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Preliminary Preference Under EU Law and ITS Effects on European Standard of Judicial Independence

European Union Member States and the Independence of Their Judicial Systems

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Abstract:

The preliminary reference procedure is a provision provided for in Article 267 (Treaty on the Functioning of the European Union) TFEU (ex Article 234 TEC) that acts as an instrument of communication between the Court of Justice of the European Union (CJEU) and national courts. Thus, when a national court or tribunal refers a question of EU law to the Court of Justice of the European Union (CJEU) for a preliminary ruling so as to allow the national courts ask questions on EU law, and on receiving that ruling, assist the national court to decide the case before it. As the questions of EU law will arise in cases before the courts of different Member States; this serves a purpose and that is, the preliminary reference procedure is to preserve the effectiveness and uniformity of EU law throughout the EU member states. However, recent cases and rulings have meant and led the European Union Member States to question their judicial status in relation to EU law and to that effect have requested the Court of Justice of the EU (CJEU) to rule on the independence of their judicial systems.

Keywords: Judicial Institutions, supremacy of EU Law, Article 267 TFEU (ex Article 234 TEC), Judicial Independence, rule of law, reform of the judiciary, EU law v. national law, interpretation of EU law, judicial enforcement of EU law.

الملخص:

الإجراء المرجعي الأولي هو حكم منصوص عليه في المادة 267 من معاهدة عمل الاتحاد الأوروبي TFEU؛ سابقا المادة 234 TEC التي تعمل كأداة اتصال بين محكمة العدل التابعة للاتحاد الأوروبي (CJEU) والمحاكم الوطنية. لذلك عندما يقوم محكمة أو هيئة قضائية وطنية بإحالة مسألة تتعلق بقانون الاتحاد الأوروبي إلى محكمة العدل التابعة للاتحاد الأوروبي (CJEU) لإصدار حكم أولي للسماح للمحاكم الوطنية بطرح أسئلة حول قانون الاتحاد الأوروبي، وعند تلقي هذا الحكم، وذلك يساعد المحكمة الوطنية للبت في القضية المعروضة عليها. حيث ستنشأ أسئلة قانون الاتحاد الأوروبي في القضايا المعروضة على محاكم الدول الأعضاء المختلفة؛ الغرض من هذا هو أن الإجراء المرجعي الأولي هو الحفاظ على فعالية وتوحيد قانون الاتحاد الأوروبي في جميع أنحاء الدول الأعضاء في الاتحاد الأوروبي. ومع ذلك، فإن القضايا والأحكام في الآونة الأخيرة قادت الدول الأعضاء في الاتحاد الأوروبي إلى التشكيك في وضعها القضائي فيما يتعلق بقانون الاتحاد الأوروبي، ولهذا الغرض طلبت من محكمة العدل التابعة للاتحاد الأوروبي (CJEU)أن تحكم في استقلالية أنظمتها القضائية.

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الكلمات الرئيسية: المؤسسات القضائية، سيادة قانون الاتحاد الأوروبي، المادة 267 TFEU المادة 234 TEC سابقًا، الاستقلال القضائي، سيادة القانون، إصلاح القضاء، قانون الاتحاد الأوروبي ضد القانون الوطني ، تفسير قانون الاتحاد الأوروبي، إنفاذ قانون الاتحاد الأوروبي.

پوختە:

ڕێکارە سەرەتاییەکان بەپێی بڕگەکانی مادەی لە پەیماننامەی کارکردنی یەکێتی ئەورووپا (TFEU)؛ پێشووتر ناسراو بە مادەی ٢٣٤ی پەیمانی کۆمەڵگەی ئەورووپا (TEC) وەك میکانزمی پەیوەندی لە نێوان دادگای دادوەری یەکێتی ئەورووپا (CJEU) و دادگاکا نیشتمانییەکان کاردەکات. کاتێک دادگایەکی نیشتمانی پرسیارێکی لەسەر یەکێك لە یاساکانی یەکێتی ئەورووپا دێتەپێش، داوا لە دادگای دادوەری یەکێتی ئەورووپا (CJEU) دەکات بۆ بڕیارێکی سەرەتایی بەجۆرێک کە ڕێگە بە دادگا نیشتمانییەکان ئەو پرسە یاساییە یەك لا بکاتەوە بەمەبەستی بڕیاردان لەسەر ئەو کەیسەی کە لەبەردەم دادگا نییشتیمانەکدا هەیە؛ واتا هاوکاری دادگای نیشتمانی بکەن بۆ بڕیاردان لەسەر ئەو دۆسیەی کە لەبەردەستیدایە. لە هەمان کادا ئەو پرسیارانەی کە لەسەر یاسای یەکێتی ئەورووپا لە کەیسەکانی بەردەم دادگاکانی وڵاتانی ئەندامی جیاوازدا سەر هەڵدەدەن. ئەم میکانیزمە خزمەت بە ئامانجێک دەکات کە بریتییە لە پاراستنی کاریگەری و یەکپارچەیی یاسای یەکێتی ئەورووپا لە سەرانسەری وڵاتانی ئەندامی یەکێتی ئەورووپا. بەڵام کەیس و بڕیارەکانی ئەم دواییە وایکردووە وڵاتانی ئەندامی یەکێتی ئەورووپا باری دادوەری خۆیان لە پێوەندی لەگەڵ یاساکانی یەکێتی ئەورووپا بخەنە ژێر پرسیارەوە و بۆ ئەو مەبەستەش ووڵاتانی ئەندامان لە یەکێتی ئەورووپا داوایان لە دادگای دادوەری یەکێتی ئەورووپا کردووە کە پێداچوونەوە بکات بۆ سەربەخۆیی سیستەمی دادوەریی ووڵاتانی ئەندامانی یەکێتی ئەورووپا.

