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# Judicial independence and access to justice

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(extracts with references)

## 1.Definition of the rule of law: Regulation 2020/2092 of 16 Dec. 2020:[1]

The rule of law requires that all public powers act within the constraints set out by law, in accordance with the values of democracy and the respect for fundamental rights as stipulated in the EU Charter of Fundamental Rights and other applicable instruments, and under the control of independent and impartial courts. It requires, in particular, that the principles of legality implying a transparent, accountable democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts; and separation of powers, be respected.

## 2.Fundamental values 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.

## 3.Article 19(1) TEU:

The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed. Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law**.**

[1]Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433I/1, 22-12-2020, Preamble, recital 3.

**4.Article 6(1) and (3) TEU:**

The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union /.../ which shall have the same legal value as the Treaties. Fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law**.**

**5.Right to an effective remedy and to a fair trial: Article 47 EU Charter:**

(para. 1): Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.

(para. 2): Everyone shall have the possibility of being advised, defended and represented.

(para. 3): Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.[2]

**6.Direct effect of Article 47 EU Charter:**

*"Article 47 of the Charter is sufficient in itself and does not need to be made more specific by provisions of EU or national law in order to confer on individuals a right which they may rely on as such."*[3]

**7.Relation between Article 47 Charter and Articles 6(1) and (2) and 13 ECHR[4]:**

"*The first and second paragraphs of Article 47 of the Charter correspond to Article 6(1) and Article 13 of the ECHR."*[5]

"*The right to effective legal remedy is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the ECHR, and which is now reaffirmed by Article 47 of the Charter."*[6]

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[2] See also: Articles 6(1) and 6(3)(c) ECHR; Airey v. Ireland, 6289/73, 9.10.1979, paras. 20-28; DEB, C-279/09, 22.12.2010.

[3] Torubarov, [GC] C-556/17, 29.7.2019, paras. 56, 73; Egenberger, [GC] C-414/16, 17.4.2018, para. 78.

[4] First part of Article 6(1) ECHR says that the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Article 13 ECHR says that everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

[5] Sacko, C-348/16, 26.7.2017, para. 39; see also: FV, T-639/16 P, 23.1.2018, para. 70

[6] Randstad Italia SpA, C-497/20, [GC] 21.12.2021, para. 57; seee also: Article 52(3) Charter; Åklagaren Fransson, [GC], C-617/10, 26.2.2013, para. 44.

**8.Detention of citizens of Japanese origin from West Coast: Korematsu v. USA, 323, 214, December 18, 1944, judgment of the Supreme Court of the USA, Justice Blake, J. (majority):**
*"All legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny."*

**9.Democracy, independent courts and the rule of law: the Belmarsh case, UKHL 56, 16 Dec. 2004, Supreme Court of the U.K., Opinion of Justice Bingham, paras. 29, 42:**
*/.../ "The more purely political (in a broad or narrow sense) a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision /.../ Conversely, the greater the legal content of any issue, the greater the potential role of the court, because under our constitution and subject to the sovereign power of parliament it is the function of the courts and not of political bodies to resolve legal questions /../ I do not in particular accept the distinction which the Attorney General drew between democratic institutions and the courts. It is of course true that the judges in this country are not elected and are not answerable to the Parliament /.../. But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law."*

**10.Court of First Instance (EU), Kadi, T-315/01, 12.9.2005, (para. 284):**
*"It does not fall to the Court of First Instance to verify that there has been no error of assessment of the facts and evidence relied on by the Security Council in support of the measures or to check indirectly the appropriateness and proportionality of those measures /.../ [with the exception in cases where ius cogens rights are at stake].*
*The question whether an individual or organization poses a threat to international peace and security, like the question what measures must be adopted vis-á-vis the persons concerned in order to frustrate that threat, entails a political assessment and value judgments which in principle fall within exclusive competence of the authority to which the international community has entrusted primary responsibility for the maintenance of international peace and security."*

**11.Grand Chamber of the CJEU, Kadi C-402/05 P (para. 326):**
*"The Community judicature must, in accordance with the powers conferred on it by the EC Treaty, ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of community measures which, like the contested regulation, are designed to give effect to the*

*resolutions adopted by the Security Council"* /…/.[7]

