WALKING THE LINE IN TIMES OF CRISIS: EU FUNDAMENTAL RIGHTS, THE FOUNDATIONAL VALUE OF THE RULE OF LAW AND JUDICIAL RESPONSE TO THE RULE OF LAW BACKSLIDING

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The research focus of the paper is on the relation between general principles, fundamental rights and the rule of law in the EU. The role of the judiciary is evaluated through the prism of the jurisprudence of the Court of Justice of the EU (CJEU) with a particular focus on the formula, introduced in the Associação Sindical dos Juízes Portugueses judgment and subsequent decisions by the CJEU, related to the rule of law and independence of the judiciary. A thorough assessment of the relation between fundamental rights, foundational values of the EU such as the rule of law and effective judicial protection through the methodological evaluation of the effectiveness and functional interpretation is included. The core of the research reflects the functional approach of the CJEU with respect to judicial independence as the condition for effective protection of fundamental rights and EU law. Especially crucial is the role of national courts for upholding the rule of law on EU level. The role of the EU's Rule of Law Report mechanism, introduced in 2020, is analysed as judicial independence forms an essential part of the reports. The EU Rule of Law reports serve as illustrations of the underlying problems, related to the rule of law and in particular the independence of the judiciary and effective judicial protection and related enforcement and implementation issues.

1 INTRODUCTION

The rule of law situation in the European Union (EU) and some EU Member States such as Hungary and Poland requires a careful assessment of the relation between general principles, fundamental rights and foundational values of the EU. The added value of the paper is discernible in contextualising the jurisprudential development of the nexus of fundamental rights, general principles and foundational values of the EU with recent mechanisms and responses, pertaining to the rule-of-law crisis. The paper inherently includes a careful examination of the nexus between fundamental rights and the rule of law as a foundational value in the EU legal order. The core of the research focuses on the role of the judiciary through the prism of the jurisprudence of the Court of Justice of the EU (CJEU) with a particular emphasis on the formula, introduced in the *Associação Sindical dos Juízes Portugueses* judgment and subsequent decisions by the Court of Justice in several rule-of-law-related cases. The jurisprudence of the CJEU has been influential in establishing the relevant standards of the independence of the judiciary within the foundational value of the rule of law. The analysis aims to reflect on the

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relation between fundamental rights, foundational values of the EU such as the rule of law and effective judicial protection through the methodological evaluation of the effective and functional and quasi-normative interpretation, amounting to a critical reconstruction of the nexus. Moreover, the research includes a detailed analysis of other cases of relevance, labelled under the term 'horizontal checks' by national courts. In this manner, it will be pertinent to reflect what role the core standards play against the deference to constitutional identity. The paper analyses the role of the European Commission with regards to the Rule of Law Report mechanism introduced in 2020 as judicial independence forms an essential part of the reports. The EU's Rule of Law reports serves an illustration of the underlying problems, related to the rule of law and in particular the independence of the judiciary and effective judicial protection.

The Montesquieu's ideal of the rule of law is even more demanding when already existing threats to judicial independence and separation of branches are amplified and politicised as in the creeping encroachment of unrestricted power when 'the insecurity of arbitrary government, and the discrimination of injustice' erode the rule of law.[1] Constitutions function as checks on the exercise of power since 'these checks reflect a kind of distrust of those who wield the authority of the state, at least with respect to protection of individual rights, and that distrust is at its greatest when it comes to the exercise of executive power'.[2]

The analysis concludes with assessment of the risk function to the independence of the judiciary and the resilience of the constitutional framework on national and supranational levels. The ultimate aim of the paper is to analyse the ongoing rule of law crisis in the EU, as it requires a re-assessment of the conceptual relations between general principles, fundamental rights and the rule of law.

2 OVERVIEW OF FUNDAMENTAL RIGHTS AND THE RULE OF LAW NEXUS IN THE EU LEGAL ORDER

In order to understand the interplay between the relation between general principles, fundamental rights and the rule of law in the EU, the starting point of the inquiry is inherently Article 2 of the Treaty on European Union (TEU) which enshrines the values of the Union:

> The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.

The role of Article 2 TEU is fundamental in the application and enforcement of the rule of law in the EU. The normative foundations of the EU legal order, enshrined in Article 2 TEU, are at the apex of categories of norms and sources of Union law.[3] This is also reflected in recent

[1] Judith N Shklar, 'Political Theory and the Rule of Law' in Judith N Shklar and Stanley Hoffmann (eds), *Political Thought and Political Thinkers* (University of Chicago Press 1998) 36.
[2] John Ferejohn and Pasquale Pasquino, 'The Law of the Exception: A Typology of Emergency Powers' (2014) 2(2) International Journal of Constitutional Law 210.
[3] Allan Rosas and Lorna Armati, *EU Constitutional Law: An Introduction* (Hart Publishing 2012) 53.

interpretation by the CJEU in cases concerning the rule of law and fundamental rights in Poland and Hungary.[4]

At first sight, the language of Article 2 TEU seems to differentiate between human rights, including fundamental rights, and the rule of law as a foundational value of the Union. Fundamental rights constitute general principles of EU law, a primary source of EU law, enshrined in the EU's Charter of Fundamental Rights (CFR). Article 6 TEU indicates that 'the rights, freedoms and principles set out in the Charter of Fundamental Rights […] which shall have the same legal value as the Treaties' in terms of hierarchy of sources of Union law.

The codification of fundamental rights in the CFR aims at making the fundamental principles clearer as a primary source of law. Fundamental rights can be envisaged as 'a common set of minimum standards below which human rights conditions must not fall' in the European integration process.[5] Moreover, the fundamental principles of the EU, including the principles of liberty, democracy and respect for human rights as well as fundamental freedoms in Article 6(1) TEU 'form part of the very foundations of the Community legal order'.[6] The foundational values, the general principles of EU law as well as the CFR form part of the primary law of the EU legal order and each continues to exist as a separate and distinct but interrelated source of EU law.[7]

As the language of the TEU does not explicitly state the relation between fundamental rights and the rule of law as a foundational value of the Union, the jurisprudence of the CJEU plays a crucial role in the process of interpretation of the nexus between the two concepts. Although the CJEU was not originally created to adjudicate on fundamental rights issues and as there might be some confusion with respect to the categorisation of the rule of law as a value or a principle under EU law, the Court of Justice has gained more and more relevance in this field throughout the years of European integration.[8]

EU's legal architecture including the Treaties 'constitutes the constitutional charter of a Community based on the rule of law' along with other principles such as direct effect and supremacy of EU law, primacy, effective judicial review, mutual trust and cooperation.[9] Pursuant

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[4] See Stoyan Panov, 'The Effect of Populism on the Rule of Law, Separation of Powers and Judicial Independence in Hungary and Poland' in Jure Vidmar (ed), *European Populism and Human Rights* (Brill Nijhoff Leiden 2020).

[5] Jochen A Frowein, Stephen Schulhofer, and Martin Shapiro, 'The Protection of Fundamental Rights as a Vehicle of Integration' in Mauro Cappelletti, Monica Seccombe and Joseph Weiler (eds) *Integration through Law* (Walter de Gruyter 1986) 231.

[6] Joined Cases C-402/05 P and C-415/05 *P Kadi and Al Barakaat International Foundation v Council and Commission* EU:C:2008:461, para 304. See also Rosas and Armati (n 3) 53.

[7] Rosas and Armati (n 3) 57.

[8] Sonia Morano-Foadi and Stelios Andreadakis, *Protection of Fundamental Rights in Europe: The Challenge of Integration* (Springer 2020) 6, 27. See also, Xavier Groussot, Anna Zemskova and Katarina Bungerfeldt, 'Foundational Principles and the Rule of Law in the European Union: How to Adjudicate in a Rule-of-Law Crisis, and Why Solidarity is Essential' (2022) 1 Nordic Journal of European Law 1, 2.

[9] Opinion 1/91 EU:C:1991:490, para 166. See also, Xavier Groussot and Johan Lindholm, 'General Principles: Taking Rights Seriously and Waving the Rule-of-Law Stick in the European Union' in Katja S Ziegler et al (eds), *Constructing Legal Orders in Europe: General Principles of EU Law, Edward Elgar, Forthcoming*, Lund University Legal Research Paper No. 01/2019 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3361668>

to the primacy principle, established in the *Costa v ENEL* case, the EU law is 'an independent source of law [that] could not […] be overridden by domestic legal provisions, however framed'.[10] Moreover, the EU law is construed as a self-referential system in which the CJEU interprets EU law. Hence, EU law is an independent source of law, characterised by primacy, direct effect, supremacy and exhibiting special characteristics as laid down in Articles 13 to 19 TEU.[11] The primacy of EU law is founded on the *Costa* judgment as well as the subsequent uniform application of EU law across the Member States that relies on while not being undermined by the constitutional traditions of the Member States.[12] As the EU law forms part of the national legal orders, the primacy doctrine resembles 'an incoming tide […] It flows into the estuaries and up the rivers. It cannot be held back'.[13]

The rule of law is indispensable for the integration process and integral to EU's values and their function. The primary sources of EU law require that judicial review must be exercised with respect to the conformity and consistent interpretation of EU law.[14] Pertinent to the function of judicial review and consistent interpretation, application and enforcement of EU law is the role of national courts. As seen below, the independence of the judiciary, including national courts, is indispensable requirement for the rule of law. The rule of law has played an essential role in the development of the EU as well as in practice of the EU institutions and the case-law of the CJEU.[15]

The interplay between foundational values and fundamental rights in the EU legal order can also be examined through the doctrine of constitutionalism. For the purpose of this paper, constitutionalism means the processes of 'locating, allocating, distributing and channelling jurisdiction and powers among specified, "constituted" legal institutions […] [I]t typically also specifies certain fundamental rights of citizens that agencies of government are legally obliged to respect'.[16] Constitutionalism can also be construed as the authority and competence of a government to regulate the rights and privileges of its subjects with clearly established limitations on such powers according to accessible and established set of criteria and rules, which would be particularly relevant for the analysis of judicial independence in some EU Member States.[17] In this sense, constitutionalism inherently incorporates the examination of the legislative and

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accessed 27 January 2023, 25. For the principle of solidarity, see Groussot et al, 'Foundational Principles and the Rule of Law' (n 8) 11.

[10] Case 6/64 *Costa v ENEL* EU:C:1964:66.

