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THE RULE OF LAW IN THE CORE OF THE EUROPEAN UNION

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Why is the rule of law important for private lawyers?

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Examples from Hungary

- Key concept: „**power acting within the constraints of law**" → but: what about quality of law and law making? → **protection against arbitrariness**
- **Special legal order** (COVID19 and war in Ukraine) → **abuse of special powers** → (i) **Government Decree 128/2020**. (IV. 17.) removing the management of a company that had an ongoing legal dispute with the government and assigning ; (ii) **Government Decree 532/2020** (XI. 28.) granting the Interior Minister veto powers over foreign investments that may result in dominant influence in certain areas of business used for preventing takeover of Aegon by the Vienna Insurance Group.
- Removing meaningful judicial control: CJEU's **Torubarov case** C–556/17, Opinion of AG Bobek: „In Czech judicial slang, but perhaps not just there, 'judicial' or 'procedural ping-pong' refers to the undesirable situation in which a case is repeatedly shuttled back and forth between courts […], or, in the context of administrative justice, between the courts and administrative authorities."
- ‚Overcodification': e.g. after state losing to students in the Gyöngyöspata Roma segregation case

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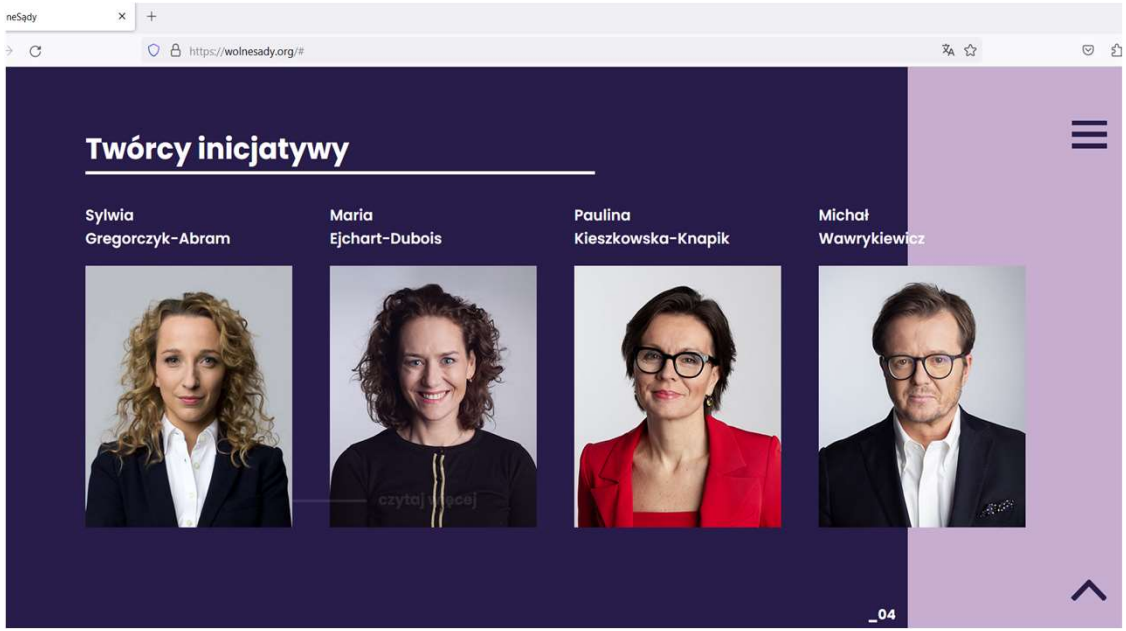
Liberal democracies versus illiberal regimes

- Fundamental differences for lawyers in liberal democracies and illiberal/hybrid regimes
- Legalistic nature of illiberal regimes → legal defeats are painful → **capture of law** (quicker, see above) and **eventually courts** (slower)
- Forum for remedying breaches: **protection of functioning institutions** against capture as long as feasible
- **Moving outside the domestic legal system** → (i) to protect the institutions and (ii) to protect the clients once the institutions cannot protect them any more
- **Moving outside the legal system altogether**: short films by the **Free Courts initiative**, coming mainly from commercial lawyers



