The Charter and the Court of Justice of the European Union
Notable Cases from 2019-2022

The Charter and the Court of Justice of the European Union Notable Cases from 2016-2018

Fundamental Rights Protection in Europe

Aniel Pahladsingh & Ramona Grimbergen (eds)

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THE CHARTER AND THE COURT OF JUSTICE OF THE EUROPEAN UNION NOTABLE CASES FROM 2019-2022

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PREFACE

With the publication of the second edition of this bundle with commentaries on the Charter of Fundamental Rights of the European Union (Charter), we aim to give a further impetus to the discussion and developments concerning fundamental rights protection in the European Union and national legal practice.

With this book we continue to follow the developments in the Luxembourg-Brussels-Strasbourg triangle and practice in the Member States. On 1 December 2023, the Charter will be legally binding for 14 years. In these years, several questions about the Charter have been clarified, such as the new status of the Charter and its significance in the national legal order. There is already a vast amount of case law from the Court of Justice of the European Union (ECJ) concerning the interpretation of the Charter and national courts are also applying it in their natio-nal proceedings. Although many questions have been addressed, the Charter is still evol-ving and questions remain about for instance its scope, the interpretation of new fundamental rights provisions, the possible limitations of fundamental rights and the relationship between the Charter and the European Convention on Human Rights (ECHR).

After the first publication in 2019 of this bundle, we, the editorial board, decided to publish a second bundle and to follow the case law of the ECJ in the following years, with again selected landmark judgments on the Charter, and to have those judgments commentated by lawyers from different EU Member States, with the very purpose of providing a guide on the Charter. Those lawyers can shed light on the Charter using their academic background, judicial or practical experience concerning the significance of the Charter in their field and sometimes beyond. You now have the result of this exercise in your hands. The book contains (in retrospect) annotated judgments of the Court of Justice of the European Union over the period of 2019-2022.

It contains comments on judgments in which the Charter is addressed spread over different jurisdictions, including constitutional law and the rule of law, criminal law, equal treatment law, privacy law, asylum and migration law, environmental law and economic law. This publication aims to provide guidance to lawyers, practitioners and academics, on the omnipresent Charter.

The contributions provide a summary of the case in relation to the Charter, a comment on the relevant Charter provision(s) and when relevant, provide commentary on the relation between the Charter and ECHR and the constitutional traditions of the Member States. The contributions also provide discussion on the development of the relevant Charter provision(s) and they provide analyses on how the commented judgment will affect domestic legal orders, legislation and practice.

Without the contributors, this book would not have existed. It remains inspiring to read how the writers from different Member States interpret case law on the Charter. And without the publishing house *Iustitia Scripta,* and in particular *Mr Peter Frissen*, the book would not have seen the light of day either. Furthermore, we are grateful to *Mr Mozes Wilhelm Marinho Sanches Junior* for the English review. We are also grateful to *Judge Mr Spielmann* for providing a foreword for this ambitious publication. We thank them all for the pleasant and inspiring cooperation.

The Hague, August 2023

Aniel Pahladsingh and *Ramona Grimbergen,* The Editors

FOREWORD – THE EUROPEAN CHARTER OF FUNDAMENTAL RIGHTS, NOTABLE CASES (PERIOD 2019-2022)

As already noted in our foreword to the previous edition of this volume covering notable judgments of the Court of Justice of the European Union ("ECJ") between 2016 and 2018, the role of the Charter is somewhat paradoxical: on one hand, it is a catalogue which goes beyond what is commonly referred to as "fundamental rights". It comprises political and socio-economic rights, as well as "modern" rights and guarantees in the fields of medicine and biology, together with the processing of personal data. On the other hand, and as regards the Member States of the Union, the Charter is not intended to be applied to every circumstance of infringement of the rights guaranteed therein. In that regard, the principles and cornerstones of the European Union law of primacy and autonomy come into play in conjunction with the principle of subsidiarity. The Charter applies only when Member States implement EU law.

