Judges Sitting on the Warsaw-Budapest Express Train: The Independence of Polish and Hungarian Judges Before the CJEU

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This article is a contribution to the vital discussions about the rule of law in the EU, focusing on a specific and crucial element of the rule of law: judicial independence. Recently, the CJEU started to use Article 19 (1) of Treaty on European Union and Article 47 of the EU Charter of Fundamental Rights as a basis for enforcing judicial independence in the Member States in cases which do not contain any explicit cross-border elements. This is how some provisions of the heavily criticized reform of the Polish judiciary have already been declared as contrary to EU law by the CJEU. However, it is not only Poland where judges face difficulties. The main subject of this article is a Hungarian case: a preliminary reference issued by a Hungarian judge questioning his own independence. Judicial independence is not primarily threatened by explicit legal provisions but by the fact that the former head of the judiciary administration regularly misused her competence to invalidate judicial applications over several years. This article analyses the Hungarian preliminary reference and its chances in light of the CJEU's recent, respective case law, especially the preliminary ruling concerning the Polish National Council of the Judiciary, the KRS (Krajowa Rada Sądownictwa) and the Disciplinary Chamber of the Supreme Court (joined cases C 585/18, C 624/18 and C 625/18).

Keywords: Hungary, Poland, European Court of Justice, Article 19 (1) TEU, Article 47 EU Charter of Fundamental Rights, judicial independence, judicial councils, disciplinary chamber, right to an effective remedy, preliminary reference, infringement procedure, rule of law, C-564/19, joined cases C 585/18, C 624/18 and C 625/18

1 INTRODUCTION: A SURPRISING EVASION ON AN ESTABLISHED LINE

The metaphor of the 'Budapest-Warsaw Express train' and *vice versa* has often been used to describe parallel political developments in Poland and Hungary since the nineties. The similarities between political paths of the two countries have been particularly apparent since 2015 when the national-conservative PiS came to power in Poland and started to restructure the Constitutional Tribunal, and two

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Bakó, Beáta. 'Judges Sitting on the Warsaw-Budapest Express Train: The Independence of Polish and Hungarian Judges Before the CJEU'. *European Public Law* 26, no. 3 (2020): 587–614.

years later, they did the same with the judiciary. By that time, the Fidesz government in Hungary had been in power for five years, with a constitution-making two-thirds majority for most of this time. They adopted a new constitution and significantly changed some institutions of public law – including the judiciary.[1]

In the last couple of years, observers could have the clear impression that the Polish government was copying its Hungarian colleagues. Alongside the similar political rhetoric, some legal methods, such as sending judges into early retirement or filling the constitutional courts with loyal judges serve to illustrate this. The express train was rushing from Budapest to Warsaw, thanks to the politicians.

Now it seems that Polish and Hungarian judges will reverse the direction of that 'express', however, they are forced to make a diversion, looking to Luxembourg. Polish judges made preliminary references to the CJEU considering the Polish judiciary reforms and meanwhile the potential of Article 19 (1) TEU and Article 47 of the EU Charter of Fundamental Rights have been explored by the CJEU. Article 19 (1) TEU is now becoming a regular point of reference for the Court regarding the independence of the judiciary in the Member States. The express from Warsaw (via Luxembourg) arrived in Budapest in a quite spectacular way. A Hungarian judge made a preliminary reference to the CJEU, but not because of the injustice he suffered, but because he considered himself not to be independent and feared that the defendant in a case before him would not get a fair trial. That might seem to be nonsense at first glance but in light of the recent case law of the CJEU, he has the chance to be qualified as dependent.

This article will briefly introduce the situation of the judiciary in both countries (section II) and then turn to the latest relevant case law of the CJEU regarding judicial independence, based on Article 19 (1) TEU and Article 47 of the EU Charter of Fundamental Rights (section III). Finally, in light of this analysis, of the likely outcome of the aforementioned Hungarian preliminary request will be considered, taking into account the similarities and differences between the cases in question (section IV). Section V. concludes.

2 TWO DIFFERENT METHODS OF UNDERMINING THE INDEPENDENCE OF THE JUDICIARY

2.1 Poland: Total occupation of courts and judicial organs

The attack on the ordinary judiciary by the Polish government began in the summer of 2017. At first sight, it may seem that the PiS simply copied the methods

[1] For a summary *see* e.g. Zoltán *Szente*, *Challenging the Basic Values – Problems in the Rule of Law in Hungary and the Failure of the EU to Tackle Them*, in *The Enforcement of EU Law and Values* 459 et seq. (András Jakab & Dimitry Kochenov eds, OUP 2017).

of the Hungarian Prime Minister Viktor Orbán in this regard,[2] although there might be some quite concrete legal reasons beyond the judiciary reform. After the Constitutional Tribunal ceased to be a real counterbalance to the government,[3] the decentralized view of constitutional review became more widespread; namely, that the constitution may be applied indirectly by ordinary courts.[4] Such an interpretation implying the horizontal application of the constitution could have been dangerous for the government, because the PiS does not hold a constitution-amending majority: the most they can do is to adopt ordinary laws contrary to the constitution. Theoretically, these laws can be reviewed by the Constitutional Tribunal, however, as this court has become an aide of the government, there are good reasons to believe that such laws practically function as silent amendments of the constitution.[5]

The ordinary judiciary and the Supreme Court were reformed through different legal measures, but these reflected a very similar logic, operating with two basic tools: retirement and the discretionary competence of a political actor (the Minister of justice or the President of the republic) over prolonging the tenures of judicial posts.

The amendment regarding the common courts was adopted by the Sejm in July 2017. The retirement age for judges has been lowered to sixty-five or sixty years old depending on gender, but the Minister of justice has the power to prolong their term of office beyond the legally mandated retirement age. The Minister also acquired extensive competence to influence the remuneration of court presidents based on his evaluation of the work of those judges. The Minister of justice enjoyed relatively broad competence in the field of the judiciary prior to the 2017 amendment, but those did not extend to the court presidents who 'have vast control over judges in their courts'.[6] Now, the Minister appoints the presidents of courts of appeal, of regional courts and of district courts,[7] and they may

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2 *See* point 2 below in details.

3 The occupation of the Constitutional Tribunal by the Polish government would exceed the frames of this paper. For details about this *see* e.g. Piotr Czarny, *Der Streit um den Verfassungsgerichtshof*, in *Polen 2015–2016*, 1 Osteuroparecht (2018), Anna Młynarska-Sobaczewska, *Polish Constitutional Tribunal Crisis: Political Dispute or Falling Kelsenian Dogma of Constitutional Review*, 23(3) Eur. Pub. L. (2017).

4 Wojciech Sadurski, *How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding*, Sydney Law School Legal Studies Research Paper 18/01 36 (Sadurski 2018). In this regard *see* e.g. Tomasz Tadeusz Koncewicz, *Polish Judiciary in Times of Constitutional Reckoning. Of Fidelities, Doubts, Boats, and … a Journey* 300 (Gdańskie Studia Prawnicze 2017). In details *see also* Monika Florczak-Wątor, *Applying the Constitution of the Republic of Poland in Horizontal Relations* 79–122 (Krakow: Jagellonian University Press 2015).

5 Similarly e.g. Wojciech Sadurski, *On the Relative Irrelevance of Constitutional Design: Lessons from Poland*, Sydney Law School Legal Studies Research Paper 2019/34.

