02, 9 November 2006; *Zlinsat Spol. S.R.O. v. Bulgaria*, Appl. no. 57785/00, 10 January 2008; *M.C. and others v. Italy.* Appl. no. 5376/11, 3 September 2013; *Ramos Nunes de Carvalho e Sà v. Portugal*, Appl. nos. 55391/13, 57728/13 and 74041/13, 21 June 2016. See also *McBride* [3], p. 154 ff.

[3] For example, see cases C-503/15 *Margarit Panicello*, of 16 February 2017, EU:C:2017:126; C-271/117 PPU *Zdziaszek*, of 10 August 2017, EU:C:2017:629.

My aim is rather to highlight some of the present challenges in implementing and strengthening the principle of judicial independence at European level. First, I will start by highlighting the difficulties in assessing the level of compliance with the principle of judicial independence and show the approaches taken by the Council of Europe (CoE) and the European Union (EU). Next, I will analyse some of the most recent decisions of the CJEU on this matter that show not only what can be the future role of the CJEU in giving effect to Article 47 of the Charter, but also how the threats to judicial independence—and consequently to the rule of law—in Member States where democracy should be considered fully consolidated, can undermine the very existence of the Area of Freedom, Security and Justice. Finally, it will be advocated that the actions taken in strengthening judicial independence within Europe need the joining of efforts of all, the Members States as well as civil society, and in particular the European Union and the Council of Europe, as only by acting together the difficult task of guaranteeing judicial independence which is constantly under threat can be achieved. However, this article will only give an outline of some of the challenges to protect judicial independence in the Member States of the Council of Europe and the European Union.

2 The protection of the judicial independence in the Council of Europe and European Union Member States

The right to an independent and impartial judge pre-established by law is enshrined in Article 6.1 of the European Convention on Human Rights (ECHR), as an element of the principles of a fair trial:

> '1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

It is also mentioned in Article 47(2) of the Charter of Fundamental Rights of the European Union:

> 'Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.'

Furthermore, Article 52.3 of the EU Charter states:

> 'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.'[4]

Therefore, the system of protection of fundamental rights within the EU is integrated with that of the ECHR and for avoiding undesired interferences between the two Courts, in its landmark judgment of 2005 in *Bosphorus v. Ireland*[5] the ECtHR established the so-called 'equivalence theory', later known as the 'Bosphorus doctrine':

[4] And as Art. 6.3 TEU states: 'Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.'

[5] *Bosphorus v. Ireland*, Appl. no. 45036/98, 30 June 2005.

upon the presumption that the CJEU grants fundamental rights a protection equivalent to that ensured by the ECHR, the Strasbourg Court is dispensed from exercising its control on violations of human rights in matters also falling within the competence of the CJEU.[6]

Within this framework, the level of protection granted by the EU Charter and by the ECHR to the fundamental right to an independent judge should be the same and the approach of both European Courts should be, if not identical, almost identical, and at least aligned. However, as it is known, already the scope of application of the EU Charter and the ECHR is not the same, as the provisions of the Charter, following Article 51(1), are applicable *only when implementing Union law*.[7]

Moreover, despite sharing the same values and principles and having very similar constitutional safeguards, the level of implementation of judicial independence varies greatly between different countries, both among the Member States of the EU, as well as compared to other non-EU Member States of the Council of Europe. Although the institutional framework of the EU should lead to a more solid level of guarantees, the truth is that there are also EU Member States where judicial independence might be at risk, as the recent reforms in Poland show.

Regarding the question if there is a visible divergence in the level of protection of judicial independence between EU Member States and non-EU CoE Member States, the answer would require first to agree on a system for measuring the level of judicial independence in practice.[8] And once the same assessment methodology based on the same indicators had been applied in all those States, a comparison between the results in the Council of Europe EU Member States could be confronted to the results obtained in non EU CoE Member States. Nevertheless, as I will try to explain next, assessing compliance with the principle of judicial independence is fraught with difficulties, and making valid comparisons between the EU and non-EU Member States also presents many hurdles.

2.1 The difficulties in assessing judicial independence

In the framework of the Council of Europe, the CEPEJ[9] evaluates the judicial systems focusing not only on their efficiency, but also on their quality and effectiveness.[10] However, the evaluation does not aim at providing an assessment of the level of inde-

[6] See, for example, *Kostoris* [2], pp. 69 ff. As this author states, this was a political choice for not hindering the process of European Union integration (p. 71).

[7] Art. 51(1) EU Charter of Fundamental Rights: 'The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.'