The case law from 2019 to 2021 illustrates this particular status of the Charter as a supranational document for the protection of fundamental rights. In particular, during that period, the ECJ developed its case law about the more commonly mentioned topics, such as the protection of personal data, the European arrest warrant, and the best interests of the child in the case law on the protection of private and family life and, indisputably, the rule of law.

Thus, as regards the protection of personal data, in its judgment of 6 October 2020, *La Quadrature du Net and Others*, the Court concluded that there has been no infringement, inter alia, of Article 8 of the Charter where general and indiscriminate data retention is taken to safeguard national security and effective safeguards are provided against the risk of abuse. As regards the European arrest warrant, a plethora of judgments published in 2019, two of which were delivered by the Grand Chamber (see judgments of 27 May 2019 *OG and PI,* and, of the same date, *PF*), provided valuable clarifications on the concept of 'judicial authority' within the meaning of Framework Decision 2002/584/JAI.

The judgment in *V.M.A.* delivered by the Grand Chamber on 14 December 2021 is also important because it demonstrates the intention of the Luxembourg Court to interpret, where necessary, the relevant provisions of the Charter from the point of view of international law. In that case, the right to privacy and the best interests of the child are interpreted in the light of Article 2 of the New York Convention on the Rights of the Child and, in particular, the principle of non-discrimination.

Finally, the irruption of the rule of law in the case law of the ECJ is also remarkable in the commented period, in particular, concerning Poland. Thus, after the

issues relating to the reforms of the Polish Constitutional Tribunal and the Supreme Court, it was the compatibility of the disciplinary regime for ordinary judges that was referred to the Court for consideration. In line with its previous case law, the Court concluded in its Grand Chamber judgment of 15 July 2021, *Commission v Poland (disciplinary regime for judges),* that the new Polish disciplinary regime for ordinary courts was incompatible with Articles 19 (1) TEU, 267 TFEU and 47 of the Charter.

While these judgments illustrate the great potential of the Charter and the Court's desire to make the rights enshrined more and more effective, the question of the fluctuating scope of the Charter in the implementation of EU law by the Member States is a recurring issue in the case law. During the period commented on, this issue is best illustrated by the judgment of the Grand Chamber of 24 June 2019, *Poplawski*. In line with its judgment *AMS* of 15 January 2014, the Court accepts that "the national court is not required, solely based on EU law, to disapply a provision of national law which is incompatible with a provision of the Charter of Fundamental Rights of the European Union which, like Article 27, does not have direct effect" (paragraph 63 of *Poplawski*). Nonetheless, for the first time, the Court provides a significant clarification of the relationship between the principles of direct effect and the primacy of EU law. Thus, it accepts that "the principle of the primacy of EU law cannot have the effect of undermining the essential distinction between provisions of EU law which have direct effect and those which do not and, consequently, of creating a single set of rules for the application of all of the provisions of EU law by the national courts" (paragraph 60 of the judgment).

The commentaries included in this volume highlight the aforementioned issues. By covering a wide range of subjects, they demonstrate that, when interpreting the Charter, the ECJ seeks to ensure the effective application of the Charter while implementing, simultaneously, the principles of direct effect and the primacy of EU law. In that sense, the commentaries present an added value in the comprehension of EU law both from an academic standpoint, as regards the limits on the application of the Charter, as well as from a practical point of view, given the evolving content of the rights enshrined therein.

Dean Spielmann, President of the First Chamber of the General Court of the European Union, President of the European Court of Human Rights (2012-2015)

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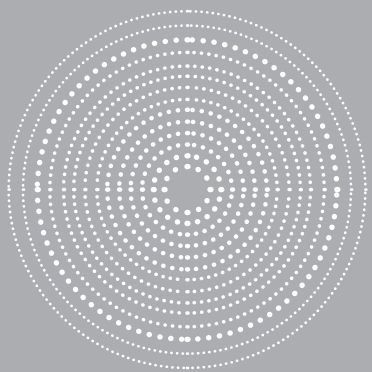

