

Judicial independence and access to justice

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7 June 2024, ERA-Trier



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Setting the scene- Rule of law



In courts we trust...

To be or not to be independent



Recent case-law on access to court



“We are all servants of the laws in order that we may be free”

- "The magistrates who administer the law, the judges who act as its spokesmen, all the rest of us who live as its servants, grant it our allegiance as a guarantee of our freedom."

- *Cicero, Murder Trials*

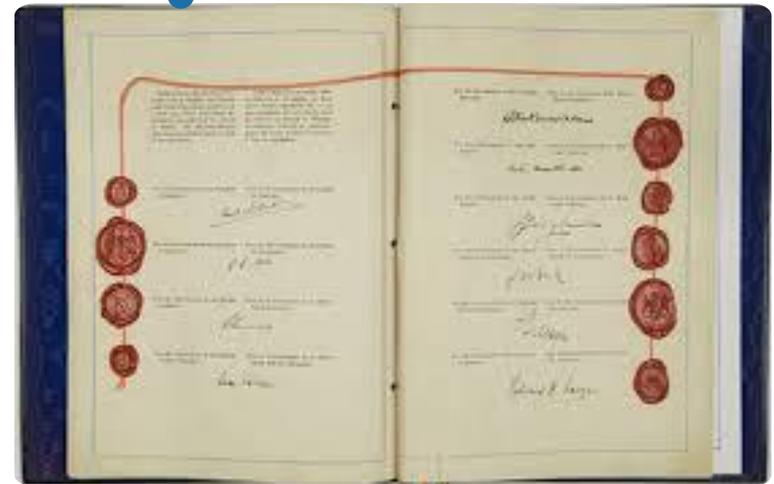


- Rule of Law = a value common to the
 - European Union
 - Council of Europe
- **Legal basis:**
 - Statute of the Council of Europe (1949)
 - Convention for the Protection of Human Rights and Fundamental Freedoms (1950)
 - ECtHR case law
 - Venice Commission reports (esp. Rule of Law Checklist, 2016)



Council of Europe/ European Convention of Human Rights

- *“devotion of member states to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and **the rule of law**, principles which form the basis of all genuine democracy”*
- (...) *European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and **the rule of law**, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration*



Treaty on European Union

- *CONFIRMING their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of **the rule of law**,*

- **Article 2**

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

- **Article 19 par. 2**

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



EU Charter of Fundamental Rights

- ...the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the **rule of law**...
- **Article 47 Right to an effective remedy and to a fair trial**
 - Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
 - Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.
 - Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.



Article 6 par. 1 ✓

ECHR

“1. In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing ... **by an independent and impartial tribunal established by law. ...**”

But also

“the rule of law is a concept inherent in all articles of the Convention”

ECtHR, *Stafford v. United Kingdom*, 28 May 2002, para. 63



Appointment
of the judges-
Achilles' heel



“established by law”

- Independent and impartial tribunals - fundamental pillar of the rule of law
- A prerequisite for the precluding of doubt regarding the independence and impartiality of **tribunals is the strict observance of the laws and rules that apply to the appointment of judges**
- In the light of the principle of the rule of law, inherent in the Convention system, a “tribunal” must always be **“established by law”** to ensure protection of the judiciary from any unlawful or undue external influence.

- What could be the link with a criminal charge for driving without a valid driving licence and driving under the influence of drugs?



Guðmundur Andri Ástráðsson v. Iceland

- **Facts**

- The applicant complained in criminal appeal proceedings that one of the judges on the bench of the newly-established Court of Appeal had been appointed in breach of the procedures laid down in domestic law
- The Supreme Court acknowledged that the judge's appointment had been irregular
- - by replacing four of the candidates – whom the Evaluation Committee had considered to be amongst the fifteen best qualified – with four others, including A.E. – who had not made it to the top fifteen – without carrying out an independent evaluation of the facts or providing adequate reasons for her decision, the Minister of Justice had breached domestic law.
- - the Parliament had not held a separate vote on each individual candidate, as required by domestic law, but instead voted in favour of the Minister's list *en bloc*

The Supreme Court held, however, that these irregularities could not be considered to have nullified the appointment, and that the applicant had received a fair trial.