**12.Kadi [GC] C-402/05 P (para. 336):**

*"The effectiveness of judicial review means the Community authority is bound to communicate grounds* [on which the name of a person is included in the list of dangerous persons] *so far as possible either when the inclusion is decided on or, at the very least, as swiftly as possible after that decision in order to enable those persons or entities to exercise /.../ their right to bring an action."*

**13.Kadi [GC], C-402/05 P (para. 337):**

*"Observance of that obligation to communicate the grounds is necessary both to enable the persons to whom restrictive measures are addressed to defend their rights in the best possible conditions, and to decide, with full knowledge of the relevant facts, whether there is any point in their applying to the Community judicature, and to put the latter fully in a position in which it may carry out the review of the lawfulness of the Community measure /.../".*

**14.Kadi [GC] C-402/05 P (para. 344):**

"*It is the task of the Community judicature to apply, in the course of the judicial review it carries out, techniques which accommodate on the one hand, legitimate security concerns about the nature and sources of information taken into account /.../ and, on the other, the need to accord the individual a sufficient measure of procedural justice."*[8]

**15.Korematsu v. US 584 F Supp 1406 (1984), Judge Marilyn Hall Patel (para. 21):**

Korematsu judgment /…/ *"stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability."*

**16.Access to independent (and impartial) court established by law: FV, T-639/16 P, 23.1.2018, para. 78:**

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[7]Compare this with the older seminal judgment of the CJEU: Les Verts v. the Parliament, 294/83, 23.4.1986, para. 23: The European Community "*is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty /.../ Where the Community institutions are responsible for the administrative implementation of such measures, natural or legal persons may bring a direct action before the CJEU against implementing measures which are addressed to them or which are of direct and individual concern to them and, in support of such an action, plead the illegality of the general measure on which they are based /.../ Where implementation is a matter for the national authorities, such persons may plead the invalidity of general measures before the national courts and cause the latter to request the CJEU for a preliminary ruling."*

[8]Compare this with Chahal v. the U.K., 15.11. 1996, paras. 41, 96, 151; see also: A and Others v. the U.K., 19.2.2009, paras. 190, 217-218, 220; Ljatifi v. the FYR of Macedonia, 19017/16, 17.5.2018, para. 35; Muhammad and Muhammad v. Romania, [GC] 800982/12, 15.10.2020, paras. 121-126, 133-206; ZZ, C-300/11, paras. 61, 65-66.

/.../ "*Having regard to the importance of compliance with the rules governing the appointment of a judge for the confidence of litigants and the public in the independence and impartiality of the courts, the judge at issue cannot be regarded as a lawful judge within the meaning of the first sentence of the second paragraph of Article 47 of the Charter of Fundamental Rights."* (See also para. 67).

**17.The concept of lawful judge and judicial dialogues between the General Court in the case FV T-639/16 P and other European courts:**

*„According to the case-law of the ECtHR, the principle of the lawful judge enshrined in the first sentence of Article 6(1) of the ECHR reflects the principle of the rule of law, from which it follows that a judicial body must be set up accordance with the intention of the legislature*".[9]

**18.Fourteen interpretative steps of the CJEU in taking various issues of independence of judges in the Member States under the scope of EU law (ASJP, C-64/16, [GC], 28.2.2018):**

- As regards the material scope of the second sub-paragraph of Article 19(1) TEU, that provision relates to 'the fields covered by Union law', irrespective of whether the Member States are implementing Union law, within the meaning of Article 51(1) of the Charter (para. 29).
- According to Article 2 TEU, the EU is founded on values, such as the rule of law, which are common to the Member States in a society in which, inter alia, justice prevails. In that regard, it should be noted that mutual trust between the Member States and, in particular, their courts and tribunals is based on the fundamental premiss that Member States share a set of common values on which the EU is founded (para. 30).
- 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 (para. 31).
- 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 (para. 32).
- The Member States are therefore obliged, by reason, *inter alia,* of the principle of sincere cooperation, set out in the first sub-paragraph of Article 4(3) TEU, to ensure, in their respective territories, the application of and respect for EU law (para. 34).
- The principle of the effective judicial protection of individuals' rights under EU law, referred to in the second sub-paragraph of Article 19(1) TEU, is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been

[9]FV, T-639/16 P, para. 72; see also paras. 73-74 and Ilatovskiy v. Russia, paras. 40-41; EFTA Court *Pascal Nobile*, E-21/16, 14.2.2017, para. 16

enshrined in Articles 6 and 13 (para. 35).

