

FACTSHEET

on judicial independence and the rule of law

Rule of Law for Lawyers Project



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I. The ICJ and partners launch a project for lawyers on judicial independence in the EU

Issues related to judicial independence are central to the **rule of law, democracy** and **human rights** issues impacting on everyone. Without independent courts, there is no access to justice and people cannot enforce their rights.

Judicial independence is under increasing pressure in many EU countries, being essential for protecting access to justice and human rights. Together with aditus, Forum for Human Rights, Free Courts, in close cooperation with Human Rights in Practice and the Romanian Institute for Human Rights, the ICJ and partners seek to promote independent and effective judicial systems to protect fundamental rights by enhancing the knowledge and skills of lawyers and civil society organizations (CSOs) in national and European **strategic litigation**.

One important tool to tackle these issues is the use of strategic litigation both at the national and at the European or international levels. While challenging, litigation on issues related to judicial independence is unfolding in a number of EU Member States, and beyond the EU as well.

The International Commission of Jurists - European Institutions (ICJ-EI) and Partners are inviting lawyers to join workshops on using strategic litigation in order to protect judicial independence and the rule of law in the EU. These workshops are organised as part of the [ROLL project](#).

Lawyers and representatives of Civil society organisations (CSOs) from Bulgaria, Czechia, Hungary, Malta, Poland, Romania, Slovakia, and Spain can apply by 30 April 2023 [here](#).

The three workshops, conducted in English, will be held in person in Brussels (13-14 June 2023), Malta (November 2023) and Prague (March 2024) with a possibility to participate online. Each workshop will cover capacity building in international legal framework on the specific issues, practical discussions on challenges linked to litigation, practical tips, recommendations on litigation strategies and ways forward.

► **Workshop 1 - Brussels, June 2023**

Institutional independence of the judiciary and autonomy of the prosecution service, including governance structures and procedures.

► **Workshop 2 - Malta, October 2023**

Appointment procedures for the judiciary and prosecution and freedom of expression of judges.

► **Workshop 3 - Prague, February 2024**

Disciplinary procedures and accountability of judges and prosecutors and judicial ethics and accountability.

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II. Judicial independence and the Rule of Law

The **Rule of Law** is a universal principle applicable to governance everywhere. It comprises a number of elements, including among others the separation of powers of executive, legislative and judicial branches of authority; law made by democratic institutions applying democratic processes; the independence and accountability of judges and lawyers; the right to a fair trial by a competent, independent and impartial court established by law; the accountability of the military to civilian authorities; the principle of legality and legal certainty; the right to recognition as a person before the law; the principle of equality, non-discrimination and equal protection of the law; the principle of accountability and fight against impunity; the right to an effective remedy and reparation for human rights violations.

The Rule of Law is inextricably linked to and interdependent with the protection of human rights, as guaranteed in international law and there can be no full realization of human rights without the operation of the Rule of Law, just as there can be no fully operational Rule of Law that does not accord with international human rights law and standards.

The **judiciary** and the **judicial system** is paramount in safeguarding the rule of law and the realization of human rights. **Judges** and **lawyers** play a vital role in ensuring that individuals can exercise their human rights, that victims of human rights violations have access to effective redress, that State authorities and private actors are accountable, and perpetrators of abuses amounting to crimes are brought to justice.

They are essential to guaranteeing access to justice and effective remedies. The judiciary is responsible for ensuring fairness of proceedings and access to remedies, as well as bearing the critical task of upholding the rule of law while protecting human rights and non-discrimination.

Once the elements of the rule of law are removed, it becomes easier to violate human rights, and it opens the door to corruption and abuse of power or discrimination and other human rights violations.

Resolution adopted by the Human Rights Council 19/36
Human rights, democracy and the rule of law
The Human Rights Council,

1. Stresses that democracy includes respect for all human rights and fundamental freedoms, inter alia, freedom of association and of peaceful assembly, freedom of expression and opinion, freedom of thought, conscience, religion or belief, the right to be recognized everywhere as a person before the law and the right to take part in the conduct of public affairs, directly or through freely chosen representatives, to vote in a pluralistic system of political parties and organizations and to be elected at genuine, periodic, free and fair elections by universal and equal suffrage and by secret ballot guaranteeing the free expression of the will of the people, as well as respect for the rule of law, the separation of powers, the independence of the judiciary, transparency and accountability in public administration and decision-making and free, independent and pluralistic media; (...)

5. Recalls that the interdependence between a functioning democracy, strong and accountable institutions, transparent and inclusive decision-making and effective rule of law is essential for a legitimate and effective Government that is respectful of human rights.

2012 Human Rights Council Resolution 19/36 on human rights, democracy and the rule of law

The Tunis Declaration on Reinforcing the Rule of Law and Human Rights

Independence of Judges and Lawyers

(...)11. The independence, impartiality and accountability of the judiciary, as well as the independence of lawyers and prosecutors, are fundamental to the Rule of Law and legal protection of human rights, yet all are facing heightened challenge from governments and other powerful actors in many countries across all regions of the world.