6 Sadurski, *supra* n. 4, at 43.

7 §§ 23–25. of Act of 27 July 2001 on the law on the organization of common courts as amended on 12 July 2017, Dz.U.2017.1452. English translation provided by the Polish authorities, available through the Venice Commission, document nr. CDL-REF(2017)046.

be dismissed by the Minister on grounds listed by law. Such grounds are sometimes broad and indefinite, such as 'low efficiency of activities'.[8]

The reform of the Supreme Court was designed in a similar way. The first version of the reform provisions was vetoed by the state President. In December 2017, the Sejm adopted a somewhat milder version of the law. A retirement age of sixty-five years applies to Supreme Court judges and instead of the Minister of Justice, the President of the Republic acquired the right to prolong the tenure of Supreme Court judges beyond the retirement age. A new disciplinary chamber (with members appointed by the President of the Republic)[9] and an extraordinary chamber of the Supreme Court have been created, and the number of Supreme Court judges has been raised from 82 to 120, which created a large number of vacancies.[10] The National Judicial Council (Krajowa Rada Sądownictwa, KRS) plays a key role in the process that is adopted to fill these vacancies.[11]

It is no wonder that the PiS government also reformed the KRS, via a decision of the Constitutional Tribunal (CT).[12] The CT declared certain provisions of the (old) law on the KRS unconstitutional, specifically those regarding the election of KRS members from among the judges and the term of office of these members. The legislation, adopted in response to the judgment, extended far beyond the findings of the court., It not only addressed the different election methods and the terms of office, but completely redesigned the composition of the KRS.[13] The constitution provides only that KRS members should be chosen from among the judges but the wording does not specify that they should be elected by the judges themselves or by other bodies (Article 187). Therefore, the government decided to change the legislation to provide that the judge members would be elected by the parliament.[14] The newly amended article of the law on the KRS has already been declared constitutional by the Constitutional Tribunal.[15]

After a practically useless dialogue in the frames of a Rule of Law Framework that could not prevent the 'serious deterioration' of the situation of the rule of law

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8 *Ibid*., § 26.
9 Article 76(8) of the law on the Supreme Court.
10 Sadurski, *supra* n. 4, at 41.
11 Article 179 of the constitution.
12 Case no K-5/17. In details: Agnieszka Bień-Kacała, *Poland Within the EU – Dealing with the Populist Agenda*, Osteuroparecht 441 (2017).
13 Marcin Matczak, *How to Demolish an Independent Judiciary with the Help of a Constitutional Court*, Verfassungsblog, https://verfassungsblog.de/how-to-demolish-an-independent-judiciary-with-the-help-of-a-constitutional-court/. (All online sources cited in this article have last been accessed on the 2nd of Nov. 2020.) A former member of the KRS, whose term had been terminated prematurely, made a complaint before the European Court of Human Rights, *see* Grzęda *v*. Poland, application no. 43572/18.
14 Article 9a of the Law on the KRS. Dz. U. 2018, 389.
15 CT judgment no. K 12/18.

in Poland,[16] in December 2017, the European Commission finally decided to activate Article 7 TEU against Poland, a decision based primarily on the reform of the judiciary,[17] and parallel infringement procedures have also been initiated.[18] The Article 7 procedure has not progressed since then, but commentators hope that it would be the CJEU that solves the problem of the Polish judiciary.[19]

Some recent judgments of the CJEU show how realistic these hopes were: namely, after being dismissed by the CJEU in cases related to judicial independence, the Polish government introduced still stricter rules regarding the freedom of expression of judges, moreover, it also tried to prevent that courts apply EU law. Before briefly discussing that cases, I am going to present a less apparent but more tricky method of influencing the judiciary, not from Poland but from Hungary.

2.2 Hungary: A cleverer, partly hidden way of influencing the judiciary?

Unlike in the case of Poland, the reasons for launching the Article 7 TEU mechanism against Hungary were manifold, given that the Fidesz government used its two-thirds majority in the parliament to restructure several fields of the public law system. Issues relating to the judiciary contribute only some points in the long list of the so-called Sargentini report of the European Parliament that finally led to the activation of Article 7 TEU against Hungary.[20] Although the report does not identify that as a systemic problem, it is important to see that the two main reasons of the Hungarian rule of law crisis is the system of targeted legislation and the practice of constant overconstitutionalization. The first means that since 2010, the government adopted several laws that do not actually have general effect, but they are designed in a way to favour the government's friends or punish their enemies. The latter refers to the strategy that some judgments of the constitutional court in politically sensitive cases were overridden by the two-thirds majority of the parliament through amendments of the constitution.[21] However, issues regarding the independence of the judiciary should not be underestimated.

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16 Summarized in the third Rule of Law Recommendation of the Commission (26 July 2017, C(2017) 5320 final), especially para. 45.

17 Reasoned proposal of the Commission in accordance with Art. 7 (1) on the Treaty of the European Union regarding the rule of law in Poland 20. 12. 2017, 2017/0360 (APP).

18 *See* s. III.

19 *See* e.g. Armin von Bogdandy et al., *A Constitutional Moment for the European Rule of Law – Upcoming Landmark Decisions Concerning the Polish Judiciary*, MPIL Research Paper 10/2018 (2018).

20 European Parliament resolution of 12 Sept. 2018 on a proposal calling on the Council to determine, pursuant to Art. 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)), points 12–18.

21 For further details *see* Beáta Bakó, *Hungary's Latest Experiences with Article 2 TEU: The Need for 'Informed' EU Sanctions* (forthcoming in *Defending Checks and Balances in EU Member States. Taking Stock of Europe's Actions* (Armin von Bogdandy et al. eds, Springer, 2021).

The Hungarian approach to sending judges into retirement is well known. The original idea was not that of Poland's ruling party, the PIS (Prawo i Sprawiedliwość, Law and Justice): the Fidesz government in Hungary adopted such a legislation in 2012, prescribing that judges (and prosecutors and notaries) must retire at the age of sixty-two. Later the age limit was raised to sixty-five, but still, both the Hungarian Constitutional Court and the CJEU found the legislation to be unlawful. The first based its reasoning on the violation of judicial independence,[22] the latter relied upon the violation of the directive on equal treatment in employment.[23] Following the judgments, the laws on the status of judges have been amended: judges affected by the legislation had to choose between retirement and continuing in office. A legislative amendment sought to influence their decisions: judges who decided not to return to service were eligible to compensation amounting to their remuneration for twelve months.[24] Many of those who returned to service, were not reinstated into their former, leading positions.[25] Judges must still retire by reaching the general retirement age which means sixty-five years minimally.[26]

Beyond that widely known story, other structural problems became apparent two years after the new Fundamental Law and the related reforms of the judiciary entered into force. Doubts about the adequacy of safeguards over the extensive powers of the head of administration of the judiciary, the President of the National Judicial Office (Országos Bírósági Hivatal, OBH), became reasonable. The President of the OBH is elected by a two-thirds majority of the parliament from amongst the judges with at least five years of service.[27] The first, most apparent problem with her powers was the ability to engage in discretionary reallocation of cases within courts from all over the country. Following the European Parliament's

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22 AB decision no. 33/2012. (VII. 17). MK [official journal] 2012, 13918.

23 CJEU, C-286/12 (ECLI:EU:C:2012:687). Regarding the different reasonings *see also* the comparative analysis of Attila Vincze, *Der EuGH als Hüter der ungarischen Verfassung – Anmerkung zum Urteil des EuGH 6. 11. 2012, Rs. C-286/12 (Kommission/Ungarn)*, 3 Europarecht (2013).

24 § 323/I (6) of Act XX. of 2013 on certain legal amendments related to the age limit in certain positions in the justice system.

25 This was also the subject of a complaint of more than 150 judges before the ECtHR. The Strasbourg Court found that it was a proper compensation and dismissed the complaints. *See* J. B. and others *v.* Hungary, ECtHR case no. 45434/12.

26 *See* the new § 91 of Act CLXII of 2011 on the Status and Remuneration of Judges (as amended through Act XX. of 2013).

27 Article 25 (5)–(6) of the Fundamental Law, 66 § of Act CLXI of 2011 on the on the Organization and Administration of the Judiciary. Actually, the first President of the OBH, Tünde Handó is the wife of a Fidesz-MEP and an old friend of the Prime Minister. She left the OBH in Nov. 2019 before her term of office expired, as she was elected as a constitutional judge. Her successor, György Barna Senyei was elected in Dec. 2019. For now, it seems that he will resolve most of the conflicts caused by the controversial practices of Ms. Handó.

resolution known as the Tavares report,[28] the possibility of case transfer was terminated through the Fifth Amendment of the Fundamental Law in autumn 2013.[29]

However, there were other, less apparent, rules that provided the OBH President with excessive powers over judges. The supervisory body of the OBH is the National Judicial Council (Országos Bírói Tanács, OBT) which is the most important body of judicial self-government, consisting of the President of the Curia and fourteen judges from each level of courts and tribunals in Hungary (according to a quota).[30] Since the Fifth Amendment of the Fundamental Law, the status of the OBT is safeguarded at the constitutional level,[31] but the supervisory powers of the OBT over the OBH are not specified in the constitution and neither the respective laws ensure that supervision to be really effective. In the first years of its operation, the OBT did not seek to limit the powers of the OBH President – until the practice regarding applications for judicial positions became clear.

