

RULE OF LAW IN THE RECENT CASE LAW OF THE CJEU AND THE ECtHR

TRAINING MATERIAL AND COLLECTION OF SOURCES

for

the Advanced Training in EU Law for Judges and Prosecutors

Preliminary ruling procedure, Charter of Fundamental Rights and the Rule of Law

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COUNCIL OF EUROPE

LEGAL BASES AND DEFINITIONS

Statute of the Council of Europe (1949)

Preamble

“The Governments... Reaffirming their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the **rule of law**, principles which form the basis of all genuine democracy”

Article 3

“Every member of the Council of Europe must accept the principles of the **rule of law** and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I.”

Convention for the Protection of Human Rights and Fundamental Freedoms (1950)

Preamble

“The Governments... Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the **rule of law**, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration”.

ECtHR case law

“[T]he principle of the rule of law [...] is inherent in the system of protection established by the Convention and its Protocols”. See, for example, *Jorgic v. Germany* (2007), no. [74613/01](#), § 64

SOURCES OF INTERPRETATION AND STANDARDS OF EVALUATION

OPINIONS AND STUDIES OF THE VENICE COMMISSION

The Venice Commission’s primary task is to provide states with legal advice in the form of “legal opinions” on draft legislation or legislation already in force which is submitted to it for examination. It also produces studies and reports on topical issues.

Reports specifically on the rule of law:

- Venice Commission: [Report on the Rule of Law](#), CDL-AD(2011)003rev, Strasbourg, 4 April 2011
- Venice Commission: [Rule of Law Checklist](#), CDL-AD(2016)007, Strasbourg, 18 March 2016

All documents of the Venice Commission concerning the rule of law:

<https://www.venice.coe.int/webforms/documents/?topic=34&year=all>

All documents of the Venice Commission by topic:

https://www.venice.coe.int/WebForms/documents/by_topic.aspx?lang=EN

All documents of the Venice Commission by country:

https://www.venice.coe.int/WebForms/documents/by_country.aspx?lang=EN

CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

HUDOC case law Database:

[https://hudoc.echr.coe.int/#{%22documentcollectionid%22:\[%22GRANDCHAMBER%22,%22CHAMBER%22\]}](https://hudoc.echr.coe.int/#{%22documentcollectionid%22:[%22GRANDCHAMBER%22,%22CHAMBER%22]})

- Tutorials and manual: <https://www.echr.coe.int/en/hudoc-database>

Selection of key cases: <https://www.echr.coe.int/selection-of-key-cases>

Case law guides per article: <https://ks.echr.coe.int/web/echr-ks/all-case-law-guides>

Supervision of execution of judgments of the European Court of Human Rights:

<https://www.coe.int/en/web/cm/execution-judgments>

MAJOR SUBJECT AREAS

The core elements of the rule of law as interpreted by the various rule of law mechanisms in the Council of Europe are:

- Legality
 - supremacy of the law
 - compliance of state action with the law
 - defined relationship between national and international law
 - derogation of the normal regime of human rights only in exceptional circumstances and in accordance with the law
- Legal certainty
 - Accessibility and foreseeability of the law
 - Non-retroactive application of the law
- Prevention of abuse/misuse of powers
 - limitation of the discretionary power of state officials
- Equality before the law and non-discrimination
 - prohibition of discrimination on grounds such as race, colour, sex, language, religion, political opinion, national or social origin, birth etc.
- Access to justice
 - independence and impartiality of the judiciary
 - fair trial
- Fundamental rights enshrined (primarily) in the European Convention on Human Rights

LEGAL BASES AND DEFINITIONS

CJEU, Case 294/83 Parti écologiste 'Les Verts' v. European Parliament, EU:C:1986:166

“It must first be emphasized in this regard that the European Economic Community is a Community based on the **rule of law**, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty.” [para. 23]

Treaty on European Union

Preamble

“Drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the **rule of law**”

“Confirming their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the **rule of law**”

Article 2

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the **rule of law** and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail

Commission Communication COM(2019) 163 - Further strengthening the Rule of Law within the Union¹

„The **rule of law** includes, among others, principles such as legality, implying a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibiting the arbitrary exercise of executive power; effective judicial protection by independent and impartial courts, effective judicial review including respect for fundamental rights; separation of powers; and equality before the law.”

Rule of Law Conditionality Regulation (2020)²

Article 2 (a)

“the rule of law’ refers to the Union value enshrined in Article 2 TEU. It includes the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law. The rule of

¹ European Commission, ‘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(2019) 163 final; See also Commission Communication COM(2014) 158 - A new EU Framework to strengthen the Rule of Law.

