



Consequences of the case *Associação Sindical dos Juízes Portugueses* (Portuguese Judges): reasons why the CJEU assumes oversight of national judicial power

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ABSTRACT: In this article, the author seeks to explain some of the reasons why the judicial power of Member States has taken on increasing centrality in the European institutional architecture, as well as examining the extent to which national judicial powers are under the control of the Court of Justice of the European Union, to the point of justifying enhanced scrutiny of the “health” and internal balance of national judicial systems.

KEYWORDS: Judicial power – effectiveness of EU law – effective judicial protection – judicial independence.

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1. Introduction

The study of the judiciary is a question that can be said to either be fashionable or one that never goes out of fashion. Scholars approach it to analyse the structure of that institution, to point out its possible dysfunctions, to comment on its decisions or to unravel other diverse aspects. It is true that the other powers of the State resulting from the classic tripartite division carried out in the eighteenth century, proposed by Montesquieu, also attract attention of jurists. Furthermore, studies contrasting the legislative or executive power with that of the judiciary – or that contain inevitable allusions to the latter – are often intertwined.

The judicial power and the way of achieving justice have been crucial issues in society since classical times. In fact, most experts have constantly shown their concern for that basic point of social coexistence: the resolution of conflicts between human beings. Beyond this generalised historical interest, the expansion of the judiciary has been examined as a global phenomenon in recent decades. For example, Cappelletti argued that it was something logical due to the previous growth that the executive and legislative powers had undergone in the past. This change demanded that the role of the judiciary in the new European democracies be that of a leading actor in trying to ensure a proper system of “*checks and balances*.”¹ More recently, another expansion that has been intertwined with another wide-ranging concept also studied by the doctrine has been that of the judicialisation of politics.

In this way, this surge of attention towards the judiciary has not gone unnoticed by the European Union (EU). Amid attacks on judicial independence in some Member States, driven by the rise to power of populist and authoritarian movements and even leading to talk of “*illiberal democracies*”, the EU, mainly through the Court of Justice of the European Union (CJEU), has expressed deep concern for the judiciary as a key element of the rule of law. This principle is a fundamental value of the EU recognised in Article 2 of the Treaty on European Union (TEU).

Through its case law, the CJEU has secured for itself the possibility of reviewing and ruling on state legislation affecting national judicial systems, which is a competence not explicitly granted by the Treaties. This development raises questions about the legitimacy of the CJEU’s action, particularly as it intervenes to achieve the cohesion of European values in an area traditionally reserved for state sovereignty. This paper seeks to explore some of the reasons why the judiciary in the Member States has become a matter of significant concern for the EU, leading to particular importance to the control over judicial powers of the Member States.

The CJEU has carried out through its case law an interpretative function that has contributed decisively to the understanding of the rule of law within the EU, giving proactive content to the value proclaimed by Article 2 TEU. In the process of European integration, its most symbolic decisions are fundamental to the current understanding of integrated Europe and to achieving a greater level of cohesion of common constitutional traditions. Thus, it is possible to affirm that the rule of law has been an integrating element in the progress of the European project, with the CJEU performing an integrating and cohesive function around its principles.²

¹ Mauro Cappelletti, “El «formidable problema» del control judicial y la contribución del análisis comparado”, *Revista de Estudios Políticos*, no. 13, 1980, 94.

² Carlos Closa, “Reinforcing EU monitoring of the rule of law: normative arguments, institutional proposals and the procedural limitations”, in *Reinforcing rule of law oversight in the European Union*, ed. C. Closa, D. Kochenov (Cambridge: Cambridge University Press, 2016), 15-35.

In its defence work, the CJEU has heavily relied on the principle of effective judicial protection for European citizens [Article 19(1) second paragraph TEU] to assess judicial independence as a basic principle of the rule of law in Europe. The requirement that courts be independent and impartial courts – essential to ensure effective judicial protection – has allowed the CJEU not only to address what can be seen as a European constitutional crisis, but also to assert the authority to examine and judge state regulations regarding the administration of justice. All this is argued based on the potential role of national courts as interpreters and enforcers of European law by the national courts. Such courts must respect the provisions of the Treaties and the Charter of Fundamental Rights of the EU (CFREU), thus creating the notion of European judiciary, where judges are organically national but functionally European.

At this point, it should be noted that this paper seeks to highlight potential reasons why the EU's interest in the judiciary of the different Member States is particularly significant, without seeking to present these as proposals for *numerus clausus*. Instead, it is with the intention of looking for justification for its actions and encouraging reflection on the virtues and risks of the matter. Thus, we question why the EU has decided to take on the evaluation of national justice administrations and why this fact may be of vital importance in the process of European integration.