وشەی سەرەکی: دامەزراوە دادوەرییەکان، باڵادەستی یاسای یەکێتی ئەورووپا، مادەی ٢٦٧ی پەیماننامەی کارکردنی یەکێتی ئەورووپا) مادەی ٢٣٤ی پێشووی پەیمانی کۆمەڵگەی ئەورووپا (TEC)، سەربەخۆیی دادوەری، سەروەری یاسا، چاکسازی لە دەسەڵاتی دادوەری، یاسای یەکێتی ئەورووپا بەرامبەر یاسای نیشتمانی، لێکدانەوەی یاسای یەکێتی ئەورووپا، جێبەجێکردنی دادوەری یاسای یەکێتی ئەورووپا.

Introduction

Article 267 TFEU (Treaty on the Functioning of the European Union) is a provision of the Treaty of Rome allowing national courts to refer questions of EU law to the Court of Justice of the European Union (CJEU) to decide such questions as to how the Treaty of Rome should be interpreted. The national court will receive the ruling for a final judgment on the question before it. Such a procedure is known as Article 267 TFEU. Article 267 TFEU which is a provision that empowers the (CJEU) to decide such issues as how the EU law should be interpreted and whether or not the European Commission or other bodies have acted properly. Further, Article 267 TFEU is intended to secure that Community law have the same understanding, effective application, secures legal unity, and Community law and its provisions' are applied across the national official legal institutions that make legal decisions and give judgments. Equally, the provisions of Article 267 TFEU serves three primary functions. First, providing advice to national courts on issues relating to the interpretation of EU law. Second, to help ensure the uniform application of EU law throughout the Union. Third, in addition to the action for annulment of an EU act (Outlined in Article 263 TFEU), an extra procedure for ex post verification of the conformity of EU institutions' acts with fundamental EU legislation, primary EU law, Treaties and general principles of EU law.[1]

[1] Mańko, R., 2017. *Briefing, Preliminary Reference Procedure,*. [online] European Parliament. Available at: <https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/608628/EPRS_BRI(2017)608628_EN.pdf> [Accessed 26 July 2021].

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This paper will refer to, and study relevant EU Treaty provisions and decided cases; in order to examine why the effectiveness and uniformity of EU law throughout the EU member states, difficulties faced by legal institutions, and judicial systems have become areas of concern throughout the European Union. And, why the contours of judicial independence remain unclear and its meaning and practice in different legal systems are often poorly understood. Further, what can be done to boost and enhance legal performance or efficiency, and how legal processes could be improved in EU legal institutions. Finally, why judicial independence has been decreasing in EU member state's judicial systems. Therefore, this research examines European Union member states' independence of their judicial systems. And, it also analyses the provisions that a court needs to take into account in making a reference whether a ruling is 'necessary' for the judgment. The effect and supremacy of provisions of community law will be discussed as well as its purpose. This study also defines and describes the legal apparatus of EU law, as well as to analyze and illustrate how frequently it is used by national courts in court cases. Emphasis will be directed to potential issues (obstacles) that prevent national judges from applying the preliminary ruling procedure and provide effective access such as the duration of the procedure and a lack of legal awareness of the mechanism and EU law in general. Finally, the study suggests ways to improve collaboration between national courts and the CJEU, which might result in more effective implementation of EU law by those who are responsible for its application and enforcement.

The enlargement and development of the legal order of the European Union rely on the assistance from, and cooperation between the Court of Justice of the European Union (CJEU) and the national courts by means of the preliminary ruling proceedings of Article 267 TFEU. It is a fact that the procedure shows its importance by the Community, as a way of developing and clarifying the law, it is also equivalently important to the individual, because it has granted individuals certain rights to use the (CJEU) when other ways have been exhausted. This has enabled individuals to stand against actions by member states or by Community institutions, for example: In *Royal Scholten – Honig* judgment declares that EU regulation is invalid for breach of principle of equality before the (CJEU) and secures a suitable rectification from their national court.[2] [3] [4] [5]. Further, in a different case, a social services adjudicator apprehended of the disputes concerning the breach of the implementation of the EU Council decisions made a reference for Preliminary Ruling under Article 267 TFEU. Studying the judgments of the Court of Justice shows that in many cases an important point has been made clear on when national courts are ordered and made obliged to make a preliminary reference under Article 267 TFEU.

