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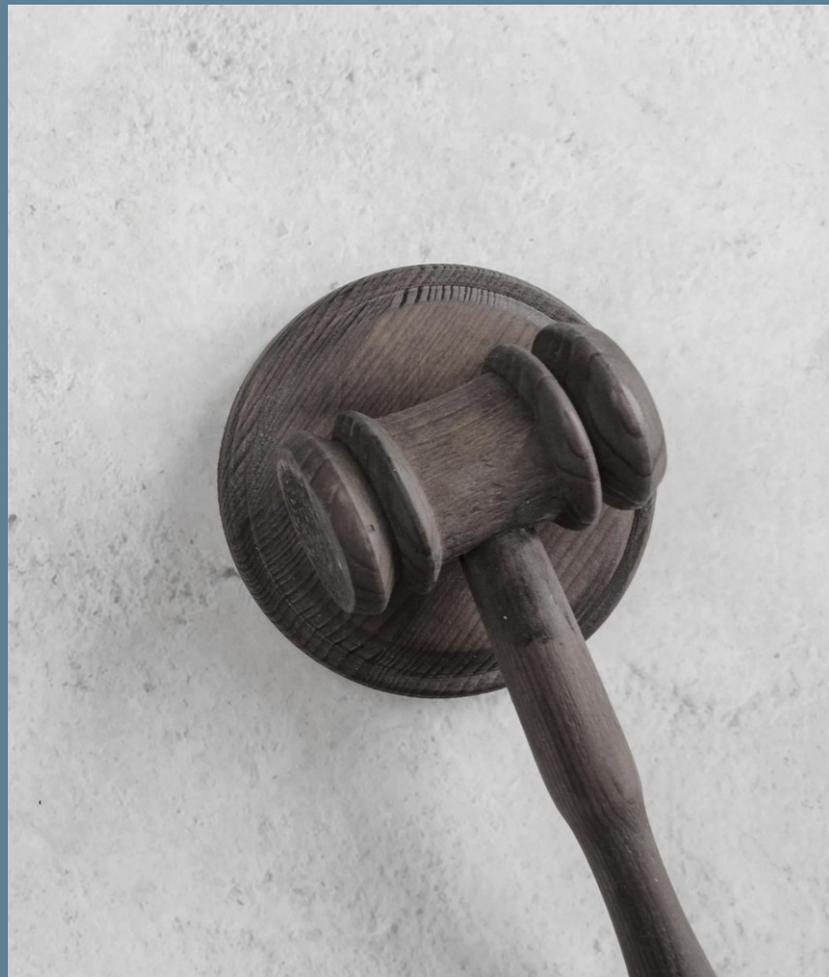
THE RULE OF LAW:

- WHY IT IS IMPORTANT FOR PRIVATE LAWYERS
- CASE-LAW OF THE CJEU

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BY THE END OF THIS SESSION YOU SHOULD

- Know how to **define** the RoL
- Learn about the **instruments** where it is defined
- Know about the **case-law of the CJEU** on the RoL
- Be able to **identify problems** related with the RoL

01. SETTING THE SCENE: WHY THE ROL IS IMPORTANT FOR PRIVATE LAWYERS

- CCBE Recommendations to uphold the RoL and fundamental rights (2019)



**I. INDEPENDENT LAWYERS ENSURE CITIZENS'
RIGHT TO EFFECTIVE JUDICIAL REVIEW OF
LEGISLATION AND GOVERNMENT DECISIONS**

**2. INDEPENDENT LAWYERS GUARANTEE
RESPECT TO PROCEDURAL SAFEGUARDS**

**3. INDEPENDENT LAWYERS PROMOTE
RESPECT TO EVERYONE'S FUNDAMENTAL
RIGHT TO PRIVACY AND CONFIDENTIALITY**

02. HOW TO DEFINE AND HOW TO MEASURE THE APPLICATION OF THE ROL

- Council of Europe
- European Union
- Member States



WHAT IS THE RULE OF LAW?

1. One of the pillars of the CoE and one of the values of the EU: art. 12 and art. 19 TEU
2. Prerequisite of the accession to the EU: art. 29 TEU
3. Cornerstone of the EU legal order

HOW CAN WE DEFINE THE THE RULE OF LAW?

