

# The Rule of Law Crisis in the European Union: From Portugal to Poland (and Beyond)<sup>1</sup>

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Judicial independence is declared as a primary law obligation to be respected by every national body which may apply or interpret European Union law. Recent legislative reforms of national judicial systems in Poland and other Member States undermine the principles of judicial independence and mutual trust and raise the idea of a rule of law crisis, claiming for an intervention of the European Union.

**Keywords:** rule of law, European Union, reforms of the judicial system, judicial independence, mutual trust.

## Teisinės valstybės krizė Europos Sąjungoje: nuo Portugalijos iki Lenkijos (ir už jos ribų)

Teismų nepriklausomumas yra deklaruojamas kaip pirminis teisės įpareigojimas, kurio turi laikytis kiekviena nacionalinė institucija, galinti taikyti ar aiškinti Europos Sąjungos teisę. Naujausios nacionalinių teismų sistemų įstatymų reformos Lenkijoje ir kitose valstybėse narėse pažeidžia teismų nepriklausomumo ir abipusio pasitikėjimo principus ir kelia teisinės valstybės idėjos krizę, reikalaujamos Europos Sąjungos įsikišimo.

**Pagrindiniai žodžiai:** teisinė valstybė, Europos Sąjunga, teismų sistemos reformos, teismų nepriklausomumas, abipusis pasitikėjimas.

## 1. European Union of law

In 1986, the Court of Justice declared that the European Economic Community, now European Union, was a “community based on the rule of law”, clarifying that “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

<sup>1</sup> This article is financially supported by national funds through FCT – Foundation for Science and Technology, IP, within the Project UID/DIR/04859/2019. It results from a presentation on the *Nanterre Network Annual Meeting 2019*, in Vilnius University, on 28 June 2019 and was submitted to the Publishing Office of *Teisė* on 30<sup>th</sup> September 2019.

basic constitutional charter, the Treaty<sup>2</sup>. *Les Verts* judgment expressly introduced the concept of rule of law into the Union's legal order, recognizing the existence of a rule of law governing the ordering of powers and institutional balance and allowing individuals to assert their rights, which is why it is argued that, from that moment, the Union lives with a constitution<sup>3</sup>.

The importance of the rule of law is, therefore, underlined as a constituent element of greater political integration. As enshrined in Article 2 of the Treaty on European Union (TEU), it integrates the range of values upon which the Union is founded, supports the procedure laid down in Article 7 TEU<sup>4</sup> and constitutes a condition for accession of new Member States to the Union (Article 49 TEU). The principle of the rule of law requires the guarantee of effective judicial protection as well, foreseen in Article 47 of the Charter of Fundamental Rights of the European Union (Charter) and, particularly, access to justice, an essential requirement of any democracy<sup>5</sup>. In this regard, the Treaty of Lisbon established in the second subparagraph of Article 19(1) TEU, Member States' obligation to provide remedies sufficient to ensure legal protection in fields covered by European Union law, reinforcing what was already the result of the sincere cooperation principle provided for in Article 4(3) TEU.

In fact, at the moment of their accession to the Union, Member States accepted and committed to ensure the primacy and effectiveness of EU law, whose functioning depends on a decentralized architecture that places national courts and tribunals and other bodies as its guardians. As a consequence, the safeguard of the rule of law relies on the efforts of Member States and European Union institutions. Such provision in article 19 TEU emphasizes this obligation, without apparently showing any innovative perspective until its invocation in the case *Association of Portuguese Judges*<sup>6</sup> to monitor the independence of national courts and tribunals.

As a matter of fact, one of the requirements of the rule of law is judicial independence, which is known for the important role in the development of the notion of 'national court or tribunal'<sup>7</sup>. Judges' impartiality and irremovability is determinant for a national body to refer questions to the Court of Justice for preliminary rulings and for the implementation of the principle of mutual trust.