[2] (Cases 145/77) Royal Scholten – Honig v Intervention Board for Agricultural Produce

[3] Craig, P., & Búrca, D. G. (2020). EU Law: Text, Cases, and Materials (7th ed.). Oxford University Press.
[4] Vakulenko, A. (2009). European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law - Edited by D. Schiek and V. Chege. European Law Journal, 15(5), 672–674. https://doi.org/10.1111/j.1468-0386.2009.00484_1.x
[5] Dagtoglou, P. (1978). The English Judges and European Community Law. The Cambridge Law Journal, 37(1), 76-97. Retrieved August 16, 2021, from http://www.jstor.org/stable/4506062

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According to Article 267 of the Treaty on the Functioning of the European Union (TFEU), the European Union's Court of Justice has authority to deliver preliminary decisions on the legality and interpretation of actions of the Union's institutions, organizations, offices, or agencies, as well as the interpretation of the Treaties. Article 267 TFEU states that if a Community law or provision is important to resolving a dispute before a national court, the legal establishment in a position of authority is authorized to, and obliged to ask the (CJEU) for an interpretation of that provision. The (CJEU) makes a responsible judgment (preliminary ruling) where a decision is necessary for a national court to determine a dispute. Further, any Legal establishment that is asked to consider making a reference has to meet certain criteria as to whether it is a court or tribunal for the purposes of Article 267 TFEU, is a matter of Union law and it is not to be decided by reference to national law.[6] Then, a number of factors are taken into account by the Courts, such as whether the

> "*the referring body is established by law, ... it is permanent, ... its jurisdiction is compulsory, ... its procedure is inter parties, ... it applies rules of law and whether it is independent.*"[7]

However, these criteria are not complete. The (CJEU) has established some provisions aimed at resolving the problem, and answer the question on what constitutes a court or tribunal in Broekmeulen (Case 246/80). In *Broekmeulen* the (CJEU) ruled that a body established under the umbrella of the Royal Medical Society for the Promotion of Medicine be considered as a "court or tribunal" of a Member State within the meaning of Article 177 of the Treaty of Rome, even though that society was a private association.[8] In *Broekmeulen* the body involved (Royal Medical Society for the Promotion of Medicine) was an appeals commission, which did constitute a court, and as the committee operated with the approval of the public authorities, its' members included some ministerial appointees, it granted a full hearing, and most importantly its decisions were final and legally binding. Furthermore, the Benelux Court of Justice was considered a court within this context, as a court common to several (Belgium, Netherlands, Luxembourg) Member States.[9] Also the Unified Patent Court, as a court common to several Member States is expected to be able to ask prejudicial questions.

[6] Case C-24/92, Corbiau v Administration des Contributions at paragraph 15

Commission v. France (C-416/17).

[7] Berry, E., Homewood, M. J., & Bogusz, B. (2019). *Complete EU Law: Text, Cases, and Materials* (4th ed.). Oxford University Press.

[8] (Case 246/80) Broekmeulen [1981] ECR 2311

[9] Matthew Parish, International Courts and the European Legal Order, European Journal of International Law, Volume 23, Issue 1, February 2012, Pages 141–153, https://doi.org/10.1093/ejil/chs003

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NECESSITY OF PRELIMINARY REFERENCE AND PROVISIONS THAT CAN BE THE SUBJECT OF A REFERENCE; ACTE CLAIR DOCTRINE

However, in view of the fact that the given case Broekmeulen which is a dispute between two parties, and involves a breach of the implementation of the EU Council Decisions, a definition of a decision by EU council would be necessary. A decision defined in Article 288 (ex Article 249 TEC) is one of the three binding devices provided by secondary EU legislation, which is not of general application, the decisions that are addressed to parties only affect them which can be a company, an individual, or a member states. Although, the legislative process for adopting of a decision differ depending on its subject matter, but, in the light of the above, on the issue of whether this case can be a matter of a reference under Article 267 TFEU, provides the kind of provisions can be the subject of a reference to the Court of Justice for a preliminarily ruling:

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

> *Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.*
>
> *Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.* [10] [11], [12]

Prior to the request for preliminary ruling is made, the case that is presented to a legal body for referral must be examined against the above criteria and relate to one of the matters considered above, for example; understanding of the treaty, the validity or interpretation of a regulation, directives or decisions. Therefore, the national court is obliged to identify that 'a decision on the question is necessary in order to enable it to give judgment'.[13] However, the European Court of justice was asked

[10] Foster, N. (2020). *EU Law Directions* (7th ed.). Oxford University Press. p.173

[11] *(2019/C 380/01. Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (2019/C 380/01), [accessed online;17th August 2021] at https://eur-lex.europa.eu/legal content/EN/TXT/PDF/?uri=OJ:JOC_2019_380_R_0001*

[12] Berry, E., Homewood, M. J., & Bogusz, B. (2019). *Complete EU Law: Text, Cases, and Materials* (4th ed.). Oxford University Press. p. 168.

