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The rule of law as the constitutional foundation of the general principles of EU law

Theodore Konstadinides

I. Introduction

The general principles of EU law are perhaps the most important contribution of European judges in ensuring the coherence of EU law as a functioning constitutional system. They comprise an expanded palette of adaptable principles which are easy to mould by the CJEU and therefore capable of filling gaps and interpreting grey areas left unattended by the Treaty drafters. Such general principles include, but are not limited to, a series of coherent principles of judicial review of EU and national measures. They govern the operation of the EU and affect all areas falling within the scope of EU law. The aim of this chapter is to contribute to the definition and scope of the general principles of EU law by concentrating on and offering a critical discussion of the rule of law as a general principle of EU law (or not). This discussion is significant not only in terms of determining the binding legal nature of the rule of law and its applicability in legal disputes under EU law. It is also vital in light of the broader concerns in the EU about reinforcing rule of law oversight and the legal regime that should govern such oversight, including the role of the CJEU and its responsiveness to national laws.

It is argued in this chapter that the rule of law is an overarching constitutional foundation of the general principles of EU law,[1] and less perhaps a general principle in its own right.[2] Having said that, it has to be established from the outset that there is no provision in EU law that excludes a constitutional principle from becoming a general principle. Additionally, there is no established authoritative catalogue of general principles of EU administrative law in either primary or secondary legislation, the CJEU's jurisprudence or indeed the relevant legal scholarship. Yet, it is generally accepted that EU general principles have historically been expressly qualified and inaugurated as such by the CJEU as a means to implement rules in different areas of which the Treaties initially made no explicit reference.[3] The rule of law is clearly not one of them. What has happened is that the CJEU has indicated that 'the rule of law is the source of fully justiciable principles applicable within the EU legal system. The Court also highlights that those principles are general principles of law stemming from the constitutional traditions common to the Member States.'[4]

The chapter is split into four parts dealing with the definition, scope and oversight of the rule of law in the EU seen through the prism of the general principles of EU law, the subject-matter of this book. Part II deals with the rule of law in the EU and its limitations, while Part III delves into discussing the nexus between the rule of law and the general principles of EU law. I take the view that the rule of law in the EU is concerned with both conduct guidance

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[1] There is no established hierarchy of constitutional, general principles of EU law or otherwise. I, however, take the view that not all principles of EU law are equal in content and scope. The rule of law in particular is very broadly construed and its content is defined by a host of sub-component rights and principles that underpin it such as, inter alia, the right to effective judicial protection and the principle of proportionality. This is why the term 'overarching constitutional foundation' is used here.

[2] Conversely, the European Parliament's DG for Constitutional Affairs has provided an indicative list of general principles and has explained that 'some principles are more generally formulated than others and some offer themselves more directly to creating clearly defined rights and obligations than others. The reason for this is that some of the general principles, such as for example the "rule of law" (Article 2 TEU) contain and are defined by a series of sub-principles. Each of these sub-principles are developed and referred to in the case law as specifically identifiable principles conferring rights on individuals and/or obligations on public bodies.' See European Parliament, DG for Internal Policies, Citizens' Rights and Constitutional Affairs, 'The General Principles of EU Administrative Procedural Law' (2015) PE 519.224. 9, 17.

[3] Armin Cuyvers argues that 'many general principles of EU law are unwritten and judge-made, even though over time many have been codified in the Treaty. Many of the more institutional-type of principles can now be found in the beginning of the TEU, such as the principle of sincere cooperation, conferral, Member State equality and the respect for national constitutional identity, subsidiarity, and proportionality'. Armin Cuyvers, 'General Principles of EU Law' in Emmanuel Ugirashebuja et al. (eds), *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (Brill 2017) 218. What is also important in terms of the codification of certain general principles is that they do not cancel the respective general principles. Hence the potential for overlap remains open. For instance, Article 6(3) TEU states that the pre-existing general principles of EU law still apply, notwithstanding the advent of the EU Charter of Fundamental Rights.

[4] Commission, 'Communication from the Commission to the European Parliament and the Council'COM (2014) 158 final. See Annex I: 'The Rule of Law as a foundational principle of the Union' 1.

and formal and substantive rights. As such, a discussion of what the rule of law stands for in the EU, as well as the ties between the EU rule of law and the general principles of EU law, is of particular meaning to its operationalisation with respect to the protection of individuals within the EU legal order. This should be the starting point of our inquiry given that, in their majority, general principles are instrumental to the protection of substantive rights.

Part IV identifies the kind of dangers that the rule of law is meant to prevent – the answer proposed here being 'non-arbitrariness'. Non-arbitrariness points to the duty of both Member States and the EU to protect citizens with law: Safeguarding the legal security of fundamental rights and other general principles of EU law is central and ontological to the EU. As such, the protection of freedom from arbitrariness is central in the rule-of-law discourse, as are the current mechanisms in place to ensure rule-of-law compliance in the EU and address the legal problems essentially overlooked by the Treaty authors and the EU legislature. This is the subject matter of Part V. There are recent examples from incidents where the rule of law has been tested by undemocratic reforms (clamping down on the judiciary, press and civil rights) in certain Member States. Although Poland is in the spotlight, other Member States have raised concerns at EU level in connection with their adherence to the rule of law.[5] Political rule-of-law monitoring and enforcement under Article 7 TEU has so far been uncontroversial and has raised more questions than answers. Judicial enforcement on the other hand has been more promising.