[11] See Morano-Foadi and Andreadakis (n 8) 67.

[12] See Case C-11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel (Solange I)* EU:C:1970:114, para 3; Case C-399/11 *Stefano Melloni v Ministerio Fiscal* EU:C:2013:107, para 59; Case C-26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* EU:C:1963:1, para 12.

[13] *HP Bulmer Ltd v J Bollinger SA* [1974] Ch 401, 418. See also, Rosas and Armati (n 3) 66.

[14] Case C-294/83 *Parti écologiste 'Les Verts' v European Parliament* EU:C:1986:166, para 23.

[15] See Laurent Pech, 'A Union Founded on the Rule of Law': Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law' (2010) 6(3) European Constitutional Law Review 359. See also, Koen Lenaerts, 'The Rule of Law and the Coherence of the Judicial System of the European Union' (2007) 44(6) Common Market Law Review 1625.

[16] Martin Krygier, 'Tempering Power' in Maurice Adams, Anna Meuwese and Ernst Hirsch Ballin (eds), *Constitutionalism and the Rule of Law* (Cambridge University Press 2017) 39.

[17] Dieter Grimm, 'Does Europe Need a Constitution?' (1986) 18(24) Journal of Legal Pluralism 1, 38.

judicial framework with focus on the interaction between the rule of law, fundamental rights and democracy.[18]

The next methodological step is to examine the jurisprudence of the CJEU on the topic. The CJEU has recently linked fundamental rights and the rule of law with a special emphasis on the rule of law incorporating judicial independence and impartiality and effective judicial protection.[19] In this manner, the jurisprudence of the CJEU outlines whether the rule of law as a value of the Union has been used as a compliance tool through the application and enforcement of fundamental rights as analysed in the following section.[20]

3 FROM PORTUGAL THROUGH MALTA AND POLAND TO LUXEMBOURG: THE CJEU'S RULE OF LAW FORMULA

The appropriate analysis of the current interplay between fundamental rights and the rule of law requires an examination of the complex role of the supranational and national judiciaries in the EU legal order. This is so as the judiciary plays a central role in the application and enforcement of EU law. The unique legal order of the EU is established upon the sincere cooperation between the judiciaries of all EU Member States and the supranational Court in Luxembourg: 'the guardians of the legal order and the judicial system of the European Union are the Court of Justice and the courts and tribunals of the Member States'.[21] This is also reflected in the language of Article 19(1) TEU, which stipulates that 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law' through their judiciaries. Moreover, the role of the judiciary on national and supranational levels is affirmed as indispensable to 'the preservation of the very nature of the law established by the Treaties'.[22] In this manner, the functioning of the judiciary, including the independence of the judiciary, would be directly relevant for the effective protection of fundamental rights.

The effective protection of fundamental rights and functioning of the EU legal order require that EU law is not limited or hindered by domestic implementation or other acts of domestic nature as this would directly challenge the EU primacy in national legal orders.[23] The independence of national courts is a condition for the principles of EU law such as primacy, direct effect, and supremacy to function effectively and to avail judicial redress against public authorities. This approach is reflected in a series of recent judgments, in which the CJEU has shed more light on the intricate interplay of fundamental rights, the rule of law and principles of Union law such as independence of the judiciary. In the following sub-sections, three judgments

[18] Sumit Bisarya and W Elliot Bulmer, 'Rule of Law, Democracy and Human Rights: The Paramountcy of Moderation' in Maurice Adams, Anna Meuwese and Ernst Hirsch Ballin (eds), *Constitutionalism and the Rule of Law* (Cambridge University Press 2017) 125.

[19] See Case C-619/18 *Commission v Poland (Independence of the Supreme Court)* EU:C:2019:531, and Case C-192/18 *Commission v Poland (Independence of Ordinary Courts)* EU:C:2019:924.

[20] See Theodore Konstadinides, *The Rule of Law in the European Union: The Internal Dimension* (Hart Publishing 2017) 169. See also, Groussot and Lindholm (n 9).

[21] Opinion 1/09 *Accord sur la création d'un système unifié de règlement des litiges en matière de brevets* EU:C:2011:123, para 66.

[22] ibid para 83.

[23] See Morano-Foadi and Andreadakis (n 8) 31.

are selected as case studies to illustrate the crystallisation of the relevant sources of Union law which concern the independence of the judiciary. The cases were selected in terms of their role and significance in the development of the interpretive design to the nexus of fundamental rights, rule of law and general principles of EU law.

3.1 *ASSOCIAÇÃO SINDICAL DOS JUÍZES PORTUGUESES* FORMULA AND THE FOUNDATIONAL VALUE OF THE RULE OF LAW

The examination starts with the *Portuguese Judges* case as it was one of the first decisions in which the CJEU introduced how the foundational value of the rule of law would be applied and interpreted in its jurisprudence. The case illustrates one of the important elements of the rule of law doctrine, namely the independence and impartiality of the judiciary.

The methodology of the CJEU in assessing judicial independence as necessary to be present and protected by the Member States is founded on delineating the material scope of Article 19(1) TEU, in concrete that 'that provision relates to "the fields of covered by Union law", irrespective of whether the Member States are implementing Union law, within the meaning of Article 51(1) of the Charter'.[24] Article 19 TEU serves as the expanding mechanism of the scope of application of EU law in seemingly internal cases to the Member States, such as related to the overall structure and function of the domestic judiciary.[25] In this manner, the CJEU focuses its interpretation on the justiciability of Article 19(1) TEU with an emphasis on the obligation on Member States to provide effective legal protection. Article 19(1) TEU 'gives concrete expression to the value of the rule of law'.[26] This is the rule of law part of the novel formula: the effective legal protection is a concrete manifestation of the rule of law value and ensures 'compliance of EU law', which constitutes the essence of the rule of law.[27] In this manner, the obligation to provide effective judicial remedies on part of the EU and its Member States anchors the crucial function of the independent judiciary on EU and national levels.

A similar methodology is applied in some infringement proceedings under Article 258 TFEU, related to the independence of the judiciary and effective judicial protection, as in the *Commission v Poland (Retirement Age)* case.[28] The case concerned the compatibility of the Law amending the Law on the system of ordinary courts and certain other laws, resulting in lowering the retirement age for judges and prosecutors in Poland.[29] The Court reads Article 19(1) TEU in light of Article 47 CFR, 'in particular, to the guarantees inherent in the right […] to an effective remedy, so that the first of those provisions entails that preservation of the independence of bodies such as the ordinary Polish courts, which are entrusted […] with the task of interpreting and applying EU law, must be guaranteed'.[30] The effective judicial protection

[24] Case C-64/16 *Associação Sindical dos Juízes Portugueses* EU:C:2018:117, para 29.
[25] Groussot and Lindholm (n 9) 14.
[26] Case C-64/16 *Associação Sindical dos Juízes Portugueses* (n 24), para 32.
[27] ibid para 35.
[28] See *Commission v. Poland (Independence of Ordinary Courts)* (n 19).
[29] ibid paras 16, 24.
[30] ibid paras 85, 98-99.

is a general principle of EU law, enshrined in Article 19(1)(2) TEU.[31] Therefore, in order to rule on the application or interpretation of EU law, domestic courts should 'meet the requirements of effective judicial protection'.[32]

The bridge to the second part of the formula is cast in the affirmation by the CJEU that the rule of law as well as human rights are foundational values, enshrined in Article 2 TEU, which necessitate mutual trust between the courts and tribunals of the Member States.[33] This principle includes trust by all Member States to implement and enforce EU law with respect to the fundamental principles and values of the EU.[34] Moreover, the principle of sincere cooperation in Article 4(3) TEU obliges Member States to ensure the application of and respect for EU law.[35] The responsibility of ensuring judicial review in the EU and respective Member States in line with the duty to provide effective legal protection of individual rights constitutes 'a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the [ECHR] […], and […] now affirmed by Article 47 of the Charter'.[36]

The third part of the formula ensures the effective protection through the existence and function of a court's independence per Article 47 CFR. The problem of effective protection of fundamental rights by functioning and independent domestic judiciary is one of the core issues, raised in multiple EU's Rule of Law reports, as seen below. The CJEU correctly identifies that the access to 'an independent and impartial tribunal previously established by law' is linked to the fundamental right of an effective remedy. The independence of the judiciary is applicable to both national and supranational judicial bodies.[37] This is so because the principle of judicial cooperation includes the preliminary ruling mechanism under Article 267 TFEU and, crucially, 'that mechanism may be activated only by a body responsible for applying EU law which satisfies, inter alia, that criterion of independence'.[38] The same approach is affirmed in the infringement proceedings cases where the CJEU proclaims that effective judicial protection requires that maintaining the independence of the judiciary is 'essential, as confirmed by the second paragraph of Article 47 of the Charter'.[39] As judicial independence is grounded in the constitutional traditions of all EU Member States, national courts are incremental for providing effective remedy and implementation of EU law. In a sense, national courts functionally 'speak' the language of the general jurisprudence of EU law and the CJEU. The Court's reasoning reads as a direct reply to the instances of restrictions and even cases of enforcement against domestic judges in Hungary utilising the preliminary ruling procedure as seen below.

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[31] *Commission v Poland (Independence of Ordinary Courts)* (n 19), para 100.
[32] ibid para 103.
[33] *Associação Sindical dos Juízes Portugueses* (n 24), para 30.
[34] See Opinion 2/13 *Adhésion de l'Union à la CEDH* EU:C:2014:2454, para 166.
[35] *Associação Sindical dos Juízes Portugueses* (n 24), para 34. See also, Opinion 1/09 (n 21), para 69.
[36] *Associação Sindical dos Juízes Portugueses* (n 24), para 35.
[37] ibid para 42. See also, Case C-506/04 *Wilson* EU:C:2006:587, para 49.
[38] *Associação Sindical dos Juízes Portugueses* (n 24), para 43. See also, Case C-284/16 *Achmea* EU:C:2018:158, para 3: 'the judicial system as thus conceived has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU'.
[39] *Commission v Poland (Independence of Ordinary Courts)* (n 19), para 105. See also, *Commission v Poland (Independence of the Supreme Court)* (n 19), para 58.

