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The Operationalisation of the Rule of Law in  
the EU Legal Order: An Evolving  
Jurisprudence of the Court

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## **Abstract**

The European project was founded on the advancement of liberal democracy where the rule of law and respect for human rights have a central place. In a period of ‘instability’ in the Union where organisational changes to national judiciaries have raised fears over rule of law backsliding among Member States threatening the functioning of the European Union’s legal order. It is necessary to facilitate a discussion around the rule of law and to examine the role of the rule of law in the European Union legal order.

The main aim of this thesis is to explore the operationalisation or justiciability of the rule of law as a founding value of the European Union enshrined in Article 2 Treaty on European Union in the European Union legal order, and its connection to European integration. To demonstrate that there is a developing jurisprudence in the European Union legal order towards increased justiciability of the rule of law, where the rule of law is being used as a stick to enforce compliance with recalcitrant ‘illiberal’ Member States. A departure from the more traditional understanding that limits the justiciability of the rule of law to an open ended value facilitating legal interpretation rather than being actionable in itself.

This thesis is divided into three main section. Section 2 examines the proposition that the operationalisation of the rule of law and European integration is linked to a substantive rights based conception of the rule of law as a basis for the jurisprudential shift. Section 3 looks at what the normative arguments are for protecting the rule of law in the European Union, or in other terms why it is necessary for increased justiciability of the rule of law in the European Union. Section 4 analyses the operationalisation of the rule of law in the jurisprudence of the Court of Justice of the European Union, in which it is argued there is three lines of argumentation for the operationalisation of the rule of law in the case law of the Court.

## **Preface**

*This thesis marks the end of my time in the Masters' programme at Lund University, a journey that firstly began when I had the opportunity to do an exchange semester during my Bachelor's, and continued when I was welcomed back for the Masters' programme. It has been a wonderful two years experiencing Swedish life and everything that Lund has to offer. It has also been a privilege to study at the University alongside people from different backgrounds and cultures and develop academically, and as a person where I have learned a lot about EU law and skills that I will continue to use. It has of course also been challenging at many times throughout the two years and a struggle to get this thesis completed.*

*Which is why I would like to thank my parents and my sister for all their love and support. For enabling me to be here to take advantage of this amazing opportunity and being there for me throughout my academic years. Although they are on the other side of the world I know they have always been there day or night to talk if needed. In particular, I would like to thank my amazing partner Hanna, whom I could not have completed the programme without, she has given me so much love and support throughout the time in Sweden. She has shown the utmost patience with me and endured my many stressful weeks and has always been willing to sit down and listen to me talk about EU law.*

*I also want to thank my supervisor and coach Xavier Groussot, for his support, encouragement and guidance throughout the thesis and this last year. For providing me the opportunity to participate in the European Law Moot Court Competition and allowing me to push myself further. I am grateful for all the knowledge and expertise you have shared with me. Moreover, I would like to thank Julian Nowag for being there for us students and letting me stop by when I needed a chat.*

*Lastly, I want to thank all the friends that I have made and spent time with at Lund University and for being part of my experience and the fun times that have been had.*

## **Abbreviations**

AFSJ	Area of Freedom, Security and Justice
Charter	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
Commission	European Commission
EU/Union	European Union
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
Treaties	Treaty on European Union and Treaty on the Functioning of the European Union.

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# 1. Introduction

## 1.1. Background

The Preamble of the Treaty on European Union (“TEU”) begins by ‘recalling the historic importance of the ending of the division of the European continent and the need to create firm bases for the construction of the future Europe’.<sup>1</sup> Therefore, The Member States’ Heads of States ‘confirmed their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the *rule of law*’.<sup>2</sup> The European project was founded on the advancement of liberal democracy where the rule of law and respect for human rights have a central place. However, of late, the wave of populist movement that has swept over the European continent has seen the rise of far right political movements and the emergence of illiberal states within the European Union (“EU”). The developing scenarios in Hungary and Poland have therefore brought into the spotlight the rule of law and whether we can allow these illiberal Member States to flourish putting into jeopardy the very values the EU was founded upon. Given this background, it is necessary to facilitate a discussion around the rule of law and to examine the role of the rule of law in the EU legal order and its place in the jurisprudence of the Court of Justice of the European Union (“CJEU”).

## 1.2. Research Questions and the Aim of the Study

The research questions and the aim of the study entails exploring the operationalisation or justiciability of the rule of law as a founding value of the EU enshrined in Article 2 TEU in the EU legal order, and its connection to European integration. The rule of law is traditionally not seen as *a* rule of law actionable before a court, in particular lacking justiciability in the EU legal order due to the open-ended nature of the values expressed in Article 2 TEU.<sup>3</sup>

In order to move away from this traditional understanding there must be a foundation for doing so. A departure of this manner represents a jurisprudential shift by the CJEU, towards what will be termed as the operationalisation of the rule of law. Therefore, as a starting point it is first asked whether the way the rule of law is perceived, i.e. can it be used as a means in

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<sup>1</sup> Consolidated version of the Treaty on the European Union [2012] OJ C 326/01.

<sup>2</sup> *ibid.*

<sup>3</sup> Dimitry Kochenov and Laurent Pech, ‘Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality’ (2015) 11 *European Constitutional Law Review* 512, 519 and 520.

itself to enforce compliance to protect its core principles?; is dependent on the conception that is subscribed to. This thesis puts forward the proposition that the operationalisation of the rule of law and European integration is linked to a substantive rights based conception of the rule of law. In answering this, the first section will examine how the rule of law is enshrined in the EU Treaty framework and then move on to discuss different understandings of the rule of law and how the EU conception of the rule of law reveals itself in relation to these different conceptions. Before putting forward arguments why the operationalisation of the rule of law and its connection to facilitating European integration is reliant on a substantive rights based conception.

Secondly, it is asked what is the rationale or what are the normative arguments for protecting the rule of law in the EU? Or in other terms why is it necessary for increased justiciability of the rule of law in the EU? It is proposed that there are three main normative arguments that justify the protection of the rule of law and its operationalisation. Firstly, the adverse impact that rule of law deficiencies have on the functioning of the EU legal order. Secondly, rule of law violations have cross-border relevance in affecting the broader Union and all its citizens. Thirdly, concerning the voluntary commitment to the Union's common values and the EU's standing and credibility in the global community.

Lastly, the thesis will aim to show through the case law of the CJEU there is a developing jurisprudence in the EU legal order towards increased justiciability of the rule of law, where the rule of law is being used as a stick to enforce compliance with recalcitrant 'illiberal' Member States. This section aims to further the discussion by addressing the question of, how has the rule of law been operationalised? And on what basis? It is proposed in relation to this research question that there are three lines of argumentation for the operationalisation of the rule of law under Article 2 TEU. Firstly, operationalisation of the rule of law is achieved through the use of Article 19 TEU to concretise the rule of law under Article 2 TEU. Secondly, the realisation of the rule of law through the protection of fundamental rights. Lastly, the rule of law and its connection to European integration and the use of the 'ever closer union' clause in further operationalising the rule of law.

### 1.3. Delimitations

This thesis' aim is to explore the operationalisation or justiciability of the rule of law in the EU legal order as a founding value established in Article 2 TEU. As part of the discussion there is a focus on the conceptions of the rule of law, however, this is used as a comparative tool to facilitate the discussion and give a background, and try to put in context the EU legal order's conception of the rule of law. The thesis therefore restricts itself in this respect and is not intended to analyse positions of legal philosophy around the conceptions of the rule of law.

The operationalisation of the rule of law could also be seen to be achieved by other means in the EU legal order. The actions taken by the institutions of the EU could be a part of that. However, the thesis will therefore not look at measures taken to protect the rule of law such as the rule of law framework adopted by the Commission setting out a new pre-Article 7 TEU procedure. Similarly, the thesis will not look at measures taken by the European Parliament and neither by the Council. The focus will be on examining the jurisprudence of the CJEU to achieve the thesis aims and answer the proposed research questions.

The thesis will also not analyse the related Treaty provision to Article 2 TEU, which is the Article 7 TEU procedure. This is because the purpose of the thesis is mainly to examine how the rule of law can be enforced and protected by other means, also basing it on the fact this procedure has already been examined by many legal scholars.

### 1.4. Methodology and Sources

In order to answer the research questions it is intended to establish what the law is, *de lege lata*, but also discussing what the law ought to be, *de lege ferenda*. Both ideal types of argumentation have the aim at producing coherent theories.<sup>4</sup> In this respect traditional legal dogmatic method is used to analyse, interpret and discuss the relevant sources. The main sources of which the thesis relies on are; EU primary law which the Treaties and the Charter lay the foundation of the EU legal order, the case law of the CJEU which include the Opinions of the CJEU, its judgments and the Opinions of the Advocates General. The judgments and Opinions of the court, and Opinions of the Advocates General are of particular importance to the research as

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<sup>4</sup> Aleksander Peczenik, 'A Theory of Legal Doctrine' (2001) 14 Ratio Juris 75, 79.



the CJEU is the principal interpreter of EU law for the consistent and uniform interpretation of EU law to be applied by the Member States. The Opinions of the Advocates General are useful guidance for analysing how the CJEU may or may not decide a case on. Also, of importance for the thesis is material produced by the Commission, the Commission being the ‘guardian of the Treaties’. Where the Commission also occupies an important role in relation to the rule of law, being able to initiate Article 7(1) TEU proceedings and infringement actions under Article 258 Treaty on the Functioning of the European Union (“TFEU”) against a Member State. Therefore, its works are important for establishing its position in relation to issues and what actions they are taking or propose to take. Lastly, the thesis also relies on secondary sources in the forms of blog-posts, books, journals and other academic literature to support the legal analyses and arguments.

## 2. A Rights Based Conception – A Foundation From Which to Build

### 2.1. Legal basis – the Rule of Law, Democracy, and Fundamental Rights in the EU

The rule of law is a ‘legally binding constitutional principle’ of the EU.<sup>5</sup> Its place in EU primary law is one of the founding values of the EU common to the Member States according to Article 2 TEU. The rule of law in the EU is inspired by the common constitutional traditions of the Member States and by international treaties.<sup>6</sup> This is reflected in the Preamble of the TEU where inspiration is drawn ‘from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law’.<sup>7</sup> The Member States’ Heads of State then confirm their attachment ‘to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law’. Further, reference is made in the Charter of Fundamental Rights of the European Union (“Charter”) which states the rule of law as a founding principle of the Union in the Preamble.<sup>8</sup>

The rule of law is integral in forming the constitutional framework which provides the uniqueness that is the autonomous EU legal order, and driving European integration towards an ‘ever closer union’,<sup>9</sup> despite the threat of European disintegration.<sup>10</sup> This has been reaffirmed by the CJEU sitting as a full court in its recent *Opinion 1/17*.<sup>11</sup> Indeed, the Opinion

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<sup>5</sup> Annex I to the Communication from the Commission to the European Parliament and the Council, ‘A New EU Framework to Strengthen the Rule of Law’, COM (2014) 158 final, 1.

<sup>6</sup> Koen Lenaerts, ‘The Court of Justice as the Guarantor of the Rule of Law within the European Union’, in G De Baere and J Wouters (eds) in *The Contribution of International and Supranational Courts to the Rule of Law* (Edward Elgar Publishing, 2015), 243; Communication from the Commission to the European Parliament, the European Council and the Council, ‘Further Strengthening the Rule of Law within the Union: State of Play and Possible Next Steps’, COM (2019) 163 Final, 1.

<sup>7</sup> Consolidated version of the Treaty on the European Union [2012] OJ C 326/01.

<sup>8</sup> Charter of Fundamental Rights of the European Union [2012] OJ C 326/391.

<sup>9</sup> Article 1(2) TEU, It states: This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen; see also Xavier Groussot and Anna Zemskova, ‘The Resilience of Rights and European Integration’ in A Bakardjieva-Engelbrekt and X Groussot (eds), *The Future of Europe: Legal and political Integration Beyond Brexit* (Hart Publishing, 2019) (forthcoming), for a discussion on the resilience of rights and its connection to the ‘ever closer union’ clause.

<sup>10</sup> See Timothy Garton Ash ‘Why We Must Not Let Europe Break Apart’ *The Guardian* (9 May 2019) <<https://www.theguardian.com/world/2019/may/09/why-we-must-not-let-europe-break-apart>> Accessed 9 May 2019, which sums up the expanse of the populist threat Europe is currently facing.

<sup>11</sup> Opinion 1/17 ECLI:EU:C:2019:341, para 110. Which states, ‘that autonomy [of the EU legal order] accordingly resides in the fact that the Union possesses a constitutional framework that is unique to it. That framework encompasses the founding values set out in Article 2 TEU, which states that the Union ‘is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights’, the general principles of EU law, the provisions of the Charter, and the provisions of the EU and FEU Treaties, which include, inter alia, rules on the conferral and division of powers, rules governing how the EU institutions and its

of the CJEU and its recent jurisprudence serves to reinforce further and strengthen our understanding of the rule of law within the EU legal order. It echoes back to its landmark judgment in *Les Verts* which emphasised that the EU is a Union ‘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’.<sup>12</sup> Making explicit the constitutional character of the rule of law in the EU legal order.

It must be pointed out that the rule of law is not mentioned as a stand-alone principle in the Treaties and the Charter, it is importantly accompanied by the values of democracy, and respect for fundamental rights. The rule of law, democracy and respect for fundamental rights, the prominent elements in Article 2 TEU which, although fundamental in their own right, are to be seen as interdependent,<sup>13</sup> and like the other values referred in Article 2 TEU must be construed in light of each other.<sup>14</sup> This is because as put by Wilms that ‘the modern Rule of Law can only serve its purpose as a fundamental value when it is understood as a tool for the protection of other fundamental values and democracy. These three concepts are inseparably linked.’<sup>15</sup> This means due to the intrinsic linkage between the respect for these values ‘there can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa. Fundamental rights are effective only if they are justiciable.’<sup>16</sup>

This informs our understanding of how the EU and in particular the CJEU understand the rule of law. It has not been expressly defined in the Treaties but left to the EU institutions to elaborate on, with the CJEU, and in recent years the Commission also taking the lead.<sup>17</sup> Indeed,

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judicial system are to operate, and fundamental rules in specific areas, structured in such a way as to contribute to the implementation of the process of integration described in the second paragraph of Article 1 TEU.’