On 12 March 2019, a Chamber of the Court found, by five votes to two, that there had been a violation the right to a tribunal “established by law”.

Referral to the Grand Chamber

Guðmundur Andri Ástráðsson v. Iceland [GC], 2020

- **Law – Article 6 § 1 :**
- the *consequences* of the breaches of domestic law, notably whether Judge A.E.’s participation had deprived the applicant of the right to be tried by a “tribunal established by law”
- interpretation of the individual components
- its relationship with the other “institutional requirements” (those of independence and impartiality)

Tribunal

characterised by its judicial function and must satisfy a series of requirements:

- **independence**, of the executive,
- **impartiality**
- duration of its members' terms of office.
- composed of judges selected **on the basis of merit through a rigorous process** to ensure that the most qualified candidates – both in terms of technical competence and moral integrity – were appointed.
- The higher a tribunal was placed in the judicial hierarchy, the more demanding the applicable selection criteria should be.



“Established”

- “Having regard to its fundamental implications for the proper functioning and the legitimacy of the judiciary in a democratic State governed by the rule of law, the process of **appointing judges** necessarily constituted an inherent element of the concept of “establishment” of a court or tribunal “by law”.
- precedent of *Ilatovskiy v. Russia* ([6945/04](#), 9 July 2009).
- support in the **purpose** of the “established by law” requirement: reflecting the principle of the rule of law,
- it sought to protect the judiciary against unlawful external influence, from the executive in particular.
- The said requirement moreover encompassed any provision of domestic law including, in particular, provisions concerning the independence of the members of a court.
- It was thus evident that breaches of the law regulating the judicial appointment process might render the participation of the relevant judge in the examination of a case “irregular”.

“By law”/in accordance with the law

- No uniformity in practices of the MS
- The mere fact that the executive had decisive influence on appointments might not as such be considered to detract from it.
- the relevant domestic law on judicial appointments has to be couched in unequivocal terms, to the extent possible, so as **not to allow arbitrary interferences**, including by the executive.

Interrelationship with independence and impartiality

common purpose - upholding the fundamental principles of **the rule of law**



Independence referred, in this connection, to the necessary personal and institutional independence that was required for impartial decision making



set of institutional and operational arrangements – involving both a procedure by which judges can be appointed in a manner that ensures their independence and selection criteria based on merit –, which must provide safeguards against undue influence and/or unfettered discretion of the other state powers, both at the initial stage of the appointment of a judge and during the exercise of his or her duties.

Independence

- ✓ the manner of appointment of its members
- ✓ the duration of their term of office;
- ✓ the existence of guarantees against outside pressures;
- ✓ whether the body presents an appearance of independence.
- *Kleyn and Others v. the Netherlands [GC], 2003, § 190;*
Langborger v. Sweden, 1989, § 32



Impartiality

subjective test- personal conviction and behaviour of a particular judge/any personal prejudice or bias in a given case;

objective test - whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality

Micallef v. Malta [GC], 2009, §§ 93-101; Morice v. France [GC], 2015, §§ 73-78; Denisov v. Ukraine [GC], 2018, §§ 61-65)

“flagrant breach” test – 3 steps

1. a *manifest* breach of the domestic law, in the sense that the breach must be objectively and genuinely identifiable as such

Balance between national courts' interpretation as to whether there had been a breach of the domestic law and the Court's assessment- unless the breach was “flagrant” – *that is, unless the national courts' findings could be regarded as arbitrary or manifestly unreasonable.*

However, the absence of a manifest breach did not as such rule out the possibility of a violation of the right to a tribunal established by law. There might be circumstances where a judicial appointment procedure that was seemingly in compliance with the relevant domestic rules nevertheless **produced results that were incompatible with the object and purpose of that Convention right.**

2nd step

Assessment in the light of the object and purpose of the requirement of a “tribunal established by law”, **to ensure the ability of the judiciary to perform its duties free of undue interference and thereby to preserve the rule of law and the separation of powers.**

only those breaches that relate to the fundamental rules of the procedure for appointing judges – that is, breaches that affect **the essence of the right to a “tribunal established by law”** – were likely to result in a violation of that right (for instance, the appointment of a person as judge who had not fulfilled the relevant eligibility criteria – or breaches that might otherwise undermine the purpose and effect of the “established by law” requirement, as interpreted by the Court).

