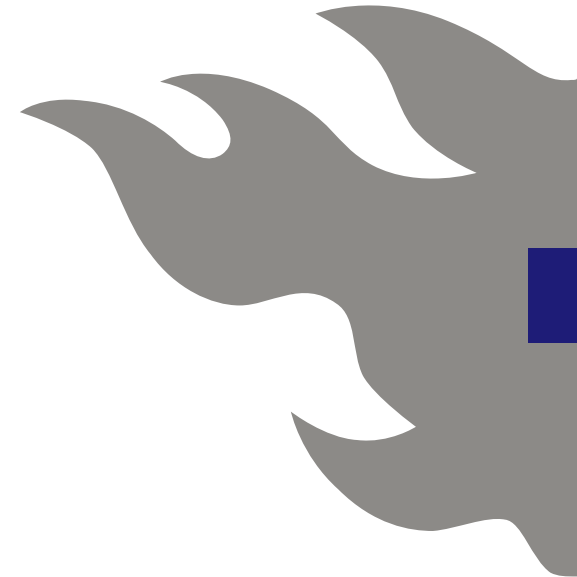


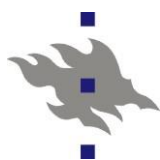
HELSINGIN YLIOPISTO
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UNIVERSITY OF HELSINKI

A Deeper understanding of EU Law through Comparative law - “Deeper first, surface second”

KVOTY, 30.3.2021 at 16.30

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Who will guess where this picture can be found?

What is Europe? EU law? Why Comparative law?



European values? Mutual trust?



- Article 2 TEU illustrates the shared values of the European societies. / Deeper levels of law (Tuori, Critical legal positivism)

■ *"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."*



European values? Mutual trust?

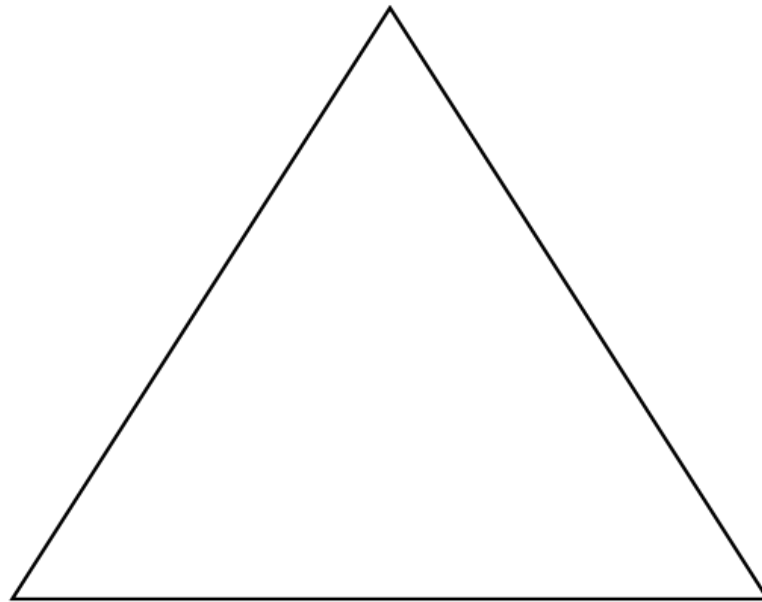
- Point: Rule of law must be understood in the context of human rights and democracy (Article 2 TEU, "the Tripod model"). There is a wide consensus that rule of law essentially aims at delimiting the abuse of power. (The Finnish EU presidency 2019)





What if something goes wrong? What if "the tripod model" is too optimistic, unrealistic? Why? What if there is a failure in rule of law development?

- The triangle model: one angle is open





My fear – return of the 1930s

- Carl Schmitt: Legalität und Legitimität: **Berlin, 1932**, p. 19:
- *”Das Wort ‘Rechtsstaat’ kann soviel Verschiedenes bedeuten wie das Wort „Recht” selbst und außerdem noch soviel Verschiedenes wie die mit dem Worte „Staat” angedeuteten Organisationen” Es gibt einen feudalen, einen ständischen, einen bürgerlichen, einen nationalen, einen sozialen, ferner einen naturrechtlichen, vernunftrechtlichen, historisch-rechtlichen Rechtsstaat. Es ist begreiflich, **daß Propagandisten und Advokaten aller Art das Wort gern für sich in Anspruch nehmen, um den Gegner als Feind des Rechtsstaates zu diffamieren.** Ihrem Rechtsstaat und ihrem Rechtsbegriff gilt der Spruch: „Recht aber soll vorzüglich heißen, was ich und meine Gevattern preisen”*

Mutual trust? What the heck is "royal prerogative"?