To achieve this goal and prove the hypothesis, we will first point out a context marked by populist or “*illiberal*” practices. We will show how judicial bodies are usually one of the main targets, with their functions being discredited both through regulatory reforms and public demonstrations. Consequently, these threats to their independence will be interrelated, presenting them as elements that jeopardise the effectiveness of European law. Due to a direct application of the decisions of a court of one Member State in the rest, among other reasons, this risk requires a response from the EU. As will be seen through a line of case law from the CJEU, it expresses its interest in guaranteeing effective judicial protection for its citizens through impartial and independent courts that may be in a position to apply EU law. Subsequently, we will consider the global trend towards the expansion of the influence of the judiciary in the legal and political life of a country and point out its role as the last defensive bastion of the rule of law. Finally, we will conclude that all roads lead to attempts to advance in the process of European integration.

2. Context: risks and attacks on the judicial function

The first of the possible reasons why the judiciary is of interest to the EU is the recent context of the old continent and, by extension, of the global landscape. Perhaps, without the dynamics followed by populist movements and their institutional reforms when they reached positions of power, the Union's incipient interest to the judiciary would not have been triggered.

Indeed, the truth is that over the last fifteen years, clearly populist political forces have emerged in Europe, with a strongly nationalist discourse and, therefore, anti-European overtones, whose practices have affected the political and institutional life of various Member States, to a greater or lesser extent. With respect to the national judicial powers, and also constitutional courts, these political currents have sought to delegitimise their actions and limit the effectiveness of their functions.

Thus, the process of delegitimation has followed patterns of behaviour aimed at discrediting the judicial function in general, with a strong message of rejection

of the possibility that the courts could overturn or qualify decisions taken by the majority. In other words, they reject the possibilities of opposition to the control of majority logic, which has also been obtained thanks to electoral legitimacy. Those practices classified as “*illiberal*” try to eliminate or undermine the checks on power,³ weakening the mechanisms and institutions designed to act as “*checks and balances*”, in contrast to a greater role and a concentration of power by the executive.⁴

Accordingly, we have witnessed discourses of public distrust towards judges⁵ but, above all, to blur the controls on power, attempts have been made to colonise as many institutions as possible responsible for developing key points of control, subordinating their actions to political factors.⁶ Clearly, the judicial function, an essential element of the legal control of power,⁷ is seen as a potential enemy of these populist movements, which must be weakened or captured so that it cannot fulfil its institutional functions. Once the judicial function has been weakened, it will be easier to undermine other democratic institutions or to have a free rein to disregard rights and values.⁸

This way, one can appreciate how they have used techniques to neutralise the governing bodies of the judges, whose main purpose is to keep the executive branch from making decisions that affect the judiciary;⁹ turn constitutional courts – usually the main target¹⁰ – into “*packed courts*” through the appointment process. In addition, their powers and functions are also being restricted,¹¹ even reforms of the administrative status of judges and the organisation of the judiciary itself.

It is cases such as these that have come before the CJEU and have enabled the development of case law defining judicial independence as a principle of the rule of law (Article 2 TEU and Article 47 CFREU), based on the defence of effective judicial protection (Article 19 TEU). The rule of law provides, through judicial review, an essential limit to the actions of power, and it is crucial to see how its deficiencies at the internal level translate into a deficient rule of law in the EU.¹²

³ Javier Tajadura Tejada, “El populismo iliberal contra el Estado de Derecho: la defensa europea de la independencia judicial. Iliberal populism against the rule of law: the European defense of judicial independence”, *Araucaria*, 25, no. 53 (2023), <https://doi.org/10.12795/araucaria.2023.i53.16>.

⁴ Astrid Barrio López, “Democracia iliberal, populismo y Estado de Derecho”, *Estudios De Deusto* 70, no. 1 (2022): 15-33, <https://doi.org/10.18543/ed.2493>.

⁵ James E. Moliterno, Peter Čuroš, “Ataques recientes a la independencia judicial: lo vulgar, lo sistémico y lo insidioso”, *Teoría y Realidad Constitucional*, 50 (2022): 117-164, <https://doi.org/10.5944/trc.50.2022.36370>.

⁶ Adam Krzywoń, “La defensa y el desarrollo del principio de independencia judicial en la Unión Europea”, *Revista Española de Derecho Constitucional*, 119 (2020): 85-117, <https://doi.org/10.18042/cepc/redc.119.03>.

⁷ Manuel Aragón Reyes, “La interpretación de la Constitución y el carácter objetivado del control jurisdiccional”, *Revista Española de Derecho Constitucional* 6, no. 17 (1986): 85-136.

⁸ Pablo Castillo Ortiz, Yaniv Roznai, “The democratic self-defence of constitutional courts”, *ICL Journal - Vienna Journal on International Constitutional Law* 18, no. 1 (2024): 1-24.

⁹ Ana Carmona Contreras, “Democracia, Estado de derecho e independencia judicial en España: un análisis en perspectiva europea”, *Estudios De Deusto* 70, no. 1 (2022): 141-57, <https://doi.org/10.18543/ed.2498>.

¹⁰ Armin von Bogdandy, “Justicia constitucional en el espacio jurídico europeo”, in *La justicia constitucional en el espacio jurídico europeo*, ed. A. Bogdandy, J. Martín y Pérez de Nanclares (Valencia: Tirant lo Blanch, 2022).