² 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

law shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU”

Regulation laying down common provisions on eight EU Funds (2021)³

Article 9

1. Member States and the Commission shall ensure respect for fundamental rights and compliance with the Charter of Fundamental Rights of the European Union in the implementation of the Funds.

2. Member States and the Commission shall ensure that equality between men and women, gender mainstreaming and the integration of a gender perspective are taken into account and promoted throughout the preparation, implementation, monitoring, reporting and evaluation of programmes.

3. Member States and the Commission shall take appropriate steps to prevent any discrimination based on gender, racial or ethnic origin, religion or belief, disability, age or sexual orientation during the preparation, implementation, monitoring, reporting and evaluation of programmes. In particular, accessibility for persons with disabilities shall be taken into account throughout the preparation and implementation of programmes.

SOURCES OF INTERPRETATION AND STANDARDS OF EVALUATION

ANNUAL RULE OF LAW REPORTS OF THE EUROPEAN COMMISSION

The European Rule of Law Mechanism provides a process for an annual dialogue between the Commission, the Council and the European Parliament together with Member States as well as national parliaments, civil society and other stakeholders on the rule of law. The Rule of Law Report is the foundation of this new process. The Rule of Law Report monitors significant developments, both positive and negative, relating to the rule of law in Member States.

- 2020 Rule of Law Report – Communication and country chapters: https://commission.europa.eu/publications/2020-rule-law-report-communication-and-country-chapters_en
- 2021 Rule of Law Report – Communication and country chapters: https://commission.europa.eu/publications/2021-rule-law-report-communication-and-country-chapters_en
- 2022 Rule of Law Report – Communication and country chapters: https://commission.europa.eu/publications/2022-rule-law-report-communication-and-country-chapters_en
- 2023 Rule of Law Report – Communication and country chapters: https://commission.europa.eu/publications/2023-rule-law-report-communication-and-country-chapters_en
- 2024 Rule of Law Report (in progress): https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2024-rule-law-report_en

³ Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy

CASE LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

InfoCuria case law database: <https://curia.europa.eu/juris/recherche.jsf?language=en>

CJEU, Selection of Major Judgments – Year 2023:

https://curia.europa.eu/jcms/upload/docs/application/pdf/2024-04/selection_grands_arrets_2023_en.pdf

CJEU, Selection of Major Judgments – Year 2022:

https://curia.europa.eu/jcms/upload/docs/application/pdf/2023-04/en-selection_des_grands_arrets_2022.pdf

CJEU, Annual Reports: https://curia.europa.eu/jcms/jcms/Jo2_7015/en/

- Most important judgments listed and summarized in “The year in review” → “Judicial activity”
→ “A look back at the most important judgments of the year”

Monthly case law digest: https://curia.europa.eu/jcms/jcms/p1_3471594/en/

MAJOR SUBJECT AREAS

The core areas of the rule of law as interpreted and applied by the rule of law mechanisms of the EU:

- Justice systems
 - independence of the justice system (including the judiciary and the prosecution service)
 - quality and efficiency of justice
 - access to justice
 - judicial cooperation in civil and criminal matters
- Anti-corruption framework
 - criminal investigations and prosecution of high level corruption cases
 - lobbying and „revolving doors”
 - asset and interest disclosure
 - whistleblower protection
- Media pluralism
 - independence of media regulators
 - transparency of media ownership
 - access to information
 - protection of journalists
- Other institutional issues related to checks and balances
 - inclusiveness, quality and transparency of law-making
 - constitutional review (if applicable)
 - state of emergency measures
 - Ombudspersons, national human rights institutions, equality bodies and other independent authorities
 - implementation of court judgments
 - civil society sector
 - elections
- Fundamental rights enshrined in the EU Charter

JUDICIAL INDEPENDENCE IN THE CASE LAW OF THE ECtHR

LEGAL BASES

European Convention on Human Rights

Article 6 (1) – Right to a fair trial

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

Article 8 - Right to respect for private and family life

- (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
- (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 10 - Freedom of expression

- (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
- (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Additional international legal sources cited by the ECtHR:

General Comment No. 32 on Article 14 of the International Covenant on Civil and Political Rights (Right to equality before courts and tribunals and to a fair trial) published on 23 August 2007, the UN Human Rights Committee

Basic Principles on the Independence of the Judiciary (1985) adopted by the 7th UN Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 Aug. to 6 Sept. 1985, and endorsed by General Assembly resolutions 40/32 of 29 Nov. 1985 and 40/146 of 13 Dec. 1985.