Judges are appointed to vacancies according to a scoring system. Judges who apply for positions are scored by the other judges serving at the given court. The President of the OBH has two choices: she may appoint the applicant with the highest score, or she may appoint someone else, but in this case, the consent of the OBT is also needed.[32] In practice, it became apparent that the OBT's role could be easily avoided in this process. The OBH President often declared applications for judicial positions invalid, if she could not appoint the person she wished to put into the role. Reasons for the invalidations were sometimes described as procedural failures in the scoring, or that the relatively low number of cases at the given court did not require the appointment of a judge. The latter reasoning is questionable in the light of the fact that often a new vacancy was established in that same court soon afterwards.[33]

The OBT has few legal powers enabling it to control the OBH, even if it endeavours to act as a counterbalance. The operation of the OBT since January 2018 clearly demonstrates these limitations. In February 2018, the OBT established

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[28] Report on the situation of fundamental rights: standards and practices in Hungary, A7-0229/2013. Regarding the judiciary *see* especially points AY, AZ, at 30–35.

[29] In details *see* e.g. Pál Sonnevend, András Jakab & Lóránt Csink, *The Constitution as an Instrument of Everyday Party Politics: The Basic Law of Hungary*, in *Constitutional Crisis in the European Constitutional Area. Theory, Law and politics in Hungary and Romania* 102–103 (Armin von Bogdandy & Pál Sonnevend eds, Oxford: Hart 2015).

[30] § 88 of Act CLXI of 2011.

[31] Article 25 (5) of the Fundamental Law.

[32] The application process is regulated in detail in §§ 14–18 of Act CLXII. of 2011 on the Status and Remuneration of Judges.

[33] OBT member Viktor Vadász discussed this practice in details, *see* Vadász, *Krízis a bírósági igazgatásban?* [Crisis in the judiciary administration?], MTA Law Working Papers 2018/13, 9–10 (2018).

a committee to examine the practice of the OBH President regarding invalidated applications.[34] Following this, four OBT members resigned suddenly in May 2018.[35] The OBH President immediately used the opportunity to declare the OBT with eleven members illegitimate,[36] despite of the clear legal provision that requires the presence of ten OBT members for the decision making.[37] Even if the OBH President was concerned about the proper functioning of the OBT, she did not hurry to organize the election of new OBT members to fill the vacancies: the election of OBT members was foreseen only months later, to take place in October 2018.

However, the remaining members were not elected at this assembly of delegated judges in October either. Interestingly, the previously listed candidates did not wish to assume the membership of the OBT. Moreover, the majority of the assembly voted down the new, spontaneously proposed delegates for membership of the OBT. The obstruction of the assembly of delegated judges is particularly concerning in light of the composition of that assembly: appointees of the OBH President (presidents of courts and tribunals) and administrative leaders of the judiciary were significantly overrepresented.[38] (The total staff number of the OBT was restituted only in 2020, after the new president of the OBH entered into office.)

Both the OBT and the OBH made recommendations for draft legislation to clarify the relationship of the two bodies, but neither has been tabled by the parliament.[39] The OBH President also asked the Commissioner for Fundamental Rights to turn to the Constitutional Court and initiate a process for interpretation of the constitution concerning the question of whether the OBT operates lawfully. After several months, the Commissioner finally made a motion to the Constitutional Court requesting the interpretation of Articles 25 (5) and (6) of the constitution.[40] The Commissioner asked three questions without explicitly agreeing either with the OBT or with the OBH. His first question was whether the OBT, as a self-governing body of the judiciary, was subject to the chain of

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34 OBT decision no. 22/2018. (II. 22).

35 Then OBT President Edit Hilbert said in an interview that some of them were oppressed from leading judges of their court, https://index.hu/belfold/2018/07/31/birosag_obt_hilbert_edit_interju/. At this point it is important to point out that court presidents are appointed by the OBH President, so there is a direct superior–subordinate relation between them.

36 Vadász, *supra* n. 35, at 10.

37 § 105 (3) of Act CLXI of 2011.

38 *See* the communication of the OBT about the event, https://orszagosbiroitanacs.hu/eredmenytelen-a-pottagvalasztas/

39 The proposal of the OBT was submitted by an oppositional MEP: draft bill no. T/3010. The proposal of the OBH President can be found here, https://www.dropbox.com/s/c3lq20lx1d1ybyx/OBH%20javaslat.pdf?dl=0.

40 Case no. before the Constitutional Court: X/00453/2019.

legitimation, namely, whether, in light of the principle of the separation of powers, its competences should be indirectly derived from the parliament and the democratic will of the people. Second, if the answer to the first question is in the affirmative, whether the legitimacy requirement requires that all levels of the judiciary should contribute to the composition of the OBT? Third, which body or organ is entitled to act in order to resolve the legitimacy problems concerning judicial bodies?

In response to the motion before the Constitutional Court, the OBT decided to involve the parliament. In May 2019, the OBT asked the parliament to remove the OBH President from her office, reasoning that she had become unworthy to hold the position and that she had neglected to fulfil her obligations for more than ninety days due to her own fault.[41] Among her omissions, the OBT listed, inter alia, the invalidation of judicial applications without proper justification, the refusal to give proper information to the OBT, the refusal to approve the budget of the OBT and the failure to establish measures to elect the remaining members of the OBT. The OBT also emphasized the controversial appointment practices of the OBH President. In June 2019, the parliament decided not to remove the OBH President, without providing any reasoning.[42] The issue is delicate because, in November 2019, Tünde Handó left her position as OBH President because she has been elected as a judge of the Constitutional Court. Her successor seems to be ready to cooperate with the OBT, but this will not automatically repair all of the problems that have occurred.

3 THE CJEU AND JUDICIAL INDEPENDENCE: DISCOVERING ARTICLE 19 (1) TEU

Currently, several cases have been referred to the CJEU related to the Polish judiciary, either in the context of infringement proceedings or of preliminary references. However, the CJEU delivered its first encouraging decision regarding judicial independence prior to these cases.

In its judgment relating to salary reductions of Portuguese judges,[43] the Court established a direct link between a single fundamental right – the right to an effective remedy and to a fair trial which is guaranteed by Article 47 of the EU Charter of Fundamental Rights – and judicial independence, and through that, the rule of law itself. According to the judgment, the material scope of Article 19 (1)

41 OBT [OBT] decision no 34/2019 (V.08). The legal basis of the removal of the OBH President on the initiative of the OBT is regulated through § 74 of Act CLXI. of 2011 on the Organization and Administration of Courts.

42 17/2019 (VI. 12) OGY [National Assembly] decision (MK 2019, 3449).

43 C-64/16, Associação Sindical dos Juízes Portugueses *v.* Tribunal te Contas, ECLI:EU:C:2018:117.

TEU relates of the fields covered by EU law which is 'irrespective of whether the Member States are implementing Union law, within the meaning of Article 51(1) of the Charter'.[44] The Court defines Article 19 TEU as a concrete expression of the rule of law as a value under Article 2 TEU. The obligation of ensuring judicial review in the EU legal order under Article 19 TEU is not only the responsibility of the CJEU but also of the national courts, the reasoning goes on.[45] The Court then turns to the relationship between effective judicial protection and the rule of law, making it clear that the existence of the first belongs to the essence of the latter. Therefore, Member States have to ensure that their courts and tribunals meet the requirements of effective judicial protection.[46]

'In order for that protection to be ensured, maintaining such a court or tribunal's independence is essential, as confirmed by the second subparagraph of Article 47 of the Charter', the Court added,[47] referring to the Charter only secondarily, while primarily basing its argumentation on Article 19 TEU. The reasoning also goes into detail about the definition of independence of these courts: being autonomous, without any hierarchical constraint or being subordinated to other bodies.[48] The outcome of the concrete case was negative in so far that the salary reduction was found not to violate the independence of the judiciary.[49] However, the decision is still a milestone in the rule of law adjudication of the CJEU, especially regarding the current situation, primarily the most recent controversial judiciary reforms in Poland.