<sup>12</sup> Case 294/83 *Parti Ecologiste “Les Verts”* ECLI:EU:C:1986:166, para 23 (emphasis added).

<sup>13</sup> Günter Wilms, *Protecting Fundamental Values in the European Union Through the Rule of Law Articles 2 and 7 TEU from a Legal, Historical and Comparative Angle* (EUI, Robert Schuman Centre for Advanced Studies, 2017), 4.

<sup>14</sup> Laurent Pech, ‘The Rule of Law as a Constitutional Principle of the European Union’(2009) Jean Monnet Working Paper Series No. 4/2009, 52.

<sup>15</sup> Günter Wilms, *Protecting Fundamental Values in the European Union Through the Rule of Law Articles 2 and 7 TEU from a Legal, Historical and Comparative Angle* (EUI, Robert Schuman Centre for Advanced Studies, 2017), 57.

<sup>16</sup> Communication from the Commission to the European Parliament and the Council, ‘A New EU Framework to the Strengthen the Rule of Law’, COM (2014) 158 final, 4.

<sup>17</sup> Theodore Konstadinides, *The Rule of law in the European Union: the Internal Dimension* (OUP, 2017), 15 and 16.

the CJEU has seized upon this opportunity even before the rule of law was explicitly referred to in the EU Treaties.<sup>18</sup>

## 2.2. Conceptualising the Rule of Law – Formal, Substantive, and the EU Understanding

The position the CJEU has taken in terms of defining the rule of law in the EU legal order through its case law has progressed significantly since “*Les Verts*” developing from a “formal” understanding of the rule of law towards one that encompasses “substantive” qualities.

Although, for the purposes of this thesis we will not enter into the debate concerning the positions on formal and substantive conceptions of the rule of law, beyond saying a few words on the differences to give a background and try to put in context the EU legal order’s conception of the rule of law. To allow us to consider how the EU understanding of the rule of law impacts on the present topic, as such standpoint naturally informs how we think about the operationalisation of the rule of law in the EU legal order, and its connection to facilitating European integration. As it is the aim to show through the discussion that follows that the operationalisation of the rule of law and European integration in the EU is heavily reliant on a substantive rights based conception of the rule of law.

The formal understanding of the rule of law is not occupied with the substantive contents of laws, validity of laws instead preconditioned on the compliance with certain formal rules.<sup>19</sup> It ‘addresses the manner in which the law was promulgated, the clarity of the ensuring norm, and its temporal dimension’.<sup>20</sup> This conception of the rule of law says nothing about substantive justice. Instead, Raz insisted, the rule of law should not ‘be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man’.<sup>21</sup> These are to be considered externalities to the rule of law in the formal conception and separate ideals.

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<sup>18</sup> The judgment of “*Les Verts*” proclaiming the [EU] is a [Union] based on the rule of law preceded any reference in the Treaties to the rule of law. The first reference to the rule of law being made in the Preamble of the Maastricht Treaty in 1992, and with the rule of law being referred to in Article 6(1) of the Amsterdam Treaty (Article 6(1) corresponding now to Article 2 TEU in the latest Treaty revision).

<sup>19</sup> Theodore Konstadinides, *The Rule of law in the European Union: the Internal Dimension* (OUP, 2017) 55.

<sup>20</sup> Paul Craig, ‘Theory and Values in Public Law: A Response’ in Paul Craig and Richard Rawlings (eds), *Law and Administration in Europe: Essays in honour of Carol Harlow* (OUP 2003) 30.

<sup>21</sup> Joseph Raz, ‘*The Authority of Law: Essays on Law and Morality*’ (OUP 1979) 211 and 214.

In stark contrast to a formal conception, proponents of a substantive rule of law propose the rule of law must in some measure demonstrate ‘normative moral principles or principles of justice’.<sup>22</sup> Under this the rule of law should encompass formal procedural attributes but not to the exclusion of substantive elements, where the ‘ideals of equality and rationality, proportionality and fairness, and certain substantive rights’ are central.<sup>23</sup> According to Dworkin the rule of law requires that the law encapsulate and enforce moral rights as part of the *ideal* of law.<sup>24</sup> Dworkin argues that the substantive rights based conception of the rule of law:

[A]ssumes that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole. [The “rights” conception] insists that these moral and political rights be recognized in positive law, so that they may be enforced *upon the demand of individual citizens* through courts or other judicial institutions... The rule of law on this conception is the ideal of rule by an accurate public conception of individual rights.<sup>25</sup>

The rule of law based on this understanding has the citizen or individual at its centre by conferring rights on individuals. The language of Dworkin is reminiscent of the CJEU’s seminal judgment in *Van Gend en Loos* establishing the doctrine of direct effect and the then Community constituting a new legal order, where the citizen and individual, and their corresponding rights are a key part of the rationale of the CJEU’s decision.<sup>26</sup> Such a fundamental judicial decision of the CJEU in setting up an integral component of the EU legal order has a substantive rights based conception of the rule of law undertones.

In support of the notion that the CJEU has then developed an understanding of the rule of law with substantive qualities or in Dworkin’s terms a rights conception it then is important to look at the case law of the CJEU. A substantive understanding can be detected in the judgment of *UPA* where the CJEU made the first explicit reference to fundamental rights in connection

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<sup>22</sup> Francis G Jacobs ‘The Lisbon Treaty, the Court of Justice and the Rule of Law’ in Niamh Nic Schuibhne and Laurence W Gormley (eds), *From Single Market to Economic Union: Essays in Memory of John A Usher* (OUP 2012) 379.

<sup>23</sup> Paul Craig, ‘Theory and Values in Public Law: A Response’ in Paul Craig and Richard Rawlings (eds), *Law and Administration in Europe: Essays in honour of Carol Harlow* (OUP 2003) 30 and 31.

<sup>24</sup> Ronald Dworkin, ‘*A Matter of Principle*’ (Harvard University Press 1985) 12.

<sup>25</sup> *ibid* 11 and 12.

<sup>26</sup> Case 26/62 *Van Gend en Loos* ECLI:EU:C:1963:1, 12.

to the rule of law.<sup>27</sup> Specifying that due to the EU being a Union based on the rule of law, judicial review of the acts of the EU institutions are not just subject to the compatibility with the Treaties, but also with the ‘general principles of law which include fundamental rights’.<sup>28</sup> The *Kadi* case further built on a substantive understanding with the CJEU relying on the rule of law in stating that in a Union based on the rule of law, the review of the validity of Union measures subject to fundamental rights must be considered to be the expression of a constitutional guarantee. In which the autonomous EU legal order and its protection of human rights cannot be prejudiced by an international agreement.<sup>29</sup>

Moreover, since the entry into force of the Lisbon Treaty fundamental rights enjoy a prominent place in Article 6(1) TEU in which the EU recognises that the rights, freedoms and principles set out in the Charter have the same legal values in the Treaties. Article 6(3) TEU also specifying that fundamental rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”) and those from the constitutional traditions common to the Member States have its place in the EU legal order as general principles of Union law. Therefore, in the post Lisbon framework, *Opinion 2/13* of the CJEU reaffirms the importance of fundamental rights in the EU legal order and to the rule of law by recognising that ‘at the heart of that legal structure are the fundamental rights recognised by the Charter, respect for those rights being a condition of the lawfulness of EU acts, so that measures that are incompatible with those rights are not acceptable in the EU.’<sup>30</sup>

Therefore, it is clear from the decisions of the CJEU, that the CJEU does not understand the rule of law in the EU legal order as merely encompassing formal and procedural requirements but has substantive qualities for ensuring compliance with and respect for democracy and human rights.<sup>31</sup>

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<sup>27</sup> Laurent Pech, ‘The Rule of Law as a Constitutional Principle of the European Union’(2009) Jean Monnet Working Paper Series No. 4/2009, 55.

<sup>28</sup> Case C-50/00 P Unión de Pequeños Agricultores ECLI:EU:C:2002:462, para 38; See also, Case C-583/11 *Inuit Tapiriit Kanatami* ECLI:EU:C:2013:625, para 91.

<sup>29</sup> Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation* ECLI:EU:C:2008:461, paras 281 – 284 and 316.

<sup>30</sup> *Opinion 2/13* ECLI:EU:C:2014:2454, para 169.

<sup>31</sup> Laurent Pech, ‘The Rule of Law as a Constitutional Principle of the European Union’(2009) Jean Monnet Working Paper Series No. 4/2009, 55; Communication from the Commission to the European Parliament and the Council, ‘A New EU Framework to the Strengthen the Rule of Law’, COM (2014) 158 final, 4.

The Commission affirmed this position by stating in its Communication on ‘A New EU Framework to Strengthen the Rule of Law’ that the rule of law is a ‘constitutional principle with both formal and substantive components’.<sup>32</sup> In doing so the Commission stated a non-exhaustive list of core rule of law principles that defines the rule of law in the EU and that reflect its formal and substantive qualities drawn from the case law of the CJEU, European Court of Human Rights (“ECtHR”) and work of the Venice Commission:

1. Legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws;
2. Legal certainty;
3. Prohibition of arbitrariness of the executive powers;
4. Independent and impartial courts;
5. Effective judicial review including respect for fundamental rights;
6. Equality before the law.<sup>33</sup>

Yet, the EU conception of the rule of law has an added layer to its substantive understanding, that the CJEU applies an ‘integrative conception of the rule of law by interpreting EU law’s formality in light of its rational ends, i.e. promoting European integration,<sup>34</sup> moreover, the effectiveness of EU law. The coherence and the functioning of the EU legal order is dependent on these rationales, particularly the effectiveness of EU law being maintained.

In this way it becomes evident the operationalisation of the rule of law in the EU legal order, and its connection to European integration is reliant on a substantive rights based conception of the rule of law with this added layer. Firstly, as these normative ideals are incompatible with a formalistic conception. Secondly, the rule of law is intertwined with the effectiveness of EU law, as the rule of law supports the effectiveness of EU law and the functioning of the EU legal order. For example as we will see in the later discussion, the

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<sup>32</sup> Communication from the Commission to the European Parliament and the Council, ‘A New EU Framework to the Strengthen the Rule of Law’, COM (2014) 158 final, 4.

<sup>33</sup> Communication from the Commission to the European Parliament and the Council, ‘A New EU Framework to the Strengthen the Rule of Law’, COM (2014) 158 final, 4; In regards to the work of the Council of Europe’s Venice Commission in relation defining the rule of law for the purpose of facilitating a correct and consistent understanding and interpretation of the notion of the rule of law see: European Commission for Democracy Through Law (Venice Commission), ‘Rule of Law Checklist’, CDL-AD(2016)007.

<sup>34</sup> Theodore Konstadinides, *The Rule of law in the European Union: the Internal Dimension* (OUP 2017) 16.

principle of independent and impartial courts considered a core part of the rule of law ensures the effectiveness of EU law is maintained, such as the preliminary ruling mechanism under Article 267 TFEU, and the principles of mutual trust and mutual recognition.<sup>35</sup> Whereby, these essential structures of EU law also assist in ensuring the independence and impartiality of Member State's courts and tribunals is enforced, thus protecting the rule of law.

Lastly, for the rule of law to move beyond its general expression as a value in Article 2 TEU to something more justiciable has required the CJEU in its approach thus far to rely on other treaty provisions and substantive elements of the rule of law such as fundamental rights to give specific expression and be capable of being enforced. As it will be examined in the forthcoming discussion, the CJEU's approach in this way by use of Art 19 TEU and the right to effective judicial protection emphasises individual rights for the protection of the rule of law and vice versa.<sup>36</sup> As put by Konstadinides, 'in this respect the rule of law forms more than part of a bundle of overlying principles together with democracy and human rights in that it places the individual at the forefront of EU integration'.<sup>37</sup> Whereby, the individual not only advances European integration towards an 'ever closer union' by becoming a core part of the system in promoting and enforcing the rule of law but involving the individual also facilitates the operationalisation of the rule of law via fundamental rights protection.<sup>38</sup>

### **3. Normative Arguments for Protecting the Rule of Law in the EU**

The previous section looked at the rule of law being a constitutional principle and founding value of the Union emphasising that the rule of law is integral in forming the constitutional framework which provides the uniqueness that is the autonomous EU legal order. Where it was reasoned the EU has a substantive rights based conception of the rule of law, and that this

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<sup>35</sup> See to that effect the recent decisions of the CJEU: Case-64/16 *Associação Sindical dos Juizes Portugueses* ECLI:EU:C:2018:117; Case C-216/18 PPU *Minister for Justice and Equality* ECLI:EU:C:2018:586; C-284/16 *Achmea* ECLI:EU:C:2018:158.

<sup>36</sup> Case C-64/16 *Associação Sindical dos Juizes Portugueses* ECLI:EU:C:2018:117, para 32 – 36; Case C-216/18 PPU *Minister for Justice and Equality* ECLI:EU:C:2018:586, paras 50 and 51; Case C-284/16 *Achmea* ECLI:EU:C:2018:158, para 36; Case C-619/18 *Commission v Poland (Indépendance de la Cour supreme)* ECLI:EU:C:2019:531, paras 46 – 49.

<sup>37</sup> Theodore Konstadinides, *The Rule of law in the European Union: the Internal Dimension* (OUP 2017) 17.