The formula concludes with the requirement for the existence of independent judiciary. In order for the values and principles analysed above to be effective and present in the legal order of the EU, the courts must exercise judicial functions fully autonomously, without being subject to any hierarchical constraints or subordinated to any other domestic body. Moreover, the judiciary should not take 'orders or instructions from any source whatsoever', and the corresponding protection 'against external interventions or pressure liable to impair independent judgment of its members and to influence their decision' shall be ensured.[40]

In the *Retirement Age* case, the Court furthers the analysis by interpreting the internal and external aspects of judicial independence through the principle of irremovability. Dismissal or other disciplinary proceedings with adjudicating functions 'must provide the necessary guarantees in order to prevent any risk of that disciplinary regime being used as a system of political control of the content of the judicial decisions', requiring a procedure incorporating the protections under Articles 47 and 48 CFR.[41] The protection also includes 'types of influence which are more indirect'.[42]

What is noticeable is that the CJEU seemingly stops short of including judicial independence as a general principle on its own standing, but the interpretation clearly indicates that the rule of law emanates from and interwoven with the duty of effective judicial protection by an independent and autonomous national court. The independence of the judiciary is vital for effective legal protection through judicial review in the EU, as Member States are tasked with guaranteeing that national courts are independent, impartial and autonomous.[43] Moreover, the development of the rule-of-law doctrine in the recent CJEU jurisprudence indicates that the effectiveness of remedies, laid down in EU law and the constitutional traditions of all Member States, is not sufficient. There is a structural and functional angle of the independence of the judiciary on national level which is ultimately responsible for upholding effective remedies. In this manner, the independence of the judiciary serves a foundational, primal function in the architecture of the EU legal order. This finding is particularly relevant for the issues, raised on multiple occasions in the EU's Rule of Law Reports in Hungary and Poland.

It is through the rule-of-law-related cases that the CJEU has been able to provide the interpretation of the substantive link between the fundamental rights, general principles and values of the Union with a special focus on the principles of judicial independence, impartiality and irremovability as the core elements and binding mechanisms of the rule of law.[44] Judicial independence thus has played the connecting, binding role of the application of EU law through Article 19 TEU and the enforceability of Article 2 TEU.[45] In this manner, the *Portuguese Judges* case can be seen as a fundamental moment for the effective monitoring of judicial independence on EU level.

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[40] *Associação Sindical dos Juízes Portugueses* (n 24), para 44. See also *Wilson* (n 37), para 51; *Commission v Poland (Independence of Ordinary Courts)* (n 19), paras 109-110.
[41] *Commission v Poland (Independence of Ordinary Courts)* (n 19), para 114.
[42] ibid para 120.
[43] See Grossout and Lindholm, *General Principles* (n 9) 8.
[44] See Dimitry Kochenov and John Morijn, 'Augmenting the Charter's Role in the Fight for the Rule of Law in the European Union' (2020) Reconnect Working Paper No. 11, 10.
[45] ibid 13. See also, Groussot et al, 'Foundational Principles and the Rule of Law' (n 8) 7.

In some of the infringement proceeding cases, the question on the separation of powers is also reviewed by the CJEU. As seen below in the Rule of Law Reports on Poland and Hungary, backsliding of the rule of law and increasing pressure and influence by the executive and legislative branches over the judicial system are outlined as one of the primary systemic problems. For example, the ambiguous role of the Minister of Justice in Poland to decide whether or not to authorise the continuation of judges' appointments beyond the retirement age, based on vague and unverifiable criteria and whose decision is not subject to judicial review, creates reasonable doubt 'as to the imperviousness of the judges concerned to external factors', thus failing to comply with the irremovability principle.[46] Poland fails to fulfil its obligations under Article 19(1)(2) TEU. The interpretation of the CJEU in rule-of-law-related infringement proceedings utilises the rule of law value as a doctrinal anchor. Hence, a mechanism to launch systemic infringement proceedings in situations where the independence of the judiciary is systematically breached, reflected in a pattern of violations, may be appropriate.[47]

3.2 DEVELOPMENTS OF THE *ASSOCIAÇÃO SINDICAL DOS JUÍZES PORTUGUESES* FORMULA: *THE MALTESE JUDGES (REPUBBLIKA)* AND *DISCIPLINARY CHAMBER* JUDGMENTS

If the *Portuguese Judges* case can be considered to introduce a rule-of-law formula, similar in its quintessential value to *Costa* and *Van Gend en Loos*, the *Maltese Judges (Repubblika)* and the *Disciplinary Chamber* judgments may be the mid-point of the journey so far. The Maltese case concerned a referral from the Maltese Constitutional Court on the Prime Minister's discretion to appoint members of the judiciary.[48] The question that the CJEU had to answer was whether the national provision on the appointment of the judiciary was compatible with Article 19(1) TEU and Article 47 CFR, focusing on the principle of effective judicial protection and the right to an effective remedy before a tribunal for rights and freedoms, guaranteed by EU law,[49] as well as whether the national provisions are precluded per Article 19(1) TEU second subparagraph on conferring on the Head of Government a decisive power in the process for appointing members of the judiciary.[50]

The *Portuguese Judges* formula was replicated in the *Maltese Judges* case by reminding that the independence of the courts, inherent in the process of adjudication, forms the essence of the effective judicial protection and the fundamental right to a fair trial under Article 47 CFR as well as the safeguarding of the common values enshrined in Article 2 TEU 'in particular the value of the rule of law'.[51] The two levels of effective protection interact as Article 47 CFR ensures the individual right of an effective judicial protection, stemming from EU law, while

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[46] *Commission v Poland (Independence of Ordinary Courts)* (n 19), paras 124-125. See also, *Commission v Poland (Independence of the Supreme Court)* (n 19), para 96.
[47] See Kim Lane Scheppele, 'Constitutional Coups in EU Law' in Maurice Adams, Anna Meuwese and Ernst Hirsch Ballin (eds), *Constitutionalism and the Rule of Law* (Cambridge University Press 2017) 472-473.
[48] Case C-896/19 *Repubblika v Il-Prim Ministru* EU:C:2021:311, para 10.
[49] ibid paras 38, 40.
[50] See ibid para 47.
[51] ibid para 51.

Article 19(1)(2) TEU works on a macro-level by ensuring that 'the system of legal remedies established by each Member State guarantees effective judicial protection in the fields covered by EU law'.[52] In this manner, the material scope of Article 19(1)(2) TEU is dogmatically affirmed to include the values of judicial independence and effectiveness. The separation of powers plays an essential role in safeguarding the independence of the judiciary as the adoption of judiciary appointments should not create reasonable doubt with respect 'to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them, once they have been appointed as judges'.[53]

3.2[a] The Disciplinary Chamber Judgment

The same line of reasoning was applied in the recent *Disciplinary Chamber* judgment with respect to the establishment of two new disciplinary chambers in Poland and the corresponding failures of Poland to fulfil its obligations under Article 19(1)(2) TEU and Article 267(2)-(3) TFEU.[54] The case directly responds to the issues with the independence of the judiciary in Poland, outlined in the EU's Rule of Reports in 2020 and 2021. In the judgment, it was established that the disciplinary regime of the judiciary must meet the guarantees of effective legal protection in the process of challenging the decisions of such bodies as they are 'are essential for safeguarding the independence of the judiciary'.[55] Correspondingly, a body as the Disciplinary Chambers in Poland must offer 'all the necessary guarantees as regards its independence and impartiality'.[56]

In order to determine whether the criteria of the independence and impartiality of the disciplinary body required by EU law were met, the Court of Justice applied a novel methodological approach by analysing the legal framework of the disciplinary bodies within 'the wider context of major reforms concerning the organisation of the judiciary in Poland'.[57] In that regard, it was not surprising that the CJEU took the opportunity to reflect about the compatibility of the overall national rules of the process of appointing judges, *inter alia* at the Disciplinary Chamber level, as the national conditions must comply with the requirements under Article 19(1) TEU.[58]

Moreover, the Court went further in its examination of the judiciary system in Poland and looked at the role and composition of the National Council of the Judiciary (KRS). As seen below, the functioning and composition of the judicial councils is a recurring theme in the EU's Rule of Law Reports. The recent changes in Poland have mandated that the executive and the legislative branches appoint 23 out of 25 members of the KRS. The Court concluded that such changes 'are liable to create a risk […] of the legislature and the executive having a greater influence over the KRS and of the independence of that body being undermined'.[59] *In toto,* the

[52] *Repubblika* (n 48), para 52.
[53] ibid para 57.
[54] Case C-791/19 *European Commission v Poland (Disciplinary Chamber)* EU:C:2021:596, paras 8, 27.
[55] ibid para 61.
[56] ibid para 81.
[57] ibid para 88.
[58] ibid para 95.
[59] ibid para 104.

circumstances around the creation and composition of the Disciplinary Chamber along with the direct and indirect influence of the executive and legislative branches give rise to a reasonable doubt as to the imperviousness of the Disciplinary Chamber which results in such a body 'not being seen to be independent or impartial […]. Such a development constitutes a reduction in the protection of the value of the rule'.[60] The importance of the *Disciplinary Chamber* should not be underestimated as it introduces an institutional assessment of the functioning of the judiciary and its relation with the rule of law and fundamental values of the EU.

3.2[b] The Non-Regression Principle

The most significant contribution of the *Maltese Judges* case to the jurisprudence in the area of the independence of the judiciary and the rule of law is the non-regression principle. The CJEU explicitly reminds the Member States that they have voluntarily committed to the values of Article 2 TEU as early as the accession process to the EU under Article 49 TEU.[61] This is an innovative approach that creates a link to the accession conditionality continuing through the commencement of the membership in the Union. The non-regression principle stipulates that '[a] Member State cannot therefore amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law, a value which is given concrete expression by, inter alia, Article 19 TEU'.[62] Crucially, any regression in the laws on the organisation of the judiciary is prohibited as such 'negative development would undermine the independence of the judiciary'.[63] In this manner, the membership of the Union necessitates a progressive protection of the rule of law and precludes backsliding. Moreover, the non-regression principle directly responds to the convenient hiding behind the membership in the EU once a State joins the EU if backsliding of the rule of law occurs. In other words, the value of the rule of law is foundational and characteristic for the EU State from the start of the accession period and continuing through the EU membership with a clear reminder that once achieving a membership status cannot result in deviation from and erosion of the foundational values of the Union. To the contrary, the membership in the EU requires progressive abidance and implementation of the Union's values.