European Charter on the Statute for Judges of 8 to 10 July 1998

Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies)

Opinions of the Consultative Council of European Judges (CCJE) on standards concerning the independence of the judiciary and the irremovability of judges

Magna Carta of Judges (Fundamental Principles) adopted by the Consultative Council of European Judges (CCJE) in November 2010

Rule of Law Checklist (CDL-AD(2016)007), adopted by the Venice Commission at its 106th Plenary Session (11-12 March 2016)

BRINGING CASES TO THE ECTHR

INDIVIDUAL APPLICATION

ECHR, Article 34

The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto.

- ➔ How to make a valid application: <https://www.echr.coe.int/apply-to-the-court> ; information available in languages other than English: https://www.echr.coe.int/web/echr/apply-to-the-court-other-languages?filter_category_3290069=2035040

ADVISORY OPINION

Protocol No. 16 to the ECHR,⁴ Article 1

- (1) Highest courts and tribunals of a High Contracting Party, as specified in accordance with Article 10, may request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto.
- (2) The requesting court or tribunal may seek an advisory opinion only in the context of a case pending before it.

RECENT DEVELOPMENTS IN THE JURISPRUDENCE

ARTICLE 6 (1) – RIGHT TO A FAIR TRIAL

Important precedents:

Ramos Nunes de Carvalho e Sá v. Portugal [GC], nos. 55391/13, 57728/13 and 74041/13 (2018)

Denisov v. Ukraine [GC], no. 76639/11 (2018)

⁴ Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treaty-num=214>

Most recent case law:

[Guðmundur Andri Ástráðsson v. Iceland \[GC\], no. 26374/18 \(2020\)](#)

- **Participation of judge whose appointment was vitiated by undue executive discretion without effective domestic court review and redress: violation**
- **Application of three-step test in determining whether irregularities in a judicial appointment process violate the essence of the right to a tribunal established by law: whether there was (1) a manifest breach (2) of a fundamental rule of the appointment procedure and (3) whether allegations were effectively reviewed and redressed by domestic courts in a Convention-compliant manner**

[Beshiri and Others v. Albania \(dec.\), nos. 29026/06 and 11 others \(2020\)](#)

- Alleged legislative interference due to the adoption of a new law with retroactive effects in response to a Court's pilot judgment.
- Inadmissible

[M.N. and Others v. Belgium \(dec.\) \[GC\], no. 3599/18 \(2020\)](#)

- Non-enforcement of judicial decision concerning administrative refusals to grant visas.
- Inadmissible: Article 6 not applicable

[Camelia Bogdan v. Romania, no. 36889/18 \(2020\)](#)

- **Inability of a judge to challenge her automatic suspension from duty, with stoppage of salary, pending consideration of her appeal against removal from judicial office.**
- **Violation**

[Dolińska - Ficek and Ozimek v. Poland, nos. 49868/19 and 57511/19 \(2021\)](#)

- **Procedure for appointing judges and the right to an "independent and impartial tribunal established by law".**
- **Manifest breaches in appointment of judges to newly established Supreme Court's Chamber of Extraordinary Review and Public Affairs following legislative reform: violation**
- **The Chamber of Extraordinary Review and Public Affairs of the Supreme Court, which examined the applicants' cases, was not a "tribunal established by law".**

[Reczkowicz v. Poland, no. 43447/19 \(2021\)](#)

- **Appointment of judges to the newly established Supreme Court's Disciplinary Chamber following legislative reform.**
- **Grave irregularities in appointment of judges to the newly established Supreme Court's Disciplinary Chamber following legislative reform: violation**
- **The Disciplinary Chamber of the Supreme Court, which examined the applicant's case, was not a "tribunal established by law".**

[Xero Flor w Polsce sp. z o.o. v. Poland, no. 4907/18 \(2021\)](#)

- **Grave irregularities vitiating election of Constitutional Court judge sitting on the panel which examined the applicant company's constitutional complaint: violation**

- **Violation as regards the right to a fair hearing, on account of the reasons given by the courts for the refusal to refer a legal question to the Constitutional Court being insufficient.**

[Bilgen v. Turkey, no. 1571/07 \(2021\)](#)

- **Decision to transfer a judge to a different and lower ranking judicial district.**
- **Inability of judge to have recourse to judicial review of unjustified non-consensual transfer decision to lower ranking judicial district : violation**

