

# The rule of law in the recent case-law of the CJEU and ECtHR

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## Rule of law as a founding value of the EU

### Article 2 TEU

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.

!!! reflection of values that are common to the European heritage (and not their source)

Respect for the values referred to in Article 2 – precondition of membership (Article 49 TEU)

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## Rule of law in the EU – content 'Umbrella principle' including

- legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws;
- legal certainty;
- separation of powers
- prohibition of arbitrariness of the executive powers;
- independent and impartial courts;
- effective judicial review including respect for fundamental rights;
- equality before the law

elements of the rule of law as recognised by the CJEU (towards EU institutions and towards the Member States when implementing EU law)

COM (2014) 158 A new EU Framework to strengthen the Rule of Law

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## Rule of law in the EU – content

- the term 'judiciary' does not cover police services. That term refers to the judiciary, which must (...) be distinguished, in accordance with the **principle of the separation of powers which characterises the operation of the rule of law**, from the executive. (C-452/16 PPU Poltorak, para 35, C-477/16 PPU Kovalkovas, para 36)
- the European Union is a union based on **the rule of law in which individual parties have the right to challenge before the courts the legality** of any decision or other national measure relating to the application to them of an EU act; Article 19 TEU, which gives concrete expression to the value of the rule of law stated in Article 2 TEU, entrusts the responsibility for ensuring **judicial review** in the EU legal order not only to the Court of Justice but also to national courts and tribunals (C-64/16, Portuguese judges, para 31-32)
- The purpose of seeking to ensure that a Member State complies with interim measures adopted by the Court hearing an application for such measures by providing for the imposition of a periodic penalty payment in the event of non-compliance with those measures is to guarantee **the effective application of EU law, such application being an essential component of the rule of law**, a value enshrined in Article 2 TEU and on which the European Union is founded (order of CJ, C-441/17 R, Commission v. Poland (Puszcza Białowieska), para 102)

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## Rule of law – procedures

1. The Council may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2 – acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, (Article 7(1) TEU)
2. The European Council may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2 - acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament (Article 7 (2) TEU)
3. The Council may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council - acting by a qualified majority (Article 7(3) TEU)

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## Political dialogue between European Commission and Poland

- Opinion concerning the rule of law in Poland (1.06.2016, C(2016)3500)
- Recommendation 2016/1374 of 27.07.2016
- Recommendation 2017/146 of 21.12.2016
- Recommendation 2017/1520 of 26.07.2017
- Recommendation 2018/103 of 20.12.2017
- Proposal for a COUNCIL DECISION on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law (COM(2017)835)

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## Article 258 TFEU as a tool to protect rule of law

- C-286/12 European Commission v. Hungary (the Supreme Court)
- C-192/18 European Commission v. Poland (common courts)
- C-619/18 European Commission v. Poland (the Supreme Court)
- C-791/19 European Commission v. Poland (Disciplinary regime applicable to judges)
- C-78/18 European Commission v. Hungary (financial transparency of associations)
- C-66/18 European Commission v. Hungary (Central European University)
- C-204/21 European Commission v. Poland (the muzzle law)

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## Interim measures as a tool to protect rule of law Article 279 TFEU

- C-441/17 R – order of the CJ (Puszcza Białowieska)
- C-619/18 R – order of the Vice-President of the CJ (the Supreme Court)
- C-204/21 R – order of the Vice-President of the CJ (the muzzle law)

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## Article 267 TFEU as a tool to protect rule of law

- **C-64/16 Associação Sindical dos Juízes Portugueses** (27/02/2018)  
– activation of Article 19(1) TFEU
- **C-216/18 LM** – rule of law in the framework of judicial cooperation in criminal matters

The list is not exhaustive (30 judgments since):

- **C-585/18 A.K.** (19/11/2019) – principle of judiciary independence in the context of nomination of judges, their transferring, delegating and retirement, as well as independence of the National Council of Judiciary
- **C-824/18 A.B.** (2/03/2021) – limiting the competence of national courts to make a reference for a preliminary ruling

## Case-law of the ECtHR

**Guðmundur Andri Ástráðsson v. Iceland** (Application no. 26374/18,  
1/12/2020)

- scope of the requirement of a “tribunal established by law”
- interrelationship between the requirements of “independence”, “impartiality” and “tribunal established by law”
- when the irregularities amounted to a violation of the right to a “tribunal established by law”: the threshold test

### Case-law of the ECtHR

- **Xero Flor w Polsce sp. z o.o. v. Poland** (application no. 4907/18) - the Constitutional Court lacking attributes of a “tribunal established by law”
- **Broda and Bojara v. Poland** (applications nos. 26691/18 and 27367/18) - lack of access to a court to contest the Minister of Justice’s decision to terminate prematurely the term of office of a court president and vice-president
- **Reczkowicz v. Poland** (application no. 43447/19) - the Disciplinary Chamber of the Supreme Court lacking attributes of an “independent and impartial tribunal established by law”
- **Dolińska-Ficek and Ozimek v. Poland** (applications nos. 49868/19 and 57511/19), Chamber of Extraordinary Review and Public Affairs of the Supreme Court lacking attributes of an “independent and impartial tribunal established by law”
- **Advance Pharma sp. z o.o v. Poland** (application no. 1469/20), – judges of the Civil Chamber of the Supreme Court appointed on the recommendation of the reformed NCJ lacking attributes of an “independent and impartial tribunal established by law”;

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- **Grzęda v. Poland** (application no. 43572/18) – lack of access to a court to contest the premature termination of the term of office of a member of the “old” NCJ
- **Żurek v. Poland** (application no. 39650/18), – lack of access to a court to contest the premature termination of the term of office of a member of the “old” NCJ
- **Juszczyszyn v. Poland** (application no. 35599/20) – the Disciplinary Chamber of the Supreme Court lacking attributes of an “independent and impartial tribunal established by law”
- **Tuleya v. Poland** (applications nos. 21181/19 i 51751/20) - the Disciplinary Chamber of the Supreme Court lacking attributes of an “independent and impartial tribunal established by law”
- **Pająk and Others v. Poland** (applications nos. 25226/18 and 3 others) – lack of access to a court to contest the Minister of Justice’s arbitrary decisions denying the applicants the possibility of continuing their service as judges beyond the lowered retirement age
- **Wałęsa v. Poland** (application no. 50849/21) – assessment of Chamber of Extraordinary Control and New Council of Judiciary !!! pilot-judgment procedure

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