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Lawyers turn to romcoms in fight for rule of law in Poland

Instead of drafting legal papers, award-winning group make short films intended to explain assault on judiciary

Stills from some of the short films made by Poland's Free Courts Foundation. Photograph: Wolne Sądy

Wawrykiewicz and Gregorczyk-Abram at the European court of justice, 2019. Photograph: Wolne Sądy

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Development of the concept of the rule of law in the EU acquis

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Development of the concept I

- Not in the original treaties
- **Les Verts judgment** (Case 294/83, 1986), § 23: „It must first be emphasized in this regard that the European Economic Community is a **community 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." (Paraphrased by Lenaerts as „neither EU institutions nor the Member States are above the law")
- **Maastricht Treaty** (1992), Preamble: MSs **confirm their attachment** to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of **the rule of law**.
- **Amsterdam Treaty** (1997), Amended Article F: **The Union is founded on the principles** of liberty, democracy, respect for human rights and fundamental freedoms, and **the rule of law**, principles which are **common to the Member States**.
- **Lisbon Treaty** (2007), 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.

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Development of the concept II

- **CJEU Opinion 2/13 on the Accession of the EU to the ECHR**, § 168: the EU's „legal structure is based on the fundamental premiss that each Member State shares with all the other Member States […] **a set of common values on which the EU is founded, as stated in Article 2 TEU**. **That premiss implies and justifies the existence of mutual trust** between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected → Respect for the common values is a precondition for mutual trust holding the Union together
- 2010: **Rule of law backsliding starts** in HU → development of the **RoL Toolbox** from 2012 on → **Need for definition** (typical RoL issue: foreseeability requires a standard against which to measure) → consecutive attempts.
- **Communication from the Commission to the EP and the Council: A new EU Framework to strengthen the Rule of Law** (COM/2014/0158 final): the **precise content** of the principles and standards stemming from the rule of law **may vary** at national level, depending on each Member State's constitutional system. Nevertheless [certain authorities, including the CJEU, the ECtHR and the VC] **provide a non-exhaustive list of these principles** and hence **define the core meaning** of the rule of law as a common value of the EU in accordance with Article 2 TEU.
- **Communication from the Commission to the EP and the Council: Further strengthening the Rule of Law within the Union. State of play and possible next steps** (COM(2019) 163 final): Under the rule of law, **all public powers always act within the constraints set out by law**, in accordance with the **values of democracy and fundamental rights**, and under the control of **independent and impartial courts**. The rule of law includes, among others, principles such as **legality**, implying a transparent, accountable, democratic and pluralistic process for enacting laws; **legal certainty**; **prohibiting the arbitrary exercise of executive power**; **effective judicial protection** by **independent and impartial courts**, effective judicial review including respect for fundamental rights; **separation of powers**; and **equality before the law**.

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Development of the concept III

- **REGULATION (EU, Euratom) 2020/2092** of the European Parliament and of the Council on a general regime of **conditionality for the protection of the Union budget** (Dec 2020): **enforceable and detailed definition**
- Article 2(a): '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
- Article 3: examples, including (i) endangering the **independence of the judiciary**; (ii) failing to prevent, correct or sanction **arbitrary or unlawful decisions by public authorities**, (iii) **limiting the availability and effectiveness of legal remedies**, including through restrictive procedural rules and lack of implementation of judgments, or limiting the effective investigation, prosecution or sanctioning of breaches of law.
- Challenged by Hungary and Poland before the CJEU (March 2021) → ironically, partly on the basis of the lack of „legal certainty" („the concept of 'the rule of law' does not lend itself to a precise definition", as a result, „the Commission's application of that regulation may become so unforeseeable as to be incompatible with the principle of legal certainty, which is itself one aspect of the rule of law")

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Development of the concept IV

- **Judgment C-156/21**, Action for annulment under Article 263 TFEU, brought by Hungary, and supported by Poland:

- Article 2 TEU is **not merely a statement of policy guidelines or intentions**, but contains values which are an integral part of the very identity of the European Union as a common legal order, **values which are given concrete expression in principles containing legally binding obligations for the Member States**.
- Although MSs enjoy a **certain degree of discretion** in implementing the principles of the rule of law, it in **no way follows** that that obligation as to **the result to be achieved may vary from one Member State to another**.
- The constitutive elements of the rule of law have been "the subject of **extensive case-law of the Court**". **Those principles** of the rule of law, as developed in the case-law of the Court on the basis of the EU Treaties, are thus **recognised and specified** in the legal order of the European Union
- Recitals also contain ample guidance, so „Hungary **cannot maintain** that (i) the Member States are **not in a position to determine with sufficient precision the essential content** and the requirements flowing from each **of the principles listed in Article 2(a)** of the contested regulation **nor** (ii) **that those principles are of a purely political nature** and (iii) that an assessment of whether they have been respected cannot be the subject of a **strictly legal analysis**"

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Recent case law of the CJEU regarding the rule of law

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Rule of law = judicial independence?

- RoL: in relation to EU institutions → in different contexts (see **Les Verts** above, or the **Kadi** judgment) BUT in relation to MSs → so far only in the context of judicial independence
- **Original jurisprudence** on judicial independence : mainly in relation to what is a „court or tribunal" for the purposes of preliminary references → whether the body (i) is established by law, (ii) permanent, (iii) its jurisdiction is compulsory, (iv) its procedure is *inter partes*, (v) applies rules of law and (vi) it is independent and impartial.
- **Case C-506/04 (Wilson)**: concept of **independence analysed in detail** → three aspects:
  - (i) The concept of independence, which is inherent in the task of adjudication, involves primarily an authority acting as a third party in relation to the authority which adopted the contested decision;
  - (ii) External aspect „requires […] that the body is **protected against external intervention or pressure** liable to jeopardise the independent judgment of its members […].
  - (iii) Internal aspect „is **linked to impartiality** and seeks to ensure **a level playing field for the parties** to the proceedings […]. That aspect requires **objectivity** […] and the **absence of any interest in the outcome** of the proceedings apart from the strict application of the rule of law."
  - All these aspects can be guaranteed by rules regarding „the composition of the body and the appointment, length of service and the grounds for abstention, rejection and dismissal of its members, in order to **dismiss any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it**. (Conclusion: members of the remedial forum are competitors, so no sufficient guarantee of impartiality)

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Connection of RoL to judicial independence – the law

- 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.
- Article 4(3) TEU: Pursuant to the principle of sincere cooperation […t]he Member States shall take any appropriate measure […] to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.
- Article 19(1) TEU: […] Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.
- Article 47 CFR: 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.
- Article 51 CFR: (1) The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union […] and to the Member States only when they are implementing Union law. […]
  (2) The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

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Connection of RoL to judicial independence – the questions

- Is Article 2 TEU justiciable, i.e. does it create directly applicable obligations for MSs, and does the CJEU has jurisdiction to enforce those obligations?
- What is the relation between Articles 2 and 19 TEU (in light of the fact that effective legal protection is an element of the rule of law)?
- The organisation of justice in the Member States falls within the competence of the Member States themselves: does this mean that questions of judicial independence connected to the organisation of the justice system fall under the CJEU's jurisdiction only when the concerned courts implement/apply Union law?
- Is there a difference between the scope of Article 19(1) TEU (Member States shall provide remedies sufficient to ensure effective legal protection **in the fields covered by Union law**) and Article 47 CFR in light of Article 51(1) CFR (the provisions of this Charter are addressed to the Member States only when **they are implementing Union law**)?