¹¹ Francesco Biagi, “La neutralización de los Tribunales constitucionales en los regímenes populistas-iliberales: un análisis a partir de los casos de Hungría y Polonia”, *Revista de Derecho Político* 116 (2023): 265-295.

¹² Armin von Bogdandy, Michael Ioannidis, “La deficiencia sistémica en el Estado de Derecho”, *Revista de Estudios Políticos (nueva época)*, no. 165, Madrid, July-September (2014): 19-64.

3. Effectiveness of EU law

When talking about effectiveness of EU law, there is a clear reference to the obligation of the Member States to respect the Treaties and other European regulations. In response to the populist movement emerged and evolved in recent times in the Member States of the EU, for example, the EU has had to react to protect its values, specifically the rule of law recognised in Article 2 TEU. However, the defence of its values is not merely a matter of institutional strength, highlighting the Union's commitment to the principles on which it is founded. Instead, it has had practical repercussions on EU law, directly affecting the principles that govern it.

In line with the reasoning of the CJEU in the case of *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas (ASJP)*, hereinafter) and in the subsequent case law on the substantive scope of judicial independence in the Member States, the EU emphasises the notion of a European judiciary and insists on positioning national courts as an adept and indispensable mechanism for the effectiveness of EU law.

Therefore, the starting point for strengthening the guarantees of the effectiveness of EU law is the fact of emphasising the dual functionality of the judges of Member States. As national and European judges, their duty is to be guarantors of effective judicial review in the legal order of the Union. Accordingly, they must fulfil this task together with the CJEU itself.

Consequently, the Court observes, through its innovative and original interpretation of the second subparagraph of Article 19(1) TEU, that this clause is a concrete expression of the value of the rule of law enshrined in Article 2 TEU: “Member States shall provide for the remedies necessary to ensure effective judicial protection in the areas covered by Union law.” Judicial independence, one of the essential principles of the rule of law, had not been expressly defined in the Treaties. Hence, it was only a matter of time before the CJEU took it upon itself to conceptualise it progressively.

In *ASJP*, the CJEU developed the notion of judicial independence, stating that it implies that “the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions.” It also refers to the irrevocability and adequate remuneration of its members as guarantees of judicial independence.¹³

Once defined, the CJEU positioned it as an inherent factor in the task of judging, which makes it a determining criterion for citizens to enjoy effective judicial protection.¹⁴ Likewise, as shown in the *Wilson* case,¹⁵ it reiterated that judicial independence has an external and an internal dimension. The external dimension refers to issues relating to the free exercise of office without external or administrative pressure and to the organisation of the judiciary itself. That is, it affects matters such as irrevocability, remuneration and access to the judicial career, while the internal one denotes impartiality towards parties in the resolution of cases. In this way, it concluded that adequate judicial review, as an expression of effective judicial protection, is inherent to the rule of law.

¹³ Judgment CJEU *Associação Sindical dos Juizes Portugueses*, 27 February 2018, C-64/16, ECLI:EU:C:2018:117, recitals 44-45.

¹⁴ *Associação Sindical dos Juizes Portugueses*, recital 43.

¹⁵ Judgment CJEU *Wilson*, 19 September 2006, C-506/04, ECLI:EU:C:2006:587.

The CJEU gave substance to and instrumentalised the effective judicial protection to the proclamation and defence of its values, creating a questionable extension of its sphere of protection. In this field, the “*areas covered by Union law*” covers a margin greater than “*the scope of application of Union law*” of Article 51 CFREU, thereby playing with the limits of the principle of attribution of powers. As a result, through this novel interpretation of Article 19 TEU, the CJEU assumed for itself the competence and power to review national rules on the organisation and administration of justice, something that was not expressly provided for in the Treaties and was traditionally reserved for and closely linked to national¹⁶ sovereignty. This self-attribution was justified in the interests of the effectiveness of EU law, since national courts are potential enforcers of EU law. This is why the CJEU considers them to be part of the “*European administration of justice*”, and therefore required to respect the values of the Union.¹⁷

Based on the above, the national judge as a European judge (*Simmenthal* case)¹⁸ must have independence to guarantee effective judicial protection for European citizens. Effective judicial review is not only the responsibility of the CJEU but also of national courts, which together form the “*European judiciary*.” The bodies that are part of this judicial system must comply with the requirements of effective judicial protection, which is primarily a duty of the Member States. In the event of non-compliance and due to its relevance in relation to common values, the EU may be required to intervene.

Judicial review is a fundamental part of the constitutional state. The EU, despite being a supranational form of organisation of political power, has a marked constitutional character and must therefore, pay attention to it to ensure the effectiveness of its legal system. Judicial review is inherent to any rule of law and must be carried out with adequate guarantees of independence. Thus, issues relating to appointments, remuneration, irrevocability and all those related to judicial independence within the framework of the organisation and functioning of the national administration of justice have served the CJEU to define the concept of the rule of law within the EU.