The CJEU affirmed the quintessential role of the rule of law as a foundational value in its February 2022 *Budget Conditionality Mechanism* judgment. The case dealt with the recently introduced general regime of conditionality for the protection of the Union budget and the rule of law.[64] The CJEU affirmed that the EU can implement protective and preventive mechanisms, as the rule of law and solidarity among Member States solidifies the trust between them. This is so because the respect for the rule of law and the other values in Article 2 TEU are at 'the very

[60] *European Commission v Poland (Disciplinary Chamber)* (n 54), para 112.
[61] *Repubblika* (n 48), para 61.
[62] ibid para 62.
[63] ibid para 63. See also, Joined Cases C-354/20 PPU and C-412/20 PPU *Openbaar Ministerie (Indépendance de l'autorité judiciaire d'émission)* EU:C:2020:1033, para 40.
[64] Joined Cases C-156/21 and C-157/21 *Hungary and Poland v European Parliament and Council of the European Union* EU:C:2022:97.

identity of the European Union as a common legal order'.[65] Moreover, the rule of law is 'a value common to the European Union and the Member States which forms part of the very foundations of the European Union and its legal order', imposing a duty on the EU Member States to abide by that constitutive value.[66] What is noticeable here is that the CJEU thickens the rule-of-law normative approach by explicitly linking it to the protection of fundamental rights. Through its jurisprudence, the Court solidifies the non-regression principle as the foundation for offering a response to the backsliding practices in some EU Member States.

The non-regression principle reasoning was affirmed in the *Disciplinary Chamber* judgment as 'any regression of [Member States'] laws on the organisation of justice is prevented, by refraining from adopting rules which would undermine the independence of the judges'.[67] The interpretation of the Court unambiguously established the scope of 'courts and tribunals' to include Disciplinary Chamber models to fall under the remit of Article 19(1) TEU along with Article 47 CFR in order for those courts to meet the requirements of effective judicial protection.[68] In essence, one ponders whether after the *Maltese Judges* and *Disciplinary Chambers* judgments, domestic judges can disapply or set aside any provision of national law, including constitutional clauses or other legislative or normative acts of general or specific application, based on the principle of supremacy,[69] especially in the scope of Article 19(1)(2) TEU - Article 47 CFR.

Another interlinked significant institutional point, raised in the *Disciplinary Chamber* case, concerns the organisation of the judiciary at Member State level and the non-regression principle. In this manner, the Court fine-tunes the principle. It is undisputed that the organisation of justice falls within the Member States' competences including various disciplinary designs and regimes on members of the judiciaries with the proviso that the Member States must safeguard 'the independence of the courts called upon to rule on questions concerning the application or interpretation of EU law, in order to ensure the effective judicial protection […] required by the second subparagraph of Article 19(1) TEU'.[70] In that vein of reasoning, the disciplinary regime must not be used as a façade for political control or pressure on judges, and 'the disciplinary liability of judges should be limited to entirely exceptional cases […] and be governed […] by objective and verifiable criteria' in order to avoid any risk of external pressure on the content of judicial decisions.[71]

The language by the Court of Justice concerning the protection of imperviousness of the judges against external pressure and deterrent effect, which may affect the neutrality of the judges, is categorical and absolute.[72] The normative context of a vaguely phrased discretionary power of the head of the Disciplinary Chamber falls within the ambit of Article 47(2) CFR as judges must exercise their competence to interpret and apply EU law without the risk of the

[65] *Hungary and Poland v European Parliament and Council of the European Union* (n 64), para 127.
[66] ibid para 128. See also, Groussot et al, 'Foundational Principles and the Rule of Law' (n 8) 2.
[67] *European Commission v Poland (Disciplinary Chamber)* (n 54), para 51.
[68] ibid paras 55, 59.
[69] See Case C-106/77 *Simmenthal* EU:C:1978:49, para 21.
[70] *European Commission v Poland (Disciplinary Chamber)* (n 54), para 136.
[71] ibid para 139-140.
[72] ibid para 157.

disciplinary regime, especially when investigations against judges can be reopened.[73] Ultimately, the core function of Article 267 TFEU to set up a dialogue between the courts of the Member States and the Court of Justice would be compromised if a national rule exists that impairs the ability of the national court to refer questions for a preliminary ruling, including subjecting national judges to disciplinary proceedings or sanctions due to their decision to refer cases to the CJEU.[74]

As the role of the judiciary within the constitutional structure at domestic as well as EU levels is firmly established and defended in the analysed cases, it is no major leap to conclude that the jurisprudence of the CJEU with respect to the linkage between Article 49 TEU, Article 19(1)(2) TEU and Article 2 TEU is a moment of constitutionalisation of the rule of law as foundational value of the Union and every Member State. The interpretation of the Court here sounds like a solution to the issues, raised in the EU's Rule of Law Reports with respect to the structure and independence of the judiciary. The cases analysed above serve as the normative and functional foundation of the jurisprudence, concerning the nexus between the rule of law, independence of the judiciary and protection of fundamental rights in the EU legal order. The CJEU has been active in securing an institutionalisation of the normative and functional foundation of the rule of law in the EU in order to protect the judiciary from various exogenous pressures and heavy politicisation. The next section introduces another layer to the framework, namely the particular effect of the nexus when fundamental rights in the process of the implementation of the European Arrest Warrant are concerned and the effect of judicial independence in the requesting State.

4 HORIZONTAL CHECK OF JUDICIAL INDEPENDENCE BY NATIONAL COURTS

The above-mentioned cases reached the CJEU through either infringement proceeding, initiated by the Commission, or through the preliminary ruling Article 267 TFEU pathway. This study includes another angle to the independence of the judiciary assessment and its role in the protection of fundamental rights and the rule of law on Union level. This method is labelled as a horizontal check by domestic courts of other Member States vis-à-vis the function of the judiciary in another Member States when it concerns the applicability and enforcement of EU law. It is an important contribution to the protection of the value of the rule of law as it enables national courts of Member States to evaluate other domestic courts in Member States where there are problems with the rule of law and protection of fundamental rights.

4.1 THE EUROPEAN ARREST WARRANT CASES AND THE RULE OF LAW

The leading authority in providing the power of national courts to check the rule of law conditions in other Member States is the *LM* case with respect to the mutual recognition

[73] *European Commission v Poland (Disciplinary Chamber)* (n 54), paras 193, 197.
[74] ibid paras 226-227.

principle in the European Arrest Warrant mechanism.[75] The case concerned the execution of the EAW from Ireland to Poland as LM contended that the legislative reforms in the judiciary in Poland would deny him the right to a fair trial and the extradition would expose him to a real risk of flagrant denial of justice in contravention to Article 6 ECHR.[76] The High Court in Ireland through the preliminary ruling procedure referred the question to the CJEU whether the executing judicial authority needs to make further assessment to the exposure of the relator to the risk of unfair trial where his trial would take place 'within a system no longer operating within the rule of law'.[77] In essence, the CJEU had to adjudicate whether the guarantee of a fair trial under Article 1(3) of the EAW Framework Decision 2002/584 can be upheld in criminal proceedings when there is evidence of a real risk of breach of fundamental rights in a Member State under an ongoing Article 7(1) TEU procedure with respect to Article 47(2) CFR on account of systemic and generalised deficiencies of the independence of the judiciary in the issuing Member State.[78]

The CJEU bases its assessment on a familiar method through the emphasis on the applicability of the principle of mutual trust as Member States shall be considered to be complying with EU law at large and fundamental rights via the principle of mutual recognition, save for exceptional circumstances.[79] The CJEU in July 2018 applies the formula introduced in the *Portuguese Judges* case in early 2018 with respect to the requirement of judicial independence to form part of the essence of the fundamental rights to a fair trial,[80] as the CJEU defines and assesses the impartiality and independence of the judiciary through the prism of the rule of law as a foundational value under Article 2 TEU, specifically expressed in Article 19 TEU and the effective judicial protection under Article 47 CFR. In the application to the particular case, it is inherent in the EAW mechanism that 'the criminal courts of the other Member States […] meet the requirements of effective judicial protection, which include, in particular, the independence and impartiality of those courts'.[81] Hence, the CJEU lays down the conditions under which the EAW executing authorities would determine whether there is a real risk of a breach of the relator's fundamental right to an independent tribunal, *ergo,* a breach of the right to a fair trial, protected under Article 47(2) CFR.[82]

Another pertinent case, dealing with the overall structure and independence of the judiciary, is *XY* judgment of 2022, in which the issue of the fundamental right to a fair trial before a tribunal previously established by law in Poland with respect to the appointment of judges by the recently restructured National Council of Judiciary (NCJ) is at stake.[83] The ultimate

[75] Case C-216/18 *PPU Minister for Justice and Equality (LM)* EU:C:2018:586.
[76] ibid para 16.
[77] ibid para 25.
[78] Article 1(3) of the EAW Framework Decision states: 'This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union'.
[79] *LM* (n 75), para 36. See also, Case C-404/15 *Aranyosi and Căldăraru* EU:C:2016:198.
[80] *LM* (n 75), para 48.
[81] ibid para 58.
[82] ibid para 59.
[83] Joined Cases C-562/21 and C-563/22 *PPU Openbaar Ministerie (XY)* EU:C:2022:100, paras 14-15.

question that CJEU had to answer dealt with the appointment of members of the judiciary and the conditions under which the transferring authority may refuse to surrender the relator for a custodial sentence, detention order or a criminal prosecution under the EAW where there is a real risk of breach of the person's fundamental right to a fair trial before a tribunal established by law.[84] The case is of particular importance as the CJEU reviewed the conditions of determination of the existence of or in increase in systemic or generalised deficiencies with respect to the independence of the judiciary through the prism of the right to a fair trial before a lawfully established tribunal through an assessment of appointment procedure of judges on domestic level.

The two cases are methodologically important as they utilise a two-prong test of independence and impartiality of the judiciary. The assessment begins with the operation of the system of justice in the receiving Member States, based on 'material that is objective, reliable, specific and properly updated', including information released in a proposal under Article 7(1) TEU proceedings.[85] It is triggered when the issuing Member State is subject to a reasoned proposal for a clear risk of a serious breach of the rule of law under Article 7(1) TEU and the existence of material to indicate that there are systemic deficiencies in the issuing Member State's judiciary.[86] The same first step is affirmed in the *XY* case.[87]

The test, introduced in *Wilson,* with respect to the independence and impartiality of the judiciary is used in the specific context.[88] The external assessment of the independence of the judiciary follows the familiar formula from the *Portuguese Judges*, namely 'the court concerned exercises its functions wholly autonomously, without being subject to any hierarchical constraints or subordinated to any other body and without taking orders or instructions from any source whatsoever'.[89] The objective criterion aims to immunise the concerned domestic court from external interventions and pressure to influence its decisions. It should be noted that in the first prong the assessment of imperviousness of the judiciary is narrowed in its scope to a particular court that participates in the EAW proceedings.