+ regard to the purpose of the law breached, that is, whether it sought to prevent any undue interference by the executive with the judiciary.

Accordingly, breaches **of a purely technical nature** that had no bearing on the legitimacy of the appointment process must be considered to fall below the relevant threshold.

3rd step

The review by national courts as to the legal consequences – in terms of an individual's Convention rights – of a breach of a domestic rule on judicial appointments

The review must be carried out based on the relevant Convention standards, adequately weighing in the balance the competing interests at stake.

a balance had to be struck to determine whether there was a pressing need – of a substantial and compelling character – justifying the departure from the principles of legal certainty and irremovability of judges

Where the domestic review had been Convention-compliant and the necessary conclusions had been drawn, the Court would need strong reasons to substitute its assessment for that of the national courts.

Application to the case

- 1. First step - findings of the Supreme Court of Iceland
- 2. Second step - grave breach of a fundamental rule of the national judicial appointment procedure, especially seen in the light of its main aim: namely, to limit the influence of the executive (by involving an independent Evaluation Committee) and thereby to strengthen the independence of the judiciary in Iceland.
 - *breaches committed by the Minister*, failure to explain why she had picked one candidate over another, as required under domestic law
 - Difference in the scores and points for judicial experience from the original list prepared by the Evaluation Committee
 - No explanations for subjective factors, such as “success” in career on how it was measured

Application to the case (2)

- allegations regarding the political connections between the Minister and the husband of the impugned judge could;
- the Minister - member of one of the political parties composing the majority in the coalition Government, by whose votes alone her proposal had been adopted in Parliament. This was sufficient to taint the legitimacy and transparency of the whole procedure
- ***shortcomings in the procedure before Parliament***
 - Failure to demand the Minister to provide objective reasons for her proposals,
 - Violations of the special voting rules,
 - Undermining of the supervisory role as a check against the exercise of undue executive discretion.
 - the applicant's belief that Parliament's decision had been driven primarily by party political considerations might not be considered to be unwarranted.

Application to the case (3)

- *3. review and redress of the allegations regarding the right to a “tribunal established by law” by the domestic courts*
- Failure of the Supreme Court to carry out a Convention-compliant assessment
- emphasis on the mere fact that that the appointments had become official
- focus on the question whether the irregularities had had any actual implications for Judge A.E.’s independence or impartiality, a question which had no direct bearing on the assessment of a separate issue regarding the “tribunal established by law” requirement.
- No response to any of the applicant’s very specific and highly pertinent arguments
- not clear from its judgment why the impugned procedural breaches had not been of such a nature as to compromise the lawfulness of the appointment of A.E. and, consequently, of her subsequent participation in the applicant’s case.
- As to the principle of “legal certainty” - the appointment of A.E. had been contested immediately after the finalisation of the relevant procedure and the impugned irregularities had been established even before they had taken office.

Application to the case (4)

- **PRACTICE of restraint displayed by the Supreme Court**
- failure to strike the right balance between preserving the principle of legal certainty on the one hand, and upholding respect for the law on the other
- it undermined the significant role played by the judiciary in maintaining the checks and balances inherent in the separation of powers.
- having regard to the significance and the implications of the breaches in question, and to the fundamentally important role played by the judiciary in a democratic State governed by the rule of law, the effects of such breaches might not justifiably be limited to the individual candidates who had been wronged by non-appointment, but necessarily concerned the general public.
- **VIOLATION of the right to a “tribunal established by law”**, on account of the participation in his trial of a judge whose appointment procedure had been vitiated by grave irregularities

See also

- Eminağaoğlu v. Turkey, 9 March 2021
- Besnik Cani v. Albania, 4 October 2022
- Dolińska-Ficek and Ozimek v. Poland, 8 November 2021
- Such merit-based selection not only ensures the technical capacity of a judicial body to deliver justice as a “tribunal”, but it is also crucial in terms of ensuring public confidence in the judiciary and serves as a supplementary guarantee of the personal independence of the judges