3.1 Horizontal Solange and Article 7 TEU

Prior to a discussion of the reform of the Polish judiciary, it is useful to offer an overview the first preliminary ruling regarding the Polish judiciary, requested by an Irish court. The case is a typical horizontal Solange[50] with an extra element: namely, the ongoing Article 7 TEU procedure against Poland. A Polish national was accused with drug-related criminal offences in Ireland and his extradition to Poland was refused by the Irish High Court because it found that the rule of law has been systematically damaged in Poland. The High Court expressed its conviction that the rule of law as a common value set up in

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44 C-64/16, para. 29.
45 C-64/16, paras 32–34.
46 C-64/16, paras 36–37.
47 C-64/16, para. 41.
48 C-64/16, para. 44.
49 C-64/16, para. 51.
50 Iris Canor, *My Brother's Keeper? Horizontal Solange: 'An Ever Closer Distrust Among the Peoples of Europe'*, 2 CMLR 385–386, 401 (2013).

Article 2 TEU has been breached in Poland and issued a request for a preliminary reference.[51]

In its judgment, the CJEU cited its earlier judgment in the case of Portuguese judges, but it did not take further steps down that that path. Instead, it made clear that the refusal of a surrender based on an European Arrest Warrant must be exceptional even in cases where a Member State subject to Article 7 process is affected. Executing EAWs may be refused automatically only after the European Council has declared the serious and persistent breach of EU values pursuant to Article 7 (2) TEU, the CJEU added.[52] While the Article 7 process is in the phase of a reasoned proposal of paragraph 1 – as it is the case with Poland – all the Irish High Court could do was, in fact, to apply a 'horizontal Solange' approach. Similar to its former decision in Aranyosi,[53] the CJEU ordered to apply an assessment process of two stages for the executing authority. First, it must be assessed generally whether the risk of breaching the right to fair trial takes place in the given country – for example, through the absence of judicial independence. Second, if the first doubt is affirmed, the particular circumstances of the concrete case should be assessed: namely, the executing authority must decide whether there are substantial grounds for believing that the applicant would not get a fair trial after his surrender.[54]

After requesting information from the Polish courts, in November 2018, the Irish High Court came to the conclusion that although, generally, the independence of the judiciary is threatened in Poland, there are no statistics or evidence suggesting that the respondent would be deprived of the right to a fair trial in the concrete case. However, this does not mean that the possibility of applying the 'horizontal Solange' is prevented in all cases. What has been decided in the concrete case is that the risk of a systemic deficiency in judicial independence – reaffirmed also by an Article 7 TEU procedure being in progress – is not necessarily sufficient to suspend the principle of mutual trust in every single criminal case. On the other hand, requiring domestic courts to make holistic, in-depth evaluations of judicial independence in foreign legal systems does not serve legal certainty.[55] Some scholars do not support the necessity of the second, concretized phase of the assessment arguing that 'since the Polish government's measures undermine the independence of the entire judiciary, there is no point to conduct an individual and specific assessment of the concrete risks the person concerned faces. There is

[51] Minister for Justice and Equality *v.* Celmer [2018] IEHC 119, para. 143.
[52] C-216/18 PPU (LM, ECLI:EU:C:2018:586), paras 72–73.
[53] C-404/15 and C-659/15 PPU paras 88–92.
[54] C-216/18 PPU, para. 68.
[55] Michal Krajewski, *Who Is Afraid of the European Council? The Court of Justice's Cautious Approach to the Independence of Domestic Judges*, 4 Eur. Const. L. Rev. 798–799 (2018).

now always the danger that any case might come at some point before a compromised judge'.[56]

Regarding preliminary references from 'problematic' Member States, the question also occurs whether cases could be referred back to the issuing courts if the CJEU finds that the independence of those courts is violated due to the possibility of political interference. On the other hand, some judges may decide not to request a preliminary ruling from the CJEU. Polish courts may also be discouraged to request preliminary references by the fact that the Minister of justice (acting as prosecutor general) issued a motion before the Constitutional Tribunal in which he sought a declaration of the unconstitutionality of Article 267 of the Treaty on the Functioning of the European Union (TFEU) 'to the extent that it allows referring to the Court [of Justice] a preliminary question … in matters pertaining to the design, shape, and organization of the judiciary as well as proceedings before the judicial organs of a member state'.[57]

3.2 When the retirement of judges finally became a rule of law issue

As mentioned above, in 2013, when the CJEU decided on the retirement of Hungarian judges in an infringement procedure, the case was handled as a discrimination case.[58] The European Commission has been inspired by the case of the Portuguese judges, as it was illustrated in 2018, a couple of months after the CJEU delivered that judgment. In the infringement proceedings brought against Poland in relation to the retirement of judges in ordinary courts and of judges at the Supreme Court, the Commission clearly alluded to Article 19 (1) TEU and Article 47 of the Charter.[59] Invoking these two norms in conjunction obviously means the delimitation of Article 51 (1) of the Charter,[60] but the CJEU placed the emphasis on Article 19 (1) TEU: in its judgment on the retirement of Supreme Court judges, the CJEU stated that 'the principle of effective judicial protection of individuals' rights under EU law' (referred to in the second subparagraph of Article 19 (1) TEU) was a general principle of EU law and it was only reaffirmed by Article 47 of the Charter.[61]

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56 von Bogdandy et al., *supra* n. 19, at 12.

57 Case no. K-7/18, in details *see* Kacper Majewski, *Will Poland, With Its Own Constitution Ablaze, Now Set Fire to EU Law?*, Verfassungsblog, https://verfassungsblog.de/will-poland-with-its-own-constitution-ablaze-now-set-fire-to-eu-law/.

58 II. 2. *supra*.

59 CJEU cases no. C-619/18 and C-192/18.

60 Matthias Schmidt & Piotr Bogdanowitz, *The Infringement Procedure in the Rule of Law Crisis: How to Make Effective Use of Article 258 TFEU*, 4 Common Mkt. L. Rev. 1094, 1095 (2018).

61 CJEU judgment in case no. C-619/18, para. 49.

The Court made clear that Article 19 (1) TEU was a proper ground for reviewing national rules that were the subject of the challenge,[62] because the Polish Supreme Court was a 'court or tribunal' that might rule on questions regarding the application of EU law,[63] and added that even if the organization of justice falls within the competence of the Member States, such competence must be exercised in compliance with obligations stemming from EU law.[64]

The outcome was a dismissal on the grounds of the second subparagraph of Article 19 (1) TEU resting upon two points. Regarding the first complaint, concerning retirement age for Supreme Court judges, the Court declared that the principle that judges should not be removed from office was not absolute, but it was subject to a proportionality test.[65] The law failed at the first stage of the assessment, because Poland had not demonstrated that the challenged measures were appropriate means for the purpose of standardizing the judges' retirement age with the general retirement age.[66] It is worth noting that the Court primarily based its decision on Article 19 (1) TEU (which refers to the effective legal protection as an obligation of the Member States and not as a fundamental right)[67] and not on Article 47 of the Charter. All the same, the Court applied the typical test of limiting fundamental rights.

The subject of the second complaint was the possibility that the President of the republic might be granted with the discretion to extend the period of judicial activity of those judges who should have retired according to the new law. At this point, the Court alluded to the independence and impartiality of judges[68] also on the basis of Article 19 (1) TEU, without even mentioning such a proportionality test that it applied regarding the first complaint. Instead, the Court created requirements according to which the granting of such extensions could be compatible with the principles of judicial independence and impartiality. Both the substantive conditions and the procedural rules for adopting such decisions must ensure that 'reasonable doubts' could not be raised in the minds of individuals concerning the neutrality of the courts 'with respect to the interests before them'.[69] In regard to the substantive rules, the Court found that the decision of the President of the republic about the extension of the term is discretionary and it is not 'governed by any objective and verifiable criterion and for which reasons

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62 C-619/18, para. 59.
63 C-619/18, para. 56.
64 C-619/18, para, 52.
65 C-619/18, para. 79.
66 C-619/18, para. 90.
67 'Member States shall provide sufficient remedies to ensure effective legal protection in the fields covered by Union law'.
68 C-619/18, para. 108 et seq.
69 C-619/18, para. 111.

need to be stated'.[70] The procedural guarantees have also been found insufficient. The fact that the National Council of the Judiciary (KRS) was required to deliver an opinion to the President prior to his decision would only have served as a guarantee if that body had been independent from the legislative power, the CJEU stated,[71] which is not actually the case in Poland.[72]

In sum, the Court based its judgment on the second subparagraph of Article 19 (1) TEU in relation to both complaints, but it made a distinction between the different elements of judicial independence. The first complaint referred to the principle of irremovability of judges, which means that judges should not be removed before their term is expired, unless they breached their obligations or proved to be incapable. This principle got a fundamental right-like status at least in so far that the proportionality test is applicable when that principle is limited, the Court concluded.[73] The limitation of the principle of judicial impartiality (the subject of the second complaint), however, is subject to a system of requirements that is aligned to the perception of 'outsiders'.[74] After the Court found that the given rules did not fulfil these requirements, the Court did not examine what the objective of the discretionary extension of judicial terms was and whether it was an appropriate and proportional means to reach that objective.