[13] RECOMMENDATIONS to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (2018/C 257/01). (20.7.2018). Official Journal of the European Union, 1(C 257/1), 1–8. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018H0720(01)&from=EN

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to consider the matter and consider the question of whether a ruling would be 'necessary'. In *CILFIT Srl*. A reference had been made by the Italian Supreme Court, the Cassazione, and involved national courts' compulsory jurisdiction under Article 267 TFEU. [14] The facts in the above case CILFIT are that; Textile companies claimed that the Italian wool charge was illegal under EU law. The CJEU was asked by the Italian Supreme Court if Article 267 TFEU imposed a "absolute obligation" to refer. Furthermore, they inquired as to whether they may do so if there was any reasonable doubt about the question. Hence, the doctrine of *Acte Clair* arose from this. The main issue in CILFIT was whether wool should be classified as an animal product or not. The *Acte Clair* concept arose from the Court of Justice's decision in *Srl CILFIT v Ministry of Health (1982)*, which gave rise to the so-called 'CILFIT criterion'.

An accurate reading of Article 267 TFEU; it would appear that the question of whether 'a decision on a matter of Community law if necessary' only applies to the national courts' discretionary jurisdiction under Article 267 TFEU. However, in *CILFIT* the (CJEU) held that:

'16…the correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other member states and to the Court of Justice. Only if those conditions are satisfied, may the national court or tribunal refrain from submitting the question to the Court of Justice and take upon itself the responsibility for resolving it.[15]

Therefore, Article 267 TFEU outlines the provisions that a court needs to take into account in making a reference whether a ruling is 'necessary' for the judgment, and the following cases have made clear what is meant by 'necessary'. Most importantly in *Cilfit srl* guidelines were given on when a ruling would not be necessary. A ruling is not necessary when; the question of understanding the community law is irrelevant to the outcome of the case, the question is substantially the same with other cases which have previously been the subject of Article 267 TFEU, this is known as the doctrine of Acte Clair. Criteria of *CILFIT Srl* could be described as versions of *"acte clair*". *Acte clair* is a doctrine originating in French administrative law, whereby if the meaning of a provision is clear no 'question' of interpreting arises; or the CJEU previously ruled on the matter (acte éclairé), or EU law is irrelevant to solve the dispute. However, In the recent judgment Commission v. France the CJEU now consider and raises the question whether an exceeding of the CILFIT exceptions – and therefore non-compliance with the referral obligation – constitutes an infringement of EU law under Article 258 TFEU.[16] [17]

[14] (Case 283/81) CILFIT v Ministry of Health, [1982] ECR I-03415
[15] Ibid. para. 16-20.
[16] Barnard, Catherine; Peers, Steve, eds. (2014). European Union Law. Oxford University Press. p. 291. ISBN 978-0-19-968611-7.
[17] Commission v. France (C-416/17).

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TRIBUNAL THAT REFUSES TO ALLOW MORE APPEALS AGAINST ITS RULING

The paragraph 3 of the Article 267 TFEU provides that a court or tribunal which does not grant further appeal against its decision or any other judicial remedy is bound to make a reference to the European Court of Justice. The concept of 'no judicial remedy under national law' certainly includes cases where there is no further appeal.[18] Such cases may come up where the national court was, like the Supreme Court of the United Kingdom, the highest in the hierarchy of courts. It may also occur in specific cases where no appeal is possible from a court which is very low in the hierarchy. In some jurisdiction, for example, there may be no appeal where the amount claimed or the value of the goods concerned is below a certain figure. In the landmark case of *Costa v ENEL*, the amount claimed was less than two pounds. There was no appeal from the magistrates because of the smallness of the sum. The magistrate was, therefore, under Article 267 TFEU obliged to refer the question before him to the Court of Justice.[19] In *Parfums Chirstian Dior BV v Evora BV* [20], the Duch Court of Appeal the 'Hoge Raad' had the authority to present a question on the issue of trade mark law to the Benelux Court, the highest court for points of law affecting the Benelux agreement. The Court of Justice held that, if the 'Hoge Raad' came to the decision that a referral was not necessary to the Benelux Court, it was legally bound to refer the case to the Court of Justice. And in case of a referral being made to the Benelux Court, the Court was itself, as the highest authority court in that case, bound to refer the matter to the Court of Justice.[21]

SUPREMACY OF EU LAW

Article 267 TFEU is intended to secure that Community law have the same understanding, effective application, and achievement. And, that the Community law and its provisions' are applied across the national legal institutions that make legal decisions and give judgments. Collectively with the doctrines of supremacy; all confliction in legal issues between European Union law, regulations, directives, treaty provisions, decisions national statute, or an act must be determined in favor of the European Union with direct effect.[22] [23] [24] It is a fact that the judicial institutions fulfill an important

[18] Tsourdi, E. L. (2019). Of Legislative Waves and Case law: Effective Judicial Protection, Right to an Effective Remedy and Proceduralisation in the EU Asylum Policy. Review of European Administrative Law, 12(2), 143–166. https://doi.org/10.7590/187479819x15840066091286.