[8] Checking whether a given legal framework complies with the principle of judicial independence and provides for the necessary safeguards is usually not be very difficult, as there is general agreement on the standards that are to be followed, as set out in the Council of Europe Recommendation (2010)12 'Judges: independence, efficiency and responsibilities' adopted by the Committee of Ministers of the Council of Europe on 17 November 2010, on the proposal of the European Committee on Legal Cooperation (CDCJ). However, establishing to what extent the judicial independence is safeguarded in practice is something quite different and by far more complex.

[9] Council of Europe Commission for the Evaluation of the Efficiency of Justice (CEPEJ).

[10] The CEPEJ was set up by the Committee of Ministers of the Council of Europe in September 2002, and is entrusted primarily with proposing concrete solutions suitable for use by Council of Europe Member

pendence of the justice system of each of the Member States. The data are provided by the States themselves, and the evaluation deals mainly with the number of judges and other professionals active in the justice system, budgetary issues, efficiency measured in terms of clearance rate and disposition time, etc. But it also addresses some questions that are relevant for judicial independence, as for example, whether judges are recruited for a permanent term or the prohibition of the transfer of judges to other positions without their consent.[11]

Nevertheless, CEPEJ is not a tool for measuring judicial independence, not only because the data are sent by the State authorities themselves but because that is not the main objective of the exercise. The truth is that measuring the degree of judicial independence in a specific State is not easy, there is no uniform methodology and assessment requires more than quantitative and qualitative data. Even once they are collected, the validation of those data lacks also an exact methodology. After many years working as international expert doing legal assessment and situation reports related to the functioning of the justice systems in many countries, I can testify that measuring the level of real implementation of judicial independence in a certain State is not easy. According to my experience, after having interviewed all kinds of stakeholders in a given country—court users, authorities, judges, judicial staff, legal professionals and also NGOs and journalists—one will just get a certain feeling on how the system works and whether the judiciary is acting with independence or not.

It might be easy to identify cases where a court clearly did not act according to the law, but it is not easy to determine the reasons motivating the judge in a single case. Assessing the legal safeguards is something simple, but detecting the motivation of an individual judge, for example whether behind his/her decision there is a case of corruption or an indirect threat to his/her life, will be much more complicated. If this is difficult, establishing a precise and reliable score on judicial independence is almost an impossible task. How can it be stated that one system grants in practice more independence than another? How can statistics show if certain judges are more independent than others? Could it be stated that, once half of the judges interviewed recognise interferences from the executive or the legislative or their fears in acting independently, the assessment shall establish a lack of independence, or half-compliance of judicial independence? Would it not be better to focus on sensitive cases—those affecting the economic and/or political power—to make an accurate assessment on judicial independence?

Collecting reliable data is not easy either. The first difficulty is quite obvious: the main actors—the judges—will not be willing to acknowledge that they do not act independently, as this would not only delegitimise them, but would also make them disciplinary liable.

This is the reason why many assessments are based on general and/or user's perceptions, which, if carried out correctly, can offer interesting data. Such studies have

States to promote the effective implementation of Council of Europe instruments used for the organisation of justice; ensure that public policies concerning courts take into account the needs of the justice system users; and offer States effective solutions prior to the point at which an application would be submitted to the European Court of Human Rights and preventing violations of Art. 6 of the European Convention on Human Rights, thereby contributing to reducing congestion in the Court.

[11]The 7th CEPEJ report published in 2018 which contains the assessment of the data of 2016 can be accessed under https://www.coe.int/en/web/cepej/cepej-work/evaluation-of-judicial-systems.

been carried out already for years, not only by the Eurobarometer or the World Bank, but also by the ABA and the CoE. Perceptions are very much influenced by the media and how they reflect the information on judicial cases. Further, one single sensitive criminal case on corruption, which attracts high attention from the media, can have a strong impact on the perceived independence, although in quantitative terms it might be absolutely irrelevant. Even if these assessments provide useful statistical data, they are not by themselves conclusive and need to be interpreted correctly. Despite their possible deficiencies, they are widely used because they establish an approximate picture of a real situation with primary information and can point out at possible deficits.

Sending out questionnaires to the Member States can be another way for obtaining data with regard to judicial independence. In the framework of the Council of Europe, an assessment of the follow-up action of the Member States in implementing CoE Recommendation Rec(2010)12 'Judges: independence, efficiency and responsibilities'[12] was carried out in 2016. This follow-up report was prepared[13] after the report of the Secretary General of the Council of Europe of 2015 had found that 'the independence of the judiciary and judges is not being guaranteed in over a third of Member States'.[14] In order to take stock of the actions taken by the Member States to strengthen judicial independence, a questionnaire was sent to the 47 CoE Member States, to which 43 Member States replied.[15] Despite its limited scope, this study allowed not only to assess the legal framework of those 43 Member States, but also to detect where further action for strengthening judicial independence was needed.