Finally, it is important to recall the fact that the application of the law in question had already been suspended before the CJEU delivered its judgment. After the CJEU ordered interim measures and expedited procedure in the case,[75] the Sejm suspended the law, and the Supreme Court judges who were retired due to the operation of the law were reinstated.[76]

In November 2019, a similar judgment was delivered in another infringement case against Poland regarding the retirement of judges at ordinary courts and the prolongation of their period of service by the justice Minister. While emphasizing the requirements of a legitimate objective and proportionality at any exceptions to the principle of irremovability of judges,[77] the CJEU based its decision on the aforementioned 'reasonable doubts in the minds of individuals' regarding the

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70 C-619/18, para. 114.
71 C-619/18, paras 115–117.
72 *See* II. 1. *supra*.
73 C-619/18, para. 79.
74 'The rules seeking to guarantee that independence and impartiality must be such that they enable any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it to be precluded'. C-619/18 judgment, para. 108.
75 Case no. C-619/18. The orders were delivered on the 18th of Oct. and on the 16th of Nov. 2019, respectively.
76 Article 2 (1) of the amending act of 21. Nov. 2018, Dziennik Ustaw 2018, 2507.
77 Judgment in C-192/18, para. 115.

imperviousness of the judges concerned,[78] because, inter alia, the extension given by Minister of justice was subject to vague and unverifiable criteria and his decision was not required to state reasons.[79] In this case, the court also examined the gender-based discrimination, because of the different retirement age for male and female judges, but concerning the principle of judicial independence, the dismissing judgment was based exclusively on Article 19 (1) TEU.

3.3 How not to select the members of an independent judicial body?

The preliminary references regarding the disciplinary chamber of the Supreme Court and the Polish Judicial Council, the KRS[80] clearly reflect the systemic nature of the problems facing the Polish judiciary. If a Supreme Court judge submits a declaration expressing a wish to serve beyond his retirement age, the KRS delivers an opinion to the President of the republic who finally decides. An appeal may be filed against the opinion of the KRS before the Disciplinary Chamber of the Supreme Court; but the members of this chamber are appointed on the proposal of the KRS. And the controversies do not end here, because the members of the KRS are elected by the parliament and no longer by the judges themselves.[81] The question is whether the Disciplinary Chamber counts as an independent court or tribunal within the meaning of EU law, given that its composition indirectly depends on the parliament, through the KRS.

In his opinion, Advocate General Tanchev answered this question in the negative: the KRS must be 'free of influence from the legislative and executive authorities' and the role of the KRS in selecting judges of the Disciplinary Chamber precludes the chamber from being sufficiently independent.[82] AG Tanchev primarily based his argument on Article 47 of the Charter but he also recalled that in its judgment concerning the retirement of Supreme Court judges, the CJEU did not address the 'severity of the breach of rules protecting the irremovability and independence of judges' in the context of Article 19 (1) TEU and the generalized breach of those rules was not mentioned either.[83] Therefore, he considers that the Disciplinary Chamber should be precluded from having jurisdiction in the disputes and the relevant national law should be disapplied.[84]

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78 C-192/18, para. 124.
79 C-192/18, para. 122.
80 Joined cases no. C-585/18, C-624/18 and C-625/18.
81 *See* II. 1. *supra*.
82 Paras 131 and 137 of the AG opinion in joined cases no. C-585/18, C-624/18 and C-625/18.
83 AG opinion in C-585/18, C-624/18 and C-625/18, para. 147.
84 AG opinion in C-585/18, C-624/18 and C-625/18, paras 153–154.

The CJEU basically followed the AG's opinion but reached a milder conclusion. Instead of stating that any of the judicial bodies involved did not satisfy the requirements of independence, the CJEU left this decision to the referring court and only determined criteria for that assessment.[85] In any case, the criteria are quite clear in the context of the concrete case. Concerning the Disciplinary Chamber, two aspects have been found relevant. First, the Chamber has exclusive jurisdiction to rule in cases of the employment, social security and retirement of judges of the Supreme Court which is especially relevant after the disputes over the new law on the Supreme Court.[86] Second, the composition of the chamber raises some questions: it is constituted solely of newly appointed judges, excluding formerly serving judges of the Supreme Court, and its members are selected by the judicial council, the KRS.[87]

At this point, the composition of the KRS has great significance. The CJEU pointed out the circumstances that led to the composition of the new KRS: that the terms of former members were reduced. Further, KRS members are now elected by the parliament and no longer by their peers, the CJEU noted.[88] Regarding the KRS, the CJEU also encouraged the referring court to examine the actual practice beyond the legal framework: 'the referring court is also justified in taking into account the way in which that body exercises its constitutional responsibilities of ensuring the independence of the courts and of the judiciary'.[89]

Contrary to the infringement cases discussed above, this preliminary ruling is primarily based on Article 47 of the Charter,[90] but operates with the same main argument: objective circumstances regarding the formation, characteristics and composition should not be 'capable of giving rise to legitimate doubts … as to the imperviousness of that court to external factors'.[91] Referring to the right to effective judicial protection, the CJEU also made clear that if the referring court found the affected judicial bodies not to be independent, provisions of national law conferring jurisdiction to them, will have to be disapplied.[92]

The judgment of the CJEU resulted in rapid reactions in Poland. First, in the case subject to that preliminary procedure, the Polish Supreme Court refused to refer the case to the jurisdiction of the Disciplinary Chamber and it quashed the opinion of the KRS in the concrete case. In its reasoning, the Supreme Court

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85 Judgment in C-585/18, C-624/18 and C-625/18, para. 171.
86 Judgment in C-585/18, C-624/18 and C-625/18, paras 147, 149. *See also* III.2. *supra.*
87 Judgment in C-585/18, C-624/18 and C-625/18, para. 152.
88 Judgment in C-585/18, C-624/18 and C-625/18, para. 143.
89 Judgment in C-585/18, C-624/18 and C-625/18, para. 144.
90 According to the CJEU, a distinct analysis of Art. 2 and Art. 19 (1) TEU could only reinforce the conclusion (para. 169).
91 Judgment in C-585/18, C-624/18 and C-625/18, para. 171.
92 Judgment in C-585/18, C-624/18 and C-625/18, para. 164.

stated that the KRS, as it is currently constituted, is not an impartial and independent body.[93] Later, in January 2020, the Supreme Court of Poland reaffirmed that whenever the Supreme Court has to determine an appeal against a resolution of the KRS, it would examine whether the KRS is an independent body according to the criteria drawn up by the CJEU.[94] Following that, the Constitutional Tribunal immediately prohibited the Supreme Court from releasing resolutions regarding the conformity of international court judgments concerning the KRS and the appointment of judges and later, the Tribunal also declared the respective resolution of the Supreme Court to be inconsistent with not only the Polish Constitution, but also with certain provisions of the European Convention on Human Rights and of the Treaty on European Union.[95]

Regardless of the CJEU judgment, the Disciplinary Chamber continued to operate until the CJEU ordered its suspension as an interim measure in April 2020.[96] The Polish legislature also reacted: a package of legal amendments was adopted by the Sejm in December 2019. According to the new rules, it is a disciplinary offence for a judge to question the legitimacy of other judges, and procedural actions to challenge the validity of such appointments are prohibited. The Venice Commission came to the conclusion that due to the reform, Polish courts will be prevented from examining whether other courts in Poland are independent under EU law,[97] so, in practice, the implementation of the aforementioned judgment of the CJEU will be made legally impossible. Based on the new rules, a judge has already been suspended because he tried to implement the decision of the CJEU regarding the KRS.[98] In April 2020, the European Commission announced to launch an infringement procedure against Poland upon the new law because of the violation of judicial independence and of the primacy of EU law,[99] and the Executive Board of the European Network of