- The very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law (para. 36-37).
- The factors to be taken into account in assessing whether a body is a 'court or tribunal' include, inter alia, whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (para. 38).
- Questions relating to EU own resources and the use of financial resources from the European Union may be brought before the Court of Auditors of Portugal (para. 39).
- To the extent that the *Tribunal de Contas* (Court of Auditors) may rule, as a 'court or tribunal', within the meaning referred to in paragraph 38 above, on questions concerning the application or interpretation of EU law, which it is for the referring court to verify, the Member State concerned must ensure that that court meets the requirements essential to effective judicial protection, in accordance with the second subparagraph of Article 19(1) TEU (para. 40).
- In order for that protection to be ensured, maintaining such a court or tribunal's independence is essential, as confirmed by the second sub-paragraph of Article 47 of the Charter, which refers to the access to an 'independent' tribunal as one of the requirements linked to the fundamental right to an effective remedy (para. 41).
- The independence of national courts and tribunals is, in particular, essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267 TFEU, in that, in accordance with the settled case-law referred to in paragraph 38 above, that mechanism may be activated only by a body responsible for applying EU law which satisfies, *inter alia,* that criterion of independence (para. 43).
- The concept of independence presupposes, in particular, 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 (para. 44).
- Like the protection against removal from office of the members of the body concerned, the receipt by those members of a level of remuneration commensurate with the importance of the functions they carry out constitutes a guarantee essential to judicial independence (para. 45).

**19.Protection of various aspects of rights of judges/candidates under Article 6 ECHR (*Vilho Eskelinen* test):**

*In order for the State to be able to rely before the ECtHR on the applicant's status as a civil servant in excluding the protection embodied in Article 6, two conditions must be fulfilled. Firstly, the State in its national law must have expressly excluded access to a court for the post or category of staff, which exercise power conferred by public law. Secondly, the exclusion must be justified on objective grounds in the State's interest. It is not enough for the State to establish that that there exists a "special bond of trust and loyalty" between the civil servant and the State, as employer.*[10]

**20. Disputes concerning judges falls under protection of Article 6 ECHR in conjunction with, for example, Article 8 and Article 1 Protocol 1 ECHR:**

/ appointment / promotion / transfer of judges / suspension / disciplinary proceedings / dismissal / reduction in salary following conviction for a serious disciplinary offence / removal from post, while remaining a judge or in cases where judges being prevented from exercising their judicial functions after legislative reform.[11]

**21.New European requirements for the right to access to "court/tribunal established by law":**

- Tribunal must be composed of judges selected on the basis of merit – that is, judges who fulfil the requirements of technical competence and moral integrity to perform the judicial functions required of it in a State governed by the rule of law. Authorities responsible in member States for making and advising on appointments and promotions should introduce, publish and give effect to objective criteria, with the aim of ensuring that the selection and career of judges are based on merit, having regard to qualifications, integrity, ability and efficiency.[12] The paramount importance of a rigorous process for the appointment of ordinary judges to ensure that the most qualified candidates are appointed.[13] The higher a tribunal is placed in the judicial hierarchy, the more demanding the applicable selection criteria should be.[14]
- Criteria for selection of judges should be fully[15] or sufficiently transparent, objective and verifiable.[16] In the opinion of Advocate General they should not be too vague, subjective or unverifiable .[17]

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[10] *Vilho Eskelinen and others v Finland, [GC] App. no. 63235/00, 19.4.2007, para. 62).*

[11] For concrete references, see: Grzęda v. Poland, [GC] 43572/18, 15.3.2022, para. 263.

[12] In this respect the ECtHR also mentiooned „independent state of mind" (Guđmundur Andri Ástrádsson v Iceland, App. no. 26374/18, 1. 12. 2020, para. 230).

[13] Ibid. paras. 220, 222, 119, 212, 124. See also: Xero Flor w Polsce sp. z.o.o. v. Poland, App. no. 4907/18, 7. 5. 2021, odst. 244; Xhoxhaj v. Albania, App. no. 15227/19, 9. 2. 2021, odst. 291; Reczkowicz v. Poland, App. no. 43447/19, 22. 7. 2021, odst. 261; Gloveli v. Georgia, App. no. 18952/18. 7. 4. 2022, odst. 50.