<sup>38</sup> In this respect see also Xavier Groussot and Anna Zemskova, 'The Resilience of Rights and European Integration' in A Bakardjieva-Engelbrekt and X Groussot (eds), *The Future of Europe: Legal and political Integration Beyond Brexit* (Hart Publishing 2019) (forthcoming), 7. In regards to the doctrine of direct and individuals serving as an effective tool of European integration and becoming a driving force of the integration process.



conception is crucial in forming the basis for the operationalisation of the rule of law in the EU and the rule of law's connection to facilitating European integration. This section aims to build on that previous discussion by looking at the normative arguments for increased justiciability of the rule of law. Three arguments that justify the protection of the rule of law in the EU and necessitates the rule of law being used as a compliance tool to enforce the fundamental value. Firstly, that rule of law deficiencies adversely impact the functioning of the EU legal order, notably in its effects on mutual trust and recognition, and effects on the judicial system and the preliminary ruling procedure. Secondly, rule of law violations operate beyond a Member State's borders in the way that *all* are affected in the EU. Thirdly, the last arguments are based on the fact that Member States have voluntarily committed themselves to the common values of the EU, in particular the rule of law, and to protect the EU's standing and credibility in the global community.

### **3.1. The Impact of Rule of Law Deficiencies on the Functioning of the EU Legal Order**

The Commission recently stated that 'if the rule of law is not properly protected in all Member States, the Union's foundation stone of solidarity, cohesion, and the trust necessary for mutual recognition of national decisions and the functioning of the internal market as a whole, is damaged.'<sup>39</sup> The Commission's concerns should not be dismissed as overstated rhetoric as the crux of the contention relates to the fact that the rule of law is essential to the functioning of the EU legal order particularly in its relationship to mutual trust and mutual recognition, and the EU's judicial system .

#### **3.1.1. Effects on mutual trust and mutual recognition**

Given that the EU is a union based on the rule of law and can be posited, as eluded to before, that the rule of law is intertwined with the effectiveness of EU law. Deficiencies in the rule of law not only have the potential to disrupt the functioning of the EU legal order but may also cause serious irreparable damage to the EU legal order,<sup>40</sup> since it is based on 'mutual legal

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<sup>39</sup> Communication from the Commission to the European Parliament, the European Council, and the Council, 'Further Strengthening the Rule of Law within the Union: State of play and possible next steps', COM (2019) 163 final, 2.

<sup>40</sup> Case C-619/18 R *Commission v Poland (Indépendance de la Cour supreme)* ECLU:EU:C:2018:1021, order of 17 December 2018, paras 64 – 70.

interdependence and mutual trust’,<sup>41</sup> that flows from the principle of sincere cooperation in Article 4(3)TEU.

Why deficiencies in the rule of law can have such an impact is due to the unique structure of the EU legal order. The CJEU has been clear-cut in a series of high profile cases how it understands the structure of the EU legal order and the foundation of its functioning. Where the quintessential statement of the CJEU is that ‘the autonomy of EU law with respect both to the law of the Member States and to international law is justified by the essential characteristics of the EU and its law, relating in particular to the constitutional structure of the EU and the very nature of that law.’<sup>42</sup> In particular, that ‘EU law is characterized by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States, and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves. Those characteristics have given rise to a structured network of principles, rules, and mutually interdependent legal relations binding the EU and its Member States reciprocally as well as binding its Member States to each other.’<sup>43</sup> It is on this which the Union builds its foundation, a constitutional principle, the principle of mutual trust. A defining feature of the EU legal order that is not only its strength in facilitating European integration, but also its source of vulnerability. That EU law is built upon the fundamental premise that Member States of the EU share and that they recognise they share, on a reciprocal basis with all others, the common values the EU is founded on as referred to in Article 2 TEU.<sup>44</sup> In *Commission v Poland (Indépendance de la Cour supreme)* the CJEU powerfully stated that, ‘that premise both entails and justifies the existence of *mutual trust* between the Member States and, in particular, their courts that those values upon which the European Union is founded, including the *rule of law*, will be recognised, and therefore that the EU law that implements those values will be respected.’<sup>45</sup>

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<sup>41</sup> Christophe Hillion, ‘Overseeing the Rule of Law in the EU: Legal Mandate and Means’ in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016) 61.

<sup>42</sup> Case C-284/16 *Achmea* ECLI:EU:C:2018:158, para 33; Case C-621/18 *Wightman* ECLI:EU:C:2018:999, para 45; Opinion 1/17, ECLI:EU:C:2019:341, para 109.

<sup>43</sup> Case C-621/18 *Wightman* ECLI:EU:C:2018:999, para 45; Opinion 1/17, ECLI:EU:C:2019:341, para 109; Case C-284/16 *Achmea* ECLI:EU:C:2018:158, para 33; Opinion 2/13 ECLI:EU:C:2014:2454, paras 166 and 167.

<sup>44</sup> Case C-619/18 *Commission v Poland (Indépendance de la Cour supreme)* ECLI:EU:C:2019:531, para 42; Case C-284/16 *Achmea* ECLI:EU:C:2018:158, para 33; Case C-621/18 *Wightman* ECLI:EU:C:2018:999, para 63; Case C-284/16 *Achmea* ECLI:EU:C:2018:158, para 34; Case C-216/18 PPU *Minister for Justice and Equality* ECLI:EU:C:2018:586, para 35; Case C-64/16 *Associação Sindical dos Juizes Portugueses* ECLI:EU:C:2018:117, para 30; Opinion 2/13 ECLI:EU:C:2014:2454, para 168.

<sup>45</sup> Case C-619/18 *Commission v Poland (Indépendance de la Cour supreme)* ECLI:EU:C:2019:531, para 43. See also to that effect: Case C-284/16 *Achmea* ECLI:EU:C:2018:158, para 34; Case C-216/18 PPU *Minister for Justice and Equality* ECLI:EU:C:2018:586, para 35.

Under this, Member States are obliged to recognise each other's legal structures or to assume that they are at least as good as their standards in terms of governance, democracy and the rule of law.<sup>46</sup> Due to the EU's regulatory and interconnected judicial network between the EU and its Member States, and where judicial cooperation is embodied through mutual recognition of judicial decisions founded on the principle of mutual trust.<sup>47</sup> The manner in which the rule of law is implemented and protected by Member States at the national level therefore plays a key role in respect to the functioning of mutual trust.<sup>48</sup>

As examined by reference to the Area of Freedom, Security and Justice ("AFSJ"), to take an example. The principle of mutual trust is fundamental to the AFSJ, and in particular the European arrest warrant system. It is the principle of mutual trust and the principle of mutual recognition, of which is based on the mutual trust between Member States, that allows for the creation of an area without internal borders to be maintained.<sup>49</sup> As the CJEU has noted on many occasions the European arrest warrant system is based on those fundamental principles as it is based on the mutual confidence between Member States that their national legal systems respect the rule of law and are capable of providing equivalent and effective protection of fundamental rights recognised at the EU level.<sup>50</sup> Such is the importance of the principles of mutual trust and mutual recognition to the functioning of the European arrest warrant that only exceptional circumstances justifies derogation due to the assumption that all Member States are in compliance with EU law and particularly with fundamental rights.<sup>51</sup>

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<sup>46</sup> Carlos Closa, 'Reinforcing EU Monitoring of the Rule of Law: Normative Arguments, Institutional Proposals and the Procedural Limitations' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016) 16.

<sup>47</sup> Dimitry Kochenov and Laurent Pech, 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality' (2015) 11 *European Constitutional Law Review* 512, 521.

<sup>48</sup> Communication from the Commission to the European Parliament and the Council, 'A New EU Framework to the Strengthen the Rule of Law', COM (2014) 158 final, 2.

<sup>49</sup> Case C-216/18 PPU *Minister for Justice and Equality* ECLI:EU:C:2018:586, para 36; Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* EU:C:2016:198, para 78.

<sup>50</sup> Case C-168/13 PPU *F* ECLI:EU:C:2013:358, para 50; Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* EU:C:2016:198, para 78.

<sup>51</sup> Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* EU:C:2016:198, paras 78 and 82; Case C-216/18 PPU *Minister for Justice and Equality* ECLI:EU:C:2018:586, paras 36, 37 and 43. See also: Koen Lenaerts 'La Vie Après L' Avis: Exploring the Principle of Mutual (Yet Not Blind) Trust' (2017) 54 *CML Rev* 805, 821, 822, 824 and 828 – 837. In which the article discusses that the principle of mutual trust is not absolute and subject to strict limitations in the context of striving to strike a correct balance between the principle of mutual trust and the protection of fundamental rights. Where such limitations of the principle should operate in such a way as to restore mutual trust due to its importance as the cornerstone of the AFSJ.

Deficiencies in the rule of law in one Member State can have a knock-on effect to disrupt and damage the carefully constructed ecosystem of mutually interdependent relations which shows the vulnerability of a legal order built upon mutual trust. That the old idiom rings true that a chain is only as strong as its weakest link. Where the principle of mutual trust is dependent on *all* Member States fulfilling their commitment under Article 2 TEU. The Commission recognising this aptly stated:

‘The confidence of all EU citizens and national authorities in the functioning of the rule of law is particularly vital for the further development of the EU into “an area of freedom, security and justice without internal frontiers”. This confidence will only be built and maintained if the rule of law is observed in all Member States.’<sup>52</sup>

In the context of the AFSJ, where the rule of law is not being observed or is actively being undermined this may jeopardise the confidence of Member States and their courts in the institutions and judicial systems of the non-observant Member States. The mistrust may manifest in the fragmentation of the AFSJ if Member States refuse to recognise and enforce judicial decisions.<sup>53</sup> In that regard, this discussion is not rooted in the abstract dealing with fictional or hypotheticals but is informed by the current crises in the EU. That in the context of the Polish reforms of the judiciary and in particular concerning the independence of the Supreme Court of Poland. The CJEU by order of the court in granting interim measures in the case of *Commission v Poland (Indépendance de la Cour supreme)* stated the fact the independence of the Supreme Court could not be guaranteed pending the final judgment in that case, is likely to undermine the trust of the Member States and their courts in the Republic of Poland and its observance of the rule of law.<sup>54</sup> Noting that ‘the undermining of those principles may have serious and irreparable effects on the proper functioning of the EU legal order...’, stating that the risk of loss of confidence was very real and not fictional or hypothetical.<sup>55</sup> The CJEU drew on the preliminary reference submitted by the High Court of Ireland in the case C-216/18 PPU *Minister for Justice and Equality (“LM”)* as evidence of the risk of loss of confidence in Polish judicial system. Where the High Court’s concern was that the person

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<sup>52</sup> Communication from the Commission to the European Parliament and the Council, ‘A New EU Framework to the Strengthen the Rule of Law’, COM (2014) 158 final, 2.

<sup>53</sup> Koen Lenaerts ‘La Vie Après L’Avis: Exploring the Principle of Mutual (Yet Not Blind) Trust’ (2017) 54 CML Rev 805, 821.

<sup>54</sup> Case C-619/18 R *Commission v Poland (Indépendance de la Cour supreme)* ECLU:EU:C:2018:1021, order of 17 December 2018, para 73.

<sup>55</sup> *ibid* paras 75 and 77.

subject to a European arrest warrant would have his right to a fair trial infringed if he were to be surrendered to the Republic of Poland due to the alleged systemic deficiencies of the rule of law in the Republic.<sup>56</sup> This demonstrates that rule of law deficiencies can have real effects on the functioning of the EU legal order through its impact on the principle of mutual trust as examined by reference to the consequences for the AFSJ.

### **3.1.2. Effects on the judicial system, and the preliminary ruling procedure**

Similarly, where rule of law deficiencies are related to concerns about the independence and impartiality of a Member State's judiciary, it impacts the functioning of the EU legal order through the EU's own judicial system. To preserve the specific characteristics and the autonomy of the EU legal order as discussed above, the Treaties established a judicial system to ensure the effectiveness of EU law via the consistent and uniform interpretation of EU law.<sup>57</sup> The CJEU has stated in that respect, that the judicial system has as its 'key stone' the preliminary ruling procedure under Article 267 TFEU.<sup>58</sup> That is because the procedure is an instrument for cooperation between the CJEU and the national courts by means of which the CJEU provides national courts with the criteria for the interpretation of EU law which they need in order to decide the disputes before them.<sup>59</sup> Where the preliminary ruling procedure is devised to facilitate 'judge to judge dialogue' to secure that the national courts and EU courts work together as if they belonged to *one* legal community to ensure the effectiveness of EU law.<sup>60</sup> The preliminary ruling procedure therefore forms part of the rationale for protecting the rule of law and its increased justiciability in the EU.

It must be recalled from the previous section that one of the core rule of law principles that form the conception of the EU rule of law is independent and impartial courts. If Member States fail to respect the rule of law in this way it is liable to have an effect on the proper working of the system of judicial cooperation embodied by the preliminary ruling procedure

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<sup>56</sup> *ibid* para 77.

<sup>57</sup> Case C-284/16 *Achmea* ECLI:EU:C:2018:158, para 35; Case C-619/18 *Commission v Poland (Indépendance de la Cour supreme)* ECLI:EU:C:2019:531, para 44; Opinion 2/13 ECLI:EU:C:2014:2454, paras 174.

<sup>58</sup> *ibid* para 37; *ibid*; *ibid* 176.

<sup>59</sup> Case C-102/17 *Secretaria Regional de Saúde dos Açores* ECLI:EU:C:2018:294, para 23; Case C-284/16 *Achmea* ECLI:EU:C:2018:158, para 37; Case C-370/12 *Pringle* ECLI:EU:C:2012:756, para 83; Case C-83/91 *Meilicke* ECLI:EU:C:1992:332, para 22.