[93] Supreme Court case no. III PO 7/18 (5 Dec. 2019).
[94] Supreme Court resolution no. I NOZP 3/19 (8 Jan. 2020).
[95] Constitutional Tribunal decisions in cases no. Kpt 1/20 and U 2/20.
[96] Order of the Court in Case C-791/19 R.
[97] In details *see* the joint urgent opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law of the Council of Europe, opinion no. 977/2019, especially para. 59, ss B and C.
[98] In line with that judgment of the CJEU, judge Pawel Juszczyn assessed the promotion of a district judge by the new KRS and in order to do that, he wanted to examine the supporting signatures for the candidates of the new KRS. Because of that, he was suspended from his post by the Disciplinary Chamber. For case studies of this case and others *see* Katarzyna Gajda-Roszczynialska, Krystian Markiewicz: *Disciplinary Proceedings as an Instrument for Breaking the Rule of Law in Poland* (Hague Journal on the Rule of Law 2020, https://link.springer.com/article/10.1007/s40803-020-00146-y.
[99] Communication of the Commission, https://ec.europa.eu/commission/presscorner/detail/en/ip_20_772.

Councils for the Judiciary initiated to expel the KRS from the ENCJ because of its dependency from the executive.[100]

The strict legislative response, especially the further disciplinary restrictions concerning Polish judges led to a very similar scenario that we have seen in the aforementioned Celmer case[101] – though it had an opposite outcome than the first one. The Higher Regional Court of Karlsruhe (Oberlandesgericht Karlsruhe) decided in February 2020 to refuse a European Arrest Warrant from Poland because of the lacking independence of the Polish judiciary, that leads to the essential violation of the defendant's right to fair trial.[102] The German court did not issue a preliminary request but decided about the case on its own. The court cited the Celmer judgment of the CJEU and evaluated both the general situation and the specific conditions.

It is apparent from the reasoning that it was the most recent judiciary reform that convinced the court that beyond the general deficiencies of the Polish justice system, the right to fair trial, as it is guaranteed by Article 47 of the Charter, cannot be safeguarded in the concrete case. The OLG Karlsruhe emphasized that if criminal judges might face disciplinary measures relating to their evaluation of evidence, a fair judicial process will be out of question.[103] In 2020, the Amsterdam District Court (Rechtbank Amsterdam) issued preliminary requests concerning the surrender of Polish citizens to Poland, referring to the Celmer judgment of the CJEU.[104] As an answer, the Warsaw District Court refused an EAW from the Netherlands in a case regarding parental rights.[105] So it seems that mutual trust continues to erode.

4 WHAT CAN HUNGARIAN JUDGES HOPE FOR?

The recent case law of the CJEU about Article 19 (1) TEU and Article 47 of the Charter may also be a solution for some problems faced by the Hungarian judiciary – and this has been realized by the judges, too.

It was argued above that the most serious (and unresolved) problem facing the Hungarian judiciary is the constant battle between two judiciary bodies: the administrative National Judicial Office, the OBH and the self-governing

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100 *See* the letter of ENCJ President Kees Sterk to KRS Chairman Leszek Mazur, https://pgwrk-websitemedia.s3.eu-west-1.amazonaws.com/production/pwk-web-encj2017-p/News/Letter%20ENCJ%20to%20KRS%2022%20April%202020.pdf.

101 *See* point III. 1. *supra*.

102 OLG Karlsruhe, case no. Ausl 301 AR 156/19.

103 See s. IV. point 3. of the decision.

104 Pending cases no C-354/20 PPU and C-412/20 PPU.

105 Warsaw District Court case no. VIII Kop 180/20 and VIII Kop 181/20, English summary at Ruleoflaw.pl: https://ruleoflaw.pl/district-court-in-warsaw-european-arrest-warrant/.

National Judicial Council, the OBT. The conflict stems from the controversial appointment practices of the OBH President who often invalidated application processes and used her legal powers to make temporary appointments in a questionable way. The OBT has drawn attention to these problems since the beginning of 2018, and now it seems that the CJEU will have the chance to decide on the matter.

4.1 A Hungarian judge questioning his own independence

The invalidation practice of the OBH President also led to lawsuits in some cases. A criminal judge, Csaba Vasvári turned to the labour court after not being appointed to a vacancy at the Higher Regional Court of Budapest (Fővárosi Ítélőtábla). He received the highest score but the OBH President invalidated the application process. The court at the first instance found that invalidating the application in the concrete case consisted of the abuse of rights by the OBH President. The court at the second instance annulled this decision with the reasoning that the OBH President did not have the legal capacity to face legal proceedings based on the invalidation of the application because this was not provided by any law.[106] These proceedings, explicitly about a status of a judge, would have been an ideal occasion to initiate a preliminary reference to the CJEU related to judicial independence.

But finally, such a reference was made in a completely different case – exactly by Mr Vasvári who is now a judge at the Pest District Court (Pesti Központi Kerületi Bíróság, PKKB). The preliminary request was made upon the motion of the lawyers of a defendant who is a Swedish national with Turkish origins, accused with the 'abuse of ammunition'. (In the concrete case, the defendant imported some ammunition to a firearm which he owned legally, but he only had the necessary licence for the firearm and not for the ammunition). His current domicile is unknown, so the criminal process is continued in his absence.

The process before the Pest District Court was suspended and three questions are referred to the CJEU[107]: the common point of them is the reference to the right to a fair trial as guaranteed by Article 47 of the EU Charter of Fundamental Rights. Only the first question concerns strictly the concrete case by raising the question of whether the defendant was provided with proper translation and interpretation in the criminal process. This question arises because there is no

[106] The anonymized database of judgments (managed by the OBH) has not been updated with these judgments yet decision as it was not a judgment in the merits of the case. Press covered the case in details, https://hvg.hu/itthon/20190320_Hando_Tunde_erinthetetlen_perelheto.

[107] PKKB decision no. 1.B.30.263/2018/30, 11th of July 2019.

database of translators and interpreters in Hungary. They are appointed at the discretion of the authorities when needed. Furthermore, there are no special rules regarding the eligibility of individuals who may work as interpreters in judicial processes.

In regard to the general situation of judicial independence in Hungary, the second question is the most relevant. The preliminary reference recalls the conflict between the OBH and the OBT including the practice of the (then) OBH President regarding invalidation of judicial applications. Next to Article 47 of the Charter, the preliminary request alludes to Articles 2 and 19 (1) TEU and recalls the CJEU's relevant case law.[108] The motion of the PKKB discusses the role of court presidents in detail: they define the system of case assignment, they can initiate disciplinary proceedings and they may affect the career development of judges through their evaluations. Given that the OBH President is a political appointee (elected by the two-thirds majority of the parliament), it is very problematic that the OBT cannot actually exercise its right to consent at the appointment of court presidents, and the OBH President is able to indirectly affect issues that belong to the powers of court presidents, the motion argues.

One might ask how all these problems relate to the concrete case? Judge Vasvári also answers this question. The Court of Appeal of Budapest, which is the second instance court to the Pest District Court, has been operating without a permanent President since January 2018. In this period, three calls for applications have been published for the position of president of the court but all of them have been invalidated, and the OBH President appointed interim presidents (serving at other courts) for the periods of one year. The newly appointed interim President of the Court of Appeal of Budapest was so loyal to the OBH President that he signed an open letter in which he called on the members of the OBT to resign.[109] The motion also points out that in 2018, the OBH President initiated five disciplinary processes against judges who were members the OBT (who are in principle entitled to control the OBH President). Judge Vasvári reminded that he was a member of the OBT and his applications for judicial positions had been invalidated without any reasoning on a number of occasions.

In the light of all these issues, the independence of all judges at the Court of Appeal of Budapest and its District Courts is questionable, Vasvári concludes, with the practical effect of questioning his own independence. The concrete preliminary question is whether the practice of invalidating judicial applications by the OBH President is contrary to the principle of judicial independence pursuant to

[108] Joined cases no. C-585/18, C-624/18 and C-625/18.