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Connection of RoL to judicial independence – the answers

- Seminal judgment: **Case C-64/16 Associação Sindical dos Juízes Portugueses (Portuguese Judges case)**, 2018:
- Article 2 TEU is justiciable through Article 19 TEU: „**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**" → mutual amplification concept (*Spieker*): Art. 19 is sufficiently specific, but needs some anchoring in Union law („in the fields covered by Union law"), Art. 2, which is not sufficiently specific and precise to be applied in a self-standing manner, provides this anchoring.
- Scope of Article 19 TEU is wider than that of Art. 47 CFR based on Art. 51: „fields covered by Union law" versus „ when they are implementing Union law" (BUT: interpretation of when protection is effective is informed by Art. 47 CFR: „In order for that protection to be ensured, maintaining such a court or tribunal's independence is essential, as confirmed by […] **Article 47** […], which refers to the **access to an 'independent' tribunal as one of the requirements linked to the fundamental right to an effective remedy**." Also see: Repubblika judgment)
- Mutual trust requires respect for common values → RoL is one of those (Art. 2 TEU) → effective legal protection in the fields covered by EU law is a core element of the RoL → Art. 19 TEU does not only require such protection, but also entrusts this responsibility to national courts in addition to the CJEU (i.e. national courts are also EU courts) → MSs are obliged by the principle of sincere cooperation (Article 4(3) TEU) to make sure that domestic courts can fulfill this role → for protection to be effective, these bodies must be independent (as confirmed by Art. 47 CFR) → and not only if/when they actually implement EU law (c.f. Art. 51 CFR), the mere potentiality of having to deal with EU law suffices (a not independent judge/court cannot become suddenly independent when dealing with an EU law issues) („every Member State must ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by that law, meet the requirements of effective judicial protection").

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Post „Portuguese judges" jurisprudence I

- Ample case law following Case C-64/16: four **infringement procedures** regarding the attacks against the independence of the Polish judiciary → **C-619/18**, June 2019; **C-192/18**, Nov. 2019; **C-791/19**, July 2021; **C-204/21**, June 2023; and numerous cases based on preliminary references (Poland, Romania, Germany, Malta, Hungary – altogether close to 30 judgments). Examples for important conclusions include the following:
- **Applicability of Article 19 TEU confirmed: Commission v. Poland III.** (C-791/19) → Poland's defence that „disciplinary cases conducted on the basis of the procedural provisions challenged by the Commission are of a purely internal nature and […] in defining those procedures, the Polish authorities have not regulated fields covered by Union law". CJEU: the concerned courts „**may be called upon to rule on questions relating to the application or interpretation of EU law** and […] as 'courts or tribunals', within the meaning of EU law, they come within the Polish judicial system in the 'fields covered by Union law' within the meaning of […] Article 19(1) TEU, so […] those courts must meet the requirements of effective judicial protection".
- **Application of the social perception test** (c.f. Wilson above): **Commission v. Poland II.** (C-192/18) → „the fact that […] the Minister for Justice is entrusted with the power to decide whether or not to grant any extension to the period of judicial activity beyond the normal retirement age is not sufficient in itself to conclude that the principle of judicial independence has been undermined. However, it is necessary to ensure that the substantive conditions and detailed procedural rules governing the adoption of such decisions are such that they cannot give rise to reasonable doubts, in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them." Factors: vague criteria; no right to reasoned decision; no right to remedy; no time limit for the Minister to deliver decision → long period of uncertainty regarding a position carrying important benefits, such as immunity.