Although, it is not clear how best to address the problem of rule-of-law enforcement, I will make some recommendations, highlighting that rule of law protection shall provide us with assurances that the method of identifying and dismantling breaches is consonant with the principle of conferral of competences whereby the EU can only act within the limits of powers conferred upon it by the Treaty. Nevertheless, the rule of law requires that all EU institutions and bodies shall act in accordance with the law and apply the rules and procedures laid down in the relevant legislation. In conclusion, I argue that we need to move on from an emphasis on the universality of respect and protection of the rule of law to a pragmatic response to what should be done in particular situations in order to eradicate authoritarian tendencies to diminish the rule of law in Europe.

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[5] See EP press release on Hungary: www.europarl.europa.eu/news/en/press-room/20180906IPR12104/rule-of-law-in-hungary-parliament-calls-on-the-eu-to-act; relevant European Commission press release available at: http://europa.eu/rapid/press-release_IP-17-5367_en.htm. See further on the state of Polish judiciary: Marcin Matczak, *10 Facts on Poland for the Consideration of the European Court of Justice* (*VerfBlog,* 13 May 2018) https://verfassungsblog.de/10-facts-on-poland-for-the-consideration-of-the-european-court-of-justice.

II. The rule of law in the EU and its limitations

While there is no set definition of the rule of law in EU law, there is a basic realm of general principles which constitute the flesh to the Treaty's bare bones.[6] These principles are essential components of the rule of law. They are primarily inducted from the legal reasoning of the CJEU and assist with the functioning of the EU legal order. In this respect, the rule of law is taken to encompass the general principles of EU law (it guarantees fundamental rights and other common European values) and thus, it constitutes both a unitary and historical desideratum of the EU legal order. Like the individual general principles of EU law, which are essentially rooted in the values enshrined in the legal systems of the Member States, the rule of law makes for an exciting topic when examined outside its traditional constitutional domicile.

What is particularly inspiring about the rule of law, in the EU context, is how the EU has gradually combined various rule-of-law conceptions and has, therefore, added an additional layer of protection to national and other sources of international law. Most importantly, EU law has stretched, and in many ways tested, the rule of law's historical domestic origins. In its attempt to forge a common constitutional direction, a *ius commune europaeum,* it has encountered many new challenges.[7] In opening the path towards an integrative approach to the rule of law, the principle has been constitutionalised in the primary sources of EU law: the Treaty, the EU Charter of Fundamental Rights, and certain procedural and substantive constitutional principles elucidated in the CJEU's judgments, inclusive of general principles of EU law.

This section will discuss the meaning that the rule of law takes in the EU which comprises an amalgam of universal principles, both related to behaviour guidance (the maxim that no one is above the law) and formal and substantive rights (namely, for the rule of law to be effective there must be respect to the general and other meta-principles of EU law). It will commence by highlighting that the EU rule of law is not designed from the ground up but combines 'shared traits' between the Member States that, as it has been argued, are

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[6] Koen Lenaerts and Jose A Gutierrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law' (2010) *Common Market Law Review* 1629, 1667.

[7] Koen Lenaerts and Jose A. Gutierrez Fons, 'The Role of General Principles of EU Law' in Anthony Arnull et al. (eds), *A Constitutional Order of States? Essays in Honour of Alan Dashwood* (Hart 2011) 179.

'sufficiently robust to amount to an identifiable common denominator'.[8] These shared traits include equality, proportionality, legal certainty, fundamental rights protection, effective judicial protection and the right to an effective remedy, and have been termed by the CJEU general principles of EU law.[9] Increasing institutional monitoring and enforcement of these general principles or rule-of-law traits against the Member States have turned the rule of law into a yardstick for behaviour. At the same time, they have hardly clarified it, something which suggests that the rule of law is still unclear and lacking as a principle. In particular, one finds it difficult to ever meaningfully distinguish between invoking the rule of law as a 'behaviour yardstick' and as 'a principle'. A combination of the CJEU's case law, the Advocate Generals' Opinions[10] and the recent rule-of-law reflections of the Commission, provide evidence of the importance of clarifying the meaning of the rule of law in the context of provisions such as Articles 2, 4(3) and 19(1) TEU whose scope, parameters and applicability remain nebulous. The focus has been on establishing a singular framework that can be employed by the EU political institutions as an urgent and decisive response to actions of national governments that constitute assaults on the rule of law.[11]

But what are the legal elements that underpin such a singular rule of law framework? Most definitions about the EU rule of law share the following characteristics, generally advocating that the law has to be:

(i) superior to everyone, whether a citizen, an organ of the state or an EU institution;

(ii) a promoter of democratic government and judicial independence;

(iii) a safeguard against arbitrary governance providing that there must be equal justice before the law between all EU citizens;

(iv) committed to fundamental rights protection and legal enforcement (inclusive of substantive human rights) and due process (even in times of emergency).[12]

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[8] Laurent Pech, 'The Rule of Law as a Constitutional Principle of the European Union' (2009) Jean Monnet Working Paper No. 4, 1.

[9] This is also established by the Treaty. Article 6(3) TEU, for instance, confirms that fundamental rights recognised by the ECHR constitute general principles of EU law. See on the CJEU's relevant jurisprudence: Takis Tridimas, *The General Principles of EU Law* (OUP 2006).