[109] Péter Tatár-Kis signed the document as the President of the Court of Appeal of Balassagyarmat, https://birosag.hu/hirek/kategoria/birosagokrol/torvenyszeki-elnokok-nyilatkozata.

the second subparagraph of Article 19 (1) TEU and Article 47 of the Charter with regard to the fact that the OBH President is exclusively responsible to and removable by the parliament. If the answer is yes, and a judge has good reasons to believe that he would be unlawfully disadvantaged because of his activity in the OBT, the second question is whether this should lead to a conclusion that the right to a fair trial is not adequately safeguarded.

Additionally, alluding to the same provisions of EU primary law, the PKKB raises a question regarding salaries. Until 2018, judges and prosecutors got the same remuneration where they held equivalent positions, but in September 2018, the premium payments of prosecutors generally increased by 10–20% (but in leading positions as much as 320%), while the premium payments of judges remained unchanged. In this situation, the OBH President can easily reward judges with discretionary bonuses, influencing judges and threatening judicial independence, the PKKB points out.

Less than a week after the PKKB submitted the motion, the prosecutor general challenged the preliminary request before the Curia (the supreme court of Hungary). The Prosecutor General used a special appeal process that is named 'remedy in order to preserve the legality'. Such an appeal may be brought by the Prosecutor General in any criminal cases without any deadlines.[110] He argued that the second and the third questions (namely those that concerned with the systemic problems of the judiciary) were not proper subjects for a preliminary procedure, because they were not aimed at the interpretation of EU law and they did not suggest that the relevant Hungarian law was contrary to the principles of EU law. It was also argued that the questions raised were not necessary to determine the case before the court. In relation to the first question, the prosecutor general underlined that no concerns were raised about the translation and interpretation in the concrete case. Therefore, the prosecutor general invited the Curia to declare that the preliminary request of the PKKB breached the law.[111]

However, there is a trick here that leads to a strange spiral. The Prosecutor General obviously requests the Curia to interpret Article 267 TFEU. The preliminary request clearly relates to the interpretation of EU primary law. The

[110] § 667 of Act XC of 2017 on the Criminal Procedure. The use of this tool must be evaluated together with the fact that the Prosecutor General is elected with the two-thirds majority of the parliament: incumbent Péter Polt is a former Fidesz member and an old friend of the prime Minister and of several Fidesz founders, including the husband of the then OBH President.

[111] The decision of the prosecutor general has not been made publicly available, only a short communication was published, http://ugyeszseg.hu/legfobb-ugyeszi-jogorvoslati-inditvany-a-keruleti-biro sag-vegzesevel-szemben/. At this point it is worth to recall the motion of the Polish prosecutor general (and Minister of justice) before the Constitutional Tribunal for the review of Art. 267 TFEU (K-7/18). That motion aims at generally preventing preliminary references regarding the judiciary administration. The Hungarian prosecutor general, on the other hand, requests only the review of a particular preliminary reference from the Curia.

question is rather whether this interpretation is necessary for the judgment. Regarding the fact that the Curia is a court 'against whose decisions there is no judicial remedy under national law' in the sense of Article 267 (3) TFEU, it might be argued that the Curia should also request a preliminary ruling in order to decide on the legality of the preliminary request made by the PKKB.

But the Curia did not do so. Instead, it upheld the motion of the prosecutor general, stating that the preliminary reference violated the law on Criminal Procedure as the preliminary questions were not relevant to the determination of the case. The Curia also added that the aim of preliminary references was to provide the uniform application of EU law and not the evaluation of the constitutional system of a Member State.[112] Despite this decision of the Curia, there is no practical impact on the preliminary reference. In judgments delivered upon the aforementioned special appeal of the Prosecutor General, the Curia may declare the preliminary reference as illegal, but it cannot order lower courts to revoke such references.[113]

Beyond that, there is another very telling story about Vasvári's reference. A couple of weeks after the Curia delivered its decision upon the motion of the prosecutor general, a disciplinary proceeding has been initiated against judge Vasvári by Péter Tatár-Kis, President of the Court of Appeal of Budapest. The case was widely discussed in the media and the Association of Hungarian Judges (Magyar Bírói Egyesület, MABIE) also objected to the proceedings, considering that the reason for invocation of the proceedings was the preliminary reference in question.[114] The law clearly states that judicial disciplinary proceedings may only be launched upon the breach of obligations or unworthy behaviour.[115] After two weeks, Péter Tatár-Kis revoked the disciplinary process, at the same time rejecting the suggestions that it had anything to do with the preliminary reference. Without revealing the 'real reasons' behind the process, Tatár-Kis insisted that he was obliged to launch the disciplinary process, but still, he had to revoke it 'in the interests of the organization of the judiciary'.[116]

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[112] Curia judgment in case no. Bt.838/2019.

[113] 669. § (3) of Act XC of 2017 on the Criminal Procedure.

[114] *See* the communication of the Association of Hungarian Judges (MABIE), http://mabie.hu/index.php/1486-tiltakozik-a-biroi-egyesulet.

[115] §§. 105–106 of Act CLXII of 2011 on the status and renumeration of judges.

[116] His communication was published in the media, e.g., https://index.hu/belfold/2019/11/22/fegyelmi_eljaras_visszavon_fovarosi_torvenyszek/.

4.2 Could the head of judicial administration abolish judicial independence?

The preliminary reference of the PKKB[117] has questions concerning its admissibility beyond the necessity of the reference. Judge Vasvári argues that he is a member of the OBT, that his applications were invalidated, but he does not present any arguments that illustrate how this would affect the outcome the concrete case before him.[118] Should he find the defendant guilty or innocent because of his invalidated applications, or, because of his superior being influenced by the OBH President? There is no reference to that in the motion.

Moreover, the referred questions also lack any clarity regarding the consequences. While related to the first question regarding the translation, Vasvári clearly asks whether the case can proceed *in abstentia*, the second and the third questions (about the controversies around the OBH President and the salary of judges) do not concern the possibility of any practical consequences. They just seek a declaration of the fact that the fair trial is not provided. Of course, it would be difficult to suggest practical outcomes at this point, such as the transfer of the case to another court, because presidents of other courts are also appointed by the OBH President. This case perfectly illustrates how difficult it is to address systemic problems through the institution of preliminary references, which is designed to serve the correct application of EU law in particular cases.[119]

The main subject of the preliminary reference is obviously the activity of the OBH President. It must be underlined that the difficult situation that has arisen between the judicial organs set out above is the result of the deficiencies of the respective law and of the attitude of the (former) OBH President. By regularly invalidating judicial applications and refusing cooperation with the OBT, she overlooked the fact that the aim of the OBT is to supervise her activities.[120] On the other hand, it is due to the omissions of the legislature that there are no proper guarantees in the respective law against such a scenario. Moreover, the parliament also did not find it necessary to correct the law afterwards, since the stalemate between the OBH and the OBT has become apparent and both affected bodies requested legislative intervention.[121] Still, it is correct that, after all, the preliminary request primarily highlights the controversial practice of the OBH President instead of the law on the Organization and Administration of the Judiciary. At the same time, Judge Vasvári made an important point regarding the bigger picture

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117 Case no. before the CJEU: C-564/19.

118 About the necessity requirement *see* e.g. Nils Wahl & Luca Prete, *The Gatekeepers of Article 267 TFEU: On Jurisdiction and Admissibility of References for Preliminary Rulings*, 2 CML Rev. 531 (2018).

119 *See also* s. V. about this.

120 *See* § 88 and § 103 of Act CLXI of 2011.