Polish saga

- **Xero Flor w Polsce sp. z o.o. v. Poland, 2021**
 - “grave irregularities concerning a constitutional court
 - executive and legislative powers had had an undue influence on the procedure
- **Reczkowicz v. Poland, 22 July 2021**
 - procedure for appointing judges in the context of a reorganisation of the judicial system had been subject to undue influence on the part of the legislative and executive powers, and that this was a fundamental irregularity adversely affecting the whole process and compromising the legitimacy of the relevant formation of the Supreme Court

Tuleya v. Poland, 2023

- **Facts:** lifting of judge's immunity from prosecution + suspension from judicial duties by Supreme Court's Disciplinary Chamber prompted by his criticisms publicly expressed in his professional capacity
- **Violation of Article 6** - Inherently deficient judicial appointment procedure to Disciplinary Chamber by reformed NCJ which lacked independence from legislature and executive
- Violation of Article 8 - Unforeseeable interpretation of the domestic law by a body not constituting an "independent and impartial tribunal established by law"
- Violation of Article 10 - Interferences not "prescribed by law" and not pursuing any legitimate aims, lack of procedural safeguards, lack of independence of the deciding body, strategy aimed at intimidating the applicant

...and many other... Lorenzo Bragado and Others v. Spain, 22 June 2023

- Appointment process for membership of the General Council of the Judiciary - governing body of the judiciary
- In 2018, the GCJ composition came up for renewal and the applicants, at the time Spanish judges, were candidates.
- During the following years, The Parliament has still not completed the appointments process.
- In 2020, the applicant judges lodged an ***amparo appeal*** with the Constitutional Court complaining about the Parliament's failure to follow through with the process for renewing the composition of the GCJ- rejected as out of time.
- **Violation of Article 6** - as the Constitutional Court had not explained the rationale behind the dates chosen as the starting point for the three-month time-limit of the amparo appeal.
- The applicants could therefore not have foreseen the way in which the relevant law on time-limits had been interpreted and applied in their case.
- That had impaired the very essence of their right of access to a court, which, in the circumstances of the case, was also closely connected to ensuring respect for the legal procedure for renewing the composition of the governing body of the judiciary and to the proper functioning of the justice system.

European Union integration through the rule of law

- ‘Integration through the rule of law’ defines what the European Union today stands for (Koen Lenaerts, president of the Court of Justice of the European Union (CJEU))
- Judgment of the Court of 23 April 1986, Parti écologiste "Les Verts" v European Parliament, Case 294/83,
- *European judicial space* – ECJ + national judges
- Venues - infringement procedures initiated by the Commission and preliminary references initiated by domestic courts



Fire starter...

- Judgement of 27 February 2018, Associação Sindical dos Juizes Portugueses, C-64/16, Reduction of remuneration in the national public administration — Budgetary austerity measures
- Judicial independence and rule of law as part of the ‘core’ values of the EU legal order – Article 19(1) TEU and Article 2 TEU
- Every Member State must ensure that the courts within its judicial system that may act in the “fields covered by EU law”, meet essential requirements (paras 36 and 37)

Appointment of judges



- **Judgment of 2 March 2021, A.B. and Others v Krajowa Rada Sądownictwa and Others** (Appoint of judges to the Supreme Court), C-824/18
- **Lack of judicial review** against resolution of the KHS (National Council of the Judiciary) proposing candidates for appointment as judges;
- Findings: absence of legal remedy in the context of a process of appointment to judicial positions of a national supreme court not necessarily contrary to Article 19(1) TEU;
- systemic doubts as to the independence and impartiality of the judges appointed at the end of that process;
- No possibilities for obtaining judicial remedies as the previous are suddenly eliminated
- the independence of a body such as the KRS from the legislature and executive is open to doubt

Appointment of judges (2)

- **Judgement of 29 March 2020, Getin Noble (C-132/20)**

Issue: polish judges initially appointed by the executive when Poland was still a non-democratic state and reappointment after a selection by a body (previous KRS), the composition of which was later declared unconstitutional, and/or following a procedure that was neither transparent nor public nor open to challenge;

Key findings: The initial appointment by the executive of an undemocratic regime is not sufficient, in itself, to give rise to doubts about the current independence of the judges in question;

- Not every irregularity in the appointment is such as to cast doubt about the independence of a judge;
- The involvement of the previous KRS not raising such doubt=unconstitutional aspects were not related to lack of independence vis-à-vis the executive (contrary to current KRS).