Independent judiciary? (The UK EU Referendum and the move towards

Brexit, Maastricht Journal of European and Comparative Law, 1/2017, s. 25-42)



The Juncer: Sir Lawrence Etherton



Worked with Tony Blair: Lord Justice Sales



The Europhile: Lord Chief Justice Thomas

Fury over 'out of touch' judges who defied 17.4m Brexit voters and could trigger constitutional crisis



How are Parliamentary Democracy and Rule of Law connected to each other? A Comparative argument (UK case law)

- See e.g. the Ponting-case (Falkland war 1982), Parliament had a right to receive accurate information as regards the sinking of the Argentinian Belgrano cruiser although it was not in the best interests of the Government (See R v Ponting (1985) Crim. L.R. pp. 318-321, Case law of the United Kingdom).
- The UK Government tried to hide behind the argument of national security and did not want to reveal accurate information of the sinking. Eventually the Government lost the Court case and was obliged to inform the Parliament properly. (Court as a Guardian of rule of law)
- The idea in Ponting case is that the concept of **the Rule of Law requires a certain kind of conception of democracy, in which the Government is subordinate to Parliament.** Additionally, one has to distinguish **the interests of the state and the interests of a majority** from one another (See Raitio, J: The Principle of Legal Certainty in EC Law, Dordrecht: Kluwer Academic Publishers, 2003, p. 140-142.)



Comparative law and the contextual approach: the example of Poland

- Rule of law related case law concerning Poland: C-216/18 PPU, LM, ECLI:EU:C:2018:586, section 48, C-619/18, Commission v Poland, ECLI:EU:C:2018:910, section 21, C-619/18 R, Commission v. Poland, ECLI:EU:C:2018:1021, C-192/18 Commission v Poland, ECLI:EU:C:2019:924, C-558/18 & C-563/18 Łowicz, ECLI:EU:C:2020:234, C-791/19 R, Commission v Poland, ECLI:EU:C:2020:277 and in the context of Article 4(2) TEU in C-715/17 Commission v Poland, ECLI:EU:C:2019:917, paragraphs 224-227.
- Is the Polish democracy based on a political culture, which does not match with the EU value base (Article 2 TEU)?



Comparative law and the contextual approach: the example of Poland – history can't be omitted!

- During the communist administration, courts were not independent of political exercise of power.
- On Rule by law thought in Eastern Europe see *Sájo, András: Rule by Law in East Central Europe*, in *Gessner, Volkmar – Hoeland, Armin – Varga, Csaba* (eds.): *European Legal Cultures*, Aldershot, 1996, pp. 471-473: “*Under socialism, the role of law was understood in its relation to the state*”, and
- “*This legal system was not **predictable**; bureaucratic discipline and the rules of jurisdiction served the irrational or only the Party-dictated politically rational decisions at the moment*”. - The question of predictability?
Rule by law ?
- Not very long ago? 1970s is back? Religious conservatism and current right-wing political tendencies – where are we heading? “Winds of change” may now have a new meaning (Scorpions 1989)



Some examples of the surface level developments in EU law, which call for comparative analysis

- **Denmark:** the Ajos-case, discrimination based on age
- Nielsen & Tvarno, Europarättslig Tidskrift 2017, s. 303 ff.:
- **”In its judgment in the AJOS-case, the CJEU upheld its findings in Mangold and Küçükdeveci. The Danish Supreme Court defied the CJEU and did the opposite of what the CJEU had held it was obliged to do”**
 - ECJ case law on discrimination based on age: Ks. esim. C-144/04 **Mangold** (2005) ECR I-9981, C-411/05 Palacios de la Villa (2007) ECR I-8531, C-88/08 Hütter (2009) ECR I-5325, C-229/08 Wolf (2010) ECR I-1, C-341/08 Petersen (2010) ECR I-47, C-555/07 **Küçükdeveci** (2010) ECR I-365, C-45/09 Rosenblad (2010) ECR I-9391, C-141/11 Hörnfeldt, 5.7.2012, C-501/12 – C-506/12, C-540/12 ja C-541/12 Specht, 19.6.2014, C-20/13 Unland, 9.9.2015, C-530/13 Schmitzer, 11.11.2014, C-529/13 Felber, 21.1.2015, etc. (mainly from Germany)



How to interpret Article 4 (2) TEU? – Respect for National Identities

- ■ Respect of National Identities?
 - C-208/09 (**von**) Sayn-Wittgenstein (2010) ECR I-13693, para. 92. Explicit reference to national identity in Article 4(2) TEU.
 - C-438/14 Bogendorff von Wolffersdorff, ECLI:EU:C:2016:401
 - Nabil Bagdadi to Peter Mark Emanuel Graf von Wolffersdorff Freiherr von Bogendorff and daughter Larissa Xenia Gräfin von Wolffersdorff Freiin von Bogendorff ?
 - Ordre public case clearly/ equality of the citizens as regards the law is the point – but no reference to Article 4(2) TEU i.e national identity. Not a matter of equality between Member States.
 - **Hardly any case law on equality between Member States – is it more like a political statement?**
 - No such problems could ever come up in Finland...

■ Back to the values...what can be learned

- Point 1: Small Member States such as Finland may engage itself to enhance the values of the EU. It is not that relevant, how big a country is when values are at stake. What matters is the sound and secure society in which the European values are not breached.
- See <https://vnk.fi/eu/finlands-eu-presidency>
- Point 2: national identity and the equality of Member States can not be misused in the context of introducing national laws or administrative practices, which breach the values of the EU. For instance, the independence of the judiciary is to be protected irrespective of national politics. This means that the dimension of weight of the equality of Member States may not exceed the dimension of weight of rule of law.
- Note! President of the Supreme Administrative Court just recently stated. ”*Suomen on mielestäni Ruotsin tapaan selvitettävä tuomioistuinten riippumattomuuden perustuslaillista ja lainsäädännöllistä vahvistamista*”. (Hallinto-oikeuspäivä 2021), i.e. similarly as in this slide.