The *XY* case builds on the *LM* first prong assessment by including the possibility for review of the judicial appointment decisions, inherently linked to the requirement for a tribunal previously established by law. Here the Court noted that the 'established by law' ultimately enshrines the rule of law as it directly concerns the judicial appointment procedure, although not every irregularity in the appointment procedure would constitute a *per se* breach.[90] What matters is the overall assessment on basis of evidence that is objective, reliable, specific and properly updated, including relevant factors such as

> constitutional case-law of the issuing Member State, which challenges the primacy of EU law and the binding nature of the ECHR as well as the binding force of judgments

[84] *XY* (n 83), para 39.
[85] *LM* (n 75), para 61.
[86] ibid para 69.
[87] *XY* (n 83), para 52.
[88] *Wilson* (n 37), para 50.
[89] *LM* (n 75), para 63.
[90] *XY* (n 83), paras 70-71.

> of the Court of Justice and of the European Court of Human Rights relating to compliance with EU law and with that convention of rules of that Member State governing the organisation of its judicial system, in particular the appointment of judges.[91]

As the *LM* and *XY* cases concern the AFSJ, it should be noted that the suggested assessment affirms further the equivalence principle, according to which 'save in exceptional circumstances, to consider all other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law'.[92] However, the recent development in the jurisprudence with respect to the functional review and assessment of the existence of systemic flaws based on substantial grounds for believing so may render cooperation between EU Member States incompatible with EU law in certain exceptional circumstances.[93] In this manner, the assessment is personalised in order to assess the specific conditions in the receiving State.[94]

The second prong is the internal, subjective aspect which concerns the impartiality of the judiciary and the individualised effect on the relator's rights. It guarantees equal distance from the parties and objectivity, for example.[95] The two-prong test requires clear rules as regards 'the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members' along with a foreseeable and established disciplinary regime, which is the connection to the rule of law values as enshrined in Article 2 TEU.[96]

The *XY* case similarly applies the second prong in a conjunctive manner with respect to the first prong. The second prong 'individualises' the systematic or generalised deficiencies of the first prong through an assessment of 'a tangible influence on the handling of his and her criminal case'.[97] *In concreto*, the test includes an examination of the existence of substantial grounds for considering that the appointment and composition of the judges is such as 'to affect that person's fundamental right to a fair trial before an independent and impartial tribunal previously established by law […] in the criminal proceedings'.[98]

Although in some criminal proceedings the identity of the judge would not be known at the moment of the transfer of the relator, there are procedural guarantees which can be taken into consideration when evaluating the real risk of the relator's right to a fair trial in the receiving jurisdiction. For example, factors of assessment may include whether there is a procedural possibility to request the rejection of one or more members of the bench for breach of the relator's fundamental rights in the issuing State, and whether it is possible to trigger such a claim for rejection and potential for appeal, based on the available information before the sending

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[91] *XY* (n 83), para 80.
[92] Opinion 2/13 (n 34), para 191.
[93] See Joined Cases C-411/10 and C-493/10 *NS and ME* EU:C:2011:865, para 86 with regard to Dublin III Regulation.
[94] See Morano-Foadi and Andreadakis (n 8) 77.
[95] *LM* (n 75), para 65.
[96] ibid paras 66-67.
[97] *XY* (n 83), para 83.
[98] ibid para 88.

State.[99] The assessment of the real risk of breach of the right to a fair trial before an independent and impartial tribunal established by law is a case-by-case based with respect to the procedure of the appointment of the judge(s), which may include the possibility of the procedure and effective function of the request to reject one or more of the judges to be taken into account.[100]

Upon carrying the test and taking into account the relator's personal situation and nature of the offence, if there are substantial grounds for believing that the relator would run a real risk of a breach of his/her fundamental right to a fair trial, then the surrender or transfer should not continue according to Article 1(3) of the EAW Framework Decision.[101] The threshold for not extraditing the relator is automatically passed if the European Council has adopted an Article 7(2) TEU decision, indicating a serious and persistent breach of the foundational values of the EU in the issuing Member State, including the rule of law, and the Council would suspend the application of the EAW mechanism to the breaching Member State, thus requiring an automatic refusal to surrender on part of the executing authorities.[102]

4.2 ASSESSMENT OF THE 'HORIZONTAL CHECK' APPROACH

The added value of the co-application of Article 19(1) TEU and Article 47(2) CFR per *LM* and *XY* cases has allowed the CJEU to 'wed' the substance of the right with the context of independence of the national judiciary, including a review of the disciplinary and appointment mechanisms. However, a possible critique may include the eventual negative effects of the backsliding in the respective Member States through the inclusion of the 'substantive' Article 19 TEU - Article 47 CFR kind of rule of law.[103] The core of such criticism is that the remedial effect of individual rights is different from addressing systemic deficiencies in the national judiciary system. The *XY* judgment provides the opportunity to clarify the applicable tests when there are systemic and generalised issues with the overall composition of the judiciary and appointment procedure through the lens of the right to a fair trial before an independent and impartial tribunal previously established by law. Moreover, the two-prong test related to the EAW cases shows the CJEU in a restrictive and restrained role. This might be explained by the purpose of the EAW to disallow for impunity hotspots in the EU by complicating the proper functioning of the EAW.

The functional interpretation of the CJEU by putting Article 47 CFR as the contextualising and doctrinal element in expressing a right to an effective remedy and a right to a fair trial in conjunction with Article 2 TEU under the value of the rule of law allows the CJEU to circumvent the restriction imposed in Article 51 TEU. However, such an interpretive approach might limit the applicability of Article 47 CFR as a free-standing provision in order to protect other

[99] *XY* (n 83), paras 90, 99.
[100] ibid para 99.
[101] *LM* (n 75), paras 74, 79.
[102] ibid para 72.
[103] See Kochenov and Morijn (n 44) 11.

fundamental rights, such as the right to privacy or freedom of expression.[104] On the other hand, as seen above in the *LM* case, Article 47(2) CFR played the central role in the adjudication of the case and successfully incorporated it with other rights, fundamental principles and foundational values such as the rule of law.

Another discernible issue is the horizontal assessment that the national courts need to perform according to the two-prong test in *LM* and *XY* cases. The individual assessment of the domestic courts involved in the administration of criminal law and extradition may necessitate detailed knowledge about the structure, organisation and functioning of the judiciary in the issuing State, based on available material. Although it is beyond doubt that 'when the separation of powers is being destroyed in one of the Member States and the independence of the courts is threatened, it would be unreasonable to expect justice in individual cases',[105] the two-step test indicates a more calibrated evaluation.

At first view, this can be criticised as a missed opportunity for the Court of Justice to lay down a more normative-oriented human-rights-oriented approach in the relationship between the presumed mutual trust between the Member States and the fundamental protections under Article 47 CFR. The *XY* case seems to bring the jurisprudence closer to a more normative-oriented approach, linked with the fundamental issue of a fair trial before a lawfully established tribunal. In that case, it is noticeable that the CJEU does not shy away from relying on the standards of the jurisprudence of the ECtHR on the particular issue.[106] This is a welcome development and it would not be surprising if the ECtHR sees an increase of cases on the subject matter of the two-prong test under Article 6 ECHR. Moreover, the recent mechanism of the Rule of Law Reports may aid domestic judges in assessing the overall situation in other Member States as the Reports contain valuable evidence of the state of the art at the current moment with respect to the status of the judiciary.

The assessment and application of the two-prong test above may also politicize the decision-making process of the courts in the sending/executing State.[107] The second prong of the test requires the relator to prove how the systematic breach in the receiving Member State would individually affect his/her rights.[108] However, the CJEU derived its formulation of the standard through analogy from the Article 4 CFR (the prohibition of torture, inhuman and degrading treatment). At first sight, the horizontal nature of the assessment may be compromised and the functioning of the EAW mechanism which is inherently built on the mutual recognition principle would be affected.[109] The counter-factual argument would indicate

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[104] Kochenov and Morijn (n 44) 13. See also, Matteo Bonelli and Monica Claes, 'Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary: ECJ 27 February 2018, Case C-64/16, *Associação Sindical dos Juízes Portugueses*' (2018) 14(3) European Constitutional Law Review 622, 634.
[105] Kochenov and Morijn (n 44) 15.
[106] See eg *XY* (n 83), paras 78-80
[107] See Kochenov and Morijn (n 44) 15.
[108] Dimitry Kochenov and Petra Bárd, 'The Last Soldier Standing? Courts versus Politicians and the Rule of Law Crisis in the New Member States of the EU' (2019) 1 European Yearbook of Constitutional Law 243, 274.
[109] See Stoyan Panov, 'Harmonize, Recognize or Minimize: A Borderless European Judicial Space? The Application of the European Arrest Warrant and Its Effect on EU Integration' (2014) 3 The Birmingham Journal for Europe.

a one-prong assessment in which national judiciaries that are not independent according to the material available before the authorities of the sending State would constitute a violation of the rule of law value, *ipso* a violation of the right to fair trial. Nonetheless, such a reading would obviate or limit the applicability of the mutual trust principle and may lead to a fragmented regime of 'rule-of-law' courts vs. 'captured' courts. The same interpretation is affirmed in the *XY* case, although the second prong allows for a prospective overall assessment of the possibilities to seek removal of judges, appointed in contravention to the principle of judicial independence and tribunal established by law. It is also doubtful whether Article 47 CFR would be 'clarified' more as a free-standing clause if subsumed within the fundamental value or institutional assessment of the judiciary in the requesting Member State. What is unambiguous is that the CJEU has been consistent in its reliance on a functional interpretation of the rule of law and fundamental rights protections.