Within the European Union, improving the effectiveness of national justice systems has become a well-established priority, for its impact not only upon the protection of human rights, but also as an essential element for economic growth and stability. The Annual Growth Survey 2018, which identifies the economic and social priorities for the EU and its Member States for the year ahead, precisely underlines 'the link between a business-friendly environment on the one hand and the rule of law and improvement in the independence, quality and efficiency of justice systems on the other.'[16]

The EU Justice Scoreboard has been produced every year for six years now. As defined in the document itself 'the EU Justice Scoreboard is a comparative informa-

[12]CM/Rec (2010)12 'Judges: independence, efficiency and responsibilities', contains 72 recommendations divided in eight chapters. It updates the previous CoE Recommendation of 1994 and does not aim at harmonising the legislation of the Member States but 'outlines in greater detail the measures which should be taken in some member states in order to strengthen the role of individual judges and of the judiciary.'

[13]CDCJ(2016)2 final, Strasbourg 13 March 2017. The report was prepared by Lorena Bachmaier on behalf of the European Committee on Legal Co-operation (CDCJ), at the request of the Secretary General of the Council of Europe, as a follow-up to its 2015 report entitled 'State of Democracy, Human Rights and the Rule of Law in Europe—a shared responsibility for democratic security in Europe', accessible at https://rm.coe.int/1680702caa.

[14]See p. 21 of the Report of the Secretary General Thorbjørn Jagland 'State of Democracy, Human Rights and the Rule of Law in Europe. A Shared Responsibility for Democratic Security in Europe' presented in the 125th Session of the Committee of Ministers, Brussels 19 May 2015.

[15]The report is the result of the evaluation of the information provided by the authorities of Member States in their replies to the questionnaire, mainly the Ministries of Justice and Ministries of Foreign Affairs, and thus it is based on official information provided by the State authorities.

[16]Communication from the Commission—*Annual Growth Survey 2018*, 22.11.2017, COM(2017) 690 final, p. 4.

tion tool that aims to assist the EU and Member States to improve the effectiveness of their national justice systems by providing objective, reliable and comparable data on a number of indicators relevant for the assessment of the quality, independence and efficiency of justice systems in all Member States.[17]

The EU Justice Scoreboard uses in its analysis, among other sources,[18] the quantitative data provided by the Council of Europe CEPEJ.[19] The 2018 EU Justice Scoreboard develops the overview of indicators concerning the independence, efficiency and quality of the national justice systems.[20] In particular, the 2018 edition focused on 'the indicators on judicial independence, particularly on the Councils for the Judiciary and on the involvement of the executive and the parliament in the appointment and dismissal of judges and court presidents.'

Upon the findings of the EU Justice Scoreboard and country-specific assessments based on the bilateral dialogue with the national authorities and stakeholders,[21] recommendations for improvement are adopted.

The figures presented in the Scoreboard do not provide an assessment and do not present quantitative data on the effectiveness of the judicial independence safeguards. They are not intended to reflect the complexity and details of those safeguards, and it is clear that having more safeguards does not, in itself, ensure the effectiveness of a justice system. 'It should also be noted that implementing policies and practices to promote integrity and prevent corruption within the judiciary are also essential to guarantee judicial independence. Ultimately, the effective protection of judicial independence requires a culture of integrity and impartiality, shared by magistrates and respected by the wider society.'[22]

The EU Justice Scoreboard provides for comparative tables on the perceived independence among the general public, among companies, among businesses, and among the judges themselves. The respondents could chose out of these three reasons when giving their answer regarding judicial independence: (1) status and position of the judge does not sufficiently guarantee judicial independence; (2) interference or pressure from economic or other specific interests; (3) interference or pressure from government and politicians. The last two reasons were the most mentioned ones, the pressure from government and politicians the most invoked one.

[17] The same document states that 'the Scoreboard does not present an overall single ranking but an overview of how all the justice systems function, based on various indicators that are of common interest for all Member States. The Scoreboard does not promote any particular type of justice system and treats all Member States on an equal footing.'

[18] See the 2018 EU Justice Scoreboard, p. 2, accessible at https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2018_en.pdf.

[19] The statute of the CEPEJ emphasizes the comparison of judicial systems and the exchange of knowledge on their functioning. The scope of this comparison is broader than 'just' efficiency in a narrow sense: it also emphasizes the quality and the effectiveness of justice. In order to fulfil these tasks, the CEPEJ has undertaken a regular process for evaluating judicial systems of the Council of Europe's Member States. Information on the CEPEJ evaluations are available at https://www.coe.int/en/web/cepej/cepej-work/evaluation-of-judicial-systems.