[10] See Case C-362/14 *Schrems* [2015] ECLI:EU:C:2015:650, para 60; AG Bot Opinion in Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* [2016] ECLI:EU:C:2016:140, para. 11.

[11] See European Commission, Press Release: 'European Commission presents a framework to safeguard the rule of law in the European Union' (Press Release, 1 March 2014) Annex 2: 'The rule of law in the Union legal system', http://europa.eu/rapid/press-release_IP-14-237_en.htm.

[12] See for an overview Theodore Konstadinides, *The Rule of Law in the European Union: The Internal Dimension* (Hart 2017).

Likewise, the goals that have motivated attention to the rule of law include, what Krygier calls 'tolerable threshold conditions' viz. what we need from the rule of law; namely, certainty, transparency, foreseeability, clarity, consistency and security of expectations (some of them constitute administrative general principles) that arbitrarily exercised power can put under threat.[13] Equally, we need EU law to be known, understandable, prospective (rather than retrospective) and predictable (the law in the Treaty and secondary legislation shall correspond to the law in practice), so as to enable EU citizens to enjoy their EU law rights and plan their life productively and securely. In this respect, the 'EU rule of law' is as much about institutions as it is about a state of affairs that helps build relations between the state and the citizens as well as between them and the EU as a polity. At the same time, the EU rule of law is not backed by a self-contained legal order which is identified by its subjects as a political community. Accordingly, any effort towards such identification has been undermined by events such as Brexit and civic or constitutional nationalism where certain Member States are increasingly pushing to devolve power from the EU to the national level.

The above adverse developments aside, globalisation has affected the development of an integrative conception of the rule of law in the EU. The growing need for a democratic and equitable international legal order which promotes the economic and social welfare of citizens and resolves crises effectively has been key to the development of the rule of law in the EU. The EU rule of law has attracted increasing discussion primarily because of the soaring attention to international rule of law standards as a means of cementing agency between states and systematising certain normative outcomes with regard to human rights protection and access to justice (including the right to a remedy) for all.[14] In this respect, the work of the Council of Europe, the Venice Commission,[15] the United Nations, and OSCE has

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[13] See Martin Krygier, 'The Rule of Law: An Abuser's Guide' (2007) University of New South Wales Law Research Paper No. 4, https://ssrn.com/abstract=952576.

[14] The principles are similar even though their application may differ. They point towards a binding (constitutional) international rule of law. See Robert McCorquodale, 'Defining the International Rule of Law: Defying Gravity?' (2016) 65 *International and Comparative Law Quarterly* 277, 279, 293–4. McCorquodale mentions the 'shared lexicon' of 'order and stability, transparency, good governance, justice and accountability' as well as 'the right to a fair trial, the right to liberty, the right to equality and the right not to be discriminated against' as common elements of the international rule of law.

[15] See CoE, 'Romania: Proposed Reforms could undermine independence of judges and prosecutors according to Venice Commission' (2018), www.coe.int/en/web/portal/-/romania-proposed-reforms-could-undermine-independence-of-judges-and-prosecutors-according-to-venice-commission.

been crucial in the development and implementation of EU rule of law standards.[16] Of course, one could detach the development of the rule law in the EU from external factors by pointing to the autonomy of EU law. Against such an approach, the fact that the dependence of EU law upon international law has been crucial to the former's development as a constitutional order can hardly be overlooked.[17] However, at the same time, support of the rule of law at both the international and regional level has not been short of criticism. Much of the criticism levelled against international law is that it neither provides a single definition of the term 'international rule of law' nor possesses a rigid compliance mechanism.[18]

The above shortcomings derive from the questionable state of affairs that pertain to the rule of law's susceptibility to conceptual stretching at the international/EU level. According to Sartori, 'the wider the world under investigation, the more we need conceptual tools that are able to travel'.[19] If we agree that the world under investigation in this chapter is the EU legal order and the conceptual tool under consideration is the rule of law, then the question we need to answer is how far can the rule of law 'travel' with the help of the available legal vocabulary? Sartori warns that the 'larger the world, the more we have resorted to *conceptual stretching,* or conceptual straining, specifically, to vague, amorphous conceptualisations'.[20] There, he cautions that 'our gains in extensional coverage tend to be matched by losses in connotative precision'.[21] In other words, the prevailing interpretation of the EU rule of law requires some leap of faith beyond what may be tightly, logically deduced from the philosophical and historical foundations of the rule of law.[22]

There are a number of limitations pertaining to the nature and scope of the EU rule of law that need to be taken into consideration before this chapter moves on to discuss the nexus between the rule of law and the general principles of EU law. As mentioned, the rule of law as it manifests itself at the domestic level may enjoy common characteristics that can be 'stretched' and applied across the board. But these traits, although shared, do not form a

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[16] See for instance Resolution 1594 (2007) of the Parliamentary Assembly of the Council of Europe on the principle of the rule of law which identifies a consensual definition of the rule of law, http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17613&lang=en.

[17] See Violeta Moreno-Lax and Paul Gragl (eds.) 'EU Law and Public International Law: Co-implication, Embeddedness and Interdependency' (2016) 35 *Yearbook of European Law*, 455 onwards.

[18] McCorquodale (n 14) 279.