[14] Guđmundur Andri Ástráđsson v Iceland, App. no. 26374/18, odst. 221-222; Dolinska -Ficek and Ozimek vPoland, App. Nos. 49868/19 and 57511/19, odst. 273.

[15] Tsanova - Gecheva c. Bulgarie, 15. 9. 2015, odst. 63.

[16] Commission v. Poland C-619/18, para. 117.

[17] AFJR, C-216/21, Opinion of Advcate General, 16. 2. 2023, footnote 72.

- Decision on selection of judges must be delivered on the basis of criteria which are both objective and relevant and should be properly reasoned, such as to be appropriate for the purposes of providing objective information upon which that authority can take its decision.[18] It is not enough to state purely formal reasons which simply make general reference to the terms in which the criteria are fixed in the law.[19]
- In assessing the sufficiency of a judicial review available to an applicant, the ECtHR will have regard to the powers of the judicial body in question and to such factors as (a) the subject-matter of the decision appealed against, in particular, whether or not it concerned a specialised issue requiring professional knowledge or experience and whether it involved the exercise of administrative discretion and if, so, to what extent; (b) the manner in which that decision was arrived at, in particular, the procedural guarantees available in the proceedings before the adjudicatory body; and (c) the content of the dispute, including the desired and actual grounds of appeal udiciala control.[20]
- It is in particular necessary for the substantive conditions and detailed procedural rules governing the adoption of those decisions to be such that they cannot give rise to such reasonable doubts with respect to the judges appointed[21] as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them, once appointed as judges.[22]

**22.A subjective right of a judge to his/her independence (based on Article 6 ECHR)?**

- dissenting opinion of Judge Sicilianos (Baka v. Hungary, [GC], 20261/12, 23.6.2016);
- Grzęda v. Poland, [GC] 43572/18, 15.3.2022, para. 264 (see also: Bilgen v. Turkey, para. 79 and Broda et Bojara v. Poland, para. 120);
- pending case Biliński v. Poland, App. no. 13278/20, Communicated on 30. 4. 2022;
- Leloup, M., 2021, Who Safeguards the Guardians? A subjective Right of Judges to Their Independence under Article 6(1) ECHR, European Constitutional Law Review; Ducoulombier, P., 2020, Le droit subjectif du juge à la protection de son independence: chainon manquant de la protection de l'Etat de droit en Europe? Procès équitables: perspective régionales et internationales, Libeer amicorum Linos-Alexandre Sicilianos, B. Lubarda, I. Motoc, P. Pinto de Albuquerque, R. Spano, M. Tsirli (eds), Anthemis.

[18]Commission v. Poland C-619/18, paras. 114-117.
[19]Ibid. para. 117.
[20]Tsanova-Gecheva c. Bulgarie, Req. no. 43800/12, 15. 9. 2015, paras. 97-98; Commission v Poland C-619/18, paras. 114-117; WB and others, C-748/19 to C-754/19, paras. 78-79.
[21]C-542/18 RX-II in C-543/18 RX-II, Simpson, 26. 3. 2020. paras. 71, 75, 80; C-585/18, C-624/18, C-625/18, A.K. in drugi, 19. 11. 2019, para. 134; Guđmundur Andri Ástráđsson v Iceland, App. no. 26374/18, para. 123.
[22]C-585/18, C-624/18, C-625/18, A.K. and others, 19. 11. 2019, para. 134; C-824/18, A.B. and others, 23. 3. 2021, para. 123.

**23.Judges: loyal to whom or loyal to what? (Grzęda v. Poland, [GC] 43572/18, 15.3.2022, para. 264):**

"*The employment relationship of judges with the State must be understood in the light of the specific guarantees essential for judicial independence. Thus, when referring to the special trust and loyalty that judges must observe, it is loyalty to the rule of law and democracy and not to holders of State power. This complex aspect of the employment relationship between a judge and the State makes it necessary for members of the judiciary to be sufficiently distanced from other branches of the State in the performance of their duties, so that they can render decisions a fortiori based on the requirements of law and justice, without fear or favour. It would be a fallacy to assume that judges can uphold the rule of law and give effect to the Convention if domestic law deprived them of the guarantees of the Articles of the Convention on matters directly touching upon their individual independence and impartiality.*"