<sup>60</sup> Opinion of Advocate General Wahl in Joined Cases C-58/13 and C-59/13 *Torresi* ECLI:EU:C:2014:265, para 51.

under Article 267 TFEU.<sup>61</sup> As it has been stated by the CJEU that the independence of national courts is essential to the judicial cooperation system, as the preliminary ruling procedure may be activated only by a body responsible for applying EU law which satisfies the criterion of independence.<sup>62</sup> This is related to the fact that effective judicial protection is only guaranteed where individuals have access to independent and impartial courts and tribunals.<sup>63</sup> Deficiencies in this respect would have a chilling effect on judicial cooperation under Article 267 TFEU due to the role that national courts occupy. National courts occupy a crucial role in the EU's judicial system as guardians of the EU legal order and the judicial system alongside the CJEU,<sup>64</sup> they are responsible in the first instance for applying EU law and for initiating the preliminary ruling procedure under Article 267 TFEU to secure the consistent and uniform interpretation of EU law.<sup>65</sup> Ensuring cases through Article 267 TFEU reach the CJEU that could not otherwise,<sup>66</sup> complementing the infringement action procedure under Article 258 TFEU, to protect individual rights in the specific case.<sup>67</sup>

The importance of the preliminary ruling procedure for the functioning of the EU legal order becomes more apparent in the way it is dual-tied to the protection of the rule of law, it is not only part of the rationale but it also enables for the enforcement of the rule of law as a method against a Member State through national courts. Further, the preliminary ruling procedure is inherently connected to European integration in the way it integrates citizens in the EU legal order for the enforcement of individual rights under EU law. It enhances the consistent and uniform interpretation of EU law, and reinforces European integration in the process. The confidence of citizens depends on their ability to access the EU judicial system. The rule of law is therefore intrinsically connected to the EU legal order and its judicial system which can cause irreparable damage to if not sufficiently protected.

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<sup>61</sup> Case C-619/18 *Commission v Poland (Indépendance de la Cour supreme)* ECLI:EU:C:2018:910, order of 15 November 2018, para 21; Case C-522/18 *Zakładowi Ubezpieczeń Społecznych Oddział w Jaśle* ECLI:EU:C:2018:786, para 15; Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Strengthening the rule of law within the Union: A blueprint for action', COM (2019) 343 final, 4.

<sup>62</sup> Case C-64/16 *Associação Sindical dos Juizes Portugueses* ECLI:EU:C:2018:117, para 43; Case C-216/18 PPU *Minister for Justice and Equality* ECLI:EU:C:2018:586, para 54.

<sup>63</sup> *ibid* 40 – 42; *ibid* 52 and 53.

<sup>64</sup> Opinion 1/09 ECLI:EU:C:2011:123, para 66

<sup>65</sup> Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Strengthening the rule of law within the Union: A blueprint for action', COM (2019) 343 final, 4.

<sup>66</sup> Opinion 1/09 ECLI:EU:C:2011:123, para 80; Xavier Groussot and Johan Lindholm, 'General Principles: Taking Rights Seriously and Waving the Rule-of-Law Stick in the European Union' in K Ziegler et al (eds), *Constructing Legal Orders in Europe: General Principles of EU Law*, (Edward Elgar 2019) Forthcoming, 27.

<sup>67</sup> Case 28/67 *Mölkerei-Zentrale Westfalen-Lippe* ECLI:EU:C:1968:17, 153.

### 3.2. We are ‘*All Affected*’

It has been discussed so far that deficiencies in the rule of law in a given Member State can have a serious impact on the functioning of the EU legal order as it is defined by the deep bonds Member States share due to the mutual interdependency of legal relations between them. Thus, it is apparent that due to the way the EU legal order is structured and operates, deficiencies of the rule of law in a Member State are not restricted to its borders but have a knock-on effect in the way Member States of the EU are *all affected*.

Extending on the foregoing discussion that rule of law deficiencies reach beyond a Member State’s own borders harming the functioning of the EU legal order, there is also a broader argument to be made. That not only those that have a stake in the functioning of the EU legal order or those that come in direct contact with the judicial system are affected by rule of law violations but it also affects all EU citizens indirectly. It is argued that due to an illiberal Member State being involved in the decision making processes they in a way ‘govern the lives of *all* citizens’.<sup>68</sup> That Member State will take decisions in the EU institutions such as the European Council and the Council of Ministers,<sup>69</sup> the illiberal values of that Member State can also influence EU legislation which is applicable across the EU.<sup>70</sup> Legitimacy of EU decision making due to the EU being built on the premise that all Member States share the common values the Union is founded upon.<sup>71</sup> Therefore, rule of law violations indirectly affect EU citizens regardless if they are residing in that Member State or not, threatening the exercise of rights granted to EU citizens.<sup>72</sup>

There is then a normative argument for protecting the rule of law in the EU and its increased justiciability which is based on the ‘all affected’ principle. The principle connotes in the

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<sup>68</sup> Jan-Werner Müller, ‘Should the EU Protect Democracy and the Rule of Law inside Member States’ (2015) 21 ELJ 141, 145; Carlos Closa, Dimitry Kochenov and J.H.H. Weiler, ‘Reinforcing Rule of Law Oversight in the European Union’ EUI Working Papers RSCAS 2014/25, 5.

<sup>69</sup> *ibid*; Dimitry Kochenov and Laurent Pech, ‘Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality’ (2015) 11 European Constitutional Law Review 512, 521.

<sup>70</sup> Günter Wilms, *Protecting Fundamental Values in the European Union Through the Rule of Law Articles 2 and 7 TEU from a Legal, Historical and Comparative Angle* (EUI, Robert Schuman Centre for Advanced Studies 2017), 60.

<sup>71</sup> Christophe Hillion, ‘Overseeing the Rule of Law in the EU: Legal Mandate and Means’ in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016) 60 and 61.

<sup>72</sup> Dimitry Kochenov and Laurent Pech, ‘Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality’ (2015) 11 European Constitutional Law Review 512, 521.

context of the EU, that all those affected from the consequences of the erosion of the EU's common values including the rule of law have an interest in limiting the externalities created by offending Member States.<sup>73</sup> In other words, there is a justification for protecting the rule of law and enforcing compliance with the rule of law against violating Member States where all EU citizens and other Member States are affected by rule of law breaches.

This normative argument is also supported by primary law. The 'all-affected' principle on some levels overlaps to the interests shared by the principle of sincere cooperation and the obligations that the Union and Member States have under Article 4(3) of the TEU. The Union and the Member States have an interest in putting a stop to rule of law violations since all are affected and they are to facilitate the achievement of Union tasks i.e. the maintenance of a Union of common values and the AFSJ, and continuance of mutual trust. Rule of law breaches puts into question their ability to live up to their obligations under Article 4(3) TEU where according to that provision they are to assist each other in carrying out the tasks that flow from the Treaties, and that Member States shall facilitate the achievement of the Unions tasks.

Similarly, the justification based on the 'all affected' principle is also supported and consistent with the rationale and the functions of Article 7 TEU. As is viewed by Müller 'the core of Article 7 consists of a mechanism to *insulate* the rest of the Union from the government of a particular Member State deemed to be in breach of fundamental values; it enables a kind of *moral quarantine*...' <sup>74</sup> This is because Article 7(3) TEU allows for the suspension of certain rights deriving from the application of the Treaties including voting rights of a Member State where there has been a determination of the existence of a serious and persistent breach by a Member State of the values in Article 2, under Article 7(2) TEU. Therefore, this 'moral quarantine' limits the affects that the offending Member State can have in influencing the decision making across the EU institutions protecting in a way *all* citizens of the Union, safeguarding their individual rights. It can be seen that the 'all affected' principle presents a legitimate reason for securing the protection of the rule of law in the EU and justifies an approach in operationalising the rule of law which also protects European integration.

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<sup>73</sup> Carlos Closa, 'Reinforcing EU Monitoring of the Rule of Law: Normative Arguments, Institutional Proposals and the Procedural Limitations' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016) 19.

<sup>74</sup> Jan-Werner Müller, 'Should the EU Protect Democracy and the Rule of Law inside Member States' (2015) 21 ELJ 141, 144.



### **3.3. Upholding ‘Internal’ Commitments and External Value Promotion**

One day a group of friends who have known each other for many years and lived in close proximity together decided to embark on a great design project, a town hall to show that ‘great architecture’ can be made out of collaborative effort and deepen integration of the community. The project would then be an example globally. So they embarked on this great project, of course some of the friends were prudent and thought they should enter into a contract with one another. They agreed on some key design principles to guide the project that formed its foundation and had to be maintained. They also added to the rules that only those that value the same design principles were allowed to join because that’s what differentiated them from other designers, and that those who wanted to join also had to live in the designated proximity among other rules. In addition, they added enforcement provisions to make sure that all abided by the agreed rules they voluntarily committed to. One of the defining design principles was that floor was to be made of stone as this formed a strong foundation for the rest of the building to be built on. However, one day the friends noticed that a select few of the group started to dismantle their designated work area and take out the stone and replace it with wood compromising the structure. The friends pointed to the design rules remarking “but this is what you agreed to,” “how can we carry on promoting this project globally with its design principles while inside the walls, the structure is compromised!”.

The final arguments that will be put forward that form part of the justification for protecting the rule of law and therefore support the operationalisation of the rule of law, is it is necessary to enforce the voluntary commitments that the Member States agreed to. Closely related to this is the issue of the of EU’s credibility and standing in the global community with its objectives of value promotion to the ‘wider world’.

#### **3.3.1. “But that is what you agreed to”**

In addition to its role as a founding value of the EU in Article 2 TEU, the rule of law constitutes a standard where it has a prominent role in which prospective Member States must fulfil to accede to the EU. This membership conditionality is formalised in Article 49 TEU which establishes that ‘any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union...’ Article 49 TEU

‘epitomises, and partly “constitutionalises”, the previously established Copenhagen conditionality.’<sup>75</sup> The Copenhagen criteria or the accession criteria still maintains its relevance in the accession process. The Copenhagen criteria set out the political and economic criteria conditions for the EU membership. At a European Council meeting in Copenhagen in 1993 the European Council committed to EU enlargement to the Central and Eastern European countries.<sup>76</sup> In doing so they stated that ‘accession will take place as soon as an associated country is able to assume the obligations of membership by satisfying the *economic and political conditions required*’.<sup>77</sup> Laying down the economic and political criteria to be fulfilled:

- 1) Political criterion: stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities;
- 2) Economic criterion: the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union;
- 3) Capacity to implement Union *acquis*: The ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union.<sup>78</sup>

The rule of law is made explicit in the criterion alongside democracy and respect for human rights, where prospective states must be able to guarantee these principles by their institutions for their accession to the EU. The EU values, and in particular the rule of law have been increasingly expressed in the EU enlargement policy to satisfy the substantive requirements under Article 49 TEU.<sup>79</sup> In support of this the Commission has conveyed that the rule of law has a dominant position in EU external policy and ‘central to the EU accession process and neighbourhood policy,’ where progress in accession negotiations is dependent on work in this area.<sup>80</sup>

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<sup>75</sup> Christophe Hillion, ‘The Copenhagen Criteria and Their Progeny’ in Christophe Hillion (ed), *EU Enlargement: A Legal Approach* (Oxford, Hart Publishing 2004), 3; See also: Theodor Konstantinides, *The Rule of law in the European Union: the Internal Dimension* (OUP 2017), 78.

<sup>76</sup> *ibid* 1.

<sup>77</sup> European Council Conclusions, 21 – 22 June 1993, SN 180/1/93 REV 1 <<https://www.consilium.europa.eu/media/21225/72921.pdf>> accessed 1 August 2019, 13 (emphasis added).

<sup>78</sup> *ibid*; European Commission, ‘Accession Criteria’ <[https://ec.europa.eu/neighbourhood-enlargement/policy/glossary/terms/accession-criteria\\_en](https://ec.europa.eu/neighbourhood-enlargement/policy/glossary/terms/accession-criteria_en)> accessed 3 August 2019.

<sup>79</sup> Christophe Hillion, ‘Overseeing the Rule of Law in the EU: Legal Mandate and Means’ in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016), 67.

<sup>80</sup> Communication from the Commission to the European Parliament, the European Council, and the Council, ‘Further Strengthening the Rule of Law within the Union: State of play and possible next steps’, COM (2019) 163 final, 6.

In the short story above the friends had all entered into an agreement and agreed on some key design principles to guide their project, and which formed its foundation. Where joining the project was conditional in that only those who valued those same design principles were allowed to join. We would expect that after joining the project those friends would continue to abide by those design principles, after all they of their own volition voluntarily committed themselves to the project based on those principles. Similarly, in regards to the EU, the values that Member States committed to when they acceded to the Union must be continued to be upheld otherwise the accession criteria becomes redundant. If we expect prospective states to adhere to these values and principles then the existing Member States of the EU must also be required to adhere, to be consistent and not hypocritical. Therefore, it can be argued irrespective of provisions detailing enforcement there is an implied right to safeguard the constitutional structure of the EU.

In the recent cases of both the full court decision in *Wightman* and the landmark ruling in *Commission v Poland (Indépendance de la Cour supreme)*, the CJEU has placed important emphasis on Article 49 TEU. Reminding the Member States of the EU that ‘as is apparent from Article 49 TEU, which provides the possibility for any European State to apply to become a member of the European Union, the European Union is composed of States which have *freely and voluntarily committed themselves* to the common values referred in Article 2 TEU, which respect those values and which undertake to *promote* them.’<sup>81</sup> Article 50 TEU on the right to withdrawal is the counterpart, in other words Article 49 TEU and Article 50 TEU are two sides of the same coin.<sup>82</sup> The CJEU also notably stating in this regard that ‘given that a State cannot be forced to accede to the European Union against its will, neither can it be forced to withdraw from the European Union against its will.’<sup>83</sup> Although expressed in relation to the question on unilateral revocation of a notification to withdraw under Article 50 TEU. It implicitly refers to the fact in the Treaties, Article 7 TEU only provides the possibility to sanction a Member State. Absent is the possibility to force a Member State to leave the EU even if there is deliberate continual disregard for the rule of law and the common values in general, by a Member State.

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<sup>81</sup> Case C-619/18 *Commission v Poland (Indépendance de la Cour supreme)* ECLI:EU:C:2019:531, para 42; Case C-621/18 *Wightman* ECLI:EU:C:2018:999, para 63, (emphasis added).

<sup>82</sup> C-621/18 *Wightman* ECLI:EU:C:2018:999, para 63.

<sup>83</sup> *ibid* 65.