[19] Case 6-64, Amedeo Arena, From an Unpaid Electricity Bill to the Primacy of EU Law: Gian Galeazzo Stendardi and the Making of *Costa v. ENEL*, *European Journal of International Law*, Volume 30, Issue 3, August 2019, Pages 1017–1037, https://doi.org/10.1093/ejil/chz056

[20] C-337/95 - Parfums Christian Dior v Evora

[21] Douglas R. Hegg 2020, *'Parfums Christian Dior Sa & (and) Anor v fums Christian Dior Sa & (and) Anor v. Evora BV'*, Denver Journal of International Law & Policy, vol. 27, no. 4 Fall, Article 9.

[22] Phelan, W. (2019) "Van Gend en Loos, 1963: Direct Effect," in *Great Judgments of the European Court of Justice: Rethinking the Landmark Decisions of the Foundational Period*. Cambridge: Cambridge University Press, pp. 31–57. doi:10.1017/9781108615020.003.

[23] (Case 26/62) Van Gend en Loos v Nederlandse Administatie der Belastingen [1963] ECR 1

[24] (Case 6/64) Costa v ENEL [1964] ECR 585

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role in administering and applying community law. The court of justice has developed an important body of case law on the application of "directly enforceable Community provisions in the courts of member states", but it is up to the national courts to work with it to make those provisions effective. As the Court said in *Simmenthal* judgement: If a member state court is asked with the limitations and boundaries of its power, to follow provisions of Community law is obliged to give full effect to those provisions. [25] In case of having cases of a confliction with provisions of national legislation, it is required as an obligation from the national Courts to apply the Community provision and refuse the national law. It is not necessary for the court to ask for or wait repeal of those laws by lawmaking or other constitutional way.[26] [27] [28].

Another case that can be examined is the decision in *Van Gend en Loos* that significantly increased the impact and effectiveness of Community law in the member States. Therefore, this case law of the (CJEU) clearly shows that a directly effective provision of community law, whether of the Treaty or a legally binding secondary Act, always prevails. On the issue of supremacy of EU Law, *Costa v ENEL* can be viewed as an important case that highlights the establishment of the close relationship between the national law of member states and the European Union which came before the (CJEU). *Costa v ENEL*, was a preliminary reference case under Article 267 TFEU (ex Article 234) which was made, and consequently a judgment as to community supremacy was made;

"The EC Treaty has created its own legal system…became an integrated part of the legal system of the member states… and which their courts are bound to apply". Costa v ENEL

The principle of community law triumph over national law was consequently recognized by the above judgment. Under Article 267 TFEU (ex Article 234), the (CJEU) has made practical and effective use of the preliminary reference practice by enforcing a set of rules, establishing EC Laws supremacy, and enforcing laws to enjoy the same significance, meaning and effect in all member states, as a result its purpose is to present an ultimate and final judgment and ruling regarding the interpretation, understanding, and validity of EC law. The fact that if a court or tribunal has the right under the treaty to make a reference, it cannot be prevented of practicing that right by a national court as confirmed in *Rheinmuhlen* case therefore providing an example of, uniform legal principles to all within the community.[29]

[25] (Case 106/177) Simmenthal v Amministrazione delle Finanze dello Stato [1978] 3 CMLR 650

[26] Avbelj, Matej (2011). "Supremacy or Primacy of EU Law—(Why) Does it Matter?". *European Law Journal*. **17** (6): 744. doi:10.1111/j.1468-0386.2011.00560.x.

[27] Lindeboom, Justin (2018). *"Why EU Law Claims Supremacy"* (PDF). Oxford Journal of Legal Studies. 38 (2): 328. doi:10.1093/ojls/gqy008.

[28] Claes, Monica (2015). "The Primacy of EU Law in European and National Law". *The Oxford Handbook of European Union Law*. doi:10.1093/oxfordhb/9780199672646.013.8. ISBN 9780199672646.

[29] (Case 166/73) Rheinmuhlen [1974] ECR 33

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The Scientific Journal of Cihan University – Sulaimaniya **PP: 101-118**
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The preliminary reference procedure in Article 267 TFEU of the European Community Treaty has made individuals to defend and believe confidently in their community rights against their member states, in which the (CJEU) has found, and advanced the basic concepts of supremacy, direct effect and state liability. This has permitted the (CJEU) to make practical and effective use of the preliminary reference procedure, and continue the unified body of legal principles of which it mainly operates, and establishes the belief of EU law prevailing all national law when the issue of incompatibility arises, consequently ensuring uniformity of application of law throughout the community. The European Court of justice judgment decisions are exceptionally prevailing, and the reason for this is the fact that no national precedent or court structure can bind (CJEU)'s decisions, *Rheinmuhlen* nor do national courts have the power to give judgment on the validity of a Community act.[30]. The decision of the European Court of Justice is compulsory on the court that made the reference, and under Article 10 of the treaty, therefore national courts are obliged to apply the judgment in following cases.