The Tunis Declaration on Reinforcing the Rule of Law and Human Rights, March 2019

Principles on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis

1. The role of the judiciary and legal profession is paramount in safeguarding human rights and the Rule of Law in times of crisis, including declared states of emergency. The judiciary serves as an essential check on the other branches of the State and ensures that any laws and measures adopted to address the crisis comply with the Rule of Law, human rights and, where applicable, international humanitarian law. In times of crisis, the principle of judicial review is indispensable to the effective operation of the Rule of Law. Judges must retain the authority within the scope of their jurisdiction as final arbiters to state what the law provides. The judiciary itself must have the sole capacity to decide upon its jurisdiction and competence to adjudicate a case.

The ICJ Geneva Declaration on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis

III. Judicial independence and International Law

1. The United Nations

The primary universal standard regarding judicial independence are the UN Basic Principles on the Independence of the Judiciary, endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

The Principles provide that The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

They go on to address the main elements of judicial independence, including freedom of expression and association of judges, judicial qualifications, appointments, and training; conditions of service and training, professional secrecy and immunity; and discipline suspension and removal. They establish the principle that "There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision."

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The independence of judiciary is provided for in article 14 of the International Covenant on Civil and Political Rights (ICCPR). **UN Human Rights Committee** is the body of independent experts that monitors implementation of and compliance with the provisions of the ICCPR by States parties (that are parties to the First Optional Protocol to the ICCPR) and can decide and adopt views in individual complaints for violations of the ICCPR (see for instance the Garzon case).

The UN Human Rights Council, a principle UN human rights body, has established a number of independent expert mandates, known as special procedures, to examine, document and report to the Council on areas of thematic and country-specific issues. Among these is **The Special Rapporteur on the independence of judges and lawyers**.

The mandate's primary objectives are to promote and protect the independence of judges and lawyers, ensure their ability to perform their duties freely and effectively, and maintain the highest standards of professionalism and integrity. Given the threats on the independence of the judiciary on a global level, this mandate was established to analyze elements regarding judicial independence in general terms, as well as to document attacks on the independence of judges, lawyers and prosecutors. The Special Rapporteur makes concrete recommendations to States, to identify ways to improve the situation. The present mandate holder is Margaret Satterthwait, who was appointed in 2022.

2. The Council of Europe

The Council of Europe (CoE) has 46 Member States, 27 of which are also members of the European Union. All of them are parties to the **European Convention of Human Rights (ECHR)**, a treaty guaranteeing the human rights and fundamental freedoms it enshrines across all Member States of the Council of Europe.

The European Court for Human Rights (ECtHR), whose judgements are binding on CoE Member States, oversees the implementation of the ECHR. It has developed a rich jurisprudence on rule of law matters, including the independence of the judiciary, access to justice and accountability for human rights violations. It has ruled in significant rule of law cases arising from CoE Members States that are also EU Member States, as well as from CoE Member States that do not belong to the EU. The binding nature of its judgments and its interim measures, and the enforcement mechanism available through the Committee of Ministers of the CoE, make it one of the strongest guarantors of the rule of law in Europe.

The Venice Commission (European Commission for Democracy through Law) is one of the leading CoE's advisory bodies on constitutional matters. Through its opinions, it provides legal advice to Member States and helps them to bring legal and institutional structures in line with Council of Europe standards and international experience in the fields of human rights and the rule of law. The opinions issued by the Venice

Commission are critical when Member States amend or change legislation related to the administration of justice. The Commission has also issued the Rule of Law checklist, an operational tool for assessing the level of rule of law compliance in any given State based on five core elements: legality, legal certainty, prevention of abuse/ misuse of powers, equality before the law and non-discrimination and access to justice.

Two expert bodies of the Council of Europe also closely work on the rule of law and judicial independence.

▶ The **Consultative Council of European Judges (CCJE)** contributes to the implementation of the Framework Global Action Plan for Judges in Europe adopted by the Committee of Ministers to strengthen the role of judges in Member States. It also serves an advisory function on general questions regarding independence, impartiality and competence of judges. To fulfil this role the CCJE prepares opinions for the Committee of Ministers or other CoE bodies upon request.

▶ The **European Commission for the Efficiency of Justice (CEPEJ)** strives to enhance the efficiency and functioning of justice in the Member States. Its methods of work include analysing the judicial systems, identifying obstacles they meet, evaluating and defining ways to improve and providing assistance at the States' request.

The CoE's Parliamentary Assembly (PACE) is a representative body consisting of parliamentarians from the Council's Member States. PACE has addressed rule of law issues, including the independence of the judiciary, for example in its 2017 Resolution on New threats to the rule of law in Council of Europe Member States.