The current state of art, the so-called European rule of law crisis<sup>8</sup>, is characterized by significant legislative amendments affecting Member States judiciary and their judicial independence and, consequently, jeopardizing the rule of law, which justified the inauguration of a new era by the Court of Justice, preparing its own intervention in such judicial system reforms<sup>9</sup>.

<sup>2</sup> Judgment of 23-04-1986, *Les Vertes*, 294/83, EU:C:1986:166, paragraph 23.

<sup>3</sup> RAMOS, R. M. A reforma institucional e a Constituição Europeia. In *Uma Constituição para a Europa – Colóquio Internacional de Lisboa*, 2004, Almedina, p. 119.

<sup>4</sup> Regarding this procedure, see COLI, M. Article 7 TEU: From a Dormant Provision to an Active Enforcement Tool? *Perspectives on Federalism*, 2018, 10(3), p. 272–303.

<sup>5</sup> LENAERTS, K. Le Traité de Lisbonne et la protection juridictionnelle des particuliers en droit de l'Union. *Cahiers de Droit Européen*, 2009, 45(5–6), p. 709.

<sup>6</sup> Judgment of 27-02-2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, EU:C:2018:117.

<sup>7</sup> According, for instance, to Judgment of 17-09-1997, *Dorsch Consult*, C-54/96, EU:C:1997:413.

<sup>8</sup> MICHELOT, M. How Can Europe Repair Breaches of the Rule of Law? *Jacques Delors Institute, Policy Paper*, n.º 221, 2018.

<sup>9</sup> Cfr. OVÁDEK, M. Has the CJEU just Reconfigured the EU Constitutional Order? *Verfassungsblog*, 2018.

## 2. The importance of judicial independence in the European Union – the renewing Judgment *Associação Sindical de Juizes Portugueses*

Already considered as a new milestone in the construction of the European Union law<sup>10</sup>, the *Associação Sindical de Juizes Portugueses* ruling is based on the adoption of legislative measures to eliminate Portugal's excessive budget deficit, among which a temporary reduction of salary of office holders and employees performing duties in the public sector was foreseen (Law no. 75/2014 of 12 of September), which affected the judges of the *Tribunal de Contas* ('Court of Auditors'). Representing these judges, the *Associação Sindical de Juizes Portugueses* brought a special administrative action before the *Supremo Tribunal Administrativo* ('Supreme Administrative Court') seeking the annulment of the administrative measures adopted by virtue of such law, grounded on the breach of the principle of judicial independence enshrined not only in the Portuguese Constitution, but also in the second subparagraph of Article 19(1) TEU and Article 47 of the Charter. Faced with those circumstances the *Supremo Tribunal Administrativo* stayed the proceedings and referred its interpretation doubts to the Court of Justice for a preliminary ruling.

In this judgment, the Court developed an impressive construction based on States' obligation to ensure that the bodies, forming part of their remedies system satisfied effective protection requirements. Recalling the notion of a national court within the meaning of European Union law, the Court of Justice underlined the importance of judicial independence, "inherent to the task of judging"<sup>11</sup>, as one of the elements to be considered. As a decisive factor, the Court examined whether the national measure undermined the irremovability of the members of the Portuguese Court, concluding that such measure was limited, transitory and adopted in the context of a financial assistance programme and had general nature, targeting "different holders of public office and persons who perform functions in the public sector, including representatives of the legislative, executive and judicial branches"<sup>12</sup>, and therefore did not prejudice the independence of the *Tribunal de Contas* judges.

Despite the concision of the Court of Justice, it developed a complex position. In this case, the Court did not take a stance on the debate on the application of the austerity measures in the field of the Union<sup>13</sup> (important to determine the application of the Charter), and preferred to focus on the application of the second subparagraph of Article 19(1) TEU.