5 EFFECTIVE AND FUNCTIONAL INTERPRETATION?

One of the principles of interpretation that the EU has relied upon in the mentioned cases is the functional interpretation to guarantee efficacy of the legal order and the applicability of the corresponding doctrines.[110] Ever since *Van Gend*, the EU legal order has been characterised by the uniform and effective functioning, based on the network of EU's and national courts where the domestic judge is an 'ordinary judge of the Union law'.[111] Article 47 CFR has been essential in determining the effective implementation of the rule of law doctrine in the jurisprudence of the CJEU. Hence, it is pertinent to underline how the CJEU approaches the issue of efficacy and essence of the fundamental right to a fair trial and judicial remedy. The right could be assessed subjectively through the right holder's perception, or objectively, based on the function of the right in the legal order.[112]

The objective institutional approach aims at evaluating whether the essence of the right is impacted to a degree that its meaning is lost for nearly all individuals.[113] A corollary pathway is to examine whether the nucleus of the affected right is compromised to a degree that the limitation would empty of content and casts doubt on the right's existence.[114] Ultimately, the functional approach examines whether the infringed right through an exception or practice is rendered ineffective or close to extinguished, an issue of particular relevance in instances of backsliding of the rule of law.[115] The objective, functional-oriented approach has been utilised in the rule-of-law cases, discussed above. In this manner, the nexus between general principles, fundamental rights and the rule of law as a foundation value of the EU has been primarily a

[110] Groussot and Lindholm, *General Principles* (n 9) 12.
[111] *Simmenthal* (n 69), paras 14–21.
[112] Mark Dawson, Orla Lynskey, and Elise Muir, 'What is the Added Value of the Concept of the "Essence" of EU Fundamental Rights?' (2019) 20(6) German Law Journal 763, 765.
[113] Sébastien Van Drooghenbroeck and Cecilia Rizcallah, 'The ECHR and the Essence of Fundamental Rights: Searching for Sugar in Hot Milk?' (2019) 20(6) German Law Journal 904.
[114] See Koen Lenaerts, 'Limits on Limitations: The Essence of Fundamental Rights in the EU' (2019) 20(6) German Law Journal 779.
[115] *Regner v Czech Republic* App no 35289/11 (ECtHR, 19 September 2017), para 50.

doctrinal construct. The right's violations can be appropriately assessed in a case-by-case manner by taking into account all relevant facts and context.[116] For example, such an approach is evident in the second part of the individual assessment formula in the *LM* and *XY* cases.

Moreover, the CJEU has used the Article 2 TEU - Article 19 TEU - Article 47 CFR pathway as the interpretive design to link the efficacy of fundamental rights and values of EU law in order to expand the scope of protection and application of EU law.[117] The doctrinal inclusion of the principle of effective judicial remedy must be anchored in corresponding practice in the EU and all Member States, which necessitates the independence of the judiciary in the EU legal order. It has been noted that values are difficult to enforce.[118] The CJEU in the *LM* and *XY* cases also designed a two-prong test to examine the breadth and depth of the breach, based on material evidence, related to the independence of the judiciary in Member States. This is important as the analysis of the Court is anchored in a positive, objective assessment of the degree of functioning of the judiciary in other Member States, coupled with the degree of the alleged violation of the particular right from a normative perspective. In this manner, a check is performed on whether the exercise of the particular right is possible whatsoever in the respective legal system, a step prior to assessing whether the right is interfered with or without legitimate reasons to do so.[119] Ultimately, through a functional approach, the CJEU has substantively amalgamated a normative scope of the nexus of the rule of law and fundamental rights, which is evidenced by the reintroduction of the referrals to the jurisprudence of the ECtHR in the *XY* case.

This is the line of reasoning of the absence of or compromised system of a judicial remedy, related to the effective protection of a right under EU law.[120] In other words, the lack of judicial remedy affects the effective judicial protection of the normative essence of the fundamental right.[121] In this manner, the principle of effectiveness may play a similar function as an essence in the protection of the fundamental right in question but also generating a normative justification for an overall value-based protection.[122] For example, the essence approach has been utilised in the *LM* case:

> The requirement of judicial independence forms part of the *essence of the fundamental right to a fair trial*, a right which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of

116 Dawson, Lynskey and Muir (n 112) 770.
117 ibid 767.
118 See Dimitry Kochenov, 'The EU and the Rule of Law - Naïveté or a Grand Design?' in Maurice Adams, Anna Meuwese and Ernst Hirsch Ballin (eds), *Constitutionalism and the Rule of Law* (Cambridge University Press 2017) 425.
119 cf Maja Brkan, 'The Essence of the Fundamental Rights to Privacy and Data Protection: Finding the Way through the Maze of the CJEU's Constitutional Reasoning' (2019) 20(6) German Law Journal 864.
120 See Dawson, Lynskey and Muir (n 112) 773.
121 See Kathleen Gutman, 'The Essence of the Fundamental Right to an Effective Remedy and to a Fair Trial in the Case-Law of the Court of Justice of the European Union: The Best is Yet to Come?' (2019) 20(6) German Law Journal 884.
122 Dawson, Lynskey and Muir (n 112) 774.

> law, will be safeguarded […] the very essence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law.[123]

The essence is rooted in the actual and realisable effective protection of fundamental rights and the rule of law. The essence of the fundamental rights is linked to the protection of foundational values of the EU such as the rule of law.

The problem with the functional approach stems from the difficult to synthesise 'one singular essence of the fundamental right to an effective remedy and to a fair trial embodied in Article 47 of the Charter'.[124] Another critique is linked to assessing the complexity of the *LM-XY* two-prong test as the deductive approach seems to be a better fit for the predictable and foreseeable feature of the rule of law in terms of clear and discernible legal expectations.[125] This, however, as pointed above, would lead to the necessity to introduce a convergent, norm-based understanding of fundamental rights and values in all domestic legal orders of the Union, which opens the door of the well-known discussion on the essential principles behind the CFR framework.[126] Nevertheless, the increased cross-fertilisation with number of cases pending before the ECtHR with thematic on the independence of the judiciary and the rule of law may create the needed charge for crystallisation of the nexus through a normative-based approach.

The issue also goes to the heart of European integration: how to achieve the coveted balance between 'supranational regulatory power […] and national democratic and constitutional legitimacy'.[127] The balancing act in the functional effectiveness doctrine lies in the degree the supranational institutions act as principals in the integration process and monitor the Member States as the agents of integration.[128] The empowerment of the national courts through preliminary rulings or directly checking the efficiency of the judicial system in other Member States per *Portuguese Judges* and the *LM* formulas indicates a degree of decentralisation and horizontal check of the applicability of fundamental rights and values of the EU and effectiveness of domestic legal orders within the EU.[129] Such a development is congruent with the functionality approach, outlined above. In this manner, the horizontal scheme of enforcement of EU law is anchored in the ability of domestic judicial authorities to act on behalf of the EU. The *Portuguese Judges, LM* and *XY* cases specify that through the preliminary procedure national courts have an important role in the enforcement of EU law rather than the so-called diagonal application of EU law by the CJEU against Member States.[130] The independence of the

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[123] *LM* (n 75), paras 48, 51.
[124] See Gutman (n 121) 884.
[125] See also, Dawson, Lynskey and Muir (n 112) 771.
[126] See Piet Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question' (2002) 39(5) Common Market Law Review 945.
[127] Peter L Lindseth, 'Between the 'Real' and the 'Right': Explorations Sling the Institutional-Constitutional Frontier' in Maurice Adams, Anna Meuwese and Ernst Hirsch Ballin (eds), *Constitutionalism and the Rule of Law* (Cambridge University Press 2017) 84-85.
[128] ibid 87.
[129] Koen Lenaerts and Jose A Gutiérrez-Fons, 'A Constitutional Perspective' in Robert Schütze and Takis Tridimas (eds), *Oxford Principles of EU Law* (Oxford University Press 2018) 119.
[130] See Csongor István Nagy, 'The Diagonality Problem of EU Rule of Law and Human Rights: Proposal for an Incorporation *à l'europeenne*' (2020) 21(5) German Law Journal 838, 843.

judiciary assessment on EU and domestic levels creates a spill-over effect on the necessity for national judicial organs to be independent and impartial.[131] In particular, the organs of the Member States, including the judiciary, are obligated to interpret national law consistently with secondary EU law as well as with fundamental rights or other general principles of EU law.[132]

In the above-mentioned cases, the jurisprudence of the CJEU includes in the scope of Article 51 CFR the duty of Member States to enforce the CFR and fundamental rights in their respective domestic legal orders. The unique feature of the EU system is that the protection of fundamental rights and values is assessed through the principle of effectiveness while maintaining the balance of national constitutional identities as the rule of law is a foundational value of all EU Member States.[133] Moreover, Article 4(2) TEU ensures 'the national identities [of the Member States], inherent in their fundamental structure, political and constitutional'. The architecture of the EU legal order envisages a harmonious interpretation of the constitutional traditions of the Member States and the fundamental rights in the CFR as laid down in Article 52(4) CFR. However, the foundational values listed in Article 2 TEU serve as 'super-primary' law as the Article enshrines the ultimate constitutional principles shared in all Member States and the EU.[134] What is unequivocal now is that the crucial role of protection of fundamental rights and foundational values such as the rule of law in the EU is functionally and doctrinally anchored in the jurisprudence of the CJEU.

6 THE ROLE OF THE EUROPEAN COMMISSION AND THE EU'S REPORTS ON THE RULE OF LAW

In order to understand and analyse the relation of fundamental rights and the rule of law, the underlying theme of the EU's Rule of Law Reports is selected as an orienteer and reflection of the issues, related to the rule-of-law backsliding phenomenon. It relates to the overall situation of the rule of law in the EU through the role of the Commission in the recently introduced Rule of Law Report system. The attempt here is not to capture the whole mechanism but to illustrate some of the pressing issues that relate to the rule of law, addressed in the paper above. What is incontrovertible is that the EU's Rule of Law reports since 2020 capture the essential legal problems that have been widely litigated before the CJEU, namely the nexus of fundamental rights protections, the rule of law as a foundational value of the EU as well as the role of the judiciary.

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[131] cf 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) 105.

[132] See Case C-275/06 *Promusicae* EU:C:2008:54, paras 68-69. See also, Rosas and Armati (n 3) 74.

[133] Bernhard Schima, 'EU Fundamental Rights and Member State Action After Lisbon: Putting the ECJ's Caselaw in Its Context' (2015) 38 Fordham International Law Journal 1097, 1113–14. See also Nagy (n 130) 858.