It is completely up to the national court to arrive at a finding whether to submit or not, despite the fact that the national court may take the requests of the parties to the case into account. In *Rheinmuhlen* the Court of Justice acknowledged that the right to make a reference arises when the judge become aware that settling the disputes depends on a point referred to in the first paragraph of Article 267 TFEU. However, in this case the fact is that, any decisions taken by the adjudicator are not legally binding, the social services adjudicator will fail to meet the criteria to qualify as a court or tribunal, therefore not allowed, and should not make a reference under Article 267 TFEU.

EUROPEAN UNION MEMBER STATES AND THE INDEPENDENCE OF THEIR JUDICIAL SYSTEMS

The Court of Justice of the European Union (CJEU) was asked to rule on the independence of the Disciplinary Chamber of the Sd Najwyszy (Polish Supreme Court) in the Joined Cases C-585/18, C-624/18, and C-625/18. The significance of these cases derives from the fact that the institutions of legal systems inside Member States is a matter of national competency and that denotes; the ability of member states to create their own laws and enact legislations with respect to a matter in the national interest. However, The CJEU has held that Member States are nonetheless obliged to conform to obligations under EU law to ensure effective judicial protection and, as a necessary corollary, judicial independence. The inference drawn is that the current case forms a formulation by the CJEU of a "European" standard of judicial independence. The conception is that the current case represents the CJEU's definition of a "European" criterion of judicial independence, and its finding that national judges have the authority to declare a legal decision or process invalid if a court's jurisdiction is found to be in violation of EU law, as well as to overturn any national measure that gives authority to a non-independent court and that is in accordance with the principle of EU law primacy also known as

[30] (Case 314/85) *Foto- Frost*

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The Scientific Journal of Cihan University – Sulaimaniya **PP: 101-118**
Volume (6), Issue (1), June 2022
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'precedence' which is based on the notion that in the cases of disputes between an aspect of EU law and an aspect of national law in an EU country, EU law will prevail.[31]

(Gajda-Roszczynialska & Markiewicz, 2020), the Polish judicial disciplinary panel law enacted legislation approved by the Sejm (223 to 205) on 20 December 2019, the bill allows the Supreme Court of Poland's Disciplinary Chamber to punish judges who are involved in "political activity," as well as condemning and criticism of the panel's political independence.[32] Furthermore, Court of Justice of the European Union (CJEU) in a court case "Commission v Poland has held that the state of Poland *"had failed to fulfil its obligations under EU law"*. As a result, the Court ruled in favor of *"the Commission's application for interim measures"* which will most likely be accomplished by monetary penalties (fines). Following the 2015 Polish Constitutional Court crisis, the bill was introduced as a continuation of previous laws aimed at increasing political influence over the courts. The law has been called harsh and severe by critics, and protests against it have taken place across Poland.[33] The bill, according to the U.N. High Commissioner for Human Rights, "risks further undermining the already heavily challenged independence of the judiciary in Poland."[34] However, a recent development on October 12, 2020, drew widespread condemnation of the Disciplinary Chamber for revoked immunity from Beata Morawiec's as a judge of the Kraków District Court. Consequently, the European Association of Judges has issued a statement stating that *"the Disciplinary Chamber of the Polish Supreme Court is not a court and cannot continue to function as one,"* [35] (International Association Of Judges,) and has asked the Polish Supreme Court to initiate an investigate in order to push the European Commission to stop such legislation from being passed and to restore the EU legal order in Poland. The Grand Chamber of the CJEU defined criteria under which the new Disciplinary Chamber of the Polish Supreme Court can be regarded independent and

[31] Grogan, J. (2020). Joined Cases A. K. v. Krajowa Rada Sądownictwa (C-585/18) and CP (C-624/18), DO (C-625/18) v. Sąd Najwyższy (C.J.E.U.). International Legal Materials, 59(3), 459-486. doi:10.1017/ilm.2020.24

https://www.cambridge.org/core/journals/international-legal-materials/article/joined-cases-a-k-v-krajowa-rada-sadownictwa-c58518-and-cp-c62418-do-c62518-v-sad-najwyzszy-cjeu/4FDE145387F7B81CC566D1AB498F8993#

[32] Gajda-Roszczynialska, K., & Markiewicz, K. (2020). Disciplinary Proceedings as an Instrument for Breaking the Rule of Law in Poland. Hague Journal on the Rule of Law, 12(3), 451–483. https://doi.org/10.1007/s40803-020-00146-y

[33] Duncan, A. K., & Macy, J. (2021, March 3). The Collapse of Judicial Independence in Poland: A Cautionary Tale | Judicature. Judicature | The Scholarly Journal About the Judiciary. https://judicature.duke.edu/articles/the-collapse-of-judicial-independence-in-poland-a-cautionary-tale/

[34] Polish lawmakers OK disciplining judges; EU decries move. (2019, December 20). AP NEWS. https://apnews.com/article/3441d8b8545f16058213525ae9fa5dd2

[35] International Association Of Judges, I. A. J. (2020, October 12, p.1). Statement of the EAJ on Judge Beata Morawiec (Poland). International Association of Judges. https://www.iaj-uim.org/news/statement-of-the-eaj-on-judge-beata-morawiec-poland/