In a surprising speech, the Court created a "new legal sphere"<sup>14</sup>, stating that "with regard to the *ratione materiae* scope <...>, that provision [of the TEU] refers to 'areas covered by Union law', irrespective of the situation in which the Member States apply that right, within the meaning of Article 51(1) of the Charter"<sup>15</sup>. In other words, the Court affirmed that the material scope of Article 19(1), second subparagraph, TEU ("the fields covered by Union law") is autonomous and broader<sup>16</sup> than the

<sup>10</sup> *Ibidem*. See, as well, SILVEIRA, A.; FROUFE, P.; PEREZ, S.; and ABREU, J. União de direito para além do direito da União – as garantias de independência judicial no acórdão Associação Sindical dos Juizes Portugueses. *Jugar Online*, 2018.

<sup>11</sup> Judgment *Associação Sindical dos Juizes Portugueses*, *cit.*, paragraph 43.

<sup>12</sup> *Ibidem*, paragraphs 45–51.

<sup>13</sup> Contrary to Judgment of 13-06-2017, *Florescu*, C-256/14, EU:C:2017:448.

<sup>14</sup> BONELLI, M.; CLAES, M. Case Note: Judicial serendipity: how Portuguese judges came to rescue the Polish judiciary. *European Constitutional Law Review*, 2018, 14(3), p. 630.

<sup>15</sup> Acórdão *Associação Sindical dos Juizes Portugueses*, *cit.*, n.º 29.

<sup>16</sup> Cfr. Opinion of 11-04-2019, *European Commission Comissão Europeia/Republic of Poland*, C-619/18, EU:C:2019:325, paragraphs 55–57. See also PIGNARRE, P.-E. Does the end justify the means? In *Robert Schuman Initiative Blog*, 2018; and SILVEIRA, A.; FROUFE, P.; PEREZ, S.; and ABREU, J. União de direito <...>, p. 6.

material scope of the Charter, which, according to its Article 51(1) is applicable to “the Member States only when they implement Union law”.

Nevertheless, the Court’s silence on the applicability of the Charter and on the integration of the national measure in a field covered by European Union law could be interpreted as a restraint<sup>17</sup> due to the lack of clarity in the distinction between the two mentioned material scopes, especially after the *Fransson* case-law, which indicated that “[s]ince the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter”<sup>18</sup>.

In accordance with the position of the Court of Justice, there was no need to verify whether Portugal was applying Union law, and it was sufficient to determine whether the Portuguese Court of Auditors was a part of the system of remedies which ensures effective judicial protection in the fields covered by Union law and, as so, must comply with the necessary requirements arising from Article 19(1) TEU. Based on the autonomous notion of a national court or tribunal, the Court of Justice declared that independence affects the national duty to ensure that the bodies which integrate the remedies system satisfy the effective judicial requirements.

Regarding the innovative character of this Judgment, it is important to point out that the Court did not have to adopt this position. The *sub judice* case could be analysed on the basis of the Charter because the national measure was adopted following Union law<sup>19</sup>. Since Portugal was implementing such law, the path drawn up by the Court led to speculation about its true intention<sup>20</sup>.

Undoubtedly, the Portuguese case-law created a new era, a new sphere of European Union law, extending its scope and allowing the Court of Justice to rule on national measures affecting the independence of national courts, even if the national measure is not implementing Union law. Since national judicial organization was a matter excluded from the scope of the Union, this interpretation is only supported by the fact that Union law application or interpretation may be entrusted to national courts or tribunals and, as so, they must fulfil the necessary requirements to ensure an effective protection thereof.

The European scenario is marked by certain reforms of national judicial systems that are not aligned with the principle of judicial independence, which has increased the idea of a rule of law crisis<sup>21</sup>, and in this matter the Portuguese case constitutes an invitation for the European Commission to act and create a precedent for the Court of Justice’s monitoring of the legislative reforms in Poland<sup>22</sup> and other Member States<sup>23</sup>, which means that the *Associação Sindical de Juizes Portugueses* case-law can act as an antechamber for the Union’s intervention in such legislative changes of the national judiciary.