A. RULE OF LAW

1. *Miriam Azem* – Miasto Łowicz
2. *Valentin Plouchard* – AB and others

1. ENFORCING THE EU RULE OF LAW: *MIASTO ŁOWICZ*, JOINED CASES C-558/18 AND C-563/18

Court of Justice of the European Union (Grand Chamber)
26 March 2020, Joined Cases C-558/18 and C-563/18, ECLI:EU:C:2020:234
(Rzecznik Praw Obywatelskich and VX, WW, XV)

Judges: *Lenaerts* (President); *Silva de Lapuerta*, *Prechal* (Rapporteur); *Vilaras*; *Regan*; *Xuereb*; *Rossi*; *Ilešič*; *Malenovský*; *Bay Larsen*; *Von Danwitz*; *Toader*; *Jürimäe*; *Lycourgos*; *Piçarra*

Advocate General: *Tanchev*

- Admissibility
- Disciplinary regime applicable to national judges
- Effective judicial protection in the fields covered by Union law
- Interpretation necessary for the referring court to be able to give judgment
- Jurisdiction of the Court
- Principle of judicial independence
- Rule of law

Articles: 19(1)(2) TEU- second subparagraph; 267 TFEU; 47 Charter of Fundamental Rights of the European Union

Author: *Miriam Azem*[1]

1. Abstract

This commentary analyses the case *Miasto Łowicz* and its contribution to the body of ECJ case law concerning the requirement of effective judicial protection, which gives a concrete expression to the value of the rule of law. *Miasto Łowicz* concerns Polish judges' (lack of) independence given the prospect of facing disciplinary proceedings carried out by judicial bodies that are neither independent nor impartial according to the ECJ and the European Court on Human Rights (ECtHR). The ECJ upheld its previous approach regarding the broad scope of Article 19(1)(2) TEU, which guarantees effective judicial protection. However, the ECJ clarifies that said

1 Miriam Azem graduated with honors from an LLB program in International and European Law, and now works as an International Advocacy and Communications Associate at a legal center dedicated to promoting the rights of Palestinians.

article does not offer absolute protection within the preliminary ruling procedure, leading to a determination of inadmissibility in *Miasto Łowicz*. While the ECJ is justified in setting certain limits, this leaves Polish judges, who are EU judges, without a remedy under EU law. In this case, the ECJ delivered a firm warning to the Polish government for (ab)using the disciplinary regime as a form of political control over the judiciary. The ECJ also warned Poland of measures that compromise the primacy of EU law.

2. Introduction

The rule of law and the concept within the European Union legal order have recently dominated legal and political discourse. The ECJ developed an extensive body of case law seeking to strike a balance between fundamental rights, protection of the rule of law and the functionality of EU mechanisms.

In the 2020 judgment *Miasto Łowicz,* Joined Cases C-558/18 and C-563/18[2] the ECJ refines its approach to the EU requirements of judicial independence in light of Poland's systemic deficiencies, as regards the independence of Polish courts and infringements of the EU principle of the rule of law. The case originates from Polish courts and concerns amendments to laws in the Polish judicial system. Since the rise of the PiS (Law and Justice party) as Poland's governing political party in 2015, the Polish legislature altered the composition, procedure of appointment, and competencies of judicial entities. The so-called "judicial reforms" are essentially aimed at dismantling the judiciary as a part of Poland's process of autocratization.[3] In *Miasto Łowicz,* the ECJ was asked to examine the independence of Polish judges in view of the disciplinary regime for judges operated by the Disciplinary Chamber, which the ECJ and the European Court of Human Rights (ECtHR) previously concluded does not fulfil the requirements of judicial independence under the two European regimes.[4] This note seeks to analyse the abovementioned judgment in terms of its contribution to EU institutions' ongoing fight for adherence to the EU rule of law (Article 2 Treaty on European Union (TEU)). Specifically, it explores the requirement of effective judicial protection, which gives a concrete expression to the value

2 Joined Cases C-558/18 and C-563/18 *Miasto Łowicz and Prokurator Generalny,* ECLI:EU:C:2020:234.

3 According to the Liberal Democracy Index (LDI), for the period of 2010-2020 Poland is placed first at 'top 10 autocratizing countries' worldwide, with Hungary being a close second. V-Dem Institute, 'Autocratization Turns Viral Democracy Report 2021' (March 2021); Laurent Pech and Dimitry Kochenov, *Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case* (2021), p. 184.