[19] Giovanni Sartori, 'Concept Misinformation in Comparative Politics' (1970) 64 *American Political Science Review* 1033, 1035.

[20] Ibid.

[21] Ibid.

[22] See Todd J. Zywicki, 'The Rule of Law, Freedom, and Prosperity' (2003) 10 *Supreme Court Economic Review* 1.

rigidly integrated whole. Additionally, they are subject to contemporary politico-socio-economic forces which manifest themselves differently in the Member States. Moreover, the rule of law as expressed domestically in each Member State, maintains concepts which are unique only to that State and are deeply embedded in its constitutional history and tradition (it goes beyond the shared traits mentioned earlier). For instance, relocating the rule of law to the EU cannot compromise constitutional principles at national level (such as the German Constitution's 'eternity' clause of Article 79(3) of the Basic Law, protecting, amongst others, the division of the Federation into *Länder*) in order to advance the EU's rule-of-law agenda.

But what standards must such domestic constitutional concepts meet in order that they should be protected from being uprooted? The answer can be found in the principle of loyalty enshrined in Article 4(3) TEU which mandates that national constitutional concepts need to be interpreted in line with EU constitutional standards as laid down in the Lisbon Treaty. For instance, their compatibility with the rule of law or expressions of the rule of law such as the principle of effective judicial protection. At the same time one needs to take into account statements made in recent years by national constitutional courts regarding reserved domains of the Member States. Some of them, like the German Constitutional Court,[23] have even established a theoretical basis to ground their claim that EU law must comply with the identity of the Constitution.[24] While the German approach has attracted attention, each national court has qualified differently the constitutional singularities that encapsulate part of its Member State's constitutional identity. The German tradition focuses on the eternity clause and the political value of the right to vote, the French on the essential characteristics of the state, while the British on a strict separation of powers.[25]

So far, it has been illustrated that the limitations pertaining to the nature and scope of the EU rule of law relate to the different application of shared traits in the Member States and the diversity of constitutional concepts which are akin to domestic constitutional identity. As such, it can be contended that the EU's internal rule of law might be different to what is expected in the Member States, therefore leaving the impression of two 'rules of law' in the

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[23] David Thym, 'In the Name of Sovereign Statehood: A Critical Introduction to the Lisbon Judgment of the German Constitutional Court' (2009) 46 *Common Market Law Review* 1795.

[24] See Monica Claes, 'Negotiating Constitutional Identity or Whose Identity is it Anyway?', in Monica Claes et al. (eds.) *Constitutional Conversations in Europe: Actors, Topics and Procedures* (Intersentia 2012) 205; Leonard Besselink, 'National and Constitutional Identity before and after Lisbon' (2010) 6 *Utrecht Law Review* 36.

[25] See Theodore Konstadinides, 'Dealing with Parallel Universes: Antinomies of Sovereignty and the Protection of National Identity in European Judicial Discourse' (2015) 34 *Yearbook of European Law* 127.

EU (an autonomous EU version and a national one which as mentioned enjoys certain distinctive features between Member States). Further evidence that the EU rule of law constitutes an autonomous concept can be drawn from the study of 'structural' supranational principles.[26] For example, the 'formal' aspects encompassed in the duty of consistent interpretation, the principle of direct effect, the principle of primacy of EU law, and the 'substantive' aspects epitomised in guaranteeing the effective enjoyment of EU freedoms and rights. These 'formal' and 'substantive' aspects are also aspects of the EU rule of law not envisaged in traditional models of the rule of law.

The above analysis of the different limitations suggests that the meaning of the rule of law cannot be confined to a narrow set of prescriptions about its nature, composite rules and their content. Hence, the rule-of-law invocations by the EU institutions and national authorities are often mutually inconsistent. This is not because, to use Sartori's terminology, the rule of law cannot 'travel' with the help of the available legal vocabulary. As demonstrated, the rule of law can travel and be enhanced with new principles. Much to do with its uncertainty relates to the fact that rule of law stakeholders in the EU and the Member States find it difficult to reconcile the different priorities that each legal order attaches to the rule of law. The Member States' authorities occasionally invoke an insular and outdated notion of sovereignty while the EU institutions use a rather wooden notion of unity, autonomy and effectiveness as a means to centralise and standardise policies from the centre. Some general explanations are offered as a way out of this conundrum in the following sections focusing on identifying the ends of the rule of law and the prevention of arbitrariness as central to the rule of law debate at both the EU and the national level. Prior to this, it would be important for the purpose of this chapter to contextualise the rule of law as a source of the general principles of EU law.

III. The nexus between the rule of law and the general principles of EU law

The rule of law and general principles of EU law discourse share similar features. Like the general principles, the rule of law as their source is a work in progress due to its 'remarkable

[26] See on the so-called 'structural principles' Marise Cremona, *Structural Principles in EU External Relations Law* (Hart 2018). See also Thies, Żelazna, and Wessel, Chapters 32, 33, and 34 respectively (below), who, all in external relations context, refer to Cremona's use of structural principles.

elasticity' and the 'richness of its underlying values'.[27] Any academic commentary such as the current one, is reduced to drawing tentative conclusions about the scope of the principles of EU law that breathe life to the rule of law.