As pointed out earlier, populist movements have triggered attention to the judiciary. Once threats arise, the effectiveness of EU law is at risk, and this is where a concern arises that will be resolved by strengthening the national judiciary as the primary or common judge of EU rules. By reminding national courts of their role as European judges (*Simmenthal* case) and their position as fundamental parts of the EU judicial system, the Union will seek to reinforce the effectiveness of its legal system.¹⁹ One should bear in mind that a legal body, based on the rule of law, is when the EU appeals to national judicial bodies to reinforce the Union of law, where neither European institutions nor Member States can evade compliance with EU law.

The effective judicial application of EU law across Member States necessarily depends on the active cooperation of national courts, whose independence is

¹⁶ Michael Krajewski, “Associação Sindical dos Juizes Portugueses: the Court of Justice and Athena’s dilemma”, *European Papers*, vol. 3, no. 1 (2018): 395-407.

¹⁷ Nuria Magaldí, “La construcción de un poder judicial europeo y las garantías de su independencia”, *Revista Española de Derecho Constitucional*, 125 (2022): 127-157.

¹⁸ Judgment of the Court *Simmenthal*, 9 March 1978, C-106/77, ECLI:EU:C:1978:49.

¹⁹ Patrícia Fragoso Martins, *Direito constitucional europeu. Fundamentos, instituições, princípios e garantias* (Universidade Católica Editora, 2022).

therefore essential to upholding the rule of law in the EU.²⁰ Judicial independence is also a prerequisite for mutual trust and sincere cooperation [Article 4(3) TEU] in judicial dialogue, particularly in areas involving arrest and surrender procedures. Seen in this light, the CJEU's approach appears quite timely – not only in its initial concern, but in its strategic effort to enlist national judiciaries in the European project by subordinating their actions to the primacy of EU law. In addition, by linking the fundamental right between effective judicial protection and the judicial independence of national judges, the CJEU could enhance the enforceability of European values.²¹

4. Global expansion of the influence of the judiciary

Continuing with the set of connections presented here as possible reasons why the EU has recently highlighted the role played by national courts, it is worth noting the important role that judicial decisions have played in the political, legal, and social life of a Member State. As in the first case listed, the context should not be ignored and one must add that, because they have also been studied by scholars in recent times, both the expansive influence of the judiciary on the legal and political landscape of Member States, and the global trend towards the judicialisation of politics.

The extent to which public life is more and more structured around the sentences of the courts should also be acknowledged. The media plays a crucial role in this regard using a strategy of “*judicial infotainment*”²² focused especially on the most high-profile cases or the most polarised controversies. Therefore, it is clear how judicial decisions often make the headlines or dominate the front pages of newspapers.

The global expansion of their influence is characterised by several factors, such as the social prestige of judges and their status on the social ladder. The language used by judges is less accessible, and judicial proceedings are sometimes fraught with formalities that distance them from everyday life of the ordinary citizen.²³ Thus, it is common for judge's decisions to be accompanied by a solid dose of legitimacy and authority, which gives them an objective quality that is, indeed, typical of what judicial control should be. Should people add to all the above the sense of responsibility that judges can assume in the interpretation of the content of constitutional issues, their active impact on the system itself may become a reality. In addition, determining the axiological content of constitutional clauses contributes to this evaluation of the judicial function.²⁴

Not only is case law another centre of normative production,²⁵ but also the decisions made by judges bring about social change in contemporary democracies and

²⁰ Armin von Bogdandy, “Justicia constitucional en el espacio jurídico europeo.”

²¹ Piotr Bogdanowicz, Matthias Schmidt, “The infringement procedure in the rule of law crisis: how to make effective use of Article 258 TFEU”, *Common Market Law Review* 55, issue 4 (2018): 1061-1100, <https://kluwerlawonline.com/journalarticle/Common+Market+Law+Review/55.4/COLA2018093>.

²² Ángel Rodríguez Vergara, “Jueces, sociedad y política”, in *España constitucional (1978- 2018): trayectorias y perspectivas*, ed. Benigno Pendás, tomo V (Madrid: Centro de Estudios Políticos y Constitucionales, 2018), 4067-4078.

²³ Peter Schuck, “El poder judicial en una democracia”, *Yale Law School Legal Scholarship Repository*.

²⁴ Alfonso de Julios Campuzano, “Estado de derecho, democracia y justicia constitucional: una mirada (de soslayo) al neoconstitucionalismo”, *Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito*, vol. 1, no. 2 (2009): 8-20.