[20] Available at https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2018_en.pdf.

[21] The most recent 2018 country reports are available at: https://ec.europa.eu/info/publications/2018-european-semester-country-reports_en.

[22] *Ibídem*, p. 44.

The EU Justice Scoreboard is a very useful tool for monitoring performance and evaluating needs and gaps, but it does not provide definitive results or parameters on judicial independence. It shows however how relevant the perceived independence is for getting an overview.

In the end, the conclusion regarding judicial Independence is that surveys and statistics on perception of the public and targeted groups is necessary and useful. But still, the level of judicial independence in practice in a relevant country is something that cannot be clearly measured. The methodology used by the EU and CoE in their studies are very similar, however the CoE does not provide for comparative tables that would allow to get an idea on how non-EU CoE Member States score *vis a vis* EU Member States. As to the legal framework, it could be stated that legal standards are quite similar in most European States (EU and non-EU Member States), even if their practical implementation might differ greatly.

In my opinion, the ultimate test of whether there is true judicial independence in the judicial system of a country—and this is my particular perception and therefore subjective—is whether there is a real possibility that a judge or prosecutor could prosecute and bring to court a high state authority, or an oligarch with economic power, for a crime of corruption; and that in doing so, the judge does not fear any adverse consequences and that he/she would feel the same freedom from pressure if the defendant were the political opponent—or economic competitor—of the accused. In this sense, the felt freedom should be understood as the feeling that whatever decision he/she might adopt, it will neither affect the judges personal safety—or that of their families—nor the development of their professional careers. But it goes without saying that applying this criterion is materially not possible, and the closest we can get to it is to obtain an idea of it by interviewing a representative number of actors and practitioners who do not fear adverse consequences from being interviewed.

3 The recent case law of the CJEU on judicial independence

Within the EU, the protection of the rule of law is a priority, and judicial independence is crucial for it. Two judgments of the CJEU given in 2018 deserve special attention with regard to the protection of judicial independence: *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas* of 27 February 2018;[23] and *Minister for Justice and Equality v. LM* of 25 July 2018..[24]

3.1 Grand Chamber Judgment of the CJEU *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* of 27 February 2018

This ruling is highly relevant to define the role of the CJEU in protecting judicial independence. The *Supremo Tribunal Administrativo* of Portugal submitted the preliminary reference concerning the interpretation of the second subparagraph of Arti-

[23] Case C-64/16 *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, Judgment of the Court (Grand Chamber) of 27 February 2018, on the request for a preliminary ruling from the Portuguese Supremo Tribunal Administrativo, EU:C:2018:117.

[24] Case C-216/18 PPU—*Minister for Justice and Equality v. L.M.*, Judgment of the Court (Grand Chamber) of 25 July 2018, EU:C:2018:586.

cle 19(1) TEU,[25] precisely if it must be interpreted as meaning that the principle of judicial independence precludes general salary-reduction measures for judges. In the main proceedings, the Association representing the judges of the *Tribunal de Contas* (Court of Auditors) of Portugal (ASJP) claimed that such administrative measures adopted in implementing the Portuguese law for reducing the state deficit infringed the principle of judicial independence. As the referring court states, those measures were adopted in the framework of EU law, because they were required by the EU as a condition for granting financial assistance to Portugal.

The final conclusion of the Court is that the measures adopted in Portugal imposing a general salary reduction to eliminate an excessive budget deficit, linked to an EU financial assistance programme, do not violate the principle of judicial independence. Although recognising that a certain level of remuneration is essential for safeguarding judicial independence,[26] the Court held that the measures were not specifically adopted in respect of the judges of the *Tribunal de Contas* but that they were of a general nature 'seeking a contribution from all members of the national public administration to the austerity effort' for reducing the State budgetary deficit and hence did not impact on judicial independence.[27]

Rather than the outcome, what is interesting about this judgment is the Court's interpretation of Article 19(1) TEU in relation to the control of the independence of the courts of the Member States. The Court's reasoning differs from the approach taken by the Advocate General in his opinion, although both come to equivalent conclusions, albeit based on different provisions. This reasoning is important to determine what will be the Court's role in ensuring independence of the judges and the courts of the Member States.

The opinion of AG Saugmandsgaard Øe considers that the concept of 'effective judicial protection' within the meaning of the second subparagraph of Article 19(1) TEU must not be confused with the principle of judicial independence mentioned in the question for preliminary ruling 'as deriving, it is alleged, from that provision';[28] and concludes that this provision 'must be interpreted as meaning that it does not enshrine a general principle of EU law according to which the independence of judges sitting in all the courts of the Member States should be guaranteed'. In his opinion, Article 19(1), interpreted in its precise legal and systematic context, relates mainly to the CJEU,[29] establishing the need for an effective judicial remedy at national level.