<sup>17</sup> Described as an elegant solution for the Advocate General in Opinion *European Commission/Republic of Poland*, C-619/18, paragraph 58.

<sup>18</sup> Judgment of 26-02-2013, *Fransson*, case C-617/10, EU:C:2013:105, paragraph 21.

<sup>19</sup> Cf. Opinion of 18-05-2017, *Associação Sindical dos Juizes Portugueses*, C-64/16, EU:C:2017:395, paragraphs 43–53. See BONELLI, M.; CLAES, M. Case Note <...>, p. 625–628.

<sup>20</sup> See SILVEIRA, A.; FROUFE, P.; PEREZ, S.; and ABREU, J. União de direito <...>, p. 4.

<sup>21</sup> See BOGDANDY, A. von; BOGDANOWICZ, P.; CANOR, I.; TABOROWSKI, M.; SCHMIDT, M. A Potential Constitutional Moment for the European Rule of Law – The Importance of Red Lines. *Common Market Law Review*, 2018, 55, p. 1–14; and TABOROWSKI, M. CJEU Opens the Door for the Commission to Reconsider Charges against Poland. *Verfassungsblog*, 2018.

<sup>22</sup> TABOROWSKI, M. CJEU Opens the Door <...>.

<sup>23</sup> Regarding Hungary, see MICHELOT, M. How Can Europe. <...>; and DUARTE, M. C. Hungria: O Estado de Direito em Crise? *Revista Portuguesa de Ciência Política* 2018, 9, p. 13–30.

### 3. From the influence of the *Associação Sindical de Juizes Portugueses* case-law to the monitoring of the Polish judicial reform

In the European spotlight, the reform of the Polish judicial system established significant changes<sup>24</sup>, such as the changes to the constitutional role of the National Council for the Judiciary in safeguarding independence of the judiciary; Polish Government's invalid appointments to the *Trybunał Konstytucyjny* (Constitutional Tribunal) and its refusal to publish certain judgments, the fact that the Minister of Justice is also the Public Prosecutor, playing an active role in prosecutions and a disciplinary role in respect of presidents of courts; and the determination of a new age of compulsory retirement of the *Sąd Najwyższy* (Supreme Court).

The changes provoked serious consequences, affecting judicial independence, the principle of mutual trust and the rule of law. Starting with the implication of the principle of mutual trust, the recognition of arrest warrants issued by other Member States was established as the “first concrete measure in the criminal field implementing the principle of mutual recognition”<sup>25</sup>, something which requires a high degree of trust between States which is only possible when they respect common conditions, such as judicial independence.

Such concern has guided Koen Lenaerts' recent speeches. In his words, the independence of the courts is a “precondition”<sup>26</sup> in their dialogue with the Court of Justice of the European Union and Member States' bodies, which should be measured in two dimensions. Internally, the national court will have to act impartially in the judgment of the cause and, externally, it is necessary to respect a separation of powers that prevents external influences in the decision-making and ensure the absence of any hierarchical or subordination relationship with another body or entity and guarantees of irremovability.

This condition has particular relevance in the context of the Framework Decision on the European Arrest Warrant, since the execution of warrants depends on a high level of confidence. As a consequence, violations of the rule of law and judicial independence have also served as grounds for challenging the principle of mutual trust in the enforcement of the European Arrest Warrant<sup>27</sup>. In Judgment *Minister for Justice and Equality/LM*<sup>28</sup>, it was questioned whether the executing Member State should consider Member States' current situation, namely the existence of a genuine risk of violation of Article 47 of the Charter, before delivering the individual in respect to whom the warrant has been issued, for the purposes of prosecuting, to the authorities of the other Member State (the issuing Member State).