²⁵ Gregorio Cámara Villar, “Justicia y política en la España democrática (una reflexión a propósito de los llamados jueces estrellas y la judicialización de la política)”, *Revista de Derecho Político*, no. 47 (2000): 27-52.

affect the development of public policies. Furthermore, this could potentially lead to changes in highly sensitive social issues such as abortion, freedoms, or fundamental rights. Similarly, we have been witnessing how courts, especially constitutional courts, have been able to play a crucial role in the democratic development of a country. For example, those states that have transitioned from authoritarian regimes to democracies, as in Eastern Europe decades ago, or even in the system of territorial organisation, as in the case of the Spanish Constitutional Court.²⁶

Another cause for its expansion is the increased control over the limits of action of state bodies.²⁷ Abuses of executive power, unconstitutional measures by the legislature, and deviations by other judges are all met with a corresponding response from the judiciary in democratic states governed by the rule of law. For this reason, accountability is a concept linked to the development of the most recent features of the welfare state, which require the clarification of responsibilities in public management and in the actions of political representatives. The law must guarantee, through appropriate judicial means, the legitimacy of political action,²⁸ but also its supervision. As has been pointed out, in a state governed by the rule of law, even the law – the work of the democratic legislator – is subject to a control of legal validity which, in reality, is nothing more than the demonstration of the imposition of legal control on power.²⁹

The subjection of power to legal control is one of the basic ideas of constitutionalism and one of the inherent clauses of the rule of law. Respect for the law, the separation of powers and the guarantee of fundamental rights must be observed by all state bodies, which means that nobody should escape judicial control,³⁰ the main, although not exclusive, means of legal control. Judicial control is characterised by its objective nature, attributed by the logic of being a form of control whose parameters and reasoning must be legal, with control being judicial by virtue of the body responsible for enforcing it.³¹ Thus, in this context, where legal control takes on a fundamental dimension through judicial control in the functioning of the state and in the struggle to uphold European values in the face of typical illiberal behaviour, it is no coincidence that the CJEU ruled that the very existence of effective judicial control is inherent in the rule of law.³²

On the other hand, the global trend of resolving political conflicts in court is a social phenomenon shaped by the very structure of the political system and the role that the judiciary occupies in that system.³³ Understood as a classic element of the rule of law that advocates for political activity to be subject to the law, the proper

²⁶ Francesco Biagi, *Corti costituzionali e transizioni democratiche* (Ed. Il Mulino, 2016).

²⁷ Ran Hirschl, “The new constitution and the judicialization of pure politics worldwide”, 75 *Fordham L. Rev.*, 721 (2006), <https://ir.lawnet.fordham.edu/flr/vol75/iss2/14>.

²⁸ Manuel García Pelayo, *Obras completas* (Madrid: Centro de Estudios Políticos y Constitucionales, 2009), 3293.

²⁹ Luis I. Gordillo Pérez, “Metaprincipios, principios constitucionales y pautas de comportamiento. Ensayo de una taxonomía de los criterios de interpretación de la justicia constitucional europea”, in *La anatomía de la justicia constitucional europea*, ed. Naiara Arriola and Luis I. Gordillo (Madrid: Centro de Estudios Políticos y Constitucionales, 2022).

³⁰ Joan Ridao Martín, “El control constitucional del Parlamento y la juridificación de la vida política”, *Revista de Derecho Político*, no. 117 (2023): 73–98.

³¹ Manuel Aragón Reyes, “La interpretación de la Constitución y el carácter objetivado del control jurisdiccional”, *Revista Española de Derecho Constitucional*, year 6, no. 17 (1986): 85–136.

³² *Associação Sindical dos Juizes Portugueses*.

³³ Joaquín Urías, *La justicia en el banquillo*, 1st edition (Barcelona: Arpa & Alfil Editores, S.L., 2024).

judicialisation of politics is a logical and necessary consequence. Different, and problematic, is the deviation of the judicialisation of politics towards the pursuit of exclusively political objectives through the distortion of judicial proceedings.³⁴ It is urgent then to reflect on and, above all, implement mechanisms that prevent, as far as possible, the advancement of political interest in justice. These mechanisms should be presented as solutions to both sides of the same problem: the misguided judicialisation of politics and the politicisation of justice. In addition, it is also necessary to find appropriate remedies for possible excesses of judicial power.

However, if we are studying the expansion of the influence of the judiciary in the European legal sphere, it is also important to highlight its role within the European jurisdictional framework. One should not ignore its wide-ranging possibilities in relation to the preliminary ruling procedure set out in Article 267 TFEU, and even the non-application of rules or jurisdictional decisions of its own constitutional court in the event of a conflict with EU law.³⁵ One cannot simply mention the dynamics and trends observed at a general level in relation to the judiciary without acknowledging that the EU itself and its Treaties include a series of prerogatives that contribute to the broad functions of the courts.

In short, judicial decisions play a key role in shaping a country's society, democratic development, and alignment with European values. In a political climate increasingly influenced by populism – where courts often resolve political disputes – it is reasonable to conclude that the EU has a strong interest in involving national judges to guarantee the effectiveness and primacy of EU law. Therefore, through judicial decisions, judicial decisions can influence the political, legal and social dynamics of a State, the EU and even the planet.

5. Last loophole for the defence of the rule of law

This section introduces another reason why the EU's attention to national courts may be justified: when other public authorities and state bodies generate negative dynamics or their actions give rise to a crisis of democratic values and the rule of law, the last bastion that can and must act to halt and reverse the situation is the judiciary.