4 The ECtHR issued its judgment concluding that the disciplinary chamber is not "established by law" within the meaning of the European Convention of Human Rights in July 2021. The ECJ concluded that the disciplinary regime was incompatible with EU law in *Commission v Poland.* ECtHR, *Reczkowicz v. Poland.* Appl. no 43447/19, judgment of 22 July 2021; Case C-791/19, *European Commission v Republic of Poland,* ECLI:EU:C:2021:596.

of the rule of law[5] and is enshrined in Article 19(1)(2) TEU and Article 47 Charter of the European Union (Charter).

3. Factual and legal background

The national legislation reviewed in *Miasto Łowicz* cannot be taken in isolation. The following section thus offers a brief account of Polish domestic legislation aimed at undermining judicial independence, EU institutions' attempts to enforce the rule of law and relevant ECJ cases.

a. Polish "judicial reforms" and EU's response

In 2017 the Sejm (the lower chamber of the Polish Parliament) passed several "judicial reforms": it lowered the retirement age of Supreme Court judges from 70 to 65, which in effect terminated the mandate of 37% of Supreme Court judges;[6] altered the appointment procedure of members of the National Council of the Judiciary (NCJ), which has a decisive role in the appointment of Polish judges. Before 2017, the majority of the members of the NCJ were appointed by judges; a reform transferred this power to the Sejm and terminated the term of office of most sitting members.[7] The Sejm also established a new disciplinary regime, including the 'Disciplinary Chamber of the Supreme Court' and the 'Chamber of Extraordinary Control and Public Affairs of the Supreme Court' composed exclusively of newly appointed judges selected by the NCJ.[8] The disciplinary regime subjects "ordinary court judges to disciplinary investigations, procedures and ultimately sanctions, on account of the content of their judicial decisions".[9] The Disciplinary Chamber of the Supreme Court is entrusted with a ruling in the first and second instances in disciplinary cases concerning Supreme Court judges and, either in the second instance or both instances in disciplinary cases concerning judges of the ordinary courts.[10]

A 2020 reform, commonly referred to as the "muzzle law", introduced several amendments: it prohibited questioning the legitimacy of judges appointed by the President of the Republic. Doing so "is a disciplinary offence punishable,

5 Case C-216/18, *Minister for Justice and Equality v. Artur Celmer*, ECLI:EU:C:2018:586, para 50.

6 Commission Recommendation (EU) 2018/103 of 20 December 2017 regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520 [2018], OJ L17/50, paras 5-6.

7 Ibid., para 32.

8 Press release European Commission, '*Rule of Law: European Commission launches infringement procedure to protect judges in Poland from political control*' (2019) <https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1957> accessed 31 March 2022.

9 Ibid.

10 *European Commission v Republic of Poland* (n 4) para. 81.

potentially, with dismissal"[11], the "muzzle law" thus expanded the scope of the disciplinary regime to include disciplinary action against a judge that challenges the indepen-dence or impartiality of other judges. The muzzle law grants the Chamber of Extraordinary Control and Public Affairs of the Supreme Court the sole competence to examine complaints relating to the lack of independence of a judge or court.