Appointment of judges (3)

- **Judgement of 20 April 2021, Repubblica, C-896/19**
- Power of the Prime Minister and Involvement of a judicial appointments committee
- Appointment of members of the judiciary by the executive is permitted as long as an independent body is involved in the assessment of candidates

Judgement of 20 April 2021, Repubblika, C-896/19

- the exercise of PM'power is circumscribed by the requirements of professional experience of the candidates, laid down in the Constitution
- if PM decides to submit to the President the appointment of a candidate not put forward by the Judicial Appointments Committee, he is required to communicate the reasons to the legislature
- No legitimate doubts concerning the independence of the candidates selected if that power is exercised only in exceptional circumstances and supported by reasons

Promotion of judges

- Judgement of 7 September 2023, Asociația “Forumul Judecătorilor din România” and YN v Consiliul Superior al Magistraturii, C-216/21
- Decision 2006/928/EC – Mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption – Article 2 TEU – Second subparagraph of Article 19(1) TEU – Rule of law – Charter of Fundamental Rights of the European Union – Article 47 – Independence of judges – National legislation altering the scheme for the promotion of judges
- Issue: whether nomination of judges to a superior court can depend on an assessment of their work by a commission composed of judges from that court

Retirement age and Preliminary ruling

- Judgement of 21 December 2023, Krajowa Rada Sądownictwa (Continued holding of a judicial office) (C-718/21)
- The preliminary ruling request is submitted by the adjudicating panel of the Extraordinary Review and Public Affairs Chamber of the Supreme Court
- It does not constitute a “court or tribunal” for the purposes of EU law if the appointment of its members was unlawful
- Inadmissibility of PR

Access to Court- Baka v. Hungary, 23 June 2016 (GC)

- **Facts** - premature termination of the mandate of the President of the Hungarian Supreme Court, following his criticism of legislative reforms and the fact that he was unable to challenge that decision before a court. By the entry into force of the Fundamental Law (the new Constitution), Kúria, the highest court in Hungary was created and replaced the Supreme Court.
- Violation of Article 6 § 1 of the Convention, access to court, as the premature termination of the applicant's term of office had not been reviewed by an ordinary tribunal or by another body exercising judicial powers, nor was it open to review.
- procedural fairness in cases involving the removal or dismissal of judges, including intervention by an authority which was independent of the executive and legislative powers in respect of every decision affecting the termination of a judge's office.



Access to Court-Kövesi v. Romania, 5 May 2020

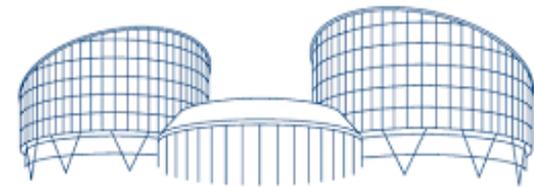
Premature termination of chief prosecutor's mandate following public criticism of legislative reforms

Limited possibility to challenge before the administrative courts the president's removal decree, only to the lawfulness *stricto sensu* of the decree, limits set by the Constitutional Court

a formal review could not have been an effective remedy for the core of the applicant's complaint – the fact that he removal had been an illegal disciplinary sanction triggered by her opinions expressed publicly in the context of legislative reforms

No judicial review of the appropriateness of the reasons, the relevance of the alleged facts on which the removal had been based or the fulfilment of the legal conditions for its validity

Violation of Article 6



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Access to court- Bilgen v. Turkey 9 March 2021

- Transfer of a senior judge at the Ankara Regional Administrative Court without his consent to another court in a lower judicial district by a decree of the High Council of Judges and Prosecutors that had not been subject to judicial review.
- Violation of Article 6 § 1 – the lack of access to a court, for an important career matter, had not pursued a legitimate aim.
- the importance of separation of powers and the independence of the judiciary.
- the international concern about the improper use of the transfer mechanism against judges in Turkey.
- what was at stake was **trust in the judiciary and personal independence of judges.**

Access to Court – Grzęda v. Poland

15 March 2022 (GC)

- removal in the context of judicial reforms in Poland of the applicant, a judge, from the National Council of the Judiciary (NCJ) before his term had ended and his inability to get judicial review of that decision. His removal had taken place.