To give an example: if we accept that the rule of law contains the general principle of equality, then it is still contestable whether the rule of law contains both equality in formal terms (equality before the law) and substantive terms (non-discrimination). Even if we were to embrace a thick version of the rule of law, we should be careful to highlight that the existence of equal treatment and non-discrimination as a fundamental right is inconclusive in the EU legal order due to limitations stemming from the material and personal scope of the Treaty and the relevant legislation in place.[28] Having said that, the CJEU has, for instance, been willing to interpret Directive 2000/78/EC on equal treatment in employment as encompassing also the obesity of a worker as a 'disability' which may hinder the effective participation of a person on an equal basis with other workers.[29]

The above example demonstrates that any discussion about general principles must consider their work-in-progress character, one which concerns how citizens come into their rights at a given moment in time within the EU constitutional framework which promotes a polity based on the rule of law.

A second feature that the rule of law shares with general principles is related to their application which is characterised by duality: both apply equally to the EU institutions and the Member States. Yet, more often than not (the recent Polish overhaul of the judiciary is a good example), we tend to focus on the deviant behaviour of Member States rather than assessing the EU itself from a rule of law perspective.[30] The latter could include, for example, an assessment of the incoherent attitude of the EU with regard to its commitment to combat climate change under the Paris Agreement[31] and its own climate and energy package strategy

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[27] Jeffrey Jowell, 'The Rule of Law and its Underlying Values' in Jeffrey Jowell and Dawn Oliver (eds.), *The Changing Constitution* (6th edn, OUP 2007) 21.

[28] See Erica Howard, 'Equality: A Fundamental Right in the European Union' (2009) 1 *International Journal of Discrimination and the Law* 19.

[29] Case C-354/13 *Fag og Arbejde v Kommunernes Landsforening* ECLI:EU:C:2014:2463.

[30] See Theodore Konstadinides, *The Rule of Law in the European Union: The Internal Dimension* (Hart Publishing 2017) Chapter 4.

[31] United Nations Framework Convention on Climate Change, 12.12.2015.

on the one hand (promoting renewable energy) and its dependence on the importation of fossil fuels from third countries (securing energy supply) on the other.[32]

It is stressed, therefore, that the current discussion about compliance with the EU rule of law by the Member States also raises a parallel discussion about non-compliance of the EU institutions with the rule of law, and how the national level reacts to it. Indeed, there is an overlaying presumption that the EU institutions are by default compliant with the rule of law and the general principles of EU law. Still, to use an example, the judicial protection afforded to EU citizens (especially the restrictive standing rules for individuals to challenge EU legislation)[33] does not correspond with the CJEU's mainstream normative approach to the rule of law as the right to effective judicial protection, which is now enshrined in Article 47 of the EU Charter of Fundamental Rights. This is, of course, a problem related to the scope of judicial review at the EU level in general which remains limited both in terms of its availability and function.[34] Hence the question stands: can the EU be entrusted with the enforcement of the rule of law as a common tradition of Member States, whilst at the same time having itself to answer to a different conception of the rule of law that fits its own type of power?

The nexus between the rule of law and general principles requires one to also compare and contrast the objectives that they are meant to achieve. Such an exercise helps to witness how EU trends converge most visibly in the attempt of EU institutions to subject all governmental action that takes place within the scope of EU law to supranational structures, processes, principles and values. Here one can juxtapose the work of different academics and distil the rule of law and general principles objectives.[35]

First, the rule of law appears to be a vehicle for supremacy and effectiveness of EU law. This is often linked to the EU's 'constitutionalisation' or the process of transformation of the EU

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[32] See for instance Tom Dyson and Theodore Konstadinides, 'Enhancing Energy Security in the European Union: Pathways to Reduce Europe's Dependence on Russian Gas Imports' (2016) 41 *European Law Review* 534.

[33] See Anthony Arnull. 'Judicial Review in the European Union' in Anthony Arnull and Damien Chalmers (eds.) *Oxford Handbook of EU Law* (OUP 2015) 376.

[34] This is prominent in the recent Advocate Generals' Wathelet and Wahl Opinions on the Cypriot bailout cases where it was stressed that actions for annulment and damages brought by bailed-in depositors against EU institutions (the Commission and the ECB) for the restructuring of the Cypriot banking sector should be dismissed as inadmissible. See CJEU Press Release No. 44/16 (21 April 2016).

[35] See on the rule of law – general principles objectives: Monica Claes and Matteo Bonelli, 'The Rule of Law and the Constitutionalisation of the European Union' in W Schroeder (ed.) *Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation* (Hart 2016) 265-89; Koen Lenaerts and Jose A Gutierrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law' (2010) 47 *Common Market Law Review* 1629.

from an international organisation to a quasi-federal structure, often driven by the CJEU.[36] Likewise, general principles serve a gap-filling function which ultimately ensures the autonomy and coherence of the EU legal system. In this regard, they can be interpreted as a CJEU federalising device.

Secondly, the rule of law appears to be a normative guarantee that no action of EU institutions can escape judicial review.[37] As mentioned earlier, this is perhaps the greatest challenge for the EU (and any Member State) because the CJEU has remained loyal to its pronouncements in *Plaumann*[38] and has relished every opportunity to protect the integrity of EU law from external judicial scrutiny.[39] However, if we take general principles to ensure that no action of EU institutions can escape judicial review, then their contribution relates to them being relied upon by litigants as specific grounds of judicial review – whilst the rule of law cannot for instance serve as a ground for review directly. To enable the rule of law become a ground of review, the CJEU would endanger legal certainty (an indispensable component of the rule of law) as the rule of law would have made for an enormously broad ground of review covering a wide range of possible abuses by national authorities that lie beyond the scope of EU law.