Post „Portuguese judges" jurisprudence II

- **Appointment of judges**: **A.B and others** (C-824/18) → the substantive conditions and procedural rules governing […] appointment decisions are such that they cannot give rise to reasonable doubts, in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality […], once appointed as judges". In addition: „the fact that it may not be possible to exercise a legal remedy in the context of a process of appointment to judicial positions […] may, in certain cases, not prove to be problematic […], the situation is different in circumstances in which all the relevant factors characterising such a process in a specific national legal and factual context, and in particular the circumstances in which possibilities for obtaining judicial remedies which previously existed are suddenly eliminated, are such as to give rise to systemic doubts in the minds of individuals as to the independence and impartiality of the judges appointed at the end of that process. […T] hat may particularly be the case where […] the independence of a body such as the KRS [National Judicial Council] from the legislature and executive is open to doubt.
- **Remuneration**: **Portuguese judges case** → „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".
- **Removal of judges**: **Commission v Poland II** (C-192/18) → „The principle of irremovability requires, in particular, that judges may remain in post provided that they have not reached the obligatory retirement age or until the expiry of their mandate, where that mandate is for a fixed term. While it is not wholly absolute, there can be no exceptions to that principle unless they are warranted by legitimate and compelling grounds, subject to the principle of proportionality. Thus it is widely accepted that judges may be dismissed if they are deemed unfit for the purposes of carrying out their duties on account of incapacity or a serious breach of their obligations, provided the appropriate procedures are followed." (otherwise reasonable doubts as the the independence may arise). The procedural requirements are as follows: „rules which define, in particular, both conduct amounting to disciplinary offences and the penalties actually applicable, which provide for the involvement of an independent body in accordance with a procedure which fully safeguards the rights enshrined in Articles 47 and 48 of the Charter, […] and which lay down the possibility of bringing legal proceedings challenging the disciplinary bodies' decisions […]."

Post „Portuguese judges" jurisprudence III

- **Transfer, secondment, demotion of judges:**
  - **W.Ż. v KRS** (C-487/19): „Transfers without consent of a judge to another court, or[…] between two divisions of the same court are […] potentially capable of undermining the principles of the irremovability of judges and judicial independence. Such transfers may constitute a way of exercising control over the content of judicial decisions because they are liable not only to affect the scope of the activities allocated to judges and the handling of cases entrusted to them, but also to have significant consequences on the life and career of those persons […]. […P]rotection from arbitrary transfer […is] a corollary to judicial independence. […] It is thus important that […] such transfer measures without consent […] may only be ordered on legitimate grounds, in particular relating to distribution of available resources to ensure the proper administration of justice, and that such decisions may be legally challenged in accordance with a procedure which fully safeguards the rights enshrined in Articles 47 and 48 of the Charter, in particular the rights of the defence."
  - **WB and Others** (Joined Cases C-748/19 to C-754/19): „the rules governing the secondment of judges must provide the necessary guarantees of independence and impartiality in order to prevent any risk of that secondment being used as a means of exerting political control over the content of judicial decisions. […] In order to avoid arbitrariness and the risk of manipulation, the decision relating to the secondment of a judge […] must be taken on the basis of criteria known in advance and must contain an appropriate statement of reasons. […T]he possibility […] to terminate the secondment of a judge at any time […] could give an individual the impression that the assessment to be carried out by the seconded judge who is to hear and determine his or her case will be influenced by the fear of termination of the secondment. Furthermore, that possibility […] could also give the seconded judge the feeling of having to meet the expectations of the Minister for Justice, which could give rise to the impression on the part of the judges themselves that they are 'subordinate' to the Minister for Justice, in a manner incompatible with the principle of the irremovability of judges." In addition: the MoJ occupies the position of Public Prosecutor General, i.e. has power over both the public prosecutor and the seconded judges: also a source of reasonable doubts for the defendants.

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Post „Portuguese judges" jurisprudence IV

- **Disciplinary procedures**:
  - **Commission v. Poland III.** (C-791/19) → „The rules applicable to the status of judges and the performance of their duties must, in particular, be such as to preclude not only any direct influence, in the form of instructions, but also types of influence which are more indirect and which are liable to have an effect on the decisions of the judges concerned, and thus preclude a lack of appearance of independence or impartiality on their part likely to prejudice the trust which justice in a democratic society governed by the rule of law must inspire in individuals […]. As regards specifically the rules governing the disciplinary regime applicable to judges, […] that regime must provide the necessary guarantees in order to prevent any risk of its being used as a system of political control of the content of judicial decisions." → same standards as for removal (definition of disciplinary offences and the penalties; involvement of an independent body; in a procedure fully safeguarding the rights in Articles 47 and 48 CFR and right to challenge the decision)
  - **Euro Box Promotion** (C-357/19 et al.) → „that national judges are not exposed to disciplinary proceedings […] for having exercised the discretion to make a reference for a preliminary ruling to the Court […], which is exclusively within their jurisdiction, […] constitutes a guarantee that is essential to their independence". Furthermore: „the disciplinary liability of a judge may, in certain very exceptional cases, be triggered as a result of judicial decisions adopted by that judge [… e.g. deliberate or grossly negligent violation of the law]). However, in order to prevent the disciplinary regime „from being diverted from its legitimate purposes and used to exert political control over judicial decisions", „the fact that a judicial decision contains a possible error in the interpretation and application of national and EU law, or in the assessment of the facts and the appraisal of the evidence, cannot in itself trigger the disciplinary liability of the judge concerned."