Notably, in any state governed by the rule of law, the exercise of power must have a legal basis that empowers and legitimises its action. In fact, it is crucial in this functional framework that if any of the three classic powers of the state exceeds the limits of its competence or exercises them in an inappropriate manner, the courts intervene to carry out an objective assessment based on the law or the constitutional text to determine whether it has acted in accordance with the relevant regulations.³⁶ Indeed, the majority logic in decision-making must have two exclusions, namely respect for fundamental rights and the subjection of public powers to the law.³⁷ Furthermore, the courts are the ones responsible for guaranteeing both of these issues when events contrary to such obligations have occurred. Hence, judicial review or analysis is the ultimate control mechanism

³⁴ Ángel Rodríguez Vergara, "Jueces, sociedad y política."

³⁵ Judgment CJEU *Energotehnica*, 26 September 2024, C-792/22, ECLI:EU:C:2024:788.

³⁶ Paul Craig, "Definición y conceptualización del Estado de derecho. La importancia de la independencia judicial", *Teoría y Realidad Constitucional* 50 (2022): 165–184, <https://doi.org/10.5944/trc.50.2022.36371>.

³⁷ Luigi Ferrajoli, "Jueces y política", *Derechos y libertades: Revista de Filosofía del Derecho y derechos humanos*, year 4, no. 7 (1999): 63–80.

designed to intervene to block violations of the legal system and restore, as far as possible, legitimate situations.

For this reason, it is a matter of great importance that this last bastion of defence can be developed, once situations that challenge democracy and the rule of law have arisen, with guarantees of independence. Otherwise, it would become a meaningless procedure that would ultimately confirm and aggravate the lack of protection of citizens' rights against abuses of power. The counterbalance of the judiciary and constitutional control exercised independently is fundamental to any democratic state governed by the rule of law.³⁸

The very nature of the rule of law implies that every judicial body is a potential court of fundamental rights.³⁹ Within the EU, this is even more evident when we look at national courts, which must ensure the rule of law in their own Member State and will have an impact on the Union. It is therefore also essential to recall that national judges serve as ordinary or common judges of EU law. Their role is substantial as guarantors of the EU legal order vis-à-vis national law or other conduct by national bodies. This role becomes even more significant when we consider it from two complementary perspectives: effectiveness and rights protection. First, from the perspective of effectiveness, ensuring that EU law is properly applied and enforced across all Member States. From the perspective of rights protection, it is essential to safeguard the rights of European citizens.⁴⁰ Indeed, the judicial systems of the Member States are designed by the Union as a mechanism for protecting its citizens against any threat or violation of the rule of law.⁴¹

Likewise, one can see that, from the doctrine itself, courts have vital importance by declaring measures aimed at illegitimate intervention in the independence of the constitutional courts and the administration of justice in general.⁴² Moreover, they can influence other conducts such as those that limit the action of political minorities.⁴³

Although this text is based on the case law of the CJEU, it has not exclusively focused on positioning the judicial bodies of the Member States as an essential bulwark in the defence of the rule of law. Along the same lines, the European Commission, in its Proposal for action to strengthen the rule of law in the Union of 17 July 2019, also pointed in the same direction, highlighting the importance of national judicial bodies. Firstly, it makes it clear that, in a state governed by the rule of law, all public authorities must always act within the limits set by law in

³⁸ Araceli Mangas Martín, "Defensa del Estado de Derecho por la Unión Europea: la rebeldía de Polonia a la independencia judicial", *Anales de la Real Academia de Ciencias Morales y Políticas* 99 (2022): 527-552.

³⁹ Pedro Cruz Villalón, "Los derechos fundamentales y la identidad del Tribunal de Justicia", in *Estado de Derecho y Unión Europea*, ed. D. J. Liñán Noguerras, P. J. Martín Rodríguez (Madrid: Tecnos, 2018), 295-311.

⁴⁰ Miguel Azpitarte Sánchez, "La erosión del Estado constitucional", in *Estado de Derecho y Unión Europea*, 345-364.

⁴¹ María Dolores Blázquez Peinado, "La UE ante las vulneraciones del Estado de derecho por parte del Estado polaco panorámica general y estado actual de la cuestión", *Revista General de Derecho Europeo*, no. 48 (2019).

⁴² Pablo José Castillo Ortiz, Yaniv Roznai, "The democratic self-defence of constitutional courts", *ICL Journal - Vienna Journal On International Constitutional Law*, December 17 (2023): <https://ssrn.com/abstract=4667235>.

⁴³ Aparna Chandra, "The role of a judge in an electoral autocracy", *Int'l J. Const. L. Blog*, 12 April 2024, <http://www.iconnectblog.com/the-role-of-a-judge-in-an-electoral-autocracy/>.

accordance with the values of democracy and fundamental rights. It also underlines the importance of control by independent and impartial courts. Secondly, it stresses the responsibility that national control mechanisms must fulfil before giving way to interventions by supranational bodies, the national courts, of the Member States.