Last but not least, the rule of law appears to encapsulate norms that need to be adhered to and promoted by all Member States, including respect for the mechanisms set up to monitor and enforce them (such as the objectives of Article 7 TEU). General principles also require such a degree of allegiance, although there is no uniform political monitoring mechanism in place to ensure that Member States respect them. Having said that, it is established that no action of national governments can escape judicial review when they act within the scope of EU law. In this context, it is liberating for the CJEU that it is not under a strict obligation to interpret the rule of law or general principles in light of the diverse constitutional traditions of the Member States. As such, the safeguarding of EU values in the Member States might require some clarification on the issue of competence.[40] But, beyond issues of legal basis and competence delimitation, there are also questions that remain to be answered with regard to

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[36] See for an overview of EU constitutionalism: Tom Flynn, *Triangular Constitutionalism* (Hart 2019).
[37] See: Francis Jacobs, *The Sovereignty of Law: The European Way* (CUP 2007).
[38] Case C-25/62 *Plaumann v Commission* [1963] ECR 95.
[39] As it became evident in its ECHR accession Opinion which contradicts the EU's Article 6 TEU mandate Opinion 2/13 concerning the Accession of the EU to the ECHR ECLI:EU:C:2014:2454.
[40] Editorial Comments, 'Safeguarding EU Values in the Member States – Is Something Finally Happening?' (2015) 52 *Common Market Law Review* 619, 625.

the consequences of enforcing a political conception of the rule of law in the Member States. This is particularly important since each context of the construction of political power in the EU leads to a different understanding. General principles are not immune from such criticism given that some of them are subject to institutional monitoring which is not always successful.

IV. Dangers that the rule of law is meant to prevent – the rule of law as a means of reducing the arbitrary exercise of power

Before we discuss specific examples such as the EU's rule of law capacity to interfere with judicial changes pushed through Poland's Parliament in 2017, we should ask whether we can confidently talk about an EU rule of law conception altogether. This is a rather provocative question which is answered to the affirmative. The argument presented here is that if the EU adopts an approach that focuses on the ends of the rule of law, we can altogether give up the conceptual exercise as a voyage of evocative ideas about the rule of law. Whatever insights and understanding we have gained through such reflection need to be translated into a measurement tool.

The question we should be asking is this: can EU institutions draw certain functions the rule of law intends to serve based on specific attributes? Sartori's conceptual framework discussed earlier provides that conceptual classes, regardless of level of generality, must contain at least one clearly specified attribute. A specified attribute of the rule of law that often gets cited in the relevant literature is the reduction of the possibility of arbitrary exercise of power, including the institutionalisation of power-restraints in order to increase predictability of state action.[41] In particular, Krygier's vision of restraint on power's arbitrariness provides a useful, although not exhaustive, doctrinal compendium about the central target to the rule of law in the EU – tempering power and doing justice to all actors

[41] Nicholas Barber, 'The Rechtsstaat and the Rule of Law' (2003) 53 *University of Toronto Law Journal* 443; Martin Krygier, 'The Rule of Law: Legality, Teleology, Sociology' in Gianiluigi Palombela et al. (eds), *Relocating the Rule of Law* (Hart 2009) 45, Gianluigi Palombela, 'The Rule of Law as an Institutional Ideal' in Leonardo Morlino and Gianluigi Palombela (eds.) *Rule of Law and Democracy: Inquiries into Internal and External Issues* (Brill 2010) 3.

that partake in the European polity.[42]

Krygier's aim is not to engage into a semantics exercise about what the rule of law contains. His approach is functional; that is, to address the question of what we want the rule of law for.[43] If we side with his theory, we shall accept that there is no such thing as a universal prescription when applying the rule of law. In his work, Krygier opposes an 'anatomical approach' to the rule of law, i.e. that the central ingredients of the rule of law are legal institutions and that we can capitalise in them by stipulating what aspects of these institutions may produce the desired results. His focus is rather on identifying the ends of the rule of law. Krygier adds that only when we identify the ends of the rule of law 'should we move to ask what sorts of things need to happen for us to achieve such a state of affairs, and only then move to ask what we need in order to get it'.[44] Accordingly, he chooses the prevention or reduction of arbitrary power as a central target of the rule of law because 'arbitrary power threatens freedom, dignity and social coordination and, spreads fear'.[45]

However, appealing Krygier's theory appears to be as a means of explaining why we need an EU rule of law that can be enforced against deviant Member States, there are three main challenges to defining it. First, as already mentioned national constitutional traditions are rich in diversity and not all of them perceive arbitrariness as the main danger that the rule of law must prevent, reduce or eliminate. The *Rechtsstaat* tradition, for instance, takes the view that law is akin to the structure of the State and does not comprise an external limitation to it. To address this criticism, Krygier has stressed that:

> '… if arbitrariness is not the only danger the rule of law is meant to prevent, it is a central one. Moreover, if other values are added to one's conception of the rule of law, it would not actually augment my claim that it is to those values that we should look first, rather than to institutional structures that too often threaten to be treated as ends in themselves'.[46]

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[42] Martin Krygier, 'Tempering Power' in Maurice Adams et al. (eds) *Bridging Idealism and Realism in Constitutionalism and Rule of Law* (CUP 2016) 34. See also for a Krygier-influenced analysis in the context of EU law: Elaine Mak and Sanne Taekema, 'The European Union's Rule of Law Agenda: Identifying Its Core and Contextualizing Its Application' (2016) *Hague Journal on the Rule of Law* 1, http://ssrn.com/abstract=2734103. See alternatively: Sionaidh Douglas-Scott, *The Law After Modernity* (Hart 2013) 220, 227.