[25] Art. 19(1) TEU: 'The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed. Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.'

[26] In this sense, see the Recommendation CoE (2010)12, para. 54:
'Judges' remuneration should be commensurate with their profession and responsibilities, and be sufficient to shield them from inducements aimed at influencing their decisions. Guarantees should exist for maintaining a reasonable remuneration in case of illness, maternity or paternity leave, as well as for the payment of a retirement pension, which should be in a reasonable relationship to their level of remuneration when working. Specific legal provisions should be introduced as a safeguard against a reduction in remuneration aimed specifically at judges.'

[27] See para. 49 of the judgment.

[28] EU:C:2017:395, para. 64.

[29] However, another interpretation of Art. 19(1) TEU was accepted already in the judgments C-583/11 P, *Inuit Tapiriit Kanatami and Others* v. *Parliament and Council* of 3 October 2013, EU:C:2013:625, para.

In other words, this provision would correspond to Article 13 ECHR, and not to Article 6 ECHR. In so far, it would not include the right to judicial independence of national courts. That right, according to the opinion of the AG, would only be protected under Article 47 of the Charter, and as it is known, the Charter only applies when implementing Union law (Article 51(1) of the Charter).[30]

As AG Saugmandsgaard Øe then indeed considers the measures adopting the salary reductions of the judges to constitute an 'implementation of provisions of EU law within the meaning of Article 51 of the Charter', he concludes the CJEU to have jurisdiction to rule on this preliminary question 'in so far it concerns Article 47 of the Charter'.

The approach of the CJEU is different from that of the Advocate General. The Court states that Article 19(1) TEU is not only related to the implementation of EU law but requires that the Member States provide remedies to ensure the effective legal protection 'in the fields covered by Union law irrespective of whether the Member States are implementing Union law, within the meaning of Article 51(1) of the Charter.'[31] The Court hence considers that Article 19(1) TEU covers the content of Article 6 ECHR as well as that of Article 13 ECHR and that Article 47 of the Charter just reaffirms the principle of judicial independence.

Recognising that national courts and tribunals together with the CJEU are jointly entrusted with ensuring an effective judicial review in the EU legal order,[32] and that judicial independence is one of the fundamental elements of the concept of 'court', it follows that the CJEU has jurisdiction to check the compliance of this premise within the scope of Article 19(1). Thus, the Court expands the scope of its own jurisdiction, covering not only those cases where national courts are implementing EU law (scope of the Charter), but also when they are deciding on 'fields covered by Union law,' (scope of Article 19(1) TEU), to answer preliminary questions related to judicial independence.

By applying Article 19(1) TEU—'the fields covered by Union law'—to judicial independence, mutual trust, sincere cooperation and the decentralised enforcement of EU law by national courts, the CJEU expands the traditional limits posed by the material criterion which defines the spheres of EU and national law and the strict limits of Article 51(1) of the Charter.

It is too early to advance what will be the impact of this judgment on monitoring the independence of national courts, but it is surely a move towards expanding the

90; and, C-456/13 P, *T & L Sugars and Sidul Açúcares* v *Commission* of 28 April 2015, EU:C:2015:284, para. 45.

[30]The Court has made clear that the concept of 'implementing Union law' within the meaning of Art. 51 of the Charter, as the AG states in his Opinion (see para. 43) 'presupposes a degree of connection between the measure of EU law and the national measure at issue which goes beyond the matters covered being closely related or one of those matters having an indirect impact on the other. In that regard, it is necessary to determine, inter alia, whether the national legislation at issue is intended to implement a provision of EU law, the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law, and also whether there are specific rules of EU law on the matter or rules which are capable of affecting it'. In this sense C-198/13 *Julián Hernández and Others* of 10 July 2014, EU:C:2014:2055; C-218/15 *Paoletti and Others* of 6 October 2016, EU:C:2016:748.

[31]See para. 29.

[32]See para. 32 and the case law of the CJEU quoted there.

powers of the CJEU in ensuring one of the main elements of the principle of the rule of law.