[134] Rosas and Armati, (n 3) 59. See also, Groussot et al, 'Foundational Principles and the Rule of Law' (n 8) 4.

6.1 OVERVIEW OF THE EU'S RULE OF LAW REPORT MECHANISM

The EU's Rule of Law Report mechanism offers a general and essential snapshot of the current situation in every Member State with respect to the independence of the judiciary among other areas such as anti-corruption framework and media freedom. The EU introduced the Rule of Law Report mechanism in 2020. The report procedure enables the Commission to evaluate every EU Member State on an annual basis as the strengthening of the rule of law is a priority for the effective functioning of the Union. The first report of 30 September 2020,[135] followed by the 2021 Rule of Law report of 20 July 2021[136] and the 2022 Rule of Law report of 13 July 2022[137] affirmed the goal of the EU institutions to reinforce the rule of law through promotion of the value and prevention of rule of law problems. It methodologically focuses on significant developments in four areas or pillars: justice system, anti-corruption framework, media pluralism, and institutional issues linked to checks and balances including Covid-related legislation and practices.[138] The aim is to facilitate cooperation on an inter-institutional level along with the Member States.

For the purposes of this paper, the pillar of the justice system is particularly important. The Commission uses the effectiveness and functionality approach to evaluate if effective judicial review ensures compliance with EU law as a fundamental aspect of the rule of law as it directly refers to CJEU's *Portuguese Judges* and *Commission v Poland* cases as well as more recent cases such as the *Maltese Judges* judgment, addressed in detail above.[139] The Commission looks at data from the Eurobarometer on the perception of the independence of the judiciary as well as various institutional efforts to strengthen judicial independence such as national judicial councils or procedures on appointment of judges. Moreover, the Reports emphasise the safeguards to ensure the sufficient independence of the prosecution from undue political pressure as part of judicial independence.[140]

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[135] European Commission, '2020 Rule of Law Report: The Rule of Law Situation in the European Union' COM (2020) 580 final, 2.

[136] European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: 2021 Rule of Law Report on the Rule of Law Situation in the European Union' COM (2021) 700 final.

[137] European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: 2022 Rule of Law Report on the Rule of Law Situation in the European Union' COM (2022)500 final.

[138] EU Rule of Law Report 2020 (n 135) 3-4. In terms of methodology, the Commission states, 'The country chapters rely on a qualitative assessment carried out by the Commission, focusing on a synthesis of significant developments since January 2019 introduced by a brief factual description of the legal and institutional framework relevant for each pillar. The assessment presents both challenges and positive aspects, including good practices. The Commission has ensured a coherent and equivalent approach by applying the same methodology and examining the same topics in all Member States, while remaining proportionate to the situation and developments' - EU Rule of Law Report 2020 (n 135) 5. See also, EU Rule of Law Report 2021 (n 136) 4-5.

[139] Rule of Law Report 2020 (n 135) 8; Rule of Law Report 2021 (n 136) 28-29; Rule of Law Report 2022 (n 137) 5.

[140] Rule of Law Report 2020 (n 135) 9. See also, *Kövesi v Romania*, App no 3549/19 (ECtHR, 5 May 2020), para 208. For example, in Bulgaria, the reports specifically focus on the (lack of) accountability of the Prosecutor General as part of the independence of the judiciary assessment, especially noticeable in the 2021 Rule of Law Report. See, European Commission, '2020 Rule of Law Report: Country Chapter on the Rule of Law Situation in Bulgaria' SWD (2020) 301 final, 4. See also, European Commission, '2021 Rule of Law Report: Country Chapter

6.2 EU'S RULE OF LAW REPORTS 2020, 2021 AND 2022 AND JUDICIAL INDEPENDENCE

Judicial independence remains an issue in some Member States. The problems, identified by the Commission, primarily relate to the functioning and capacity of judicial councils in the line of assessing structural concerns, directly influencing the backsliding of the rule of law and increasing pressure and influence by the executive and legislative branches over the judicial system.[141] The findings are not surprising as the effectiveness and functionality approach is applied in the reports. For example, the independence of the National Judicial Council (NJC) is put under strain in Hungary as well as the procedure of the appointment to the Supreme Court outside the regular appointment procedure in 2020.[142] The 2021 Rule of Report on Hungary commences with a reminder that the NJC continues to face challenges with respect to the balance between its competences and function and the President of the National Office for the Judiciary in terms of the management of the courts.[143] The individual country report goes into detail on the independence of the judiciary by focusing on describing the issues with lack of effective oversight over the NOJ President, thus leading to potential arbitrary decisions in the management of the judicial system, which continues in 2021.[144] The same issue remains pertinent as the Rule of Law Report 2022 contains specific recommendations.[145] The topic of the structure and function of judicial councils with respect to the right to fair trial before an independent and impartial tribunal previously established by law would be particularly relevant for the development in the jurisprudence of the CJEU.

Moreover, specific examples for denting the effectiveness of the legal order are provided such as the *Kuria* declaratory decision on prohibiting District Court judges to use the Article 267 TFEU procedure. Some disciplinary proceedings have been instituted against judges issuing preliminary reference. This goes to the core of the issue of the effective protection of fundamental rights and functioning of the EU legal order.[146] Additionally, the election of the new *Kuria* president also raises concerns with respect to the appointment of a top judicial post with the involvement of a judicial body and submission of the judiciary to the undue influence of the legislative branch.[147] The issues were reaffirmed as unresolved in the 2022 Rule of Law Report on Hungary.

In Poland, the analysis focuses on the existing Article 7(1) TEU proceedings as well as on the infringement proceedings with respect to the Supreme Court's Disciplinary Chambers,

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on the Rule of Law Situation in Bulgaria' SWD (2021) 701 final, 3-5. See also, Groussot et al, 'Foundational Principles and the Rule of Law' (n 8) 9.

[141] Rule of Law Report 2020 (n 135) 10, and Rule of Law Report 2021 (n 136) 8-9.

[142] Rule of Law Report 2020 (n 135) 10.

[143] European Commission, '2021 Rule of Law Report: Country Chapter on the Rule of Law Situation in Hungary' SWD (2021) 714 final, 3.

[144] European Commission, '2020 Rule of Law Report: Country Chapter on the Rule of Law Situation in Hungary' SWD (2020) 316 final, 3. See, Rule of Law Report 2021: Hungary (n 143) 6.

[145] Rule of Law Report 2022 (n 137) 6. See European Commission, '2022 Rule of Law Report: Country Chapter on the Rule of Law Situation in Hungary', SWD (2022) 517 final, 2.

[146] See Rule of Law Report 2020: Hungary (n 144) 4.

[147] Rule of Law Report 2021: Hungary (n 143) 5-6.

covered in detail above. The focus of the report in Poland is on the series of more than 30 laws related to the restructuring of the justice system. It also includes a detailed section on the politically appointed National Council of the Judiciary.[148] Additionally, the report of 2020 emphasises the creation of the Disciplinary Chamber and the Chamber of Extraordinary Control and Public Affairs in 2018-2019 with concrete effect on judicial independence, subject to infringement proceedings before the CJEU.[149] In this line, the Commission highlights the restrictive disciplinary regime which lacks an effective judicial review mechanism, also reflected in a series of breaches found by the CJEU.[150] Similar issues remain unresolved and illustrated in the Rule of Law Report 2022 despite Poland's commitments in the Recovery and Resilience Plan to dismantle the Disciplinary Chambers of the Supreme Court which continues to decide on cases concerning judges.[151]

Other examples include issues with the composition and functioning of the Supreme Judicial Council in Bulgaria, which remain pertinent in the 2021 Rule of Law Report, and systemic problems with the independence of the judiciary and recent reforms in Slovakia.[152] In Bulgaria, one of the issues is linked to the absence of accountability of the Prosecutor General and his structural and decisive control over the Prosecutors' chamber function remain unresolved with a particular focus on the powers of the Prosecutor General over the Supreme Judicial Council in 2021 and the introduction of a mechanism for a special Prosecutor to investigate the Prosecutor General, which was subsequently declared unconstitutional on 11 May 2021.[153] The Commission notes that under the Recovery and Resilience Plan, Bulgaria has committed to establish an effective mechanism for the accountability and criminal liability of the Prosecutor General and the possibility for judicial review of Prosecutor decisions not to open investigation.[154]

The rule of law is based on institutional checks and balances. They are important for the effective functioning of the judicial system as they concern '[the] transparent, accountable, democratic and pluralistic process for enacting laws, the separation of powers, the constitutional and judicial review of law', among others.[155] Constitutional reforms play a crucial role in strengthening the rule of law and checks and balances, especially when such reforms create and enable new pathways for citizens 'to challenge the exercise of executive or legislative power'.[156] Civil society also needs to be protected.