1. Common constitutional traditions of the MS
2. Work of the European Commission for Democracy through Law ("Venice Commission")
3. Case-Law of the ECtHR and the CJEU
4. Regulation 2020/2092

VENICE COMMISSION: THE ROL CHECKLIST



LEGALITY



LEGAL CERTAINTY



**PREVENTION OF ABUSE
(MISUSE) OF POWERS**



**EQUALITY
NON DISCRIMINATION**



**EFFECTIVE JUDICIAL
PROTECTION**



LEGALITY

- Supremacy of law
- Compliance with the law
- Exceptions in the emergency
- Duty to implement the law

LEGAL CERTAINTY

- Accessibility to legislation
- Accessibility of court decisions
- Foreseeability of the laws
- Stability and consistency of law
- Legitimate expectations
- Non retroactivity
- “Nulla poena sine lege”
- “Res iudicata”



PREVENTION OF THE ABUSE OF POWERS

- Unfair, unreasonable, irrational or oppressive decisions violate the RoL
- Indication of the scope of executive discretion
- Judicial control or independent review
- Obligation to give reasons





EQUALITY AND NON-DISCRIMINATION

- Equality in law
- Equality before the law

ACCESS TO JUSTICE

- Independence of the Judiciary
- Independence of individual judges
- Impartiality of the Judiciary
- Autonomy of the prosecution services
- Fair trial



The Venice Commission has stated that “the concept of emergency rule is founded on the assumption that in certain situations of political, military and economic emergency, the system of limitations of constitutional government has to give way before the increased power of the executive. However, **even in a state of public emergency the fundamental principle of the rule of law must prevail.**”

EU LAW DEFINITION: REGULATION 2020/2092

‘The rule of law’ refers to the Union value enshrined in Article 2 TEU. It includes 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, also as regards fundamental rights; **separation of powers**; and **non-discrimination and equality before the law**.

The rule of law shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU.