[Xhoxhaj v. Albania, no. 15227/19 \(2021\)](#)

- **Vetting proceedings leading to dismissal of Constitutional Court judge.**
- **Bodies set up to vet serving judges and prosecutors to combat corruption objectively independent and impartial tribunals, established by law: no violation**
- **Lack of statutory limitation for asset evaluation not breaching principle of legal certainty, given its sui generis nature and context: no violation**

[Albuquerque Fernandes v. Portugal, no. 50160/13 \(2021\)](#)

- **Dismissal, on procedural grounds, of a constitutional appeal by a judge challenging a disciplinary penalty.**
- **Restoration of the rule of law by the Constitutional Court after an erroneous procedural act by the applicant: no violation**

[Eminağaoğlu v. Turkey, no. 76521/12 \(2021\)](#)

- **Sanction of disciplinary transfer against a judicial officer, later replaced with a reprimand, on account of public statements and criticisms.**
- **Inability of judicial officer to have recourse to judicial review of disciplinary proceedings against him: violation**

[Żurek v. Poland, no. 39650/18 \(2022\)](#)

- **Lack of judicial review of premature termination ex lege, after legislative reform, of a serving regional court judge's mandate as member of the National Council of the Judiciary (NCJ) and its spokesperson: violation**

[Grzęda v. Poland \[GC\], no. 43572/18 \(2022\)](#)

- **Lack of judicial review of premature termination ex lege, after legislative reform, of a serving judge's mandate as member of the National Council of the Judiciary: violation**

[Juszczyszyn v. Poland, no. 35599/20 \(2022\)](#)

- **Grave irregularities in appointment of judges to newly established Supreme Court's Disciplinary Chamber, that suspended judge from duties for verifying another judge's independence: violation**

[Catană v. the Republic of Moldova, no. 43237/13 \(2023\)](#)

- **Requirements of independence and impartiality not met in two disciplinary proceedings against a magistrate: violation**

[Tuleya v. Poland, nos. 21181/19 and 51751/20 \(2023\)](#)

- **Lifting of judge’s immunity from prosecution and suspension from judicial duties by Supreme Court’s Disciplinary Chamber**
- **Manifest breach of domestic law due to inherently deficient judicial appointment procedure to Disciplinary Chamber by reformed NCJ which lacked independence from legislature and executive: violation**

[Gyulumyan and Others v. Armenia \(dec.\), no. 25240/20 \(2023\)](#)

- Termination of terms of office of Constitutional Court judges and President, all appointed with life tenure, through non-judicially reviewable amendments in constitutional reform context: Article 6 inapplicable; inadmissible

[Pajak and Others v. Poland, nos. 25226/18 and 3 others \(2023\)](#)

- **Legislation differentiating between men and women with regard to the retirement age of judges.**
- **Absence of serious reasons capable of justifying an exceptional absence of judicial review of the early termination of the applicants' duties as judges as a result of unilateral decisions by the Minister of Justice, representative of the executive, and the Conseil national de la Magistrature, a body subordinate to the latter: violation**

[Ovcharenko and Kolos v. Ukraine, nos. 27276/15 and 33692/15 \(2023\)](#)

- **Dismissal of constitutional judges.**
- **Inadequate judicial review of Parliament’s decision to dismiss Constitutional Court judges for “breach of oath” without a clear interpretation of that offence and the scope of their functional immunity: violation**

[Lorenzo Bragado and Others v. Spain, nos. 53193/21 and 5 others \(2023\)](#)

- **Parliament’s failure to pursue the mandatory selection process to the governing body of the judiciary.**
- **Constitutional Court’s dismissal of amparo appeal, as out of time and without examining merits, against Parliament’s failure to pursue appointment process of a new General Council of the Judiciary (GCJ), by magistrates on final candidate list: violation**

[Stylianidis v. Cyprus \(dec.\), no. 24269/18 \(2024\)](#)

- Inability of former judge to seek judicial review of the decision to promote other candidate judges.
- Inadmissible

ARTICLE 8 – RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE

[Xhoxhaj v. Albania, no. 15227/19 \(2021\)](#)

- Vetting proceedings leading to dismissal of Constitutional Court judge.
- Justified dismissal of judge and lifetime ban from re-entering justice system as result of individualised and serious findings of vetting process: no violation

[Eminağaoğlu v. Turkey, no. 76521/12 \(2021\)](#)