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Post „Portuguese judges" jurisprudence V

- **Law in context:**
  - **Commission v. Poland I** (C-619/18) → „As the Advocate General observed in point 76 of his Opinion, such a major restructuring of the composition of a supreme court, through a reform specifically concerning that court, may itself prove to be such as to raise doubts as to the genuine nature of such a reform and as to the aims actually pursued by it."
  - **Commission v. Poland III.** (C-791/19) → „taken together, the particular context and objective circumstances in which the Disciplinary Chamber was created, the characteristics of that chamber, and the way in which its members were appointed are such as to give rise to reasonable doubts […] as to the imperviousness of that body to external factors, in particular the direct or indirect influence of the Polish legislature and executive, and its neutrality with respect to the interests before it and, thus, are likely to lead to that body's not being seen to be independent or impartial, which is likely to prejudice the trust which justice in a democratic society governed by the rule of law must inspire in those individuals" (KRS members almost exclusively elected by the legislature; previous members' membership terminated prematurely → „legitimate doubts as to the independence of the KRS"; only new-judges in the DC; privileged position and benefits within the Supreme Court).
  - **Land Hessen** (C-272/19) → „factors [having relevance to judicial independence], when taken together, in addition to the circumstances in which those choices were made, may […] throw doubt on the independence of a body involved in the procedure for the appointment of judges, despite the fact that, when those factors are taken individually, that conclusion is not inevitable […] As regards the conditions governing the appraisal and promotion of judges, which are also called into question by the […] Administrative Court of Wiesbaden, suffice it to state that the documents submitted to the Court contain no indication as to how the manner in which the executive uses its powers in that regard are such as to engender legitimate doubts, particularly in the minds of litigants, concerning whether the judge concerned is impervious to external elements and whether he or she is impartial with respect to the opposing interests that may be brought before him or her."

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Post „Portuguese judges" jurisprudence VI

- **Non regression: Repubblika v Il-Prim Ministru** (Case C-896/19) → „compliance by a Member State with the values enshrined in Article 2 TEU is a condition for the enjoyment of all of the rights deriving from the application of the Treaties to that Member State. A Member State cannot therefore amend its legislation in such a way as to bring about a **reduction in the protection of the value of the rule of law** […]. The Member States are thus required to ensure that […] **any regression** of their laws on the organisation of justice is prevented, by refraining from adopting rules which would undermine the independence of the judiciary."
- ‚Non-regression principle' based on relationship between Article 49 TEU and Article 2 → potential solution to the Copenhagen dilemma? (*Kochenov-Dimitrovs*): „It was therefore on the basis of the provisions of the Constitution in force prior to that reform that the Republic of Malta acceded to the European Union under Article 49 TEU. Article 49, which provides for the possibility for any European State to apply to become a member of the European Union, states that the European Union is composed of States which have freely and voluntarily committed themselves to the common values referred to in Article 2 TEU, which respect those values and which undertake to promote them."
- **Remedies through primacy of EU law**: **A.B and others** (C-824/18) → „Where it is proved that those articles [4, 19 and 267 TEU] have been infringed, the principle of primacy of EU law must be interpreted as requiring the referring court to disapply the amendments at issue, whether they are of a legislative or constitutional origin, and, consequently, to continue to assume the jurisdiction previously vested in it to hear disputes referred to it before those amendments were made."