If the Union is unable to eject an illiberal Member State when they embark on a course which is inconsistent with the values of the EU and can cause serious and irreparable damage to the functioning of the EU legal order. It justifies the need for a strengthening and enforcement of the rule of law especially when Member States start to dismantle ‘the stone foundation replacing it with wood and compromising the structure’, in order to guide Member States back to fulfilling the obligations they agreed to.<sup>84</sup> After all the integrity to the EU’s claim for autonomy ‘based on external delimitation and internal cohesion’ is dependent on the Copenhagen criteria and ‘membership conditionality based on the rule of law adherence’.<sup>85</sup> It is this adherence to the rule of law and the common values including democracy and respect for humans rights that distinguishes EU Member States from third countries allowing for the advancement of European integration towards an ‘ever closer union’. It was fittingly put by Koen Lenaerts in this respect, that ‘an EU Member State and a third country may be equals before international law, but they are *not equals* before the law of the EU as only the former is part of the EU understood as a *Union of values*’.<sup>86</sup>

### 3.3.2. Value promotion and credibility in the global community

This leads to another point in the story and the final point to be discussed. The question being how can the friends project be an example globally and how can they promote the project based on its design principles, when behind the projected façade and inside the walls the structure is compromised? Similarly the question for the EU is how can the EU engage in value promotion if it cannot protect its own legal and political system from violations of the fundamental values that form its foundation?

According to Article 3(5) TEU the EU’s ‘missionary principle’ which sets out the EU’s objectives in relation to its presence on the global scene and its goals for EU relations for the wider world.<sup>87</sup> The provision states, ‘in its relations with the wider world, the Union shall

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<sup>84</sup> This view is similarly held by Jan-Werner Müller who also suggests in the absence to eject a Member State it ‘implies a right to safeguard this constitutional settlement [the EU legal order] through interventions in Member States’. See Jan-Werner Müller, ‘Should the EU Protect Democracy and the Rule of Law inside Member States’ (2015) 21 ELJ 141, 145.

<sup>85</sup> Theodore Konstadinides, *The Rule of law in the European Union: the Internal Dimension* (OUP 2017), 78.

<sup>86</sup> Koen Lenaerts ‘La Vie Après L’Avis: Exploring the Principle of Mutual (Yet Not Blind) Trust’ (2017) 54 CML Rev 805, 809.

<sup>87</sup> Ester Herlin-Karnell, ‘EU Values and the Shaping of the International Legal Context’ in F Amtenbrink and D Kochenov (eds), *European Union’s Shaping of the International Legal Order* (Cambridge, Cambridge University Press 2013) < [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2263987](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2263987)> accessed 20 August 2019, 5.

uphold and promote its values and interests and contribute to the protection of its citizens'. Therefore, it envisages that the EU's values and in particular the rule of law are exported to the global community. These objectives are reiterated in a more specific sense under Article 21(1) TEU in relation to EU external action as part of the Common Foreign and Security Policy, which reinforces the notion of the rule of law as an exportable quality. Where Article 21(1) TEU states:

The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

Further reference is made in Article 21(2)(b) TEU that the EU shall define and pursue common policies and actions in order to 'consolidate and support democracy, the rule of law, human rights and the principles of international law'. In order for the EU to be seen as a normative power in light of these aims it depends largely on the EU being able to uphold its values on the internal dimension before the values are exported externally.<sup>88</sup> Logically this is an extension to the previous point that if acceding States are held to account over their institutions ability to guarantee the rule of law then existing Member States must uphold their commitments. Likewise, there is case to be made in favour of protecting the rule of law and enhancing its enforcement, it is to maintain the EU's credibility inside its borders and outside its territory.<sup>89</sup> Deficiencies in the rule of law displays that the unity of Member States is weakened behind the EU as a global actor.<sup>90</sup>

Returning then to the rationale of the protecting the rule of law in the EU legal order and the necessity for operationalising the rule of law. It has been demonstrated thus far that the 'European project' is reliant on permanent respect for the rule of law in all Member States for

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<sup>88</sup> *ibid* 1 and 2.

<sup>89</sup> Günter Wilms, *Protecting Fundamental Values in the European Union Through the Rule of Law Articles 2 and 7 TEU from a Legal, Historical and Comparative Angle* (EUI, Robert Schuman Centre for Advanced Studies 2017), 57.

<sup>90</sup> Theodore Konstadinides, *The Rule of law in the European Union: the Internal Dimension* (OUP 2017), 67.

the proper functioning of the EU legal order and its integrated judicial system.<sup>91</sup> It is essential for the consistent and uniform interpretation of EU law and for mutual trust upon which mutual recognition is built. It is also what allows for the functioning of the AFSJ, preventing fragmentation. Therefore, it is imperative to protect and promote of the rule of law, deficiencies relating to the rule of law in one Member State impacts the EU as whole and as a result ‘the Union has a shared stake in resolving rule of law issues wherever they appear’.<sup>92</sup> This also necessitates for an approach which operationalises the rule of law to enforce compliance to uphold the voluntary commitments made by all Member States to respect the rule of law, and also to promote it.

#### **4. Operationalising the Rule of Law in the EU Legal Order**

In order to examine the operationalisation of the rule of law in the EU legal order, and to examine the developing jurisprudence in the EU legal order towards increased justiciability of the rule of law, a progression from ‘yardstick’ to ‘plain’ stick, and also its connection to facilitating European integration. It has been necessary to answer in the previous sections whether the way the rule of law is perceived is dependent on the conception that is subscribed to, in order to form the basis for the operationalisation of the rule of law. Building on from that, the normative arguments for increased operationalising the rule of law in the EU legal order were considered.

To protect the rule of law and ensure commitment of the common values referred to in Article 2 TEU that the Member States have committed to requires the ability to respond and to take action in an effective manner by enforcing compliance and remedying deficiencies. The ability to do so is limited if there are inadequate tools to perform these functions. The EU has ‘an extremely limited set of legal tools to address systemic violations of the EU values at the national level’,<sup>93</sup> particularly where these violations are related to the rule of law. The jurisprudence of the CJEU has developed increasingly to respond to the challenges and lend a

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<sup>91</sup> Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, ‘Strengthening the rule of law within the Union: A blueprint for action’, COM (2019) 343 final, 1.

<sup>92</sup> *ibid.*

<sup>93</sup> Dimitry Kochenov and Laurent Pech, ‘Upholding the Rule of Law in the EU: On the Commission’s ‘Pre-Article 7 Procedure’ as a Timid Step in the Right Direction’ (2015) Robert Schuman Centre for Advanced Studies Research EUI Working Paper RSCAS 2015/24, 4

hand in providing the relevant tools – legal basis, to protect the rule of law. In this sense there has been a trend towards increased justiciability of the rule of law at the judicial level, separate from the political mechanism under Article 7 TEU for serious and persistent breaches of EU values in Article 2 TEU.

This section aims to further the discussion by addressing the question of how has the rule of law been operationalised and on what basis? It is proposed in this part that there is three lines of argumentation for the operationalisation of the rule of law in the EU legal order. Firstly, the use of Article 19 TEU to concretise the rule of law under Article 2 TEU. Secondly, the realisation of the rule of law through the protection of fundamental rights. Lastly, the rule of law and its connection to European integration and the use of the ‘ever closer union’ clause in further operationalising the rule of law.

#### **4.1. Article 19 TEU – A Concrete Expression of the Rule of Law**

In 2011 the Hungarian government’s early retirement policy of the judiciary led to the removal of ten percent of the judiciary’s most senior in a blatant attempt to undermine the independence of the judiciary and the rule of law.<sup>94</sup> This action by the Hungarian government has clear implications for the rule of law and its impact on the functioning of the EU legal order. Especially when ‘undermining the judiciary is on page one of the populist playbook’.<sup>95</sup> Threatening the independence of the judiciary by allowing the Hungarian government to replace judges with those who are more to their liking and whom the judges owe their loyalty to. The Commission brought as a result infringement proceedings under Article 258 TFEU but the action was based on age discrimination.<sup>96</sup> Due to the absence of general EU competence over the independence and impartiality of national judiciaries, the Commission was forced to rely on the general principle of non-discrimination on the grounds of age to challenge the

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<sup>94</sup> Dimitry Kochenov and Laurent Pech, ‘Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality’ (2015) 11 *European Constitutional Law Review* 512, 514; Kim Lane Scheppele, ‘Enforcing the Basic Principles of EU Law through Systemic Infringement Actions’ in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016), 109.

<sup>95</sup> Secretary General of the Council of Europe, ‘State of Democracy, Human Rights and the Rule of Law: Populism – How Strong are Europe’s Checks and Balances?’ (2017) Council of Europe < <https://rm.coe.int/state-of-democracy-human-rights-and-the-rule-of-law-populism-how-strong/168070568f>> accessed 25 August 2019, 15.

<sup>96</sup> Case C-286/12 *Commission v Hungary* ECLI:EU:C:2012:687.

legislation implementing the compulsory retirement of the judges.<sup>97</sup> The Commission won the case but it left many wondering if it was a victory at all, as many of the judges affected by the legislation were never reinstated and the Hungarian government avoided restoring the most important judges, where compensation was offered instead.<sup>98</sup> It, however, did not solve the underlying issue of a violation of judicial independence by state interference, and a breach of the rule of law, resulting in reality an ineffective intervention by the Commission under Article 258 TFEU.<sup>99</sup>

Fast forward to 2018 where the Republic of Poland embarked on a similar course to Hungary by lowering the retirement age of the judges appointed to the Supreme Court and granting the President of Poland discretion to extend the period of employment of the judges of that court beyond the newly fixed retirement age. This led to the Commission initiating infringement proceedings against these measures. In contrast to the outcome in Hungary it can be seen that the Commission has had more success tackling the issues related to judicial independence and the rule of law, evident from the judgment in *Commission v Poland (Indépendance de la Cour supreme)*.<sup>100</sup> This difference in result can be attributed to changes in the legal landscape facilitated by the CJEU by allowing the rule of law to be operationalised through its linkage to key articles in the Treaties and the Charter.

The turning point to the changes of the role of the rule of law in the EU in this way stems from the case of *Associação Sindical dos Juizes Portugueses* which is part of a series of cases in 2018 and 2019 that has seen the CJEU elaborate on the rule of law in the EU legal order.<sup>101</sup> In the process offering the Commission a life line and a means to engage with illiberal Member States in the backsliding of EU values and attacks on the rule of law. The case originated as a

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<sup>97</sup> Dimitry Kochenov and Laurent Pech, 'Upholding the Rule of Law in the EU: On the Commission's 'Pre-Article 7 Procedure' as a Timid Step in the Right Direction' (2015) Robert Schuman Centre for Advanced Studies Research EUI Working Paper RSCAS 2015/24, 4

<sup>98</sup> Kim Lane Schepelle, 'Enforcing the Basic Principles of EU Law through Systemic Infringement Actions' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016), 109 and 110.

<sup>99</sup> Dimitry Kochenov, 'Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool' (2015) 7 Hague Journal on the Rule of Law 153, 165 and 166.

<sup>100</sup> Case C-619/18 *Commission v Poland (Indépendance de la Cour supreme)* ECLI:EU:C:2019:531

<sup>101</sup> Xavier Groussot and Johan Lindholm, 'General Principles: Taking Rights Seriously and Waving the Rule-of-Law Stick in the European Union' in K Ziegler et al (eds), *Constructing Legal Orders in Europe: General Principles of EU Law*, (Edward Elgar 2019) Forthcoming, 8; The series of relevant cases includes: Case C-284/16 *Achmea* ECLI:EU:C:2018:158; Case C-216/18 *PPU Minister for Justice and Equality* ECLI:EU:C:2018:586; Case C-220/18 *PPU Generalstaatsanwaltschaft (Conditions de détention en Hongrie)* ECLI:EU:C:2018:589; Case C-49/18 *Vindel* ECLI:EU:C:2019:106; Case C-8/19 *PPU RH* ECLI:EU:C:2019:110.



preliminary ruling from the Supreme Administrative Court, where the Associação Sindical dos Juizes Portugueses a Trade Union of Portuguese Judges acting on behalf of the members of the Court of Auditors brought an action seeking annulment of administrative measures that reduced the remuneration of those judges.<sup>102</sup> As a result the Supreme Administrative Court referred a question asking, must the principle of judicial independence, enshrined in the second subparagraph of Article 19(1) TEU, and in Article 47 of the Charter, and in the case law of the CJEU be interpreted as precluding the measures to reduce the remuneration that was applied to the judiciary in Portugal?<sup>103</sup> Unknowingly lighting the first match for the future use and argumentation against rule of law violations. The significance of *Associação Sindical dos Juizes Portugueses* to the wider rule of law debate is that it confirmed that Member States have a legal obligation to ensure judicial independence and this is linked to the rule of law. It gave a foothold for the protection and enforcement of the rule of law, particularly where it is related to organisational changes to national judiciaries.

The way the CJEU has managed to operationalise the rule of law in Article 2 TEU can only be described as a remarkable feat of judicial engineering. The CJEU has capitalised on its earlier rulings such as *Les Verts*, *UPA*, and *Kadi* as discussed prior, where the CJEU has linked judicial review with the rule of law, it is a core rule of law principle. Stating that ‘the very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law’,<sup>104</sup> or in the words of Advocate General (“AG”) Bobek, ‘effective judicial review constitutes the bedrock of the rule of law on which... the European Union is based’.<sup>105</sup> Article 19(1) has become a key provision in that respect as the CJEU has stated that effective judicial protection is required by it. The CJEU further held that Member States are required by EU law to ensure that their courts and tribunals meet the requirements of effective judicial protection, which is a concrete expression of the rule of law.<sup>106</sup> That in order for that protection to be ensured the independence of national courts is essential as confirmed by Article 47 of the Charter.<sup>107</sup> Seen as the complementary case to *Associação Sindical dos Juizes Portugueses*, the case *LM* further defined in detail the requirements of the guarantees of independence and impartiality building on the previous jurisprudence of the court in this

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<sup>102</sup> Case C-64/16 *Associação Sindical dos Juizes Portugueses* ECLI:EU:C:2018:117, para 2 and 12.

<sup>103</sup> *ibid* 18.

<sup>104</sup> *ibid* 36; Case C-72/15 *Rosneft* ECLI:EU:C:2017:236, para 73.