[43] Krygier, (n 41) 47.

[44] Ibid 47.

[45] Martin Krygier, 'Still A Rule of Law Guy' (2013) 34 *Recht der Werkelijkheid* 1, 3.

[46] Krygier, (n 41) 58.

Secondly, one could argue that Krygier's hostility towards unchecked power is based on the (almost unconscious) presumption that there is something corrupt about power-wielders. Indeed, a critic could argue that his theory is predicated on the political authorities' inclination towards misuse of their powers. Against the argument that constitutionalism and the rule of law are the panacea to arbitrariness, Hayek contends that 'the prevention of arbitrariness, though one of the aims, is by no means a necessary effect of obeying a constitution'. Accordingly, the fact that no constitution or treaty has ever provided a definition of what is 'arbitrary' provides the lever with which to argue that the prevention of arbitrariness is not central to the rule-of-law debate.[47] In his defence, Krygier provides examples of common manifestations of arbitrary power while at the same time he takes a broadly construed approach to arbitrariness to even include circumstances when officials go by the book. The latter somewhat weakens the basis of his argument and puts into question the idea of legal certainty. He argues that:

> 'To counteract such forms of arbitrariness, space needs to be made for a larger understanding of the contributions of constitutionalism and the rule of law, more "idealistic", more open-ended and open to the complex realities of the world we seek uncertainly to navigate'.[48]

Thirdly, and perhaps most significantly, a critic may argue that in the context of EU law, the prohibition of exercise of arbitrary power as the key function of the rule of law may not always serve us well. For instance, it may be more relevant to the EU institutions exercising their legislative power over the Member States and their citizens. Conversely, it may not be as helpful an attribute in the context of examining a Member State's adherence to the EU rule of law. To be more specific, whereas the rule of law for the EU is often framed in terms of the principle of conferral, in the case of the Member States it is perceived in terms of compliance with the EU *acquis* (namely, recognition of the authority of EU law to rule and compliance with EU law norms).[49]

To add to the question about the rule of law's duality, is the above 'conferral–compliance'

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[47] Friedrich Hayek, *Legislation and Liberty, Volume 3: The Political Order of a Free People* (University of Chicago Press 1979).
[48] Krygier (n 42) 22.
[49] See chapters in external relations section of this volume, in particular Żelazna, Chapter 33 below.

distinction proof that there are two rules of law even within the EU? One needs to be clear at this point that the EU's internal rule of law might be different to what is expected from the Member States. As such, one may agree that the idea of reduction of arbitrary exercise of power as a central tenet of the EU rule of law has to be adjusted in order to imply something meaningful that can be acted upon by the Member States. For example, reducing the capacity of their executives to act independently out of whim, constitutional caprice, paying little or no regard for hard-earned EU legal values and with little consideration towards their counterparts.

In this regard, the rule of law as a means of reducing the arbitrary exercise of power is therefore important for Member States like Poland where it can place their respective governments in check and reverse decisions concerning the retirement age of judges, and stopping the arbitrary reassignment of cases between courts.[50] Yet, one also has to appreciate that there are Member States that may allegedly jeopardise the EU rule of law without acting arbitrarily in the narrow or broader sense. Member States like Greece have been singled out as showing poor fiscal performance and other 'serious deficiencies' in terms of compliance with EU asylum law and the ECHR.[51] At the risk of over-generalising, there are 'failing states' in Europe with internal and endogenous problems, related to the maintenance of law and order, which have produced cross-border impact. The ideal of reduction of arbitrariness as a means of answering why a singular rule of law in the EU may be necessary is in short supply there.

In contrast, one shall not fail to notice the more 'advanced' Member States which demonstrate (and perhaps justifiably so in some circumstances) different signs of 'unruliness' to 'failing states'. They, through their highest courts, have reserved the final say in cases of possible transgressions of EU competences, and thus have attributed to themselves the role of 'halting' the EU institutions when acting undemocratically and against the rule of law. At first, their theoretical reaction to the primacy of EU law may be perceived as a sign of arrogance or disobedience, therefore, flirting with the idea of consciously breaching their membership obligations. Conversely, the stream of potential *ultra vires* reviews by national courts can also be characterised as a *par excellence* example of whistle-blowing that the EU is defaulting on its own (rule of law) terms. In a marginal set of cases, some national courts

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[50] See Case C-619/18 *Commission v Poland* ECLI:EU:C:2019:531.