Despite the lack of courage to formally emphasize, contrary to what happened in Judgment *Aranyosi and Căldăraru*<sup>29</sup>, that the national judicial authority must postpone the decision on the surrender of the individual concerned until it obtains information regarding the existence of risk of fundamental rights or violation of the rule of law, the Court of Justice ruled that, “on account of systemic or generalized deficiencies so far as concerns the independence of the issuing Member State's judiciary”, the national

<sup>24</sup> About Polish rule of law crisis, see, for instance, PECH, L.; and WACHOWIEC, P. 1095 Days Later: From Bad to Worse Regarding the Rule of Law in Poland (Part I). *Verfassungsblog*, 2019.

<sup>25</sup> PATERSON, N.; and VERMEULEN, G. Mutual recognition, prisoner transfer & sentence execution in the European Union – A journey bound for choppy waters? *EU Criminal Justice, Financial & Economic Crime: New Perspectives*, ed. Marc Cools et al., 2011, p. 41.

<sup>26</sup> LENAETS, K. *The Court of Justice and national courts: a dialogue based on mutual trust and judicial independence*. Speech at the Supreme Administrative Court of the Republic of Poland, Warsaw, 2018.

<sup>27</sup> See BERTRAND, J. *The Rule of Law in Poland and the European Arrest Warrant: A Blessing in Disguise?* Oxford Human Rights Hub, 2018.

<sup>28</sup> Judgment 25-07-2018, *Minister for Justice and Equality/LM*, C 216/18 PPU, EU:C:2018:586.

<sup>29</sup> Judgment 5-04-2016, *Aranyosi and Căldăraru*, C-404/15 e C-659/15 PPU, no. 104.

authority “must determine, specifically and precisely, whether <...> there are substantial grounds for believing that that person will run such a risk if he is surrendered to that State”<sup>30</sup>.

In fact, the violation of the rule of law by Poland had implications as regards implementation of the foundation stone of judicial cooperation, threatening the proper functioning of Union law and seriously compromising mutual trust, which cannot be understood as “blind trust”<sup>31</sup>. Due to its serious impact on the rule of law and respect for judicial independence, the legislative reform of the Polish judiciary motivated the Commission to initiate the procedure laid down in Article 7 (1) TEU and intervene due to the manifest risk of a serious breach of the rule of law, and since Poland failed to take any steps to resolve the risk of a serious breach, the Commission decided to bring another infringement action against Poland for failure to fulfill its obligations under the second subparagraph of Article 19(1) TEU and Article 47 of the Charter on the grounds of reducing the retirement age of Supreme Court judges and granting the President of the Republic of Poland the power to extend the active service of those judges. Those national measures would constitute a breach of the values referred to in Article 2 TEU and more specifically of the rule of law and judicial independence as a guarantee of effective protection in fields covered by European Union law.

At a first glimpse, such legislative change was not integrated in the fields covered by Union law, because it is a matter reserved to Member States. However, the Commission took advantage of the Court’s encouragement in the case of the Portuguese judges, and the conclusions of Advocate General Tanchev<sup>32</sup> indicated that the Portuguese courts had opened the door for European intervention in relation to the Polish judges. Same class, different contexts, a new era. It seems that the conditions to declare the incompatibility of the Polish reforms with the rule of law were met, since the position adopted in the Portuguese case extended the jurisdiction of the Court of Justice (and the European Union’s competence) to the supervision of the judicial organization of Member States<sup>33</sup>, which was classically understood as a competence excluded from the sphere of the Union.

According to the Court’s point of view, the fundamental right to effective judicial protection includes not only the duty to ensure the necessary remedies for individual protection in the fields covered by European Union law, but also the obligation to guarantee that such remedies respect the requirement of judicial independence. Unexpectedly, the independence of the courts has become a requirement for all those national bodies which can potentially be common courts of European Union law in the future.

Finally, on 24<sup>th</sup> June of this year, the Court of Justice ruled that the Polish law which lowers the retirement age of the Supreme Court judges is contrary to European Union law and breaches the principle of the irremovability of judges and judicial independence. The Court invoked the Venice Commission’s<sup>34</sup> doubts regarding the reform of the retirement age as “side-lining a certain group of judges”<sup>35</sup>

<sup>30</sup> Judgment *Minister for Justice and Equality/LM*, paragraph 79. Regarding the impact of such judgment, see FRĄCKOWIAK-ADAMSKA, A. Mutual trust and independence of the judiciary after the CJEU judgment in LM – new era or business as usual? *EU Law Analysis*, 2018.