<sup>105</sup> Opinion of Advocate General Bobek in Case C-556/17 *Torubarov* ECLI:EU:C:2019:339, para 49.

<sup>106</sup> Case C-64/16 *Associação Sindical dos Juizes Portugueses* ECLI:EU:C:2018:117, paras 32, 34 and 37.

<sup>107</sup> *ibid* 41 and 42.

area.<sup>108</sup> While noting as discussed before that those guarantees are important for the proper working of the judicial cooperation system embodied by the preliminary ruling procedure under Article 267 TFEU and for the functioning of mutual trust.<sup>109</sup> Article 19(1) is further reinforced by recourse to Article 4(3) TEU where the obligation is supported by the principle of sincere cooperation.<sup>110</sup>

In this way the CJEU has managed to capture the situations where there are changes to a Member State's judiciary in a way that undermine judicial independence, that these situations are now a direct violation of Treaty provisions that are a concretisation of the rule of law. Thus the rule of law has been operationalised in the way it has been given specific effect in the EU legal order beyond the wording in Article 2 TEU. The effectiveness of this approach can be seen in the way that the material scope of Article 19(1) TEU has been interpreted, that the 'provision relates to the "fields covered by Union law"', irrespective of whether Member States are implementing Union law, within the meaning of Article 51(1) of the Charter.<sup>111</sup> Where the material scope is much broader and far encompassing. It opens up a gateway that the Commission was unable to contend in *C-286/12 Commission v Hungary*, that national courts fall within the scope of Article 19(1) TEU because the EU has opted for an 'integrated system of judicial administration whereby national courts assume the task of applying EU law in cases where it is relevant.'<sup>112</sup> Therefore, because national courts act as 'EU courts' in that respect they fall within the fields covered by EU law due to the capacity to enforce EU rights within their jurisdiction.<sup>113</sup> In *C-619/18 Commission v Poland (Indépendance de la Cour supreme)* the CJEU further strengthened this argument in response to the claims by the Republic of Poland of competence creep. The CJEU stated that although 'the organisation of justice in the Member States falls within the competence of those Member States, the fact remains that, when exercising that competence, the Member States are required to comply with their obligations

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<sup>108</sup> Case C-216/18 PPU *Minister for Justice and Equality* ECLI:EU:C:2018:586, paras 63 – 67; For cases relating to the previous jurisprudence of the CJEU in respect of the requirements of independence and impartiality see: Case C-506/04 *Wilson*, ECLI:EU:C:2006:587; Joined Cases C-58/13 and C-59/13 *Torresi* ECLI:EU:C:2014:2088; Case C-222/13 *TDC A/S* ECLI:EU:C:2014:2265; Case C-503/15 *Margarit Panicello* ECLI:EU:C:2017:126.

<sup>109</sup> *ibid* 54; Case C-64/16 *Associação Sindical dos Juizes Portugueses* ECLI:EU:C:2018:117, para 41.

<sup>110</sup> *ibid* 34.

<sup>111</sup> *ibid* 29; Case C-619/18 *Commission v Poland (Indépendance de la Cour supreme)* ECLI:EU:C:2019:531, para 50.

<sup>112</sup> Koen Lenaerts, 'National Remedies for Private Parties in the Light of the EU Law Principles of Equivalence and Effectiveness' (2011) 46 *Irish Jurist* (N.S.) 13, 13.

<sup>113</sup> *ibid*; Case C-64/16 *Associação Sindical dos Juizes Portugueses* ECLI:EU:C:2018:117, para 40; Case C-619/18 *Commission v Poland (Indépendance de la Cour supreme)* ECLI:EU:C:2019:531, para 51.

deriving from EU law and, in particular from Article 19(1) TEU.<sup>114</sup> That this does not amount to competence creep because in requiring Member States to comply with those obligations the EU is not exercising that competence itself, neither is aggregating that competence.<sup>115</sup>

## 4.2. Operationalising the Rule of Law through Fundamental Rights Protection

Due to the way the rule of law is intrinsically linked to the principles of democracy and respect for fundamental rights it is no giant leap to state that the operationalisation of the rule of law is also achieved through the realisation of fundamental rights. This is aligned with the objectives of the Commission in C-235/17 *Commission v Hungary (Usufruits sur terres agricoles)*, with the view that the examination of the legislation of the Member States under fundamental rights in rule of law cases would be necessary to ensure respect for the rule of law in those States. That the finding of a violation of the Charter in these cases would constitute, for individuals affected by the legislation in question, a realisation of the rule of law. That such an application of the Charter would increase the visibility of fundamental rights and lead to the legitimisation of Union law in the ‘*eyes of all citizens of the Union*’.<sup>116</sup> The trend in the jurisprudence is one that reflects the operationalisation of the rule of law in this way, based on a substantive rights based conception of the rule of law.

The direction, however, taken by the CJEU is far from uncontroversial, it raises tensions over the relationship between the competence of the Union in fundamental rights protection under the Charter in EU law, and the handling of rule of law issues. A number of AGs have taken a narrow and restrictive approach in respect to these issues. In *SEGRO* the referring court put to the CJEU whether the national measures taken by Hungary violated the economic freedoms under Articles 49 and 63 TFEU but also notably the right to a fair trial and the right to property in respect of Articles 47 and 17 of the Charter.<sup>117</sup> AG Øe considered that an alleged infringement of Articles 17 and 47 of the Charter cannot be examined independently of the

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<sup>114</sup> Case C-619/18 *Commission v Poland (Indépendance de la Cour supreme)* ECLI:EU:C:2019:531, para 52; Joined Cases C-202/18 and C-238/18 *Rimšēvičs and ECB v Latvia* ECLI:EU:C:2018:139, para 57.

<sup>115</sup> *ibid* 52.

<sup>116</sup> Opinion of AG Øe in Case C-235/17 *Commission v Hungary (Usufruits sur terres agricoles)* ECLI:EU:C:2018:971, para 99.

<sup>117</sup> Joined Cases C-52/16 and C-113/16 *SEGRO and Horváth* ECLI:EU:C:2018:157. See also for a detailed examination Xavier Groussot, Niels Kirst and Patrick Leisure ‘*SEGRO* and its Aftermath: Between Economic Freedoms, Property Rights and the “Essence of the Rule of Law”’ (2019) 2 *Nordic Journal of European Law* (forthcoming).

question of the infringement of the freedoms of movement as this would extend the competence of the Union beyond the limitations laid down in Article 6(1) TEU and Article 51(2) of the Charter.<sup>118</sup> Likewise, AG Wathelet and AG Bobek take a narrow approach in direct support of AG Øe, to the effect that fundamental rights are the ‘shadow’ of EU law and can only be enforced when a Member State is ‘implementing Union law’ in their view.<sup>119</sup> While the CJEU refrained from being drawn in on examining the national legislation in light of Articles 47 and 17 of the Charter due to the finding of a breach under Article 63 TFEU in *SEGRO*.<sup>120</sup> The Commission put the issue at the forefront of its claim in *Commission v Hungary (Usufruits sur terres agricoles)* inviting the CJEU to rule on a failure to comply with the Charter independent from the economic freedoms.<sup>121</sup> Therefore, forcing the CJEU to choose ‘between two different theories with regard to how to apply the fundamental rights in situations where a violation of primary EU law has already been found.’<sup>122</sup>

For AG Øe and Bobek the central issue is the competence of the CJEU in regards to the application of fundamental rights under the Charter and the inherent fundamental rights jurisdiction vested in national constitutional courts and the ECtHR, and the extent to which the CJEU can exercise fundamental rights review.<sup>123</sup> In this connection is the concern that a review of fundamental rights on an independent ground based on a broad interpretation of ‘implementing Union law’ would act as a *gateway* to the field of application of the Charter in which ‘the Member State[s] *undertakes to comply with the catalogue of fundamental rights contained therein,*’ and amount to expanding the scope of obligations beyond its ‘functionally’ defined dimension in an overreach of competence by the CJEU.<sup>124</sup> The same underlying concern is present in the argumentation of AG Tanchev in the infringement proceedings against Poland where the position was taken that a separate assessment of the material scope is required

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<sup>118</sup> Opinion of AG Øe in Joined Cases C-52/16 and C-113/16 *SEGRO and Horváth* ECLI:EU:C:2017:410 paras 121 and 138.

<sup>119</sup> Opinion of AG Wathelet in Case C-284/16 *Achmea* ECLI:EU:C:2017:699, para 220; Opinion of AG Bobek in Case C-298/16 *Ispas* ECLI:EU:C:2017:650, paras 29 – 34; Opinion of AG Bobek in Case C-646/17 *Moro* ECLI:EU:C:2019:95, paras 80 – 89.

<sup>120</sup> Joined Cases C-52/16 and C-113/16 *SEGRO and Horváth* ECLI:EU:C:2018:157, paras 127 and 128.

<sup>121</sup> Case C-235/17 *Commission v Hungary (Usufruits sur terres agricoles)* ECLI:EU:C:2019:432, paras 1 and 37 – 39.

<sup>122</sup> Xavier Groussot, Niels Kirst and Patrick Leisure ‘*SEGRO* and its Aftermath: Between Economic Freedoms, Property Rights and the “Essence of the Rule of Law”’ (2019) 2 *Nordic Journal of European Law* (forthcoming), 21; Opinion of AG Øe in Case C-235/17 *Commission v Hungary (Usufruits sur terres agricoles)* ECLI:EU:C:2018:971 para 96.

<sup>123</sup> Opinion of AG Øe in Case C-235/17 *Commission v Hungary (Usufruits sur terres agricoles)* ECLI:EU:C:2018:971, para 67 and 68; Opinion of AG Bobek in Case C-646/17 *Moro* ECLI:EU:C:2019:95, paras 91 and 99.

<sup>124</sup> *ibid*, paras 97 and 98; *ibid*, paras 88 – 90.

under both Article 19(1) TEU and Article 47 of the Charter, rejecting the claim based on a cumulative application in absence of an assessment under Article 51(1) of the Charter.<sup>125</sup> Taking the view that otherwise it would ‘undermine the current system of review of the compatibility of national measures with the Charter and open the door for Treaty provisions such as Article 19(1) TEU to be used a “subterfuge” to circumvent the limits of the scope of application of the Charter.’<sup>126</sup>

In responding to these concerns the CJEU has continued its progressive approach laid down in *Associação Sindical dos Juizes Portugueses* framing fundamental rights as a key tenet as part of the obligations on Member States particularly where the matters touch upon rule of law issues. Opting to not follow the restrictive interpretation of the AGs. The CJEU in *Commission v Hungary (Usufruits sur terres agricoles)* stated that since Hungary is actively invoking an exception provided by EU law, Article 17 of the Charter applies as it must be regarded as ‘implementing Union law’ under Article 51(1) of the Charter.<sup>127</sup> Putting the right to property front and centre and reaffirming a substantive approach to the rule of law. Further, in responding to the judicial reforms in Poland the CJEU’s judgment in *Commission v Poland (Indépendance de la Cour supreme)* continues in the same manner, enforcing a substantive rights based conception of the rule of law finding the Republic of Poland failed to fulfil its obligations under Article 19(1) TEU for the first time.<sup>128</sup>

In doing so the CJEU inherently acknowledges a rule of law deeply rooted in a respect for fundamental rights that can be enforced against a Member State. It does so by recognising that the principle of effective judicial protection of individual rights referred to in Article 19(1) TEU is a *general principle* of EU law which arises from the constitutional traditions common to the Member States.<sup>129</sup> In which the principle has been enshrined in Articles 6 and 13 of the ECHR, and Article 47 of the Charter which corresponds to those provisions, confirming the

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<sup>125</sup> Opinion of AG Tanchev in Case C-619/18 *Commission v Poland (Indépendance de la Cour supreme)* ECLI:EU:C:2019:325, paras 42, 54 – 56; Opinion of AG Tanchev in Case C-192/18 *Commission v Poland (Indépendance des juridictions de droit commun)* ECLI:EU:C:2019:529, paras 4, 67 – 70 and 114.

<sup>126</sup> Opinion of AG Tanchev in Case C-619/18 *Commission v Poland (Indépendance de la Cour supreme)* ECLI:EU:C:2019:325, paras 57.

<sup>127</sup> Case C-235/17 *Commission v Hungary (Usufruits sur terres agricoles)* ECLI:EU:C:2019:432, paras 62 – 66; For more on this point see Xavier Groussot, Niels Kirst and Patrick Leisire ‘*SEGRO* and its Aftermath: Between Economic Freedoms, Property Rights and the “Essence of the Rule of Law”’ (2019) 2 *Nordic Journal of European Law* (forthcoming).

<sup>128</sup> Case C-619/18 *Commission v Poland (Indépendance de la Cour supreme)* ECLI:EU:C:2019:531, para 124;

<sup>129</sup> *ibid*, para 49.

fundamental rights connection.<sup>130</sup> The judgment reaffirms what was established in *Associação Sindical dos Juizes Portugueses*. In that regard, the arguments of AG Tanchev that allowing the direct influence of Article 47 of the Charter on the meaning of Article 19(1) TEU would interfere with the competence in relation to fundamental rights review becomes weakened.<sup>131</sup> When as acknowledged by the AG himself that a ‘*constitutional passerelle*’ between those provisions exists given the common sources as a basis for those fundamental rights and must be interpreted in harmony, it would otherwise create an unnecessary division in fundamental rights review.<sup>132</sup> In any event, where matters concern the rule of law and persistent actions of illiberal Member States violating the common values that underpin the foundation of the Union arguments regarding scope become futile. As AG Bobek aptly states in the context of national measures affecting the judiciary, ‘any such transversal, horizontal measures that will by definition affect each and every operation of the national judiciaries are a matter of EU law... largely irrespective of whether the specific procedural point that gave rise to that litigation is or is not within the scope of EU law in the traditional sense.’<sup>133</sup> In that light it is important to not lose sight that those constitutional and institutional guarantees are ultimately there to ensure the effective judicial protection of EU law rights for individuals, the essence of the rule of law.<sup>134</sup>

The operationalisation of the rule of law through the realisation of fundamental rights is further supported in the jurisprudence of the Court. The CJEU has recently held that some fundamental rights are self-executing and establishing that a broader range of legal persons are required to comply with the Charter by holding that it applies to ‘a field covered by EU law,’ even in horizontal situations.<sup>135</sup> This is evidenced by the cases of *Egenberger* and *Bauer* where the Court stated that Article 21 and Article 47 of the Charter is ‘sufficient in itself and does not need to be made more specific by provisions of EU or national law to confer on individuals a right which they may rely on as such’.<sup>136</sup> Adding bite to the Charter with the direct effect of

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<sup>130</sup> *ibid.*

<sup>131</sup> Opinion of AG Tanchev in Case C-192/18 *Commission v Poland (Indépendance des juridictions de droit commun)* ECLI:EU:C:2019:529, para 70.