For further information, see:

- ▶ New threats to the rule of law in Council of Europe Member States: selected examples, Council of Europe's Parliamentary Assembly, Resolution 2188 (2017)
- ▶ Report on the rule of law, adopted by the Venice Commission at its 86th plenary session, Venice, 25-26 March 2011
- ▶ Rule of Law Checklist, adopted by the Venice Commission at its 106th Plenary Session, Venice, 11-12 March 2016
- ▶ Framework Global Action Plan for Judges in Europe, CCJE, Strasbourg, 12 February 2001
- ▶ Judicial independence in the context of the 2030 Agenda for Sustainable Development, Report of the Special Rapporteur on the independence of judges and lawyers, Diego García-Sayán, 13 July 2022
- ▶ Basic Principles on the Independence of the Judiciary, United Nations, 6 September 1985

II. Judicial independence in EU law

The European Union was established based on rule of law principles, including the independence of the judiciary. Judicial independence is one of the fundamental values upon which the European Union is built.

These values are embedded in the founding Treaties of the EU and in the EU Charter on Fundamental Rights.

Treaty of the European Union 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.

EU Charter on Fundamental Rights

Preamble

This Charter reaffirms, (...) the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights.

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.

The exercise of all rights guaranteed in the EU Charter is jeopardised by the lack of effective justice systems, independent and impartial courts and tribunals and other rule of law safeguards. It is essential that judicial independence be protected both at the national and EU levels.

What can EU institutions do to ensure judicial independence in Member States?

1. Treaty-based procedure in case of serious breach of EU values (Article 7 procedure)

The procedure under Article 7 of the Treaty on the European Union (TEU) is an important accountability measure invoked by EU institutions to ensure that rule of law and human rights are respected when a Member State persistently breaches EU's founding values (Art. 2 TEU). The Article 7 procedure was initiated by the Commission in December 2017 against Poland and the by the European Parliament in September 2018 against Hungary.

Treaty of the European Union Article 7

1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.

The Council shall regularly verify that the grounds on which such a determination was made continue to apply.

2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.

3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

2. The Court of Justice of the European Union (CJEU)

The Treaties of the European Union provide safeguards for judicial independence through the CJEU's infringement proceedings (Art. 258 of the Treaty on the Functioning of the European Union (TFEU)) – that the Commission can initiate if it considers that a Member State has failed to fulfil an obligation under the Treaties, and preliminary references (Art. 267 TFEU) – which can be initiated by a national judge in a particular case about the application of EU law. The Court can provide a strong and reliable response to violations of judicial independence in EU Member States.

Article 19 TEU gives concrete expression to the value of the rule of law as affirmed in Article 2 TEU and assigns 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 both national courts and tribunals as well as to the CJEU (Judgment of 27 February 2018, Associação Sindical dos Juizes Portugueses v Tribunal de Contas, C-64/16, EU:C:2018:117, paragraph 32).

Treaty of the European Union Article 19

1. 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.

2. The Court of Justice shall consist of one judge from each Member State. It shall be assisted by Advocates-General. The General Court shall include at least one judge per Member State. The Judges and the Advocates-General of the Court of Justice and the Judges of the General Court shall be chosen from persons whose independence is beyond doubt and who satisfy the conditions set out in Articles 253 and 254 of the Treaty on the Functioning of the European Union. They shall

be appointed by common accord of the governments of the Member States for six years. Retiring Judges and Advocates-General may be reappointed.

3. The Court of Justice of the European Union shall, in accordance with the Treaties:

- (a) rule on actions brought by a Member State, an institution or a natural or legal person;
- (b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions;
- (c) rule in other cases provided for in the Treaties.

The Court can indicate interim measures in order to prevent irreparable harm to the independence of the judiciary or other crucial institutions or systems in a rule of law crisis.

3. The European Commission's Rule of Law report

There are other tools by which the EU institutions can foster the protection of the rule of law across the EU.

Since 2020, the European Commission has issued a yearly Rule of Law report, which, since 2022, also includes recommendations to Member States. Civil society can contribute to these reports with their submissions to the Commission in view of the issuance of the Rule of Law report highlighting concerns about compliance with RoL in specific EU Member States. Linked to this, the rule of law dialogue is regularly conducted among Member States in the General Affairs Council. There, a discussion takes place regarding the Rule of Law situation of all EU Member States based on the Commission's Rule of Law report.

4. Conditionality mechanism

In January 2021, a general regime of conditionality for the protection of the EU budget – “conditionality regulation” Regulation 2020/2092 – was adopted. The mechanism provides for the possibility of suspension of payments or financial corrections if breaches of the principles of the rule of law occur, which affect or seriously risk affecting the sound financial management of the Union budget.

In the case of Hungary the mechanism was invoked on 16 December 2022. As a result, given Hungary's only partial remedial action to date, a suspension of 6.3 billion Euros, equivalent to 55% of the funds, was agreed until the government fulfils 'horizontal enabling conditions.' These conditions include, among others, ensuring judicial independence, academic freedom and the right to asylum, removing the homophobic propaganda law.

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