- **Sanction of disciplinary transfer against a judicial officer, later replaced with a reprimand, on account of public statements and criticisms.**
- **Use in disciplinary investigation of recordings of applicant's telephone conversations, intercepted during the criminal investigation against him, not "in accordance with the law": violation**

[Juszczyszyn v. Poland, no. 35599/20 \(2022\)](#)

- **Unforeseeable suspension of judge, in connection with the giving of a judicial decision, based on manifestly unreasonable application of law, by a body not being "a tribunal established by law": violation**

[M.D. and Others v. Spain, no. 36584/17 \(2022\)](#)

- **Police report on group of serving judges who signed a manifesto on the Catalan people's "right to decide", consisting of information partially extracted from police ID database.**
- **Insufficient inquiry into data leak to press: violation**

[Gyulumyan and Others v. Armenia \(dec.\), no. 25240/20 \(2023\)](#)

- **Termination of terms of office of Constitutional Court judges and President, all appointed with life tenure, through non-judicially reviewable amendments in constitutional reform context: Article 8 inapplicable; inadmissible**

[Pająk and Others v. Poland, nos. 25226/18 and 3 others \(2023\)](#)

- **Legislation differentiating between men and women with regard to the retirement age of judges.**
- **Combined effect of legislation differentiating between men and women with regard to the retirement age of judges and ministerial refusals to allow the applicants to continue to exercise their functions beyond the lowered age: violation**

[Ovcharenko and Kolos v. Ukraine, nos. 27276/15 and 33692/15 \(2023\)](#)

- **Dismissal of constitutional judges.**
- **Constitutional Court judges' dismissal for participating in a debatable judgment, without clear interpretation of the imputed "breach of oath" and the scope of their functional immunity: violation**

[Tuleya v. Poland, nos. 21181/19 and 51751/20 \(2023\)](#)

- **Disciplinary Chamber's decision lifting applicant's immunity and suspending him from duties**
- **Decision on lifting immunity and suspension based on an unforeseeable interpretation of the domestic law by a body not constituting an "independent and impartial tribunal established by law": violation**

[Aydın Sefa Akay v. Türkiye, no. 59/17 \(2024\)](#)

- **Arrest and pre-trial detention as well as the search of his house and person of a judge of an international court despite the diplomatic immunity conferred on him**

by that court's Statute, following the attempted coup of 15 July 2016, when Türkiye declared a state of emergency: violation.

ARTICLE 10 – FREEDOM OF EXPRESSION

Important precedents:

Olujčić v. Croatia, no. 22330/05 (2009)

Kudeshkina v. Russia, no. 29492/05 (2009)

Di Giovanni v. Italy, no. 51160/06 (2013)

Morice v. France [GC], no. 29369/10 (2015)

Baka v. Hungary [GC], no. 20261/12 (2016)

Most recent case law:

[*Panioglu v. Romania*, no. 33794/14 \(2020\)](#)

- Code-of-conduct penalty on judge for publishing unsubstantiated allegations calling into question moral and professional integrity of a fellow judge: no violation

[*Miroslava Todorova v. Bulgaria*, no. 40072/13 \(2021\)](#)

- Applicability as concerns the disciplinary sanctions of reduction of salary and demotion of a judge.
- **Disciplinary proceedings and sanctions against the President of the judges' association in retaliation against her criticism of the Supreme Judicial Council and the executive: violation**

[*Eminağaoğlu v. Turkey*, no. 76521/12 \(2021\)](#)

- **Sanction of disciplinary transfer against a judicial officer, later replaced with a reprimand, on account of public statements and criticisms.**
- **Disciplinary sanctions imposed on applicant for different statements made: violation.**

[*Żurek v. Poland*, no. 39650/18 \(2022\)](#)

- **Premature termination *ex lege*, after legislative reform, of a judge's mandate as member of the National Council of the Judiciary (NCJ) and its spokesperson.**
- **Measures taken against the applicant by the authorities for public statements made in his professional capacity as NCJ spokesperson concerning legislative reforms affecting the judiciary: violation**

[*Kozan v. Turkey*, no. 16695/19 \(2022\)](#)

- **Disciplinary sanction imposed on a magistrate for having shared, in his Facebook group reserved for fellow magistrates, a press article criticizing the High Council of Judges and Prosecutors and questioning its independence from political power: violation**

[*Manole v. the Republic of Moldova*, no. 26360/19 \(2023\)](#)

- **Dismissal of a judge for having disclosed to a journalist a summary of reasons for her dissenting opinion before the full text of the decision was published: violation**