<sup>31</sup> LENAETS, K. La vie après l’avis: Exploring the principle of mutual (yet not blind) trust. *Common Market Law Review*, 2017, 54, p. 805–840.

<sup>32</sup> Opinion of 11-04-2019, *European Commission/ Republic of Poland*, C-619/18, EU:C:2019:325.

<sup>33</sup> Cfr. COLI, M. The Associação Sindical dos Juizes Portugueses judgment: what role for the Court of Justice in the protection of EU values? *Diritti Comparati*, Working Papers, 2018.

<sup>34</sup> European Commission for Democracy through Law (Venice Commission), Opinion no. 904/2017 (CDL-AD(2017)031), on the Draft Act amending the Act on the National Council of the Judiciary; on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland; and on the Act on the organisation of Ordinary Courts, 11-12-2017.

<sup>35</sup> Judgment *European Commission/ Republic of Poland*, paragraph 82.



of that court and decided that the application of the national measure is not justified by a legitimate objective and the President of the Republic's discretionary power to extend the period of activity of judges beyond the new retirement age is not governed by any objective and verifiable criterion and concluded that Poland breached the judicial independence and failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU<sup>36</sup>.

The ruling validated the doctrinal suspicions and demonstrated that Member States' organization of justice, which is a national competence, can be assessed under Union law since they are required to comply with their obligations and ensure effective judicial protection in the fields covered by European Union law. As the Polish Supreme Court is a European Court, it must comply with the requirement of judicial independence. Such decision confirms that the independence of the national courts and tribunals is a requirement for all bodies which can potentially apply and interpret Union law.

#### 4. Brief notes on the interpretation of the case-law of the second paragraph of Article 19(1) TEU

Deriving from the second subparagraph of Article 19(1) TEU, the obligation for Member States to ensure that all their courts and tribunals which can apply and interpret Union law offer guarantees of independence allowed a (re)interpretation of the scope of European Union law. Based on the potential application of such law, the Court encouraged the Commission's initiative and prepared the future judgments in cases of breach of the rule of law for non-compliance with the necessary conditions for effective judicial protection.

The Court's position in Judgment *Associação Sindical de Juizes Portugueses* has given new life to the mentioned provision of article 19 TEU and found a way for the European Union to control legislative changes<sup>37</sup> which undermine founding values, which may be felt in similar cases of breach of the rule of law in the judicial system and used to protect the independence of court members and mutual trust. Yet, despite this welcomed contribution, there are some negative aspects that should be approached.

First of all, this is a risky interpretation, mainly because the organization of the national judiciary is (or was) a matter reserved to the States, and the position of the Court of Justice allows this interference on matters falling within the exclusive competence of Member States<sup>38</sup>. This is a serious issue because the European Union is formed by sovereign States, which relinquished spheres of sovereignty but did not create any Federal European State.

The control of the rule of law inaugurated by the Court allows to protect fundamental principles and rights at national level and to overcome the slowness and complexity associated with the operation of Article 7 TEU. However, if the legislator wanted to surround this procedure with precautions, has the Court not gone too far in the *Associação Sindical de Juizes Portugueses* case-law? To what extent is it possible or legitimate under the Treaties to judicially interfere in matters of an internal nature?<sup>39</sup> This is a meandering crossing, which will require a weighting and balancing, under penalty of Article 19 (1) TEU to become a mechanism of forcible integration<sup>40</sup>, a source of construction of the "European judiciary"<sup>41</sup>.

<sup>36</sup> Judgment *European Commission/ Republic of Poland*, paragraphs 96, 114 and 124.