Moreover, one must not ignore the possibility that EU law offers national courts to challenge national legislation through the preliminary reference procedure when they consider such legislation to be potentially contrary to EU law. Reasonably, this means that the EU has reflected that, in the event of facts presumed to violate EU law, national judges can stop such acts by requesting assistance from the CJEU for interpretation. This has been proven in some aspects of the so-called Polish saga. In conclusion, not only does the EU's most recent action in this area demonstrate its confidence in the judiciary as the last bastion of the rule of law, but its very configuration of operation also reflects this.

6. European integration process

At this point, one must acknowledge that all the possible motivations highlighted so far are reasons for the EU to take control of the national judicial powers, and those lead to a specific aim, that is, all the other potential reasons presented so far lead to this one. It may be seen as just one more, but it is really the one that justifies everything else, grouping all the previous ones together and being both the cause and end of its action.

It is unfeasible to add them all up and not finish seeing this one. The context, marked by a situation widely described as a crisis, is ideal for this. The effectiveness of EU law is an essential element to provide integration through its legal system. The expansion of the influence of the judiciary on the dynamics of a country is a determining factor in placing the EU, with its Treaties, CFREU and other regulations, as a leading actor in conflict resolution. Thanks to the judicial bastion of protection of the rule of law and guarantee of fundamental rights, its function is also prevented and promoted. All this is nothing more than acting along essential lines that help to lay the foundations of the future, a future in which the EU can have a high degree of intervention and participation, which is the central idea that has been constantly running through the integration process.

Assigning a certain level of supervision over the activities of national judicial authorities largely serves to strengthen the guarantee of the effectiveness of EU law and the protection of fundamental rights through judicial channels. The rule of law, in its material conception, indispensably needs respect for this type of rights, which requires their observance by state institutions, including the judiciary with the CJEU being the body that guarantees and monitors compliance with these clauses in the EU legal space. It is precisely one of the elements of these rights – judicial independence as an integrating element of effective judicial protection (Article 19 TEU) – that has enabled it to give substance to the rule of law (Article 2 TEU) and to define its roadmap for integration through this European value.

Of course, another fundamental point in the interest shown by national judicial bodies in the actions of the CJEU is the reinforcement of judicial dialogue through the preliminary ruling. This is a reinforced matter, we argue because an important leading role for national courts could already be foreseen with the simple reading of Article 267 TFEU. From its wording, two major conclusions

can be drawn: national judicial bodies have an active role in this reference for a preliminary ruling procedure and the nomination of the CJEU as the highest interpreter of the Treaties. Consequently, this gives meaning to the European legal system, ensuring its effectiveness and unity in interpretation. Therefore, the self-assignment of the evaluation of national judicial bodies is nothing more than an instrument for the CJEU to enhance its own position. Significantly, this certifies itself as the constitutional and constitutionalising court that it is, allowing it to bring cohesion to EU law, a fundamental component for European integration.

In the same way, overseeing the functioning and judicial guarantees offered by the Administrations of justice of the different Member States is essential for mutual trust and loyal cooperation (Article 4 TEU) in the functioning of the “other” judicial powers within the EU, vital for the development of, among others, European arrest warrants. In addition, seeking to ensure respect for the Rule of Law by national courts, as an objective of the Union, can be fitted as an act of promoting its values, as stated in Article 3 TEU.⁴⁴

To conclude, it seems logical that assuming competences is another step in the expansion of the European integration process, and that the scope of action of the European institutions will be even greater. At this point, we would like to highlight, however, the importance that the idea of linking European integration with the guarantee of effective judicial protection can provide. Beyond the questionable assumption of unexpected powers, the CJEU’s approach to the judiciary can also be seen as a support or collaboration to the so-called horizontal integration.⁴⁵

Horizontal integration is the one born, developed and has an influence from, by and for European citizens. These measures of possible control by the CJEU over the administrations of justice of the Member States not only serve as a check against abuses of power that undermine judicial independence but can also be a very useful factor in aligning the demands that European citizens have towards their national judicial systems. That is, to the courts in charge of settling their controversies. The actions of the CJEU can help to bring the quality of judicial systems in the EU closer together and make them more comparable with the demands and achievements of the citizens of one Member State being understood as such also for those of another nation. This results in the promotion of quality justice systems and the guarantee and protection of fundamental rights through effective judicial protection. All of this, in addition, with the European citizen and their rights must be at the centre of the integration process.⁴⁶

Ultimately, the concretisation and, therefore, definition of what the fundamental values and principles of the EU are and should be is a dynamic process, as has been mentioned. It should be added that it must be removed from shifting majorities,⁴⁷ allowing its development as a basic pillar of the future of Europe. In this case,

⁴⁴ Christopher Hillion, “Overseeing the rule of law in the EU: legal mandate and means”, in *Reinforcing rule of law oversight in the European Union*.

⁴⁵ Alessandra Silveira, “Horizontal integration and Union based on the rule of law”, in *O Estado de direito na União Europeia - The rule of law in the European Union*, ed. Anabela Miranda Rodrigues, Jónatas Machado and Paulo Pinto Albuquerque (Instituto Jurídico - Faculdade de Direito - Universidade de Coimbra, 2022), https://estudogeral.sib.uc.pt/bitstream/10316/104159/1/RuleOfLaw_Livro.pdf.

