

# 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

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The European Court of Justice is behind a recent and genuine enhancement of European constitutionalism, placing the rule of law, a long-established value and principle of EU law, at the centre stage. This rule of law-enhancing process of re-articulation of EU constitutionalism is ongoing and represents the Court of Justice's incrementalist response to the process of rule of law backsliding which first emerged in Hungary before spreading to Poland.

This volume aims to present and critically analyse this judicial response on a case-by-case basis taking the Court's judgment of 27 February 2018 in Case C-64/16, *ASJP (Portuguese Judges)* as a departure point and its judgment of 15 July 2021 in Case C-791/19, *Commission v. Poland (Disciplinary Regime for Judges)* as a provisional end point. By offering key excerpts and a critical assessment of the Court of Justice's most important orders and judgments which have reshaped the meaning and scope of the EU rule of law principle and associated legal obligations since 2018, this casebook-style volume will be of interest to those wishing to gain an expert understanding of the crucial recent evolution in the field of EU rule of law through the lens of the Court's orders and judgments both taken individually and as a whole.

In order to better understand the meaning and scope of the EU Member States' obligation to ensure that their courts meet the requirement of effective judicial protection, this volume first offers a detailed examination of the judgment which can be viewed as belonging to the Pantheon of the European Court of Justice's rulings, on a par with *Van Gend en Loos* and *Costa*, that is, the Court's Grand Chamber ruling in *ASJP*, a case informally known as *Portuguese Judges*. This judgment,

which may also be understood as the Court's first significant albeit indirect answer to the ongoing process of rule of law backsliding, first witnessed in Hungary and now under way in Poland, marked a new beginning for the rule of law as a fundamental and enforceable value of the EU legal order, referred to in Article 2 TEU and given concrete and justiciable expression by inter alia the second subparagraph of Article 19(1) TEU: 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'.

The European Commission's enforcement of the EU Member States' obligation to ensure that their courts meet the requirement of effective judicial protection is then detailed via an examination of several Court of Justice's orders and judgments. With respect to the Court's orders, four of them issued within the framework of infringement cases C-441/17 R (*Białowieża Forest*); C-619/18 R (*Independence of Poland's Supreme Court*); C-791/19 R (*Independence of the Disciplinary Chamber of Poland's Supreme Court*); and C-204/21 R (*Poland's Muzzle Law*) are presented. While the first one predates the Court's ruling in *Portuguese Judges*, its inclusion in this volume was motivated by the fact that it prefigured the Court's subsequent and unprecedented orders in infringement actions directly concerned with the protection of judicial independence in Poland. With respect to the Court's judgments on the merits, the infringement rulings issued in Case C-192/18 (*Independence of the ordinary courts*); Case C-619/18 (*Independence of the Supreme Court*); and Case C-791/19 (*Disciplinary regime for judges*) are analysed. With these three judgments, Poland has become the first EU Member State to be found to have violated the second subparagraph of Article 19(1) TEU three infringement cases in a row.

The two most important rulings to date issued by the Court of Justice in response to national requests for a preliminary ruling originating in both instances from Polish courts in relation to the requirements of judicial independence under Article 19(1) TEU and/or Article 47 CFR are then assessed: Joined Cases C-585/18, C-624/18 and C-625/18, *A.K. e.a. (Independence of the disciplinary chamber of the Supreme Court)* and Joined Cases C-558/18 and C-563/18 *Miasto Łowicz and Prokurator Generalny*. These two judgments, in addition to providing further clarification regarding the obligation to ensure that national courts meet the requirement of effective judicial protection, also illustrate a new trend whereby Article 267 TFEU has emerged as a tool of self-defence for the national judges under attack and thus serves as an instrument of enforcement of the EU's fundamental values in a broader context where the European Commission appears keen to use infringement actions in the most leisurely and parsimonious way.

Due to the lengthy nature of the present volume, the Court of Justice's preliminary judgments of 20 April 2021 in Case C-896/19 (*Maltese Judges*) and of 18 May 2021 in Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 (*Romanian Judges*) are not examined individually but integrated in the analysis of the Court's infringement judgment of 15 July 2021 regarding Poland's new disciplinary regime for judges (Case C-791/19) and the Court's preliminary judgment of 2 March 2021 regarding Poland's 'fake judges' (Case C-824/18). This is not, however, to deny their importance and significant added value to the extent that they both make clear inter alia that national authorities are under a negative but also positive obligation to respect EU requirements relating to judicial independence as well as an obligation not to regress in this area. In more practical terms, this means that a Member State cannot post accession adopt rules undermining judicial independence as this would violate the second subparagraph of Article 19(1) TEU which prohibits national authorities from adopting new legislation amounting to a regression in the Member State concerned in the protection of the value of the rule of law, in particular the EU guarantees relating to judicial independence. It also means an obligation to refrain from adopting legislative changes which undermine the rule of

law, which is the case when, for instance, a new special prosecution section is established and is used as an instrument of pressure and intimidation with regard to judges, or when national authorities adopt new rules regarding the personal liability of judges which fail to provide guarantees designed to avoid any risk of external pressure on the content of judicial decisions.