<sup>132</sup> *ibid.*, 96 and 97.

<sup>133</sup> Opinion of AG Bobek in Case C-556/17 *Torubarov* ECLI:EU:C:2019:339, paras 55.

<sup>134</sup> *ibid.*, 56.

<sup>135</sup> Daniel Sarmiento, ‘The Year of the Infringement’ *Despite our Differences* (10 January 2019) <<https://despiteourdifferencesblog.wordpress.com/2019/01/10/the-year-of-the-infringement/>> (Accessed 20 October 2019); Opinion of AG Bobek in Case C-171/18 *Safeway* ECLI:EU:C:2019:272, para 45.

<sup>136</sup> Case C-414/16 *Egenberger* ECLI:EU:C:2018:257, paras 76 and 78; Joined Cases C-569/16 and C-570/16 *Bauer* ECLI:EU:C:2018:871, para 89.

fundamental rights under the Charter in horizontal cases. The approach of the CJEU is also reaffirmed in *Cresco* earlier this year.<sup>137</sup>

In choosing a progressive approach to the application of fundamental rights the CJEU in effect has reinvented the wheel in a ‘game of shadows’. Fundamental rights are more than just a ‘shadow’ of EU law, they form part and parcel of the substantive rights based conception of the EU rule of law. Where the enforcement of fundamental rights undoubtedly leads to the strengthening and protection of the rule of law based on their inherent connection in the constitutional framework of the EU legal order.

### **4.3. The Rule of Law and an Ever Closer Union**

In the EU legal order there is an inherent connection between the rule of law and European integration. The relevance of European integration to the rule of law debate arises from the fact European integration is historically seen as ‘one of the principal means with which to consolidate democracy.’<sup>138</sup> In relation, the Commission has stated that ‘European integration has itself made a significant and lasting contribution to a rule-based order in Europe’.<sup>139</sup> Therefore, it is argued that due to those connections and the way in which it is perceived, European integration has a role in the operationalisation of the rule of law and this is evident from the jurisprudence of the CJEU.

The relationship of the rule of law to European integration can be understood as operating as part of a feedback loop, reinforcing one another. The rule of law protects and facilitates European integration allowing for the proper functioning of the EU legal order and preventing the fundamental principles of mutual trust and mutual recognition from being undermined. Allowing for judicial cooperation between Member States and the Union to flourish. The strengthening of European integration also protects the rule of law. Through the consolidation of national courts into the EU judicial system acting as EU courts, and the direct involvement

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<sup>137</sup> Case C-193/17 *Cresco* ECLI:EU:C:2019:43, para 76.

<sup>138</sup> J.H.H Weiler, ‘Federalism and Constitutionalism: Europe’s “Sonderweg”’ (2000) Jean Monet Center for International and Regional Economic Law and Justice, Working Paper, 10.

<sup>139</sup> Communication from the Commission to the European Parliament, the European Council, and the Council, ‘Further Strengthening the Rule of Law within the Union: State of play and possible next steps’, COM (2019) 163 final, 2.

of citizens through the protection of individual rights allows for the means to actively challenge rule of law violations by a Member State and protect the rule of law.

The CJEU has played an active role in facilitating European integration and the protection of the rule of law in this regard. Reflecting again on *Van Gend en Loos*, the resulting doctrine has put the courts and individuals, ‘two set of actors in the epicentre of EU law,’<sup>140</sup> the CJEU steadily building upon this. The judgments key to the operationalisation of the rule of law through Article 19 TEU are also relevant in this respect. Post *Associação Sindical dos Juizes Portugueses* and *LM* national courts have a more active role in protecting the EU rule of law due to the ability to raise issues with national legislation and structural changes that undermine the rule of law through the preliminary ruling mechanism. The judgments of *Associação Sindical dos Juizes Portugueses* and *Commission v Poland (Indépendance de la Cour supreme)* reveal the institutionalisation of national courts within the EU judicial system affirming the national courts’ part in European integration and the protection of rule of law.<sup>141</sup> In doing so it takes judicial cooperation to new heights where it becomes evident that it is a core component of EU legal order. The development towards deeper integration of national courts participation in the EU judicial system is also clear from the CJEU judgment in *Eurobolt*. The CJEU stated that national courts can request to the EU institutions evidence and documents for the purpose of deciding on the validity of a contested act in proceedings before them as interpreted by Article 267 TFEU and Article 4(3) TEU.<sup>142</sup> *Eurobolt* reinforces the institutionalisation in the EU judicial system with a more integrated judiciary where the involvement of EU institutions in national proceedings represents a positive feature, when national courts are to decide on issues of EU law.<sup>143</sup> It demonstrates the dual obligation of Article 4(3) TEU and principle of sincere cooperation, where involvement of the EU institutions in fulfilment of their obligation

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<sup>140</sup> Xavier Groussot and Anna Zemskova, ‘The Resilience of Rights and European Integration’ in A Bakardjieva-Engelbrekt and X Groussot (eds), *The Future of Europe: Legal and political Integration Beyond Brexit* (Hart Publishing, 2019) (forthcoming), 13.

<sup>141</sup> Case C-619/18 *Commission v Poland (Indépendance de la Cour supreme)* ECLI:EU:C:2019:531, para 51; Case C-64/16 *Associação Sindical dos Juizes Portugueses* ECLI:EU:C:2018:117, para 40.

<sup>142</sup> Case C-644/17 *Eurobolt* ECLI:EU:C:2019:555, paras 30 – 32.

<sup>143</sup> Daniel Sarmiento, ‘National Courts and the Review of Validity of EU Acts After Eurobolt’ *Despite our Differences* (4 July 2019) < <https://despiteourdifferencesblog.wordpress.com/2019/07/04/national-courts-and-the-review-of-validity-of-eu-acts-after-eurobolt/>> (Accessed 1 October 2019).



strengthens the judicial review process and by virtue the rule of law.<sup>144</sup> The principle of sincere cooperation holds together the two levels of the EU judicial system in this regard.<sup>145</sup>

In addressing the ‘second set of actors’ of European integration involved in the protection of the rule of law, the individual. It has already been explained earlier in the discussion the role of the individual in facilitating European integration and promoting and enforcing the rule of law, however, it is worth noting again. ‘[I]ndividuals have been more than citizens of one of the Member States. They have occupied a central role in the shaping of the constitution of the European Union.’<sup>146</sup> Just as that centrality contributed to driving the increasing significance of fundamental rights in the Union,<sup>147</sup> it is now moving into the next phase, enforcing the rule of law. Recognising this Weiler stated ‘the secret of the rule of law in the legal order of the European Union rests... in the genius of the preliminary reference procedure’.<sup>148</sup> Weiler could not have been more accurate in that regard given use of Article 267 TFEU in a number of cases to address rule of law issues.

How then does European integration have a role in further operationalising the rule of law in the EU? European integration is itself embodied in EU primary law through the ‘ever closer union’ clause in Article 1(2) TEU. The connection between Article 1(2) TEU and the rule of law is apparent from the CJEU’s opinions in *Opinion 2/13* and *Opinion 1/17* which acknowledge that the rule of law and fundamental rights are at the heart of the EU’s legal structure that contribute to the process of integration under Article 1 TEU.<sup>149</sup> It is proposed that the Article 1 TEU can be used to further operationalise the rule of law and develop the scope of claims under EU law to challenge rule of law violations. This would be entirely consistent with the jurisprudence of the CJEU. In *Pupino* Art 1 TEU was used to develop the scope of individual rights in EU law within the previous third pillar, where the jurisdiction of the CJEU

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<sup>144</sup> Indeed judicial review being an important part of the rule of law, and the EU being a Union founded based on the rule of law featured as the context of which Advocate General Hogan came to the same conclusion as the CJEU that EU institutions are to provide the relevant information when requested by national courts, see Opinion of Advocate General Hogan in Case C-644/17 *Eurobolt* ECLI:EU:C:2019:164, paras 25 – 29 and 35 – 37.

<sup>145</sup> Daniel Sarmiento, ‘National Courts and the Review of Validity of EU Acts After Eurobolt’ *Despite our Differences* (4 July 2019) < <https://despiteourdifferencesblog.wordpress.com/2019/07/04/national-courts-and-the-review-of-validity-of-eu-acts-after-eurobolt/> > (Accessed 1 October 2019).

<sup>146</sup> Robin CA White ‘Reshaping the Human Rights Landscape of the European Union’ in Niamh Nic Schuibhne and Laurence W Gormley (eds), *From Single Market to Economic Union: Essays in Memory of John A Usher* (OUP 2012), 357.

<sup>147</sup> *ibid.*

<sup>148</sup> J.H.H. Weiler, ‘Van Gend en Loos: The Individual as Subject and Object and the Dilemma of European Legitimacy’ (2014) 12 *International Journal of Constitutional Law* 94, 103.

<sup>149</sup> *Opinion 2/13* ECLI:EU:C:2014:2454, paras 167 – 169; *Opinion 1/17* ECLI:EU:C:2019:341, para 110.

was limited pre-Lisbon.<sup>150</sup> Allowing the principle of conforming interpretation to be extended to framework decisions adopted in the context of Title VI.<sup>151</sup> In a similar way the ‘ever closer union’ clause supports an interpretation that would lead to increased justiciability under Article 2 TEU. Further concretising the provision or interpreting Articles 2 and 4(3) TEU in a way that supports systemic infringement actions under Art 258 TFEU.<sup>152</sup> Indeed, the objective of the ‘ever closer union’ clause ‘favours an interpretation of the rule of EU law which tends to strengthen, and not dissolve, the European Union.’<sup>153</sup> Adopting such an approach would be consistent with the progressive stance the CJEU has recently taken, advancing the means of which to enforce the rule of law against recalcitrant States.

## 5. Conclusion – Two Steps Forward and One Step Backward?

The aim of the study is to explore the operationalisation or justiciability of the rule of law enshrined in Article 2 TEU in the EU legal order and its connection to European integration. In order to fulfil this aim several research questions were proposed to establish the scope of the thesis to examine the different facets of the topic. The starting point was with the proposition that the operationalisation of the rule of law in the EU legal order and European integration is linked to a substantive rights based conception of the rule of law. Where it was asked whether the way the rule of law is perceived i.e. can it be used to as a tool in itself to enforce compliance?; is dependent on the conception that is subscribed to. It was established in Section 2 examining these issues, that it is evident from the case law of the CJEU and with reference to the Commission’s work, that the operationalisation of the rule of law in the EU legal order is reliant on a substantive rights based conception of the rule of law. This is due to the normative ideals that are incorporated in the EU rule of law and the reliance on elements that are associated with a substantive conception, namely fundamental rights.

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<sup>150</sup> Xavier Groussot and Anna Zemskova, ‘The Resilience of Rights and European Integration’ in A Bakardjieva-Engelbrekt and X Groussot (eds), *The Future of Europe: Legal and political Integration Beyond Brexit* (Hart Publishing, 2019) (forthcoming), 5; Case C-105/03 *Pupino* ECLI:EU:C:2005:386, para 36.

<sup>151</sup> Case C-105/03 *Pupino* ECLI:EU:C:2005:386, paras 38 – 43.

<sup>152</sup> Kim Lane Schepelle, ‘Enforcing the Basic Principles of EU Law through Systemic Infringement Actions’ in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016), In which it is proposed that the Commission could pursue systemic infringement proceedings against offending Member States on the basis of Articles 2 and 4(3) TEU.

<sup>153</sup> Opinion of AG Campos Sánchez-Bordona in Case C-621/18 *Wightman* ECLI:EU:C:2018:978, para 133; The CJEU has also used Article 1 TEU as an interpretative guide in Case C-57/16 P *Client Earth* ECLI:EU:C:2018:660, paras 73 and 74.

Building upon this, Section 3 examined three normative arguments that justify the protection of the rule of law and its operationalisation in order to answer the proposed questions of what is the rationale or what are the normative arguments for protecting the rule of law in the EU? It was established the ‘European project’ is reliant on permanent respect for the rule of law in all Member States for the proper functioning of the EU legal order and its integrated judicial system.<sup>154</sup> That rule of law deficiencies have an adverse impact on the functioning of the EU legal order due to the unique structure of the EU legal order, where the fundamental principle of mutual trust is essential for maintaining the coherence of the AFSJ and judicial cooperation among Member States. Similarly, it was established that rule of law violations have cross-border relevance in affecting the broader Union and all of its citizens where there is a normative argument for protecting the rule of law and enforcing its compliance when all EU citizens and other Member States are affected by rule of law breaches. It was reasoned that support for this argument is found within primary law in terms of the rationale encompassed within Article 4(3) TEU and Article 7 TEU. It was further established it is necessary for an approach which operationalises the rule of law to enforce compliance in order to uphold the voluntary commitments made by all Member States to respect the rule of law, and also to promote it.