⁴⁶ Ugo Villani, “Sul controllo dello Stato di diritto nell’Unione Europea”, *Freedom, Security & Justice: European Legal Studies*, no. 1 (2020): 10-27.

⁴⁷ Álvaro Sánchez Bravo, “El Estado de derecho como valor fundamental en la Unión Europea”, *Nuevo Derecho*, vol. 16, no. 27 (2020), <https://doi.org/10.25057/2500672X.1372>.

and with a horizontal vision of the integration project, being able to supervise the organisation of national courts can also be a positive measure in terms of trying to mitigate from Europe the possible abuses of power that take place in the Member States, including the excesses committed by the judiciary. Of course, it will always face opposition from nationalist, anti-European speeches, which will justify their messages with the legitimacy deficit that has questioned the jurisprudential attribution of the CJEU. From the point of view of the European citizen, the legitimacy of the Union is based on the observance of tangible results for their quality of life. In other words, it is there that the effectiveness of EU law must be focused on for the maintenance of its project and for the construction of a common future.⁴⁸

7. Final considerations

After having laid out this series of causes that have been shown to be potentially decisive or, at least, influential in the self-attribution by the CJEU of the control and analysis of the judicial power of the Member States that make up the EU, we will present some basic considerations for reflection and review.

The illiberal context is the origin of the EU's reaction. Without practices threatening European values, especially towards the rule of law, the need to respond through the defence of them from the EU would not have been apparent. A generally anti-European speech and a political dynamic marked by the exercise of reforms that undermined the typical clauses of the rule of law, such as judicial independence, are what have caused concern about the response mechanisms for the defence of European values. Given the inoperability and non-effectiveness of Article 7 TEU, the EU has had to intervene in other ways, including through judicial mechanisms, with the CJEU standing as a valuable guardian. One of the ways of responding to the risk situation has been carried out through the CJEU. However, just as illiberalism has been the origin of the CJEU's action, the statements of the CJEU may provoke reactions from populist-illiberal movements, whose anti-European speeches and practices have not yet been eliminated, remaining very present in the contemporary life of the Member States.

Thus, in the context of risk, national judges as the main enforcers of EU law are presented as key actors in ensuring its effectiveness. For this reason, it was necessary to strengthen their role as agents of the European judiciary in the face of threats. In addition, the CJEU has progressively pointed out that national judicial powers must present a series of guarantees both in their composition and their functioning to be able to comply with and enforce EU law. Importantly, this also has consequences for the protection of the rights of European citizens.

The attention to the judiciary and, specifically, to its independence, is not solely the result of the attacks suffered that call into question the effectiveness of EU law. There is a global trend towards the judicialization of politics and towards social and political dynamics where judicial decisions have a significant influence and capture the attention of the media and, consequently, of society in general. There, the Union wants to appear and knows that it can do so with a leading role, not only through the aforementioned case-law of the CJEU relating to Article 19 TEU. It can also achieve this by emphasising and reiterating the wide options offered to national courts by

⁴⁸ Armin von Bogdandy, Michael Ioannidis, "La deficiencia sistémica en el Estado de Derecho", *Revista de Estudios Políticos (nueva época)*, no. 165, July-September (2014): 19-64.

the mechanism of judicial dialogue that is the question referred for a preliminary ruling (Article 267 TFEU). This ultimately invites and allows the EU to have a voice and vote through the CJEU.

In the same way, the attacks suffered by the judiciary and its independence have highlighted something that could already be intuited. When the democratic quality of debates and the political or social coexistence of a country diminishes considerably, in the face of possible abuses and excesses of power, the organic schemes of the different states place the judiciary to try to curb or correct these deviations. Given this logic, we claim that illiberal movements try to capture and reduce the possibilities of action of the courts. For this reason, the EU has tried to protect and reinforce the mechanism that must act to limit the powers and ensure the protection of the fundamental rights of its citizens.

Finally, and in relation to the jurisdictional protection of citizens under EU law, it is essential for the CJEU to determine the scope of protection of the concept of “*Union of law*”, a permanent and continuous process of construction through which limits are established for the European institutions and the Member States as a guarantee for European citizens. The interpretation of Article 19 TEU by the CJEU brings notable consequences that enable the EU to advance in the integration process during these times of uncertainty. Among these, the EU provides a horizontal perspective of the process, as this integration of judicial systems paves the way to placing citizens at the core of progress.

Consequently, this allows for the EU’s compliance with what citizens may demand about the quality of national judicial systems to be addressed. In addition, it should be emphasised that Article 19 TEU can be invoked by individuals since it has direct effect.⁴⁹ Only with citizens who perceive the progress of other countries as their own and feel that the progress of their own country is shared in other parts of the EU, can the EU have greater arguments for subsistence.

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⁴⁹ Judgment CJEU *Hann-Invest*, 11 July 2024, joined cases C-554/21, C-622/21 and C-727/21, ECLI:EU:C:2024:594, recitals 34-37.