The above-described "judicial reforms" and generally the process of "rule of law backsliding" in Poland have been (unsuccessfully) addressed by all EU institutions. In 2017, the Commission initiated an article 7(1) TEU procedure against Poland, which entails a determination of the existence of a "clear risk of a serious breach by a Member State of [the rule of law]".[12] However, there has been no progress on that front.[13] Since then, the Commission initiated several infringement proceedings addressing specific "judicial reforms". On 3 April 2019, the Commission launched an infringement procedure on the grounds that "[t]he new disciplinary regime undermines the judicial independence of Polish judges by not offering necessary guarantees to protect them from political control".[14] As will be detailed below, on 15 July 2021, the ECJ issued its ruling concerning said infringement proceedings, ru-ling that the disciplinary regime for judges is incompatible with EU law.[15]

In April 2020, in response to the entry into force of the muzzle law, the Commission launched infringement proceedings, noting that "[t]he new law on the judiciary undermines the judicial independence of Polish judges".[16] In December 2022, Advocate General Collins issued his opinion holding that the muzzle law infringes EU law, the case is pending before the ECJ. An interim measures order was issued in July 2021, ordering, among other things, the immediate suspension of provisions preventing Polish judges from directly applying EU law protecting judicial independence and provisions governing the Disciplinary Chamber's power to lift the judicial immunity of Polish judges.[17] Following, in October 2021, the ECJ imposed a € 1 million daily penalty payment on Poland for failing to comply with the interim

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11 Council of Europe, 'Opinion No. 977 / 2019 European Commission for Democracy Through Law (Venice Commission), Urgent Opinion of the Venice Commission And The Directorate General Of Human Rights And Rule Of Law' (Opinion No. 977 / 2019) (2020) para. 45.

12 Consolidated Version of the Treaty on European Union [2012], OJ C 326/13, art 7(1).

13 This is due to the alliance Poland and Hungary formed with regards to rule of law matters and the unanimity in Council required in order to activate additional steps in the Article 7 procedure.

14 Press release European Commission (n 8).

15 *European Commission v Republic of Poland* (n 4) para. 237.

16 Press release European Commission, '*Rule of Law: European Commission launches infringement procedure to safeguard the independence of judges in Poland*' (29 April 2020) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_772> accessed 15 October 2021.

17 Press release European Commission, '*Independence of Polish judges: Commission asks European Court of Justice for financial penalties against Poland on the activity of the Disciplinary Chamber*' (7 September 2021) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_4587> accessed 31 March 2021; Laurent Pech, *'Protecting Polish Judges from Political Control A brief analysis of the ECJ's infringement ruling in Case C-791/19 (disciplinary regime for judges) and order in Case C-204/21 R (muzzle law)'* (Verfassungsblog, 20 July 2021) <https://verfassungsblog.de/protecting-polish-judges-from-political-control/> accessed 31 March 2022.

measures order. Most recently, in December 2021, the European Commission launched another infringement procedure against Poland due to serious concerns about the Polish Constitutional Tribunal and its recent rulings expressly challenging the primacy of EU law (see section 4 below).[18] The latter proceedings have not been lodged with the ECJ to date.

Recently, Polish authorities faced financial and political pressures from the EU and instituted several seemingly cosmetic changes, including the replacement of the Disciplinary Chamber of the Supreme Court with the "Professional Liability Chamber". The new Chamber is composed of both judges unlawfully appointed by the new NCJ and judges appointed before the passage of the "reforms".[19] It is important to stress that judges who were suspended by the Disciplinary Chamber were not automatically reinstated and will not necessarily be reinstated in the future. A new proposed bill suggests further amendments, including the moving of the Professional Liability Chamber to the Supreme Administrative Court, to unlock funds that the EU conditioned to compliance with the EU rule of law.[20]

b. ECJ case law on judicial independence

The requirement of judicial independence forms a part of the EU rule of law,[21] which is one of the values upon which the Union is founded according to Article 2 TEU.[22] In context of infringement proceedings and preliminary references, the ECJ relies on Article 47 Charter and Article 19(1)(2) TEU interchangeably to enforce judicial independence. The provision at the heart of *Miasto Łowicz* is Article 19(1)(2) TEU which provides that "[m]ember States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law".[23]

Effective legal protection presupposes an independent judiciary. The ECJ's focus on Article 19(1)(2) TEU rather than on Article 47 Charter is attributed to the different scopes of the two provisions. While Article 47 Charter is limited by Article 51(1) Charter, which stipulates that the Charter is applicable when Member States or EU institutions are "implementing Union law",[24] Article 19(1) TEU does not have an equivalent limitation, rather, it "aims to guarantee effective judicial

18 Press release European Commission, *'Rule of Law: Commission launches infringement procedure against Poland for violations of EU law by its Constitutional Tribunal'* (22 December 2021) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_7070> accessed 31 March 2022.