The final section, Section 4, addressed the questions of how has the rule of law been operationalised? And on what basis? In order to show that there is a developing jurisprudence in the EU legal order towards increased justiciability of the rule of law. It was established in the discussion the recent case law of the CJEU marks a jurisprudential shift towards the need to enforce compliance with the rule. It was demonstrated that the case law of the CJEU can be demarcated into three strands in operationalising the rule of law. Where the analysis focussed, firstly, on the use of Article 19 TEU to concretise the rule of law under Article 2 TEU to capture the situations where are organisational changes to a Member State’s judiciary which undermine the rule of law. Secondly, drawing on the case law of the court to evidence that the operationalisation of the rule of law is also achieved through the protection of fundamental rights. Thirdly, the analysis examined the rule of law and its connection to the rule of law and its connection to European integration with emphasis on the feedback loop that exists. Each of the strands demonstrates the complex nature of the EU legal order in which there is also inherent overlap between the rule of law, fundamental rights and European integration with the

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<sup>154</sup> Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, ‘Strengthening the rule of law within the Union: A blueprint for action’, COM (2019) 343 final, 1.

underlying tensions present in balancing effective enforcement while staying within the boundaries of conferred competence. In embarking on a progressive approach towards a more justiciable rule of law to be enforced against Member States who seek to depart from the common values of the Union it is evident the CJEU has adopted a substantive rights based conception of the rule of law, reaffirming what was established in Section 2. The question while we await the further developments in the Polish saga is whether the CJEU will carry on this progressive path it has carved or has ‘rule of law fatigue’ set in like in the much maligned Brexit which has also gripped the Union.<sup>155</sup>

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<sup>155</sup> Daniel Sarmiento, ‘Limits of the Rule of Law: Is the Protection of Polish Judges Running out of Steam?’ *The EU Law Live Blog* (25 September 2019) <<https://eulawlive.com/2019/09/25/the-limits-of-the-rule-of-law-is-the-protection-of-polish-judges-running-out-of-steam/>> (Accessed 15 October 2019).

## **Bibliography**

### **Union Primary Legislation and International Agreements**

Charter of Fundamental Rights of the European Union [2012] OJ C 326/391

Consolidated version of the Treaty on the European Union [2012] OJ C 326/01

Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/01

### **Judgments of the Court of Justice of the European Union**

Case 26/62 *Van Gend en Loos* ECLI:EU:C:1963:1

Case 28/67 *Mölkerei-Zentrale Westfalen-Lippe* ECLI:EU:C:1968:17

Case 294/83 *Parti Ecologiste "Les Verts"* [1986], ECLI:EU:C:1986:166

C-83/91 *Meilicke* ECLI:EU:C:1992:332

C-50/00 P *Unión de Pequeños Agricultores* ECLI:EU:C:2002:462

C-105/03 *Pupino* ECLI:EU:C:2005:386

C-506/04 *Wilson*, ECLI:EU:C:2006:587

C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation*  
ECLI:EU:C:2008:461

C-583/11 *Inuit Tapiriit Kanatami* ECLI:EU:C:2013:625

C-286/12 *Commission v Hungary* ECLI:EU:C:2012:687

C-370/12 *Pringle* ECLI:EU:C:2012:756

C-58/13 and C-59/13 *Torresi* ECLI:EU:C:2014:2088

C-168/13 PPU *F* ECLI:EU:C:2013:358

C-222/13 *TDC A/S* ECLI:EU:C:2014:2265

C-72/15 *Rosneft* ECLI:EU:C:2017:236

C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* EU:C:2016:198

C-503/15 *Margarit Panicello* ECLI:EU:C:2017:126

C-52/16 and C-113/16 *SEGRO and Horváth* ECLI:EU:C:2018:157

C-57/16 P *Client Earth* ECLI:EU:C:2018:660

C-64/16 *Associação Sindical dos Juizes Portugueses* ECLI:EU:C:2018:117

C-284/16 *Achmea* ECLI:EU:C:2018:158

C-414/16 *Egenberger* ECLI:EU:C:2018:257

C-569/16 and C-570/16 *Bauer* ECLI:EU:C:2018:871

C-102/17 *Secretaria Regional de Saúde dos Açores* ECLI:EU:C:2018:294

C-193/17 *Cresco* ECLI:EU:C:2019:43

C-235/17 *Commission v Hungary* ECLI:EU:C:2019:432

C-644/17 *Eurobolt* ECLI:EU:C:2019:555

C-49/18 *Vindel* ECLI:EU:C:2019:106

C-202/18 and C-238/18 *Rimšēvičs and ECB v Latvia* ECLI:EU:C:2018:139

C-216/18 PPU *Minister for Justice and Equality* ECLI:EU:C:2018:586

C-220/18 PPU *Generalstaatsanwaltschaft (Conditions de détention en Hongrie)*  
ECLI:EU:C:2018:589

C-522/18 *Zakładowi Ubezpieczeń Społecznych Oddział w Jaśle* ECLI:EU:C:2018:786

C-619/18 *Commission v Poland (Indépendance de la Cour supreme)* ECLI:EU:C:2019:531

C-619/18 *Commission v Poland (Indépendance de la Cour supreme)* ECLI:EU:C:2018:910,  
order of 15 November 2018

C-619/18 R *Commission v Poland (Indépendance de la Cour supreme)*  
ECLI:EU:C:2018:1021, order of 17 December 2018

C-621/18 *Wightman* ECLI:EU:C:2018:999

C-8/19 PPU *RH* ECLI:EU:C:2019:110

### **Opinions of the Court of Justice of the European Union**

Opinion 1/09 ECLI:EU:C:2011:123

Opinion 1/17 of the Court (Full Court) ECLI:EU:C:2019:341

Opinion 2/13 ECLI:EU:C:2014:2454

### **Opinion of Advocate Generals**

Opinion of Advocate General Wahl in Joined Cases C-58/13 and C-59/13 *Torresi*  
ECLI:EU:C:2014:265

Opinion of Advocate General Øe in Joined Cases C-52/16 and C-113/16 *SEGRO and Horváth*  
ECLI:EU:C:2017:410

Opinion of Advocate General Wathelet in Case C-284/16 *Achmea* ECLI:EU:C:2017:699

Opinion of Advocate General Bobek in Case C-298/16 *Ispas* ECLI:EU:C:2017:650

Opinion of Advocate General Bobek in Case C-646/17 *Moro* ECLI:EU:C:2019:95

Opinion of Advocate General Øe in Case C-235/17 *Commission v Hungary*  
ECLI:EU:C:2018:971

Opinion of Advocate General Bobek in Case C-556/17 *Torubarov* ECLI:EU:C:2019:339

Opinion of AG Campos Sánchez-Bordona in Case C-621/18 *Wightman* ECLI:EU:C:2018:978

Opinion of Advocate General Hogan in Case C-644/17 *Eurobolt* ECLI:EU:C:2019:164

Opinion of Advocate General Bobek in Case C-171/18 *Safeway* ECLI:EU:C:2019:272

Opinion of Advocate General Tanchev in Case C-192/18 *Commission v Poland (Indépendance des juridictions de droit commun)* ECLI:EU:C:2019:529

Opinion of Advocate General Tanchev in Case C-619/18 *Commission v Poland (Indépendance de la Cour supreme)* ECLI:EU:C:2019:325

### **Commission Communications**

Communication from the Commission to the European Parliament and the Council, ‘A New EU Framework to the Strengthen the Rule of Law’, COM (2014) 158 final



Annex I to the Communication from the Commission to the European Parliament and the Council, ‘A New EU Framework to the Strengthen the Rule of Law’, COM (2014) 158 final

Communication from the Commission to the European Parliament, the European Council and the Council, ‘Further Strengthening the Rule of Law within the Union: State of Play and Possible Next Steps’, COM (2019) 163 Final

Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, ‘Strengthening the rule of law within the Union: A blueprint for action’, COM (2019) 343 final

### **European Council Conclusions**

European Council Conclusions, 21 – 22 June 1993, SN 180/1/93 REV 1  
<<https://www.consilium.europa.eu/media/21225/72921.pdf>> accessed 1 August 2019

### **Council of Europe Material**

European Commission for Democracy Through Law (Venice Commission), ‘Rule of Law Checklist’, CDL-AD(2016)007

Secretary General of the Council of Europe, ‘State of Democracy, Human Rights and the Rule of Law: Populism – How Strong are Europe’s Checks and Balances?’ (2017) Council of Europe  
<<https://rm.coe.int/state-of-democracy-human-rights-and-the-rule-of-law-populism-how-strong/168070568f>> accessed 25 August 2019

### **Books**

Dworkin R, ‘*A Matter of Principle*’ (Harvard University Press 1985)

Konstadinides T, *The Rule of law in the European Union: the Internal Dimension* (OUP 2017)

Raz J, ‘*The Authority of Law: Essays on Law and Morality*’ (OUP 1979)

Wilms G, *Protecting Fundamental Values in the European Union Through the Rule of Law Articles 2 and 7 TEU from a Legal, Historical and Comparative Angle* (EUI, Robert Schuman Centre for Advanced Studies 2017)

### **Contributions to an Edited Book**

Closa C, 'Reinforcing EU Monitoring of the Rule of Law: Normative Arguments, Institutional Proposals and the Procedural Limitations' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016)

Craig P, 'Theory and Values in Public Law: A Response' in Paul Craig and Richard Rawlings (eds), *Law and Administration in Europe: Essays in honour of Carol Harlow* (OUP 2003)

Groussot X and Lindholm J, 'General Principles: Taking Rights Seriously and Waving the Rule-of-Law Stick in the European Union' in K Ziegler et al (eds), *Constructing Legal Orders in Europe: General Principles of EU Law*, (Edward Elgar 2019), (forthcoming)

Groussot X and Zemskova A, 'The Resilience of Rights and European Integration' in A Bakardjieva-Engelbrekt and X. Groussot (eds) in *The Future of Europe: Legal and political Integration Beyond Brexit* (Hart Publishing 2019), (forthcoming)

Herlin-Karnell E, 'EU Values and the Shaping of the International Legal Context' in F Amtenbrink and D Kochenov (eds), *European Union's Shaping of the International Legal Order* (Cambridge, Cambridge University Press 2013)

< [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2263987](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2263987) > accessed 20 August 2019

Hillion C, 'The Copenhagen Criteria and Their Progeny' in Christophe Hillion (ed), *EU Enlargement: A Legal Approach* (Oxford, Hart Publishing 2004)

Hillion C, 'Overseeing the Rule of Law in the EU: Legal Mandate and Means' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016)

Jacobs F, 'The Lisbon Treaty, the Court of Justice and the Rule of Law' in Niamh Nic Schuibhne and Laurence W Gormley (eds), *From Single Market to Economic Union: Essays in Memory of John A Usher* (OUP 2012)

Lenaerts K, 'The Court of Justice as the Guarantor of the Rule of Law within the European Union', in G. De Baere and J. Wouters (eds) in *The Contribution of International and Supranational Courts to the Rule of Law* (Edward Elgar Publishing, 2015)

Schepelle K, 'Enforcing the Basic Principles of EU Law through Systemic Infringement Actions' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016)

White R, 'Reshaping the Human Rights Landscape of the European Union' in Niamh Nic Schuibhne and Laurence W Gormley (eds), *From Single Market to Economic Union: Essays in Memory of John A Usher* (OUP 2012)

### **Journal Articles**

Groussot X, Kirst N and Leisure P 'SEGRO and its Aftermath: Between Economic Freedoms, Property Rights and the "Essence of the Rule of Law"' (2019) 2 *Nordic Journal of European Law* (forthcoming)

Kochenov D, 'Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool' (2015) 7 *Hague Journal on the Rule of Law* 153

Kochenov D and Pech L, 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality' (2015) 11 *European Constitutional Law Review* 512

Lenaerts K, 'National Remedies for Private Parties in the Light of the EU Law Principles of Equivalence and Effectiveness' (2011) 46 *Irish Jurist* (N.S.) 13

Lenaerts K, 'La Vie Après L'Avis: Exploring the Principle of Mutual (Yet Not Blind) Trust' (2017) 54 *CML Rev* 805

Müller J-W, 'Should the EU Protect Democracy and the Rule of Law inside Member States' (2015) 21 ELJ 141

Peczenik A, 'A Theory of Legal Doctrine' (2001) 14 Ratio Juris 75

Weiler J, 'Van Gend en Loos: The Individual as Subject and Object and the Dilemma of European Legitimacy' (2014) 12 International Journal of Constitutional Law 94, 103

### **Research/Working Papers**

Closa C, Kochenov D and Weiler J, 'Reinforcing Rule of Law Oversight in the European Union' EUI Working Papers RSCAS 2014/25

Kochenov D and Pech L, 'Upholding the Rule of Law in the EU: On the Commission's 'Pre-Article 7 Procedure' as a Timid Step in the Right Direction' (2015) Robert Schuman Centre for Advanced Studies Research EUI Working Paper RSCAS 2015/24

Pech L, 'The Rule of Law as a Constitutional Principle of the European Union'(2009) Jean Monnet Working Paper Series No. 4/2009

Weiler J, 'Federalism and Constitutionalism: Europe's "Sonderweg"' (2000) Jean Monet Center for International and Regional Economic Law and Justice, Working Paper

### **Web Pages and Blogs**

Sarmiento D, 'The Year of the Infringement' *Despite our Differences* (10 January 2019) <<https://despiteourdifferencesblog.wordpress.com/2019/01/10/the-year-of-the-infringement/>> (Accessed 20 October 2019)

Sarmiento D, 'National Courts and the Review of Validity of EU Acts After Eurobolt' *Despite our Differences* (4 July 2019) <<https://despiteourdifferencesblog.wordpress.com/2019/07/04/national-courts-and-the-review-of-validity-of-eu-acts-after-eurobolt/>> (Accessed 1 October 2019)

Sarmiento D, 'Limits of the Rule of Law: Is the Protection of Polish Judges Running out of Steam?' *The EU Law Live Blog* (25 September 2019) <<https://eulawlive.com/2019/09/25/the-limits-of-the-rule-of-law-is-the-protection-of-polish-judges-running-out-of-steam/>> (Accessed 15 October 2019).

Ash T, 'Why We Must Not Let Europe Break Apart' *The Guardian* (9 May 2019) <<https://www.theguardian.com/world/2019/may/09/why-we-must-not-let-europe-break-apart>> Accessed 9 May 2019