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The Scientific Journal of Cihan University – Sulaimaniya **PP: 101-118**
Volume (6), Issue (1), June 2022
ISSN 2520-7377 (Online), ISSN 2520-5102 (Print)

impartial in its opinion of November 19, 2019. The decision is based on a request for a preliminary determination filed by the Polish Supreme Court's Labor and Social Insurance Chamber.[36] [37]

The Commission has affirmed that current instruments that has a political and jurisdictional connotation: political (art. 7 TEU) and jurisdictional (art. 267 and Article 258 TFEU) can be utilized to reinforce the application of European Union laws in Member States. In its efforts to strengthen the judicial independence of member states on 17 July 2019, the Commission made available a document entitled Strengthening the rule of law within the Union- A blueprint for action, in which it reiterated that every member state has a legal obligation to guarantee the rule of law as the core element of judicial independence.[38]

The EU Justice Scoreboard provides an annual summary of measures relating to the efficiency, quality, and independence of justice systems in the EU. Its goal is to provide objective, accurate, and comparative data to help Member States enhance the efficacy of their national justice systems. In its 2019 report a chapter entitled 'Guaranteeing judicial independence' confirms for the first time actions taken at EU level to safeguard independence of justice systems as a key component of justice reforms proposed in 2018. In the same context. And, the EU Judicial Scoreboard report has concluded that a substantial number of Member States have continued their efforts to improve the efficacy of their national justice systems. Nevertheless, issues still persist safeguarding citizens' complete confidence in the legal systems of those Member States where judges' prestige, position, and their independence, may be jeopardized.

Under the principle of procedural autonomy, Member States have the authority to decide on the organization of their legal systems, On the other, they must observe the obligation imposed by EU law. However, new rulings by CJEU reveals that the court has established further obligations for Member States, in accordance with Article 19.1 TEU and directly related to the right that "Member States shall provide remedies sufficient to ensure effective legal protection". And, with the aim of evaluating whether a Member State's judicial system adheres to the principle of a fully independent judiciary; The duty of sincere cooperation laid down in Article 4(3) TEU, ensures that national courts, Member States are obliged to safeguard and "to assist each other in carrying out the tasks" in all areas covered by EU law. In a recent case 2018 Judgment in Case C-64/16, request for a preliminary ruling under Article 267 TFEU from the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal), Associação Sindical dos Juízes Portugueses v Tribunal de Contas in which; the salary of a number of public sector office holders and employees, including judges of the Tribunal de Contas, was temporarily reduced by the Portuguese legislature beginning in October 2014. (Court of Auditors,

[36] (Joined Cases C-585/18, C-624/18, and C-625/18)

[37] Pech, L. (2020). Protecting Polish judges from Poland's Disciplinary "Star Chamber": Commission v Poland. Case C-791/19 R, Order of the Court (Grand Chamber) of 8 April 2020, EU:C:2020:277. SSRN *Electronic Journal.* Published. https://doi.org/10.2139/ssrn.3683683

[38] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, Strengthening the rule of law within the Union- A blueprint for action, COM (2019) 343 final, 17 July 2019, p 5.

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The Scientific Journal of Cihan University – Sulaimaniya **PP: 101-118**
Volume (6), Issue (1), June 2022
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Portugal). The Association of Portuguese judges considered that a reduction of their salary could threaten judicial independence. The Court of Justice of the European Union has held that the salary reductions applied to the judges of the Tribunal de Contas and equally to the entire public sector in Portugal do not infringe the principle of judicial independence. In addition, the reductions at issue were on a temporary basis.[39]

In conclusion, the preliminary ruling procedural mechanism does not appear to be used very frequently. Although the European Union has enacted a range of laws and regulations, but it seems that the European Union has failed to provide a fully working and effective mechanism to ensure and enable Member States to make available remedies sufficient to provide legal protection and a proper functioning judiciary; hence, the lack of judicial independence in and a mechanism of judicial and political insurance in European member states. However, recently, the European Union appears to have started to realize that it has a duty to ensure that each Member State's judicial system provide sufficient resources to carry out its duties. The fact is that the principle of judicial independence has received less attention and consideration by European institutions, in spite of the fact that; both the Charter of Fundamental Rights of the European Union and the European Treaties make reference and refer to this principle for which Member states are responsible. The Principle of the right to an effective legal remedy and to receiving a fair trial in the scope of and in relation to Article 47 of the Charter of the Fundamental Rights of the European Union in essence resonates Article 2 of the EU Treaty on the European Union (TEU), which states, that the EU is established on the values of equality, the rule of law, and respect for human rights. [40] And, it is important to note that Article 19 of the TEU, introduced by the Treaty of Lisbon (2007), stipulates that member states have to offer and deliver satisfactory remedies to ensure effective legal protection in the fields covered by Union law. As a consequent, it is found that the European Commission over recent years has developed new strategies to strengthen the rule of law; the Commission's Communication in April 2019, on further strengthening the rule of law within the Union-State confirms that the independence of the judiciary as a crucial measure of the rule of law.[41]

The Commission has taken the appropriate steps and will continue to keep an eye on the situation in the Member States. It is dedicated to ensuring that any reform of the justice system abide by EU

[39] Pech, Laurent and Platon, Sébastien, Judicial Independence Under threat: The Court of Justice to the Rescue in the ASJP Case (Case C-64/16, Associação Sindical dos Juízes Portugueses, Judgment of the Court of Justice (Grand Chamber) of 27 February 2018.