19 Laurent Pech, '*Covering Up and Rewarding the Destruction of the Rule of Law One Milestone at a Time*' (Verfassungsblog, 21 June 2022) <https://verfassungsblog.de/covering-up-and-rewarding-the-destruction-of-the-rule-of-law-one-milestone-at-a-time/> accessed 25 December 2022.

20 Piotr Buras, '*The final countdown: The EU, Poland, and the rule of law*' (*European Council on Foreign Relations*, 14 December 2022) <https://ecfr.eu/article/the-final-countdown-the-eu-poland-and-the-rule-of-law/> accessed 25 December 2022.

21 Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget [2020], OJ L433/1, art 2.

22 Consolidated Version of the Treaty on European Union (n 12) art 2.

23 Ibid., art 19.

24 Charter of Fundamental Rights of the European Union [2012], OJ C326/391, art. 51.

protection in 'the fields covered by Union law'".[25] Due to the (almost) identical purpose of the two provisions, Advocate General Bobek cleverly argued that the:

"[D]etailed discussion about the exact scope of Article 51(1) of the Charter when contrasted with Article 19(1) TEU looks a bit like a debate on what colour to choose for the tea cosy and the dining set to be selected for one's house (...) while disregarding the fact that the roof leaks, the doors and windows of the house are being removed, and cracks are appearing in the walls".[26]

Advocate General Bobek essentially warns against overestimating the delamination between Article 19 (1) and Article 47 Charter to apply the concept of effective judicial protection stemming from both provisions.[27] How the ECJ views Article 19(1)(2) TEU and Article 47 Charter jointly is evident in the case *AB and Others,* where the ECJ notes that: "the principle of the effective judicial protection of individuals' rights under EU law, referred to in the second subparagraph of Article 19(1) TEU (…) is now reaffirmed by Article 47 of the Charter".[28] Thus, despite the elaborate focus on the TEU provision throughout this contribution, the reader must not lose track of the essence of protecting fundamental rights, as enshrined in the Charter.

In its extensive body of case law concerning judicial independence, the ECJ clarifies what the principle entails and what is required of Member States in this respect. In the ground-breaking judgment, *Associação Sindical dos Juízes Portugueses* (*ASJP*),[29] the ECJ first noted that the Member States have a general obligation to ensure that courts or tribunals "meet the requirements of effective judicial protection".[30] This requires courts to be "*protected against external intervention or pressure liable to jeopardise the independent judgme*nt of its members as regards proceedings before them"[31] (emphasis added). When reviewing compliance with the EU requirements of judicial independence, the ECJ also held that "in order to establish whether a tribunal is 'independent' within the meaning of Article 6(1) of the ECHR, regard must be had (…) to the question whether the body at issue presents an appearance of, it being added, in that connection, that what is at stake is the

25 Ibid., art 47; Joined Cases C-585/18, C-624/18 and C-625/18 *A. K. and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy*, ECLI:EU:C:2019:982, para. 82.

26 Case C-556/17, *Alekszij Torubarov v Bevándorlási és Menekültügyi Hivatal*, ECLI:EU:C:2019:339. Opinion of AG Bobek, para. 55.

27 Peter Van Elsuwege and Femke Gremmelprez, 'Protecting the Rule of Law in the EU Legal Order: A Constitutional Role for the Court of Justice', *European Constitutional Law Review* (2020), p. 26.

28 Case C-824/18, *A.B. and Others v Krajowa Rada Sądownictwa and Others*, ECLI:EU:C:2021:153, para. 98.

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

30 Ibid., para. 37.

31 Case C-506/04, *Graham J. Wilson v Ordre des avocats du barreau de Luxembourg*, ECLI:EU:C:2006:587, para. 51.