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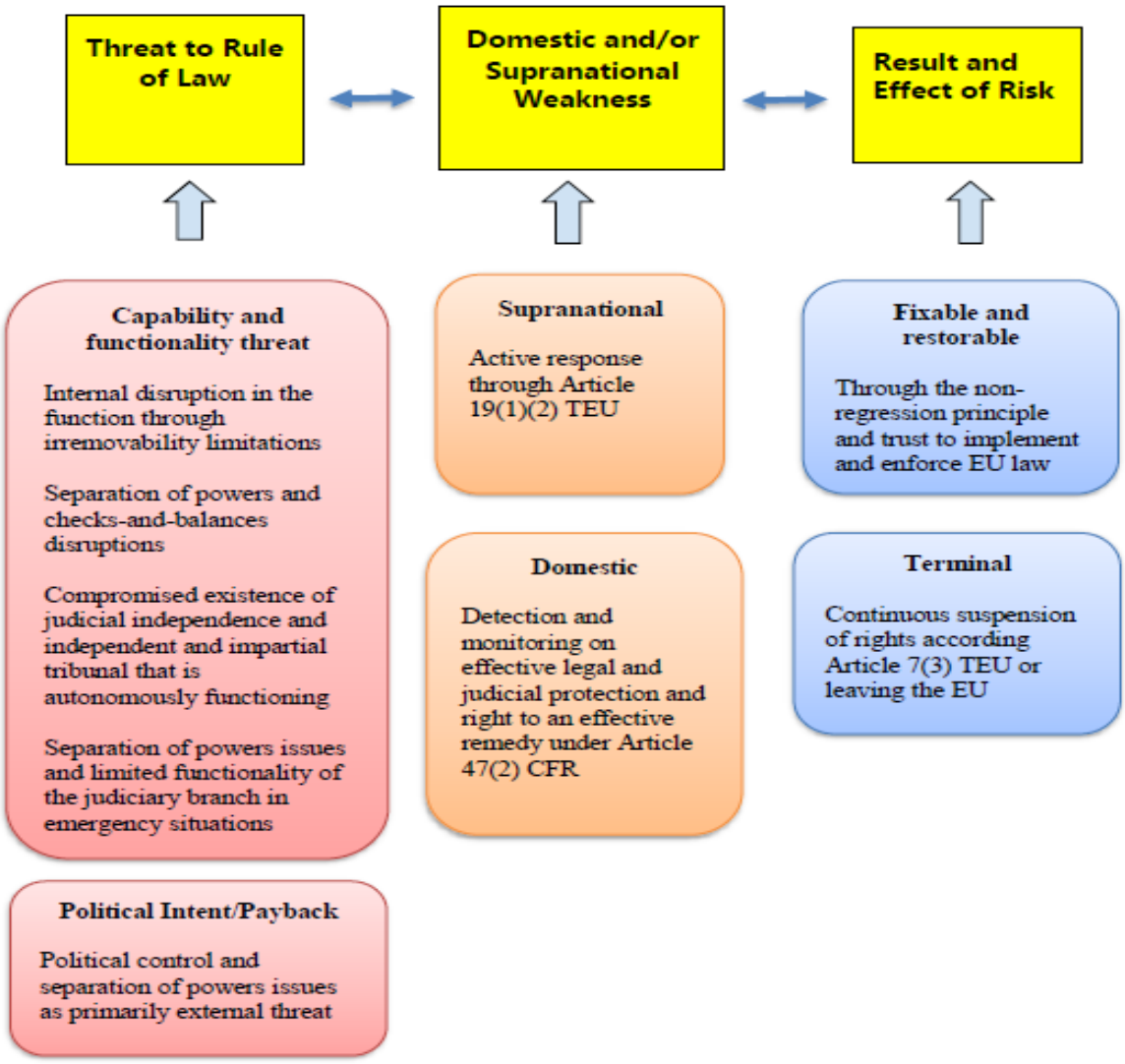
[148] European Commission, '2020 Rule of Law Report: Country Chapter on the Rule of Law Situation in Poland' SWD (2020) 320 final, 4.
[149] ibid 5. See also, Rule of Law Report 2021 (n 136) 8.
[150] See European Commission press release of 29 April 2020, IP/20/772. See *European Commission v Poland (Disciplinary Chamber)* (n 54).
[151] Rule of Law Report 2022 (n 137) 7-8.
[152] Rule of Law Report 2020 (n 135) 10-11. Rule of Law Report 2021: Bulgaria (n 140) 5-6.
[153] See Rule of Law Report 2020 Bulgaria (n 140) 5. See also, *Kolevi v Bulgaria* App no 1108/02 (ECtHR 5 November 2009), paras 121-136. See also, Rule of Law Report 2021: Bulgaria (n 140) 3-4.
[154] Rule of Law Report 2022 (n 137) 7. See also, European Commission, '2022 Rule of Law Report: Country Chapter on the rule of law situation in Bulgaria', SWD (2022) 502 final, 4-5.
[155] Rule of Law Report 2020 (n 135) 20.
[156] ibid 1. See also, Rule of Law Report 2021 (n 136) 20-22.

Backsliding has been observed in new restrictive regulations on foreign-funded civil society organisations within the EU.[157] Another problematic practice is the expedited legislative procedure to amend or introduce structural reforms in the judiciary without necessary consultation and deliberation. For example, in Poland the legislature spent on average 18 days on the series of more than 30 laws on the judiciary.[158] Moreover, the *res judicata* and non-retroactivity principles and legal certainty were undermined by the novel competence of the Supreme Court in Poland to review ordinary courts' decisions dating back 20 years.[159] Lingering problems remain in the area of appointments to the Supreme Court in Poland, subject of various judgments by the CJEU and ECtHR, as examined above.[160] The examples above provide a snapshot of some recurring systemic and structural factors associated with the backsliding phenomenon in the rule of law and the independence of the judiciary as a whole. The problems remain lingering in various Member States. The CJEU has provided a detailed functional and doctrinal foundation for the EU institutions to react to the rule-of-law backsliding phenomenon. What remains to be seen is the enforcement against the breaching Member States and its effectiveness.

7 THE RISK FUNCTION AND RESILIENCE OF EFFECTIVE JUDICIAL PROTECTION

In conclusion, in order to crystallise and synthesise the effectiveness and functionality approach in situations of backsliding of the rule of law, the risk to the rule of law as a foundational value can be represented as a function of the threat to the rule of law, domestic and national institutional weaknesses in their structure and function, and result and effect of the materialisable risk. These parameters should be assessed cumulatively as they cannot be addressed individually.[161] The essential task is the applicability of the effective judicial protection formula along with the enforcement mechanism of various EU institutions involved in the process. The risk assessment could be illustrated in the following graph below:

[157] See C-78/18 *Commission v. Hungary* EU:C:2020:476.
[158] See Rule of Law Report 2020: Poland (n 148) 16.
[159] ibid.
[160] Rule of Law Report 2022 (n 137) 7.
[161] The risk assessment methodology is based on resilience strategies for institutional systems. See eg DoD, 'Resilient Military Systems and the Advanced Cyber Threat' (2013) 29.



As constitutionalism and the rule of law serve to limit the arbitrary use of power, 'they also channel, direct, facilitate and inform infrastructural change'.[162] Moreover, the link to the separation of powers is clearly discernible as if all powers are accumulated in the same entity or person, 'whether of one, a few, or many, and whether hereditary, self-appointed or elective', such a system of concentration of power 'may justly be pronounced the very definition of tyranny'.[163] This is clearly identified as one of the main multisystem threats to the rule of law as a foundational value. The projection of political influence for various motives such as payback or removing any constraints through the tempering of the separation of powers is identified as creating internal and external threats to the independence of the judiciary.

The EU system resembles a constitutional pluralist model in which there might exist competing constitutional claims and interpretations, as seen above by different domestic legal

[162] Krygier (n 16) 56.
[163] See Alexander Hamilton, James Madison and John Jay, *The Federalist Paper No. 47* (Penguin 1987).

order, but there must be a supranational judicial avenue to accommodate and ultimately resolve such tensions.[164]

Maduro uses the metaphor of a musical score in which melodies of different instruments are played and the musicians may change their roles but at the end an overall sound is produced in harmony. In that line, it is not surprising that sometimes we observe a more active and engaged Court of Justice, especially when the rule-of-law score is being played wrongly by the musicians in some Member States.[165] As far as the frictions are fixable, reversible or restorable, the effect of the risk may be minimised and the weaknesses in the system of enforcement may limited on domestic and supranational levels. However, if the risk effect or result is terminal, then one may envisage that the situation enters the realm of the existence of a serious and persistent breach of Union values under Article 7(2) and the corresponding Article 7(3) TEU sanctioning mechanism or ultimately leaving the Union.[166]

8 CONCLUSION

Is the EU moving towards 'positive constitutionalism' according to Holmes' definition in the sense of a supranational framework that regulates powers with the ultimate goal 'towards socially desirable ends, and prevent social chaos and private oppression, immobilism, unaccountability, instability, and the ignorance and stupidity of politicians'?[167] Or is the Union moving towards a more fragmented structure in which domestic courts and governments will attempt to undermine the authority of the CJEU?[168]

The current crisis of the rule of law in some Member States of the EU, coupled with the restrictive measures in response to the pandemic, illustrates the complexity of the compound democratic orders such as the supranational structure of the EU. At the current moment, there are multiple pending infringement proceedings against Poland, for example. Moreover, the Commission has been criticised as being inactive in the lack of an urgent response to the backsliding of the rule of law in some EU Member States and even threatened with Article 265 TFEU proceedings by the European Parliament on several occasions.[169] It is noticeable that the Court of Justice of the EU has relied more heavily on foundational values of the Union in recent quintessential cases, directly relevant for the protection of the independence of the judiciary in EU Member States and effective judicial protection of fundamental rights. As

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[164] See Miguel Poiares Maduro, 'Three Claims of Constitutional Pluralism' in Matej Avbelj and Jan Komárek (eds) *Constitutional Pluralism in the European Union and beyond* (Hart Publishing 2012) 70.
[165] Miguel Poiares Maduro, 'Contrapunctual Law' in Neil Walker (ed), *Sovereignty in Transition* (Hart Publishing 2003) 523.
[166] Stoyan Panov, 'The EU's Trifecta Mechanisms: Analysis of EU's Response to the Challenges to the Rule of Law and Corruption' (2019) 5 Kyiv-Mohyla Law and Politics Journal 83, 89-91.
[167] Stephen Holmes, *Passions and Constraints. On the Theory of Liberal Democracy* (University of Chicago 1995) 51.
[168] Wojciech Kość and Lili Bayer, 'Battle of the courts: Contradictory rulings in Poland, EU raise specter of "Polexit"' (*Politico*, 14 July 2021) <https://www.politico.eu/article/contradictions-in-rulings-poland-eu-worries-polexit/> accessed 27 January 2023.
[169] European Parliament, 'Rule of Law: Parliament prepares to sue Commission for failure to act' (10 June 2021), < https://www.europarl.europa.eu/news/en/press-room/20210604IPR05528/rule-of-law-parliament-prepares-to-sue-commission-for-failure-to-act> accessed 27 January 2023.

the breaches of the foundational values may be characterised as political and ideological as in the case in Hungary and Poland, it is important to note that infringement proceedings or preliminary rulings may not be enough to deter Member States from continuous breaches. This paints a complex picture with respect to the constitutionalisation of the EU law and the relation and role of EU institutions, including the Court of Justice, with regard to domestic courts and governments.

Ultimately, the discourse will reach a junction at which the EU institutions and the Member States will need to decide where the Union stands on protecting, enforcing and abiding by the foundational value of the rule of law, enshrined in all constitutions in the EU Member States. It is time to echo the doctrine that the primary law of the EU functions 'to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts'[170] if the Union wants to be governed by the rule of law, enshrined and reflected in common values and fundamental rights.

[170] *West Virginia Board of Education v Barnette* 319 US 624 (1943) 638.

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