MEASUREMENT OF THE RULE OF LAW

ENCJ

Reports on
independence &
accountability

WORLD ECONOMIC FORUM

Global
Competitiveness
Index

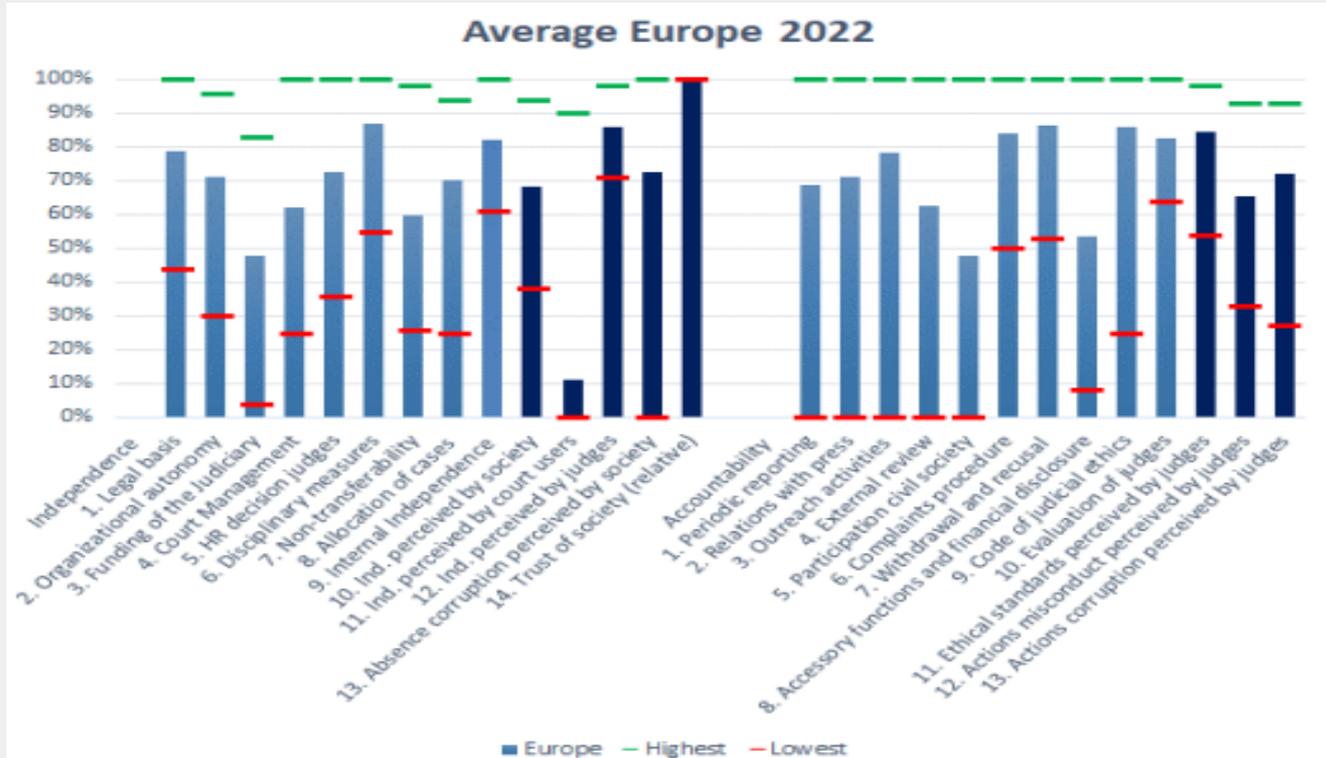
EUROPEAN COMMISSION

Eurobarometer

WORLD JUSTICE PROJECT

Rule of Law Index

ENCJ: INDEPENDENCE AND ACCOUNTABILITY



WEF: INSTITUTIONAL INDICATORS

Judicial independence: Response to the question “In your country, how independent is the judicial system from influences of the government, individuals, or companies?” [1 = not independent at all; 7 = entirely independent].

Corruption perception index: This indicator measures perceptions of corruption in the public sector

Egalitarian democracy index: This indicator measures the equality of freedoms and rights of individuals across all social groups, equality of distribution of resources across all social groups, equality of access to power across all social groups and individuals and level of electoral democracy.

EUROPEAN COMMISSION

EUROBAROMETER ON THE ROL 2019



Rule of Law in the EU Perceptions of Europeans

★ What do Europeans say about the respect of the rule of law in their country?

Europeans say that respect of the rule of law is important and note that improvement is needed in their countries



at least 86% say that the principles⁽¹⁾ of the rule of law are important



at least 80% say that the respect of principles⁽¹⁾ of the rule of law needs improvement in their country

★ What do Europeans say about the respect of the rule of law in other EU Member States?



of Europeans say that it is important for all EU Member States to respect the core values of the EU including fundamental rights, rule of law and democracy



say that it is important to be able to trust that authorities in other Member States take decisions based on the law



say it is important to be able to access an independent and impartial court in other Member States



say it is important for media and civil society to operate freely and without pressure in other Member States

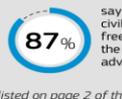


of Europeans do not feel well informed about EU's fundamental values

Media and civil society are considered key players in ensuring the respect of the rule of law



say it is important that media and journalists can criticise the government without risk of intimidation



say it is important that civil society can operate freely and criticise the government without adverse consequences



for these two aspects, 77% say that improvement is needed in their country

⁽¹⁾The full list of principles of rule of law is listed on page 2 of this infographic

WORLD JUSTICE PROJECT: FACTORS OF THE ROL

- Constraints on Government powers
- Absence of corruption
- Open Government
- Fundamental rights
- Order and security
- Regulatory enforcement
- Civil Justice
- Criminal Justice

03.

**THE RULE OF LAW IN THE RECENT CASE-LAW
OF THE CJEU AND THE ECTHR**

CJEU: LEGALITY



Take into account similar applications (28.6.18, C-564/16P)



Need to observe legal limits (17.1.19, C-310/16)



Need for a clear definition of offences and penalties (20.12.17, C-102/16)



A person may not rely to his benefit on an unlawful act committed in favour of another (30.5.18; C-390/17 P)



Fiscal legality (8.5.19, C-566/17)

CJEU: LEGAL CERTAINTY



Know precisely the
extent of obligations
(20.12.17, C-516/16)



Need for clear
rules on
retroactivity
(14.5.20, C-15/19)



Limit to retroactivity of the
interpretation given by CJEU:
good faith and risk of serious
difficulties (23.4.20, C-401/18)

CJEU: LEGAL CERTAINTY



Limit to the obligation to interpret national law in conformity with EU Law (5.9.19, C-331/18)



Limit to the discretion of MS in implementing EU Law (19.12.19, C-386/18)



Setting of time limits for bringing proceedings (7.11.19, C-280/18)

Clarity, predictability, accessibility
(19.12.19, C-752/18)

Protection of the individual against
arbitrariness (12.2.19,
C-492/18 PPU)

The exercise
outside the legal
framework of any
competence or
power is similar to
an abuse of
power (20.9.16, C-
105/15 P to
C-109/15 P)

Linked to
transparency
(2.5.19, C-309/18)
and legal
certainty and
equality (29.7.19,
C-556/17)

The diagram features three concentric, semi-circular arcs in a dark blue color. The central text is positioned between the inner and middle arcs. Three grey circular markers are placed on the outermost arc, with lines connecting them to the surrounding text blocks. The text is arranged around the arcs: on the left, a vertical block; at the top, a horizontal block; on the right, a vertical block; and at the bottom, a horizontal block.