[Tuleya v. Poland, nos. 21181/19 and 51751/20 \(2023\)](#)

- **Impugned measures prompted by applicant's views and criticisms publicly expressed in his professional capacity**
- **Interferences not "prescribed by law" and not pursuing any legitimate aims; Applicant not afforded minimum procedural safeguards in preliminary inquiries; Decision on lifting immunity and suspension taken by a body not constituting an "independent and impartial tribunal established by law"; No requisite procedural safeguards to prevent arbitrary application of relevant substantive law; Measures could be characterised as a strategy aimed at intimidating (or even silencing) the applicant**

[Danileț v. Romania, no. 16915/21 \(2024\)](#)

- **Disciplinary sanction imposed on a judge for comments published on his Facebook page: violation.**

JUDICIAL INDEPENDENCE IN THE CASE LAW OF THE CJEU

LEGAL BASES

Treaty on European Union

Article 2

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Article 19 (1)

... Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

Charter of Fundamental Rights of the European Union

Article 47 – Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

BRINGING CASES TO THE CJEU

INFRINGEMENT PROCEDURE

Treaty on the Functioning of the European Union

Article 258

If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.

Article 259

A Member State which considers that another Member State has failed to fulfil an obligation under the Treaties may bring the matter before the Court of Justice of the European Union.

Before a Member State brings an action against another Member State for an alleged infringement of an obligation under the Treaties, it shall bring the matter before the Commission.

The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party's case both orally and in writing.

If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court.

- ➔ Information about the infringement procedure: https://commission.europa.eu/law/application-eu-law/implementing-eu-law/infringement-procedure_en
- ➔ European Commission's database of infringement decisions: https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/

PRELIMINARY RULING PROCEDURE

Treaty on the Functioning of the European Union

Article 267

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.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

- ➔ CJEU Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOC_2019_380_R_0001
- ➔ Rules of Procedure of the Court of Justice: https://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/rp_en.pdf

RECENT DEVELOPMENTS IN THE JURISPRUDENCE

Important precedents

Judgment of 27 February 2018, ASJP (Portuguese Judges) (Case C-64/16)

Judgment of 25 July 2018, LM (Case C-216/18 PPU)

Order of 17 December 2018, Commission v Poland (Independence of Poland's Supreme Court) (C-619/18 R)

Judgment of 5 November 2019, Commission v Poland (Independence of Poland's ordinary court judges) (C-192/18)

Judgment of the Court (Grand Chamber) of 19 November 2019, A. K. and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy (Independence of the Disciplinary Chamber of the Supreme Court) (Joined Cases C-585/18, C-624/18 and C-625/18)

Most recent case law:

[Judgment of the Court \(Grand Chamber\) of 26 March 2020, Miasto Łowicz \(Judicial disciplinary system\) Joined Cases C-558/18 and C-563/18](#)

- The Court of Justice declared that two requests for a preliminary ruling concerning Polish legislation from 2017 establishing a disciplinary procedure regime for judges were inadmissible. However, it stated that the fact that national judges made requests for a preliminary ruling which turned out to be inadmissible cannot lead to disciplinary proceedings being brought against them. The Court observed that provisions of national law which expose national judges to **disciplinary proceedings** as a result of the fact that they submitted a **reference to the Court for a preliminary ruling** cannot be permitted. Not being exposed to disciplinary proceedings or measures for that reason also constitutes a guarantee essential to the independence of the judiciary.

Judgment of the Court of 26 March 2020, *Simpson and HG* Joined Cases C-542/18 RX-II & C-543/18 RX-II

[Judgment of the Court \(Grand Chamber\) of 15 July 2021, *European Commission v Republic of Poland* \(Disciplinary regime applicable to judges\) \(C-791/19\)](#)

- The Court of Justice held that the **disciplinary regime applicable to judges** of the Sąd Najwyższy (Supreme Court, Poland) and judges of the ordinary courts is not compatible with EU law. The European Commission brought an action before the Court of Justice seeking a declaration that, by that new disciplinary regime and, in particular, by establishing a new disciplinary chamber within the Supreme Court, Poland had infringed EU law. The Court of Justice upheld all of the Commission's complaints: in the light of the wider context of major reforms which had recently affected the Polish judiciary and the combination of factors that framed the process whereby that new chamber was established, it held *inter alia* that that chamber does not offer all the guarantees of **impartiality and independence** and is not protected from the direct or indirect influence of the Polish legislature and executive.