3.2 Judgment of the CJEU *Minister for Justice and Equality v. LM* of 25 July 2018

This judgment deserves to be mentioned here, as it addresses the issue whether the risk of a breach of the right to a fair trial in one Member State could be a ground for putting on hold the principle of mutual recognition and for refusing to execute a European arrest warrant (EAW). The request for preliminary ruling referred by the High Court of Ireland on 23 March 2018 was filed in the framework of proceedings relating to the execution of several EAWs issued by Polish authorities against L.M., for the purpose of conducting criminal prosecution, *inter alia*, for drug trafficking. The referring court asked whether the executing authority, once determined that there is a systemic breach of the rule of law in the requesting state, should 'make any further assessment, specific and precise, as to the exposure of the individual concerned to the risk of unfair trial where his trial will take place'; and, should the CJEU answer this question in the positive, if the executing court was 'obliged to revert to the issuing judicial authority for any further necessary information that could enable the national court discount the existence of the risk to an unfair trial and if so, what guarantees as to fair trial would be required?'[33]

In other words, the Irish Court was asking to what extent should they check the level of protection of the fundamental rights of the person requested in the issuing State before executing the EAW, and if this was found insufficient depart from the principle of mutual recognition.

In fact the issue, far beyond the specific case, poses a further challenge on the functioning of the Area of Freedom, Security and Justice, as it asks whether the principle of mutual recognition can be put on hold in case there is evidence of serious breaches of the rule of law. The issue was already raised in the much-debated case *Aranyosi Căldăraru*,[34] but then regarding the risk of a violation of Article 3 ECHR due to inhuman prisons conditions in the issuing States.

This time the principle of mutual recognition was analysed with regard to judicial independence. Concretely, the referring court sought for an answer as to how to act in a case where a flagrant denial of the rule of law has undermined mutual trust among the Member States. The situation in the issuing State at stake had been recognised by the European Commission and by the Venice Commission[35] as a general breach of the principle of the rule of law in violation of Article 2 TEU.

[33] EU:C:2018:586, para. 25 of the judgment.

[34] Case C-404/15 *Aranyosi and Căldăraru*, Judgment of the Court (Grand Chamber) of 5 April 2016, EU:C:2016:198. On this judgment see, *Bovend'Eerdt* [1], pp.112–121; *Ollé Sesé/Gimbernat Díaz* [6], pp. 1–19; *Muñoz Morales* [5], pp. 1–26.

[35] Opinion of the Venice Commission No 904/2017 of 11 December 2017 'On the Draft Act amending the Act on the National Council of the Judiciary, on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the organisation of Ordinary Courts'; and Opinion of the Venice Commission No 892/2017 of 11 December 2017 'On the Act on the Public Prosecutor's office', available at http://www.venice.coe.int/webforms/events/.

In this regard, the Commission had opened a dialogue with the Polish authorities under the Rule of Law Framework in January 2016. Despite repeated efforts for almost two years to engage the Polish authorities in a constructive dialogue within this framework, the Commission adopted a decision on 20 December 2017 that there is a clear risk of a serious breach of the rule of law in Poland. The Commission also proposed to the Council to adopt a decision under Article 7(1) of the Treaty on European Union on the determination of a clear risk of a serious breach of the rule of law.[36] In December 2017, the Commission decided to refer the Polish Government to the European Court of Justice for a breach of EU law by the Law on the Ordinary Courts Organisation.[37]

Despite its significance, there is no scope to delve into the Polish situation regarding the rule of law, nor on the measures taken by the EU and the impact of the activation of the mechanism of Article 7 TEU, which provides for the suspension of certain rights of a Member State deriving from the EU Treaties in case of 'a serious and persistent breach … of the values referred to in Article 2 TEU'. It is clear that such infringements pose risks to the functioning of the EU as a whole. Nevertheless it is highly unlikely that Poland will face sanctions, as the Article 7(2) mechanism requires unanimity in the Council for finding a violation and thus adopting a sanction. After Poland had been heard by the Council in June 2018,[38] Commission Vice President Timmermans stated on 20 November 2018 before the LIBE Committee of the European Parliament that 'up until today none of the concerns of the Commission raised in its reasoned proposal have been addressed by the Polish authorities. The systemic risk for the rule of law still persists'.[39] The development of the situation of the judiciary in Poland should be followed, as might pose a real challenge upon the capability of the EU to reverse such infringements. Triggering the procedure foreseen in Article 7 TEU is one step, and it should be sufficient for a Member State to reverse the situation that has led to the infringement procedure itself. As for now, the CJEU

[36]The Commission adopted a fourth Rule of Law Recommendation regarding the rule of law in Poland, setting out the Commission's concerns and recommending how these concerns could be addressed. Commission Recommendation of 20.12.2017 regarding the rule of law in Poland complementary to Commission Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520, Brussels 20.12.2017, C(2017) 9050 final.

[37]The infringement procedure (Case C-192/18, *Commission v. Poland*) relates to a violation of Art. 157 TFEU and Directive 2006/54, based on the discrimination on the basis of gender due to the introduction of a different retirement age for female judges and male judges Further the procedure is triggered for infringement of Art. 19(1) TEU in combination with Art. 47 of the Charter of Fundamental Rights due to the attack to the independence of the judiciary as a result of the discretionary power given to the Minister of Justice to prolong the mandates of judges who have reached the lowered retirement age.