[40] Communication from the Commission to the European Parliament, the European Council and the Council, Further strengthening the Rule of Law within the Union-State of play and possible next steps, COM (163) final of 3 April 2019, p 2.).

[41] Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions – The 2019 EU Justice Scoreboard, COM (2019) 198 final of 26 April 2019.

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Volume (6), Issue (1), June 2022
ISSN 2520-7377 (Online), ISSN 2520-5102 (Print)

law and European principles on the rule of law.[42] The European Commission's 2018 proposal for a Regulation of the European Parliament and the Council has made access to European funds conditional on compliance with EU laws - *"effective judicial protection by independent courts."*[43]

In September 2018 and December 2017, the European Parliament and the European Commission made proposals asking the Council and the Commission to decide in accordance to Article 7(1) of the TEU, whether a clear risk of a serious breach by Hungary of the EU treaty' and Poland of the rule of law existed based on Article 7.1 TEU.[44] [45] The Court of Justice of the European Union (CJEU) has set 'independence' as a standard and principle to determine whether an organ can be considered a court of a tribunal for the sake of Article 267 TFEU, that is, CJEU's jurisdiction to give preliminary rulings. But, recent rulings, for example; Associaçao Sindical dos Juizes Portugeses of February 2018 or the cases European Commission v. Republic of Poland of June and November 2019 all indicate that the Court of Justice of the European Union considers the principle of an independent judiciary core element of the rule of law, beyond what Article 267 TFEU provides for in the context of preliminary rulings. [46] [47] [48]

On the contrary, the Court of Justice concluded that Poland's verdict to reduce judges' statutory retirement age was against EU law, consequently, Poland's decision on judges was contrary EU law. The Court said that setting a lower retirement age for women and giving a minister the right to make the final choice on how long judges could stay on the job were both mistakes. The measure forced 20 of the country's 72 top court judges to step down from the bench earlier than planned. The European Court of Justice ((CJEU)) ruled in Commission v Poland (Disciplinary regime for judges) Case, in its judgments of 5 December 2019 and 15 January 2020, on 8 April 2020 Poland's new Polish judicial disciplinary panel at the Supreme Court of Poland violated European Union law. The Court of Justice

[42] Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions The 2019 EU Justice Scoreboard, COM (2019) 198/2 final of 20 May 2019.
[43] Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, COM/2018/324 final - 2018/0136 (COD), p.5.
[44] European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 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).
[45] Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, COM (2017) 835 final on 20 December 2017.
[46] Judgement of 27 February 2018 (Grand Chamber), Associação Sindical dos Juízes Portugueses, C-64/16, EU:C:2018:117
[47] Judgement of 25 July 2018 (Grand Chamber), LM, C-216/18 PPU, EU:C:2018:586.
[48] Judgement 24 June 2019 (Grand Chamber), European Commission v. Republic of Poland, C-619/18, EU:C:2019:531 and Judgement of 5 November 2019 (Grand Chamber), European Commission v. Republic of Poland, C-192/18, EU: C:2019:924.

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held in its decision, stating that the measure that came into force undermines the principle of the irremovability of judges, that principle being essential to their independence.[49]

This research article has found that while much remains to be developed, but the principal of the fundamental rights, enforcing the human rights, and laws; such as a fair trial can have a significant influence in the EU system of fundamental rights protection and the EU system of judicial protection and independence more broadly.

RECOMMENDATIONS AND SUGGESTIONS

Member states should make progress to address rule of law matters, to enhance values such as rule of law and transparency.

Member states to boost the resources, reforms, and funding of the justice system; for example, tackling the backlogs of cases and the slow bureaucracy.

As a scholarly subject, judicial independence in its legal context (broader questions of institutional design) to receive more reviews and closely studied, and concerns adequately addressed and engage academic institutions to tackled legal shortcomings.

The Commission should enact and put in place procedures to avoid making the legal system vulnerable to political influence and interference. For example, the council should find alternative ways for the Council's members to be elected.

Enhance and respect for rule of law across the 27-member bloc; finding instruments and mechanisms to handle rule of law crises.

[49] *Opinion in Case C-791/19 Commission v Poland (Disciplinary regime for judges) – IEU MONITORING*. (2021, May 6). IEU MONITORING. https://portal.ieu-monitoring.com/event/opinion-in-case-c-791-19-commission-v-poland-disciplinary-regime-for-judges/

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(C-337/95) Parfums Christian Dior v Evora.

(Case C-24/92) Corbiau v Administration des Contributions at paragraph 15.

(Case 283/81) CILFIT Srl.

(C-416/17) Commission v. France.

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