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Post „Portuguese judges" jurisprudence VII – the limitations

- **Limitations of preliminary references and disapplying domestic law**:
  - **M.F. v J.M. (Prokurator Generalny)** (C-508/19) → „an action such as that in the main proceedings seeks, in essence, to obtain a form of *erga omnes* invalidation of the appointment of the defendant in the main proceedings to the office of judge of the […] Supreme Court, even though national law does not authorise, and has never authorised, all subjects of the law to challenge the appointment of judges by means of a direct action for annulment or invalidation of such an appointment" that → the questions referred to the Court in the present reference for a preliminary ruling go beyond the scope of the duties of the Court under Article 267 TFEU → the reference is inadmissible. These arguments should be raised in the disciplinary proceedings against M.F.
  - **IS** (Case C-564/19) → Questions regarding the irregular appointment of court presidents and problems of remuneration → In preliminary reference proceedings, there must be „a connecting factor between that dispute and the provisions of EU law whose interpretation is sought, by virtue of which that interpretation is objectively required for the decision to be taken by the referring court […]. In the present case, it is not apparent […] that there is a connecting factor between the provisions of EU law to which the second and third questions referred for a preliminary ruling relate and the dispute in the main proceedings […]." → Infringement procedure instead of preliminary reference.
- **Presumption in favour of the referring court**: **Getin Noble Bank** (C-132/20) → „In so far as a request for a preliminary ruling emanates from a national court or tribunal, it must be presumed that it satisfies those requirements [of courts and tribunals], […] irrespective of its actual composition. […] It is important to point out that the presumption […] applies solely for the purposes of assessing the admissibility of references for a preliminary ruling under Article 267 TFEU. It cannot be inferred from this that the conditions for appointment of the judges that make up the referring court necessarily satisfy the guarantees of access to an independent and impartial tribunal previously established by law, for the purposes of the second subparagraph of Article 19(1) TEU or Article 47 of the Charter." This presumption may be „rebutted where a final judicial decision handed down by a national or international court or tribunal leads to the conclusion that the judge constituting the referring court is not an independent and impartial tribunal".

Post „Portuguese judges" jurisprudence VIII – the limitations

- **Judicial independence in the context of EAW's**: **Openbaar Ministerie** (L. and P.) (Joined Cases C-562/22 PPU and C-563/21 PPU) → two-step examination (Celmer case, C-216/18 PPU, July 2018): „where the executing judicial authority called upon to decide on the surrender of a person in respect of whom a European arrest warrant has been issued has evidence of systemic or generalised deficiencies concerning the independence of the judiciary in the issuing Member State, it cannot, however, presume that there are substantial grounds for believing that that person runs a real risk of breach of his or her fundamental right to a fair trial if surrendered to that Member State, without carrying out a specific and precise verification which takes account of, inter alia, that person's personal situation, the nature of the offence in question and the factual context in which that warrant was issued, such as statements or acts by public authorities which are liable to interfere with how an individual case is handled"
- Still valid? Does it pertain when the „right to a tribunal established by law" is at issue? → „the procedure for the appointment of judges necessarily constitutes an inherent element of the concept of a 'tribunal established by law'", which in turn is „a cornerstone of the right to a fair trial" → BUT: „it is necessary to ensure not only respect for the fundamental rights of the persons whose surrender is requested, but also the taking into account of other interests, such as the need to respect, where appropriate, the fundamental rights of the victims of the offences concerned." If the existence of systemic or generalised deficiencies were, in itself, sufficient to enable the executing judicial authority to refuse to surrender, it would lead to a high risk of impunity, and „would lead to a de facto suspension of the implementation of the European arrest warrant mechanism in respect of that Member State" (which can only be lawfully done in the political process of Article 7 TEU) → The two-step system must still be followed.
- STEP 1: assessment, on the basis of any factor that is objective, reliable, specific and properly updated concerning the operation of the judicial system in the issuing Member State and, in particular the general context of judicial appointment in that Member State (reasoned proposal of the EC on the basis of Article 7(1) TEU, the resolution of the Polish Supreme Court, relevant case-law of the CJEU and the ECHR are such factors). STEP 2: It is for the person in respect of whom an EAW has been issued to adduce specific evidence to suggest that systemic or generalised deficiencies in the judicial system had a tangible influence on the handling of his or her criminal case or are liable to have such an influence. Such evidence can be supplemented, as appropriate, by information provided by the issuing judicial authority.