<sup>37</sup> BOGDANDY, A. von; BOGDANOWICZ, P.; CANOR, I.; TABOROWSKI, M.; SCHMIDT, M. <...>. p. 3.

<sup>38</sup> OVÁDEK, M. Has he CJEU <...>.

<sup>39</sup> See PIGNARRE, P.-E. Does the end <...>.

<sup>40</sup> In this respect, see SILVEIRA, A.; FROUFE, P.; PEREZ, S.; and ABREU, J. União de direito <...>, p. 4.

<sup>41</sup> BONELLI, M.; CLAES, M. Case Note <...>, p. 643.

Secondly, this interpretation of the Court may have a discouraging effect on the mechanism provided for in Article 267 TFEU<sup>42</sup>. If it can be concluded that certain legislative changes have infringed judicial independence, some bodies may be excluded from the notion of ‘national court or tribunal’ on the basis of a reference for a preliminary ruling. This effect clearly seems to contradict the position of the Court and even the European Court of Human Rights’ case-law, since the Luxembourg Court has shown a concern to relax the interpretation of the ‘national court or tribunal’ notion in order to extend the competence to refer questions<sup>43</sup>, and the Strasbourg Court has already acknowledged the relevance of preliminary reference under the right to a fair trial, as provided for in the European Convention on Human Rights<sup>44</sup>.

## Conclusions

As part of European identity<sup>45</sup>, judicial independence plays an unquestionable role in the protection of the rule of law, which has now been reinforced by the Court’s clarification that it is a requirement resulting from the obligation laid down in the second subparagraph of Article 19(1) TEU.

Intentionally, the *Associação Sindical de Juizes Portugueses* case-law elevated to primary obligation the duty to ensure the judicial independence of bodies integrated in the national remedies system which contribute to effective judicial protection in the fields covered by Union law. As a result, the Judgment under consideration created a new era, extending the scope of European Union law to control national measures on judicial organizations affecting the independence of national courts, supported by the fact that Union law application or interpretation may be entrusted to them. This is certainly a delicate interpretation which creates a favourable precedent for the monitoring of the legislative reform of the judicial system in Poland and other States and constitutes an invitation for the Commission to bring infringement proceedings<sup>46</sup>. However, such position may have undesirable effects, such as the influence on the subsumption of the notion of ‘national court or tribunal’ and the Court’s interference in matters of exclusively national competence.

More than an opportunity for the Court’s involvement in Poland’s rule of law crisis, the scope of Union Law has been rebuilt, leading it to the extreme<sup>47</sup> and demonstrating how the Court is committed to upholding the principle of judicial independence in order to protect the rule of law and mutual trust.

As the Commission referred after the recent ruling on the Polish reform, this case-law is important for the protection of the judiciary in Poland and beyond<sup>48</sup>, confirming that Portugal operated as an antechamber for future interventions on Member States’ judiciary organization and reinforcing that the independence of the courts, as a result of the Court of Justice’s activism, can (and must) be a weapon at the service of the effectiveness of European Union law and protection of structural values and fundamental rights.

<sup>42</sup> *Ibidem*, p. 637.

<sup>43</sup> See for example paragraph 31 of Judgment *Dorsch*.

<sup>44</sup> Judgment of ECHR, 30-07-2015, *Ferreira Santos Pardal*, 30123/10; and Judgment of ECHR, 20-09-2011, *Ullens de Schooten and Rezabek*, 3989/07 and 38353/07.

<sup>45</sup> LENAERTS, K. *The Court of Justice* <...>.

<sup>46</sup> BONELLI, M.; CLAES, M. Case Note <...>, p. 636

<sup>47</sup> *Ibidem*, p. 623.

<sup>48</sup> European Commission statement on the Judgment of the European Court of Justice on Poland’s Supreme Court law, 24 June 2019.