[38]The hearing foreseen within the process of Art. 7 TEU was held on 26 June 2018, where Poland expressed that they did not share the assessment done by the EU Commission on the breach of the rule of law in Poland. See Report of the hearing held by the Council on 26 June 2018, Brussels, 8 August 2018, JAI 740, accessible at http://www.statewatch.org/news/2018/aug/eu-council-rule-ofLaw-poland-10906-18.pdf.

[39]Speech of 20 November 2018, 'Remarks at Public Hearing on the Rule of Law in Poland, at the European Parliament's Committee on Civil Liberties, Justice and Home Affairs', accessible at https://ec.europa.eu/commission/commissioners/2014-2019/timmermans/announcements/remarks-public-hearing-rule-law-poland-european-parliaments-committee-civil-liberties-justice-and_en.

has issued an order on interim measures under Article 279 TFEU to be adopted by Poland while the judgement is rendered.[40]

For the purpose of this paper and the analysis of the impact of the *LM* judgment it is relevant to point out to what extent a real risk of a breach of the right to a fair trial on account of systemic or generalised deficiencies regarding judicial independence can affect the principle upon which the functioning of the cooperation in criminal matters is based, i.e. the principle of mutual recognition. It is convincing that the mere existence of such risk should not lead to the refusal to cooperate with the requesting judicial authority of another Member State, and as the CJEU in *L.M.* judgment clearly states, the executing authority 'must determine, specifically and precisely, whether having regard to [the individual's] personal situation, as well as to the nature of the offence for which he is being prosecuted and the factual context' and taking into account the information provided by the issuing authority, whether 'there are substantial grounds for believing that that person will run such a risk if he is surrendered'.[41]

Although such controls will only end up in refusing cooperation if the risk in the individual case has been sufficiently established, having assessed the personal and substantive circumstances of the case, the mere fact that the executing authority shall undertake such check before complying with an EAW means that the principle of mutual recognition is already severely weakened. There is the risk that mutual recognition based on mutual trust will no longer be the rule but slowly become the exception, considering severe infringements of the rule of law and the protection of human rights in certain States. Such checking being against the principle of mutual recognition 'save exceptions',[42] allowing too many exceptions to the system will fatally undermine the already questioned mutual trust. This should bring us back to reflecting on the importance to preserve the common values enshrined in Article 2 TEU, to ensure a common and effective protection of fundamental rights in all EU Member States and to take measures for safeguarding judicial independence as basic element of a democratic State respecting the rule of law.

4 Concluding remarks: the way ahead

Judicial independence as well as democracy and the rule of law are no static realities so that once achieved, they are fixed and guaranteed against any setback. This is an obvious lesson that history, which is not linear, has taught us. This is something known, which does not mean that remembering it is not necessary, because once political stability and democracy are reached both citizens and authorities, as well as the international community, tend to relax the mechanisms for protecting them. Judicial independence is not alien to this trend. It is always necessary to be vigilant that its safeguards continue to be implemented and that attacks against it get a response.

[40] Case C-619/18 *Commission v Poland*, Order of 17.12.2018, EU:C:2018:1021.

[41] Ruling of the CJEU in the case *L.M.*, para. 79. On the Opinion of the AG, see *Mirandola* [4], 24 July 2018.

[42] See *Aranyosi and Căldăraru*, para. 78, quoting Opinion 2/13 of the Court, of 18 December 2014, para. 19, EU:C:2014:2454.

To that end, a first step might be to agree on mechanisms capable to provide a reliable diagnosis on the level of judicial independence. Carrying out an assessment of the degree of independence or lack of judicial independence in a specific State is a difficult task, especially when there is no agreement on what methodology to apply or what the sources consulted should be. The CoE—through CEPEJ—and the EU Justice Scoreboard—which also works with data from CEPEJ—offer important analysis of certain indicators which are useful for a first diagnosis and even more helpful when they are complemented with justice perception studies and interviews with the main stakeholders conducted by independent observers.

The next step is equally complex: to determine what measures should be adopted on the basis of the analysis obtained. In 2016, the CoE adopted the Plan of Action on Strengthening Judicial Independence and Impartiality[43] 'to accord the highest priority to working with the States to strengthen further the independence and impartiality of the judiciaries in Europe'..[44] This Action Plan is aimed at taking action in protecting the judiciary in its relations with the executive and legislature, but also taking action to reinforce its independence from the prosecution service, and taking action towards protecting the independence of the individual judges.[45]

The adoption of a Plan of Action by itself does not change reality, but at least it shows that there is awareness on the need to act, that the areas where action is needed have been identified and that a commitment to support such actions has been assumed. Obviously, the actions of the CoE find their limits—and advantages—as in any international organisation whose powers to enforce policies depend on to the cooperation of its Member States and the international community.