**CJEU
PREVENTION OF
ABUSE OF POWERS**

CJEU: EQUALITY AND NON-DISCRIMINATION

- Uniform interpretation of the law (7.11.19, C-555/18)
- Transparency as its corollary (4.4.19, C-699/17)
- Comparable situations must not be treated differently and different situations must not be treated in the same way, unless such treatment is objectively justified (3.12.19, C-482/17)
- Obligation of national courts to set aside discriminatory provisions without having to request or wait its prior removal by the legislature (8.5.19, C-396/17)

CJEU: JUDICIAL INDEPENDENCE



Receipt by judges of a level of remuneration commensurate with the importance of the functions they carry out (27.2.18, C-64/16 and 7.2.19, C-49/18)



Judicial appointments. Powers of the Prime Minister (20.4.21, C-896/19)

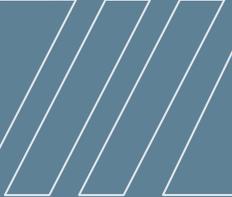
“Article 19 TEU, which gives concrete expression to the value of the rule of law affirmed in Article 2 TEU, entrusts the responsibility for ensuring the full application of EU law in all Member States and judicial protection of the rights of individuals under that law to national courts and tribunals and to the Court of Justice “

JUDGMENT OF 27 FEBRUARY 2018, ASSOCIAÇÃO SINDICAL DOS JUÍZES PORTUGUESES, C-64/16, EU:C:2018:117, PARAGRAPH 32

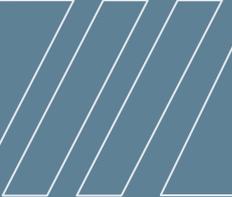
INDEPENDENCE OF THE JUDICIARY IN POLAND



Independence of the Supreme Court
(24.6.19, COM/PL, C-619/18)



Independence of ordinary courts
(5.11.19, COM/PL C-192/18)



Disciplinary Chamber of the SC
(19.11.19, C-585/18, C-624/18 and
C-625/18)

JUDICIAL COOPERATION

Limitations to the principles of mutual recognition and mutual trust
5.4.16, Aranyosi and Căldăraru, C-404/15 and C-659/15 PPU

Systemic or generalized deficiencies in the justice system
25.7.18; Minister of Justice, C-216/28 PPU

De facto suspension of the implementation of the EAW mechanism?
17.12.29, L. and P., C-354/20 PPU and C-412/20 PPU

AUTONOMY OF THE PROSECUTORIAL SERVICES

Prosecutor
General of
Lithuania
(27.5.19, C-
509/18)

Public
Prosecutor's
Offices in **Lübeck
and Zwickau**
(27.5.19, C-508/18
and C-82/19)

Public Prosecutor's
Office in **Lyon and
Tours** (12.12.19, C-
566/19 PPU and
626/19 PPU)

Public
Prosecutor's
Office in
Sweden
(12.12.19, C-
625/19 PPU)

Public
Prosecutor's
Office in
Brussels
(12.12.19, C-
627/19 PPU)

ECTHR: THE FUNDAMENTAL RIGHTS' APPROACH

- The right to a fair hearing before a tribunal as guaranteed by Article 6.1 must be interpreted in the light of the Preamble to the Convention, which declares the **rule of law to be part of the common heritage of the Contracting States** (Guðmundur Andri Ástráðsson v. Iceland and Sabeh El Leil v. France)
- Even in the context of a **state of emergency**, the fundamental principle of the rule of law must prevail (Pişkin v. Turkey).
- The duty of the State to **provide adequate compensation for wrongs** that are attributable to the authorities and have been duly established by the courts is of crucial importance in a society governed by the rule of law (Scordino v. Italy).
- **Principle of legal certainty** constitutes one of the basic elements of the rule of law and (Guðmundur Andri Ástráðsson v. Iceland) and presupposes, in general, respect for the principle of res judicata
- **Arbitrariness** amounts to the negation of the principle of the rule of law (Al-Dulimi and Montana Management Inc. v. Switzerland).

ECTHR

- **Independence:** the unlawful appointment of a judge in bench means that the case was not heard by a tribunal established by law (Xero Flor v. Poland)
- **Impartiality** can be subjective (regard must be had to the personal conviction and behaviour of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case) and objective (by ascertaining 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 and Nicholas v. Cyprus)
- In **disciplinary proceedings** against members of the judiciary, the fact that the judges hearing the case are themselves still subject to a set of disciplinary rules is not in itself a sufficient basis for finding a breach of the requirements of impartiality (Ramos Nunes de Carvalho e Sá v. Portugal).

SOME FINAL THOUGHTS

- New challenges in the defence of the RoL
- Revisiting the principles on which the RoL is built
- Active role of legal practitioners

THANK YOU!

Do you have any questions?
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