[Judgment of the Court \(Grand Chamber\) of 2 March 2021, *A.B. and Others v Krajowa Rada Sądownictwa and Others* \(Appointment of judges to the Supreme Court\) \(C-824/18\)](#)

- The Court of Justice held that, since successive amendments to the Polish Law on the National Council of the Judiciary have the effect **of removing effective judicial review of that council's decisions** to proposing the President of the Republic candidates for the office of judge at the Sąd Najwyższy (Supreme Court, Poland), they are liable to infringe EU law. It stated that, where an infringement has been proved, the principle of **the primacy of EU law** requires the national court to disapply such amendments.

[Judgment of the Court \(Grand Chamber\) of 20 April 2021, *Repubblika* \(Maltese judges\) \(C-896/19\)](#)

- A Maltese association whose purpose is to promote the protection of justice and the rule of law had challenged before the Prim'Awla tal-Qorti Civili – Ġurisdizzjoni Kostituzzjonali (First Hall of the Civil Court, sitting as a Constitutional Court, Malta), the procedure for the appointment of members of the Maltese judiciary, as governed by the Constitution. The Court of Justice held that national provisions of a Member State which confer on the Prime Minister a decisive power in the **appointment of members of the judiciary**, while providing for the involvement of an independent body responsible for assessing candidates and providing an opinion, are not contrary to EU law.

[Judgment of the Court 18 May 2021, *Asociația 'Forumul Judecătorilor din România' and Others*, C-83/19 and Others](#)

- The Court of Justice ruled on a series of Romanian reforms in the areas of judicial organisation, the disciplinary regime applicable to judges, and the financial liability of the State and the personal liability of judges as a result of judicial error. Taking the view that those reforms are likely to infringe EU law with regard to a number of aspects such as the creation of a specialised section of the Public Prosecutor's Office dedicated to cases involving judges, the conditions giving rise to the personal liability of judges and respect for their procedural rights, it observed that the **principle of the primacy of EU law** precludes national legislation, as interpreted by the Constitutional Court, which deprives a lower court of the right to disapply of its own motion a national provision which is contrary to EU law.

[Judgment of of the Court of 6 October 2021, *W.Ż.* \(Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment\) \(C-487/19\)](#)

- The Court of Justice held that **transfers without consent of a judge** from one court to another or between two divisions of the same court are liable to undermine the principles of the

irremovability of judges and judicial independence. Moreover, the order by which a court, ruling at last instance and sitting as a single judge, dismissed the action of a judge transferred against his or her will, must be declared null and void if the appointment of that single judge took place in clear breach of fundamental rules concerning the establishment and functioning of the judicial system concerned.

[Judgment of the Court \(Grand Chamber\) of 16 November 2021, Criminal proceedings against WB and Others \(Judicial secondments in Poland\) \(Joined Cases C-748/19 to C-754/19\)](#)

- The Court of Justice considered that the independence and impartiality of judges and the presumption of innocence may be jeopardised by the regime currently in force in Poland, which permits, inter alia, the Minister for Justice to second judges to higher criminal courts and to terminate that secondment at any time without stating reasons. The lack of criteria for those **secondments** creates a risk of political control being exerted over the content of judicial decisions, especially since the Minister also assumes the role of Public Prosecutor General.

[Judgment of the Court \(Grand Chamber\) of 21 December 2021, Criminal proceedings against PM and Others \(Euro Box Promotion and Others\) \(Romanian judges II\) \(Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19\)](#)

- The Court of Justice dealt with a number of cases following on from the reform of the judicial system with regard to combating corruption in Romania. The question arose as to whether the application of the case-law arising from a number of decisions of the Curtea Constituțională (Constitutional Court, Romania) on the rules of criminal procedure applicable to fraud and corruption proceedings was liable to infringe EU law. The Court of Justice reaffirmed that the primacy of EU law requires that national courts are to be empowered to disapply a decision of a constitutional court that is contrary to EU law, without national judges incurring disciplinary liability. **EU law precludes the application of the case-law of a constitutional court** leading to the setting aside of judgments delivered by panels of judges which are deemed to be improperly constituted, in so far as the setting aside of those judgments, in conjunction with the national provisions on limitation periods, creates a systemic risk of impunity in respect of acts constituting serious offences of fraud.