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## **The Rule of Law Crisis in the European Union: From Portugal to Poland (and Beyond)**

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S u m m a r y

Judicial independence plays an indisputable role regarding the rule of law, in the current European scenario. In fact, due to the activism of the Court of Justice, it was declared as a primary law obligation to be respected by every national body which may apply or interpret European Union law. In the light of the second subparagraph of Article 19(1) of the Treaty on the European Union, Member States are obliged to ensure effective judicial protection in the fields covered by European Union law and, according, to the Court's position in Judgment *Associação Sindical de Juizes Portugueses*, all national courts and tribunals integrated in the national system of remedies which can act as a European ordinary court must observe certain requirements arising from such effective protection, such as judicial independence. Only an impartial and irremovable body can guarantee individual protection and institutional trust, fundamental in the Union of law.

Recent legislative reforms of national judicial systems in Poland and other Member States undermine the principles of judicial independence and mutual trust and raise the idea of a rule of law crisis, claiming for an intervention of the European Union. In this regard, the Court of Justice used the Portuguese judges' case-law to extend the scope of Union law and find a way to put Member States' judicial organization under its control. Therefore, this jurisprudence emerged as an antechamber for the Court's intervention in the Polish rule of law breach regarding recent legislative changes on the national judiciary.

Both cases are marked by legislative alterations which affect judges. Same class, different contexts, which allowed the world to witness the first steps of a new era which, on the one hand, can curb the violation of such structural value, but, on the other hand, can force a further integration of Member States.

## **Teisinės valstybės krizė Europos Sąjungoje: nuo Portugalijos iki Lenkijos (ir už jos ribų)**

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S a n t r a u k a

Teismų nepriklausomumas yra neginčijamas teisinės valstybės principas pagal dabartinį Europos scenarijų. Ir iš tikrųjų, dėl Teisingumo Teismo aktyvumo tai buvo įtvirtinta kaip pirminis teisės įpareigojimas, kurio turi laikytis kiekviena nacionalinė institucija, galinti taikyti ar aiškinti Europos Sąjungos teisę. Atsižvelgiant į Europos Sąjungos sutarties 19 straipsnio 1 dalies antrą pastraipą, valstybės narės yra įpareigosotos užtikrinti veiksmingą teisminę apsaugą srityse, kurioms taikoma Europos Sąjungos teisė, ir, remiantis Teismo pozicija byloje *Associação Sindical de Juizes Portugueses*, visi nacionaliniai teismai ir tribunolai, integruoti į nacionalinę teisių gynimo sistemą, galintys veikti kaip įprastas Europos teismas, privalo laikytis tam tikrų reikalavimų, kylančių iš tokios veiksmingos apsaugos, pavyzdžiui, teismų nepriklausomumo. Tik nešališkas ir nepriklausomas organas gali garantuoti asmens apsaugą ir institucinį pasitikėjimą.

Naujausios nacionalinių teismų sistemų įstatymų reformos Lenkijoje ir kitose valstybėse narėse pažeidžia teismų nepriklausomumo ir abipusio pasitikėjimo principus ir kelia teisinės valstybės idėjos krizę, todėl reikėtų Europos Sąjungos įsikišimo. Šiuo atžvilgiu Teisingumo Teismas pasinaudojo Portugalijos teisėjų praktika, kad išplėstų Sąjungos teisės taikymo sritį ir rastų būdą perimti valstybių narių teisminės organizacijos kontrolę. Tokiu būdu ši jurisprudencija tapo Teismo įsikišimo į teisinės valstybės pažeidimą Lenkijoje, vykusį dėl nacionalinę teismų sistemą reglamentuojančių įstatymų naujausių pakeitimų, alternatyva.

Abiem atvejais padaryti įstatymų pakeitimai, turintys įtakos teisėjams. Ta pati esmė, skirtingos detalės, leidusios pasauliui pamatyti pirmuosius naujos eros žingsnius, kurie, viena vertus, gali pažaboti tokios pamatinės vertybės pažeidimą, bet, kita vertus, paspartinti tolesnę valstybių narių integraciją.