121 *See* II. 2. *supra*.

of the legal framework: the OBH President is elected by the parliament (with two-thirds majority[122]) and she is responsible only to the parliament. It is exclusively the legislature that can remove her before the end of her term.[123]

The position of the OBH President obviously raises the question whether the controversial practices that have been adopted are manifestations of the indirect influence of the power of the legislature over the judiciary. In this regard, some parts of the recent judgments of the CJEU might contain some guidelines. The judgment about the retirement of Polish Supreme Court judges is relevant in so far as the extension of service term is concerned, which is a decision at the discretion of the President of the Republic of Poland. However, the President belongs to the executive rather than the legislature, but the Court's statement on indirect types of influence is no doubt relevant. Specifically, the procedural rules regarding the extension must 'be such as to preclude not only any direct influence, in the form of instructions, but also types of influence which are more indirect and which are liable to have an effect on the decisions of the judges concerned'.[124] What should that mean in the case of the Hungarian OBH President? She does not decide on the extension of terms but on the promotion of judges which is essential to judicial independence, with particular regard to the competences of the court presidents.[125] Furthermore, her decision is not discretionary, at least in theory. However, in cases where she invalidated applications and appointed temporary court presidents, avoiding the role of the OBT, she made de facto discretionary decisions. Therefore, there are convincing arguments for applying this requirement also in the Hungarian case.

It is also very useful to compare the Hungarian case with the preliminary reference case regarding the Polish KRS.[126] It must be emphasized that the equivalent of the KRS in the Hungarian legal system is not the OBH but the OBT: they are both councils of the judiciary: bodies of self-government. However, it still makes sense to find some common points in the two cases. The Polish judiciary council, the KRS, is in principle the guardian of the independence of the Polish judiciary,[127] but now, its members are elected by the parliament. The body has the competence to make recommendations to the President of the republic regarding judicial appointments to the Supreme Court and other courts

122 Article 25 (6) of the Fundamental Law.
123 *See* §§ 70 to 74 of Act CLXI of 2011. The President of the Republic can only initiate to discharge her from her office, if she is unable to undertake her duties for reasons which are not attributable to her. In cases of her omissions, actions, or conflict of interests, the decision is up to the parliament. Actually, in Nov. 2019, the parliament removed her as she was elected as a constitutional judge.
124 Judgment in C-619/18, para. 112.
125 *See* IV. 1. *supra*.
126 *See* IV. 3. *supra*.
127 Article 186 (1) of the Polish Constitution.

and it may turn to the Constitutional Court to review acts affecting judicial independence.[128] The Hungarian OBT is in principle the supervisor of the judicial administration body, the OBH. While the OBH President is elected by the parliament, the members of the OBT are selected by the judges themselves. However, de facto, the OBT could not effectively fulfil its supervisory role over the OBH because its budget depends on the OBH,[129] conflicts of interest are not excluded as OBH-appointed judicial leaders may also be members of the OBT,[130] and, as discussed above, the consent of the OBT is easy to be avoided when judicial appointments are made.

The relevance of the Polish KRS in the preliminary reference regarding the Disciplinary Chamber was the fact that the President of the republic appoints members of that chamber on the proposal of the KRS. The CJEU basically considered two points. First, that the Disciplinary Chamber has exclusive jurisdiction in cases that are crucial for judicial independence, and second, that its composition is highly influenced by the KRS which is elected by the legislative branch.[131]

It must be seen that the OBT plays a more indirect role than the KRS in the Polish case. Namely, Judge Vasvári suggests that a concrete court is not independent because it is led by an interim appointee of the OBH President, after the OBT has been set aside and the normal application process for that position has been invalidated.

However, the core of the problem is the same: judicial self-government bodies, whose task would be to guarantee the independence of the judiciary, cannot perform their functions properly thanks to external influence. In the case of the Polish KRS, this influence is more direct through the election of its members by the parliament. In Hungary, the influence was not exercised directly by the parliament but by the OBH President, who was elected by the two-thirds majority of the parliament.[132]

The encouraging thing about the CJEU's approach in the KRS case is the relevance of the actual practice beyond the legal and organizational situation. The Luxembourg Court expressly called the referring Polish court to take into account 'the way in which that body exercises its constitutional responsibilities'.[133] If the

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128 *See* e.g. Anne Sanders & Luc von Danwitz, *Selecting Judges in Poland and Germany: Challenges to the Rule of Law in Europe and Propositions for a New Approach to Judicial Legitimacy*, 4 German L. J. 775–776 (2018).

129 § 104 of Act CLXI of 2011.

130 § 90 of Act CLXI of 2011.

131 *See* IV. 3. *supra*.

132 Normally, the two-thirds majority would have to guarantee a consensus between the government and the opposition, but in a case when one party governs with two-thirds majority, they need no compromise: the current system of the judiciary administration was set up exactly within these power relations.

133 Judgment in C-585/18, C-624/18 and C-625/18, para. 144.

practical experiences are examined in the Hungarian case, then the appointment practice of the former OBH President, together with the fact that she was elected by the parliament, is likely to be impugned as it is 'capable of giving rise to legitimate doubts' about the imperviousness of judges to external factors.

From the perspective of the right to effective judicial remedy, we must recall the two-stage assessment, reaffirmed by the CJEU in the LM (Celmer) case[134]: in the second stage, it should be measured whether in the particular case there are substantial grounds for believing that the applicant would not get a fair trial. This assessment has been established for EAW-related 'horizontal Solange' cases where a court of a Member State had to review the independence of a court of another Member State. Caution is understandable (moreover, required) in such cases, and the attitude of the CJEU might change in the present case where the requesting court must decide about its own judicial system.

But the judgment in LM shows that an ongoing Article 7 TEU procedure, which is based primarily on the systemic oppression of the judiciary, is not enough to declare the lack of independence of any court in the affected Member State. Judge Vasvári demonstrated some arguments regarding this point: he is a member of the OBT, disciplinary proceedings have been brought against him and other OBT members, and so on.

Two questions arise at this point. First, whether his (alleged) lack of judicial independence can be linked to every single case he tries, and second, whether its cause, the dependent superior implies a lack of independence of the whole court belonging to that court President. And if the answer to both questions is positive, this will lead to consequences, because this is the court with the biggest caseload in Hungary.

5 WHAT CAN BE SOLVED BY A PRELIMINARY REFERENCE, AND WHAT CANNOT?

The cases of Poland and Hungary illustrate that the most effective infringement proceedings are usually limited to the most apparent and harsh violations of judicial independence. The rest of the problems remain to be solved either before the national constitutional courts (which are not the best choice as they are may be subject to political influence to a greater or lesser extent in these two countries[135]), or before the CJEU through preliminary reference procedures. However, preliminary rulings regarding the interpretation of EU primary law have *erga omnes* effect, the preliminary proceeding itself is 'not strictly an enforcement measure'.[136]

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134 C-216/18 PPU.

135 For details *see* e.g. sources in fn. 3. and fn. 21.

136 Morten Broberg, *Preliminary References as Means for Enforcing EU Law*, in *The Enforcement of EU Law and Values* 107–108 (András Jakab & Dimitry Kochenov eds, OUP 2017).

In a preliminary reference relating to the interpretation of EU law, the CJEU cannot annul any national rules, but may order the referring court to disapply national rules.

But what if the referring court is unable to disapply national rules, as it is the case with the PKKB? Namely, the (alleged) dependency of the referring Hungarian judge primarily roots in a controversial *practice* of the OBH President – who is no longer in office. Even if this practice has been enabled by inadequate rules, those are institutional rules, rather than being substantive or procedural rules that could be applied or disapplied by the referring court in the concrete dispute.

Preliminary rulings bind national courts who apply the law, but not the addressees of the law – even if they are judges themselves, like the OBH President. Accordingly, even if the judgment of the CJEU will find that the invalidation practice of the former OBH President was contrary to EU law, such an interpretation may only be effective beyond the concrete case (and as mentioned above,[137] the practical consequences for the concrete case are not clear at all), if judges, whose appointments have been refused based on the invalidation of the application process bring proceedings based on labour law against the OBH and allude to Article 19 (1) TEU.[138] In such processes, the Hungarian courts hearing the proceedings will have to align with the interpretation of the CJEU. However, this is not necessarily guaranteed in practice. In principle, a deviance from a preliminary ruling could be subject to an infringement procedure, but infringement procedures may be brought against governments.[139] And governments have no influence on the judiciary – normally. But as demonstrated in this article, the situation of the Hungarian and Polish judiciary is far from normal.

[137] Point IV. 2.

[138] It is worth to remind that the former OBH President has currently been appointed to the Constitutional Court, and it seems probable that her successor will not continue her controversial appointment practice.

[139] Andreas Hofmann, *Resistance Against the Court of Justice of the European Union*, Int'l J. L. in Context 266 (2018).