Violation of Article 6 § 1 - lack of judicial review

- Importance of the context of the case – the weakening of judicial independence and adherence to rule-of-law standards brought about by Government reforms.
- successive judicial reforms had been aimed at weakening judicial independence, starting with the grave irregularities in the election of judges of the Constitutional Court in December 2015, then, in particular, the remodelling of the NCJ and the setting up of new chambers of the Supreme Court, while extending the Minister of Justice's control over the courts and increasing his role in matters of judicial discipline.
- The Court also referred to its judgments related to the reorganisation of the Polish judicial system, as well as the cases decided by the Court of Justice of the European Union and the relevant rulings of the Supreme Court and Supreme Administrative Court of Poland.
- It held that as a result of these successive reforms, the judiciary had been exposed to interference by the executive and legislature and its independence had been substantially weakened.

Access to court - Żurek v. Poland, 16 June 2022

- Removal of the the applicant - judge, spokesperson for the National Council of the Judiciary (NCJ), one of the main critics of the changes to the judiciary initiated by the legislative and executive branches of the new Government which came to power in 2015.
- No procedural possibility, judicial or otherwise, to contest the premature termination of his mandate.
- Violation of Article 6 § 1 - the lack of judicial review of the decision to remove the applicant from the NCJ.
- Intimidating effect of the accumulation of measures taken against the applicant – including his dismissal as spokesperson of a regional court, the audit of his financial declarations and the inspection of his judicial work because of the views that he had expressed in defence of the rule of law and judicial independence
- overall context of successive judicial reforms, which had resulted in the weakening of judicial independence and what has widely been described as the rule-of-law crisis in Poland.

Access to court -Pająk and Others v. Poland, 24 October 2023

- Judges complaining about legislative amendments lowering the retirement age for judges from 67 to 60 for women, and to 65 for men
- The continuation of a judge's duties after reaching retirement age is conditioned upon authorisation by the Minister of Justice and by the National Council of the Judiciary ("the NCJ").
- the decisions taken in respect of each applicant by the Minister of Justice and by the NCJ had constituted arbitrary and unlawful interference, in the sphere of judicial independence and protection from removal from judicial office, on the part of the representative of executive authority and the body subordinated to that authority.
- Violation of Article 6 access to court – lack of any review



L'Europe...sans les juges

- *L'Europe des Juges*
- Robert Lecourt
- Judge - European Court of Justice 1962- 1976
- President of the Court 1967 - 1976
- Rapporteur in Costa v. ENEL case 1964

Tools

ECHR Guides- https://ks.echr.coe.int/documents/d/echr-ks/guide_art_6_civil_eng
Factsheets –

https://www.echr.coe.int/documents/d/echr/FS_Independence_justice_ENG

<https://ks.echr.coe.int/documents/d/echr-ks/protection-of-judges>

FRA, *Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level – Guidance*

https://fra.europa.eu/sites/default/files/fra_uploads/fra-ecthr-2016-handbook-on-access-to-justice_en.pdf

https://ejtn.eu/wp-content/uploads/2022/12/2019-056-RoL-Manual-170x240-WEB_FINAL.pdf

K. Lenaerts, ‘Upholding the Rule of Law through Judicial Dialogue’, 38 *Yearbook of European Law* (2019)

S. Adam, ‘Judicial Independence as a Functional and Constitutional Instrument for Upholding the Rule of Law in the European Union’, in P. Craig et al., *Rule of Law in Europe: Perspectives from Practitioners and Academics* (EJTN 2019) p. 35.

Reports on Rule of law

https://dq4n3btxmr8c9.cloudfront.net/files/oj7hht/Liberties_Rule_Of_Law_Report_2024_FULL.pdf

Thank you for your attention!

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