Looking beyond cases directly raising judicial independence issues, this volume also examines a number of cases which arguably show that the process of rule of law backsliding in some EU countries has had a significant albeit often implicit impact on other areas of the Court's case law, with the Court arguably recalibrating its interpretation and approaches in relation to several fundamental concepts in EU law primarily in light of the situation in Poland. This impact can be first evidenced in the stricter interpretation of the meaning of 'court of tribunal' in the sense of Article 267 TFEU used in Case C-274/14 *Banco de Santander*. A similar tightening of the concept of 'issuing judicial authority' within the meaning of the European arrest warrant (EAW) can be detected in Joined Cases C-508/18 *OG (Public Prosecutor's Office of Lübeck)* and C-82/19 *PPU PI (Public Prosecutor's Office of Zwickau)*, as well as in Case C-509/18 *PF (Prosecutor General of Lithuania)*.

Another significant development, likely to have been brought about, at least in part, in reaction to Poland's rule of law crisis, can be found in Case C-284/14 *Commission v. France (Advance Payment)*, where the Court offered a long-awaited recalibration of *CILFIT*. The Court also pushed for a stricter defence of the jurisdiction of the national courts to ensure full effectiveness of EU law in Case C-284/16 *Achmea*, a stricter defence which however threatens to leave investors formerly covered by intra-EU bilateral investment treaties (BITs) without any judicial protection at all in countries experiencing rule of law backsliding. The Court also enabled, at least theoretically, stricter scrutiny by judicial authorities called upon to execute EAWs of mutual trust obligations on account of systemic deficiencies which may affect the independence of a national judiciary in a backsliding Member State in Case C-216/18 *PPU LM (Celmer)*. This recalibration may however be viewed as patently insufficient considering the systemic nature and current extent of Poland's rule

of law breakdown. Finally, the Court adopted a demanding interpretation of the requirement of ‘established by law’ to comprehensively review an EU judicial appointment procedure in its Grand Chamber judgment of 26 March 2020 in Joined Cases C-542/18 RX-II *Simpson* and C-543/18 RX- II *HG*. While this judgment did not concern a national judicial appointment procedure, it was easy to see how the Court’s reasoning could be extrapolated to the situation in Poland where manifest irregularities have repeatedly affected the appointments of multiple individuals, in particular to the Supreme Court.

This volume ends with the Court of Justice’s latest crucial challenge: how to deal with manifestly irregularly appointed ‘judges’. To understand the unprecedented and complex nature of this problem, an analysis of the Court’s judgment of 2 March 2021 in Case C-824/18, *AB et al. (Appointment of judges to the Supreme Court – Actions)* – the most important judgment issued by the Court to date regarding the extent to which EU law can be used to review *national* judicial appointment procedures and connected judicial review rules – is offered. *AB* is itself the Court of Justice’s third major judgment in a preliminary ruling case originating from a Polish court (in this instance, Poland’s Supreme Administrative Court) raising issues connected to Poland’s rule of law breakdown, out of a total of 37 (and counting) rule of law related national requests for a preliminary ruling submitted by Polish courts, compared to a total of four infringement actions lodged with the Court by the Commission to date. With so many preliminary cases remaining to be answered, one can expect the Court of Justice to provide further clarification on the extent to which EU law may be relied upon to deal with the situation of individuals appointed to judicial positions on the back of inherently deficient procedures which disclose an undue influence of the legislative and executive powers.

Following this largely chronological overview, the volume concludes with a transversal analysis of the core implications of the Court’s contribution to the fight against rule of law backsliding. While this includes identifying blind spots in the Court of Justices’ case law to date, the Court’s contribution amounts to one of the most important developments in the law of the Union since its foundational jurisprudence of the early 1960s. In other words, the multifaceted line of case law, which was prefigured by the Court’s interim order in *Białowieża Forest* before being fully exposed in the Court’s judgment in *Portuguese Judges*, has led to a deep renewal of the most essential features of EU’s constitutionalism. This renewal occurred through the articulation of a more substantive idea of the rule of law at the supranational level backed by the judicial ‘activation’ of the until then untapped potential of Article 19(1) TEU – an operationalisation of the EU principle of effective judicial protection fully justified and grounded in the Treaties – for the Court of Justice to intervene in defence of a core and well- established component of the rule of law: the principle of judicial independence.

In addition to the emergence of increasingly detailed standards of judicial independence binding on the Member States, these developments have resulted in upgrading the very nature of the judicial dialogue between the Court of Justice and the national courts. Essentially, the values of the EU are moving to the realm of the law, turning the Union into a true constitutional system where the rule of law and its core components have become an enforceable part of EU law, paving the way to the progressive ‘unification’ of European judicial power on the basis of fundamental principles that are binding and enforceable at both national and EU levels. In presiding over this development, the Court of Justice has reinforced the ‘values dimension’ of the EU, which now complements the internal market dimension of the EU construct.