The mechanisms to protect judicial independence in each of the Member States of the European Union, apart from the action plans and justice programme of the EU,[46] should be more effective, since the Treaties themselves establish the possibility to enforce compliance through the infringement procedure. Thanks to the extensive in-

[43]CM(2016)36 final adopted at the 1253rd meeting of the Ministers' Deputies, on 13 April 2016, the Committee of Ministers, accessible at https://rm.coe.int/1680700285.

[44]See p. 5.

[45]These last measures are the following:

> 'i. limit interference by the judicial hierarchy in decision making by individual judges in the judicial process and define the powers of the prosecution service in order to ensure that judges are protected from undue pressure and able to freely follow or reject the motions of prosecutors;
> ii. ensure that the rules relating to judicial accountability and the review of court decisions fully respect the principles of judicial independence and impartiality;
> iii. effective remedies should be provided, where appropriate, for judges who consider their independence and impartiality threatened;
> iv. prevent and combat corruption within the judiciary and shield judges from inducement to corruption. In this respect, member States should ensure that the remuneration and working conditions of judges are adequate and that standards of professional conduct and judicial ethics are reinforced;
> v. counter the negative influence of stereotyping in judicial decision making;
> vi. ensure comprehensive and effective training of the judiciary in effective judicial competences and ethics;'
> vii. ensure that judges are protected by legal regulations and adequate measures against attacks on their physical or mental integrity, their personal freedom and safety.'

[46]See for example, the Proposal for a Regulation of the European Parliament and of the Council establishing the Justice Programme, Brussels, 30.5.2018 COM(2018) 384 final.

terpretation of Article 51 of the Charter and through a smart interpretation of Article 19(1), the CJEU has jurisdiction on references regarding judicial independence in matters 'covered by EU law'. Furthermore, as seen in the case *L.M.* the judicial authorities of the Member States will also carry out an indirect control over the independence of the judiciary of another Member State when called to execute an EAW, although such control will be limited to ensuring the protection of the fundamental rights of the defendant in the precise case.

However, as seen in the case of Poland, the activation of the Article 7 TEU mechanism, while serving to convey a strong message, does not necessarily provide for an immediate and effective change, since the measures to be adopted are also subject to the political interplay within the EU and subject to international policy considerations. Nonetheless, and despite its shortcomings, it is still better than nothing. However, it might be necessary to think of stronger mechanisms to tackle infringements of the rule of law, once the system for monitoring has detected generalised deficiencies.[47]

In conclusion, while more effective mechanisms can be implemented—something that is not simple in the intergovernmental sphere subject to EU or to international law—the CoE and the EU should join and coordinate efforts in strengthening judicial independence in all European States (Members and non-Members of the EU), because joint action is essential for the protection of human rights and the rule of law.

References

1. Bovend'Eerdt, K.: The joined cases *Aranyosi* and *Căldăraru*: a new limit to the mutual trust presumption in the area of freedom, security, and justice? Utrecht J. Int. Eur. Law **32**(83), 112–121 (2016)
2. Kostoris, R.: Handbook of European Criminal Procedure. Springer, Cham (2018)
3. McBride, J.: Human Rights and Criminal Procedure. Council of Europe Publishing, Strasbourg (2009)
4. Mirandola, S.: European arrest warrant and judicial independence in Poland: where can mutual trust end? (Opinion of the AG in C-216/18 PPU L.M.). European Law Blog 24.7.2018, available at: https://europeanlawblog.eu/2018/07/24/european-arrest-warrant-and-judicial-independence-in-poland-where-can-mutual-trust-end-opinion-of-the-ag-in-c-216-18-ppu-l-m/
5. Muñoz Morales, M.: 'Dime cómo son tus cárceles y ya veré yo si coopero'. Los casos *Caldararu y Aranyosi* como nueva forma de entender el principio de reconocimiento mutuo', InDret 1/2017, pp. 1–26
6. Ollé Sesé, M., Gimbernat Díaz, E.: 'Orden europea de detención y entrega y tratos inhumanos o degradantes. STJE de 5 de abril de 2016, asuntos C-404/15 y C-659/15PPU: *Aranyosi y Caldararu*', La Ley Unión Europea (40) 1–19 (2016)

[47] See the Proposal for a EU Regulation of the European Parliament and of the Council 'On the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States', Brussels, 2.5.2018 COM(2018) 324 final.