[Judgment of the Court \(Grand Chamber\) of 22 February 2022, RS \(Effect of constitutional court rulings\) \(Romanian judges III\) \(Case C-430/21\)](#)

- EU law precludes a national rule under which **national courts** have **no jurisdiction to examine the conformity with EU law of national legislation** which has been held to be constitutional by a judgment of the constitutional court of the Member State. The application of such a rule would undermine the principle of the primacy of EU law and the effectiveness of the preliminary-ruling mechanism.

[Judgment of the Court of 23 November 2021, IS \(Illegality of the order for reference\) \(C-564/19\)](#)

- In a reference for a preliminary ruling from a Hungarian court, the Court of Justice ruled on the compatibility of Hungarian law with the EU directive on the right to interpretation and translation in criminal proceedings. As the Alkotmánybíróság (Supreme Court, Hungary) had ruled that referring the matter to the Court of Justice for a preliminary ruling was unlawful, the Court of Justice, in addition, reaffirmed that the system of cooperation between the national courts and the Court of Justice precludes a national supreme court from declaring that a **request for a preliminary ruling** submitted by a lower court is unlawful. Moreover, EU law precludes **disciplinary proceedings** from being brought against a national judge on the ground that he

or she has made a reference for a preliminary ruling to the Court of Justice: such proceedings are liable to deter all national courts from making references for a preliminary ruling, which could jeopardise the uniform application of EU law.

[Judgment of 5 June 2023 \(Grand Chamber\), Commission v Poland \(Independence and private life of judges\) \(C-204/21\)](#)

- The review of respect by a Member State for values and principles such as the rule of law, effective judicial protection and judicial independence falls entirely within the competence of the Court. Any regression of their laws on the organisation of justice is prevented. The Member States may not disregard by relying on national provisions or case-law, including constitutional provisions and case-law.
- The Disciplinary Chamber of the Supreme Court does not satisfy the requirement of independence and impartiality, therefore the mere prospect, for judges called upon to apply EU law, of running the risk that such a body may rule on matters relating to their status and the performance of their duties is liable to affect their independence.
- In certain circumstances, national courts are required to ascertain whether they themselves or the judges of whom they are composed, or other judges or courts meet the requirements laid down by EU law.
- The conferral on a single national body (namely the Extraordinary Review and Public Affairs Chamber of the Supreme Court) of the jurisdiction to verify compliance with essential requirements relating to effective judicial protection infringes EU law. Compliance with those requirements must be guaranteed across all the substantive areas of application of EU law and before all national courts seised of cases falling within those areas.

[Judgment of 13 July 2023 \(Grand Chamber\), YP and Others \(Lifting of a judge's immunity and his or her suspension from duties\) \(C-615/20 and C-671/20\)](#)

- **National courts must refrain from applying an act** such as the Disciplinary Chamber's resolution where such a consequence is essential in view of the procedural situation at issue in order to ensure the **primacy of EU law**, without that being precluded by any consideration relating to the principle of legal certainty or the alleged finality of a decision.

[Judgment of 21 December 2023 \(Grand Chamber\), Krajowa Rada Sądownictwa \(Continued holding of a judicial office\) \(C-718/21\)](#)

- In view of all the circumstances connected with the appointment of judges of the Extraordinary Review and Public Affairs Chamber of the Polish Supreme Court, **an adjudicating panel of that chamber does not constitute a 'court or tribunal' for the purposes of EU law**. Consequently, the Court of Justice does not examine the substance of the questions for a preliminary ruling raised by that body.

USEFUL SOURCES

Databases

Judiciary Hub: <https://judiciaryhub.eu/>

HUDOC case law database (ECtHR): <https://hudoc.echr.coe.int>

InfoCuria (CJEU): <https://curia.europa.eu/juris/recherche>

Collections of judgments

CJEU, Selection of Major Judgments – Year 2023:
https://curia.europa.eu/jcms/upload/docs/application/pdf/2024-04/selection_grands_arrets_2023_en.pdf

CJEU, Selection of Major Judgments – Year 2022:
https://curia.europa.eu/jcms/upload/docs/application/pdf/2023-04/en-selection_des_grands_arrets_2022.pdf

CJEU, Annual Reports: https://curia.europa.eu/jcms/jcms/Jo2_7015/en/

- Most important judgments listed and summarized in “The year in review” → “Judicial activity”
→ “A look back at the most important judgments of the year”

ECHR Knowledge Sharing platform: <https://ks.echr.coe.int/>

ECHR case law guides per article: <https://ks.echr.coe.int/web/echr-ks/all-case-law-guides>

Blog pages

EU Law Live: <https://eulawlive.com/>

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