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Recalibration of previous case law

Kochenov and Pech (*Respect for the Rule of Law in the Case Law of the European Court of Justice*):

- **Banco de Santander SA** (Case C-274/14) → stricter interpretation of the idea of „court or tribunal of a Member State" for the purposes of Article 267 TFEU;
- **Joined Cases C-508/18, OG (Public Prosecutor's office of Lübeck) C-82/19 PPU, PI (Public Prosecutor's office of Zwickau) and Case C-509/18, PF (Prosecutor General of Lithuania)** → stricter interpretation of the concept of 'issuing judicial authority' within the meaning of the EAW Framework Decision;
- **Commission v. France (Case C-416/17)** → stricter interpretation of the obligation to refer for courts of last resort under Article 267 TFEU;
- **Achmea (Case C-284/16)** → stricter defence of the jurisdiction of national courts to ensure the full effectiveness of EU law → BUT: criticised for weakening the protection of investors vis a vis illiberal states where courts are captured

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Back to relevance for private lawyers

- Recalibration cases show relevance of RoL jurisprudence for non-backsliding legal systems and allow for operationalisation in private legal practice
- ECtHR offers an avenue for this, especially through Article 6 („fair and public hearing within a reasonable time by an independent and impartial tribunal established by law"):
  - **Reczkowicz v Poland** (application no. 43447/19) → § 264. „Having regard to all the above considerations, and in particular to the convincing and forceful arguments of the Supreme Court in the judgment of 5 December 2019 and the resolution of 23 January 2020, and that court's conclusions as to the procedure for judicial appointments to the Disciplinary Chamber being contrary to the law – conclusions reached after **a thorough and careful evaluation of the relevant Polish law from the perspective of** the Convention's fundamental standards and of **EU law, and in application of the CJEU's guidance and case-law** – the Court finds it established that in the present case there was a manifest breach of the domestic law for the purposes of the first step of the Ástráðsson test."
  - **Dhahbi v Italy** (application no. 17120/09) → right to a reasoned decision, § 31. „[under Article 267 TFEU], national courts against whose decisions there is no judicial remedy under national law, and which refuse to request a preliminary ruling from the CJEU on a question raised before them concerning the interpretation of European Union law, are required to give reasons for such refusal in the light of the exceptions provided for by the case-law of the CJEU" (the question is irrelevant; the European Union law provision in question has already been interpreted by the CJEU; or the correct application of EU law is obvious).

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Case study

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Preliminary references

- **Court discretion** (last instance obliged, but can avoid doing so)
- **Relatively short**: 15-18 months, but can be 8-10 weeks in PPU cases
- **Particular case** needed (systemic through individual), but no need to wait for outcome
- **Interim measures** possible in principle
- **Impact**: can be systemic (disapplying non-compliant domestic norm)
- **„Enforcement”**: up to domestic court and the domestic enforcement system

Infringement procedures

- **Commission discretion** (can be petitioned through formal complaint: Commission has 12 months to assess)
- **Long**: average length about 48 months
- **No particular case** needed
- **Strong interim measures** have been requested and applied in RoL cases (EUR 1 million per day in the muzzle law case)
- **Impact**: systemic (MS required to take necessary measures)
- **Enforcement**: bringing back the country to court (Art. 260, TFEU: lump sum or penalty payment)

ECHR

- **Up to applicant/lawyer**
- **Varied length**: can be up to 6-7 years (RoL cases decided quickly at the moment; Reczkowicz in 2 years and 3 months)
- **Particular case** needed and need to wait for outcome (in Art. 6 cases)
- **Restrictive approach to interim measures**, but have been exceptionally granted in Polish judicial independence cases
- **Impact**: can be systemic (general measures envisaged by the Court)
- **Enforcement**: Committee of Ministers / domestic enforcement mechanism

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Thank you for your attention!

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