[51] *MSS v Greece and Belgium* App no. 30696/09 (ECtHR, 21 January 2010); *AA v Greece* App no. 12186/08 (ECtHR) 22 July 2010.

have entertained the possibility of resorting to 'counter-measures' (specifically, *ultra vires* or *intra vires* identity 'locks') in order to protect the State's constitutional order from transgressions of powers and EU arbitrariness.[52] Such 'locks', however, are last-resort weapons that may pose the danger of ultimately 'constrain[ing] the institution imposing them, not just the institution that is the target of the constraint'.[53]

While hostility to arbitrariness in the exercise of power is far from perfect as the main goal of the EU rule of law, it is useful in orienting EU institutions towards adopting a solution-based/teleological approach; that is, identifying the ends of the rule of law. In this respect, they can move forward from debating formal versus substantive theories about the rule of law and focus on the very purpose and value of the rule of law in the EU. Yet, in order to establish the EU rule of law's legitimacy and ensuring its observance, the EU needs to take stock of the socio-political context where the rule of law requirements flourish or perish. Accordingly, any common rule-of-law traits need to be encouraged in the social context in order to count. Jacobs pointed out that 'the rule of law embodies certain values which seem, at least in Europe, widely accepted as essential to modern social and political life; and that we shall be able to identify some of those values'.[54] Yet, as much as it is desirable, identifying common values is not a sufficient practice in its own right. One can hardly make a convincing argument that, if shared traits exist between Member States, so does the EU rule of law without monitoring how these traits are supported and acted upon.[55] Krygier rightly places, therefore, particular emphasis on 'how the law is *received*, not on how it is expressed or even delivered'.[56] This is particularly important in the context of rule of law compliance and enforcement.

V. Current mechanisms in place to ensure rule-of-law compliance in the EU

[52] *R (on the application of HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3; Case C-62/14 *Gauweiler v Deutscher Bundestag* EU:C:2015:400; 1.
[53] See Paul Craig and Menelaos Markakis, '*Gauweiler* and the Legality of Outright Monetary Transactions' (2016) 41 *European Law Review* 1, 4–24.
[54] Francis Jacobs, *The Sovereignty of Law* (CUP 2007) 8.
[55] Neil Walker makes a similar argument: Neil Walker, 'The Rule of Law and the EU: Necessity's Mixed Virtue' in Gianluigi Palombela et al. (eds), *Relocating the Rule of Law* (OUP 2009) 122.
[56] Krygier (n 41) 64.

This section will focus on the EU's attempt to formulate a notion of the rule of law which is based on structuring, monitoring and enforcement. It is argued that this is not possible insofar as Member States are acting outside the scope of EU law and cannot be captured by the conventional infringement procedure of Article 258 TFEU.[57] While this chapter does not oppose the recent focus of the EU institutions on a specific EU rule-of-law targeted enforcement procedure, it nonetheless argues that the EU institutions shall be less concerned with the technicalities of such enforcement (namely, the rule of law mechanism of Article 7 TEU). Instead, they shall engage better with the question of whether the EU rule of law can and should be enforceable in the first place. Below, this section highlights some of the limitations of rule-of-law governance through political coercion. It is contended that such limitations are intimately related to power and the fact that the EU can act in an area only in so far as the competence has been conferred to it by the Member States. Adherence to the fundamental principle of conferral under Article 4(3) TEU that governs the limits to EU competence becomes a crucial element here.

Although a singular rule of law dynamic has been implicit, there is little discussion about its conceptual boundaries or indeed the reasons behind the EU's shifted attention to disciplining 'systemic deficiencies' in the Member States.[58] The onus is on the EU institutions to put forward a convincing explanation regarding their increasing sensitivity towards rule of law breaches although I will list below three reasons why the EU is seeking a model of rule-of-law governance which has discipline of 'defaulting' Member States as its central tenet.

First, through a specific rule-of-law enforcement mechanism the EU can compensate for the pre- and post-accession compliance *lacunae*. In particular, it is argued that although the principles embodied in Article 2 TEU must be respected by EU candidate states; such requirement often fades following their accession to the EU. There is indeed a grey area between accession to the EU and resort to the nuclear option of Article 7 TEU. Experience from recent EU enlargements demonstrates that the high threshold of conditionality does not imply a high level of integration with reference to the necessary adjustments. It often places more emphasis on transplanting the EU's concrete model of market economy than on its

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[57] See for detail on the Article 258 TFEU procedure: S. Andersen, *The Enforcement of EU Law: The Role of the European Commission* (OUP 2012).

[58] See COM (2014) (n 4) final; for an analysis see Dimitry Kochenov and Laurent Pech, 'Upholding the Rule of Law in the EU: On the Commission's Pre-Article 7 Procedure as a Timid Step in the Right Direction' (2015). Robert Schuman Centre Research Paper No. 24, http://ssrn.com/abstract=2598199; see also Special Rule of Law issue (2016) 54 *Journal of Common Market Studies* 1043.

commitment to the rule of law.[59] But who is to blame? When it comes to EU enlargement, there is only so much we can attribute to the practice of the EU institutions since they only play a facilitative monitoring role in the relevant negotiations. This is perhaps why today there are far-reaching accession obligations regarding the rule of law in candidate countries.

Secondly, it is often the case that EU law is constructed on the false premise that Member States will apply its norms correctly. The proliferation of EU legislation touching upon almost every aspect of national policy has increased the number of instances where Member States are seen to 'default' in its transposition. In this respect, the EU rule of law concerns the Member States' engagement with the process of market integration and the progressive coordination of their economic policies (homogeneity among Member States and sustainable performance).[60] It is also compatible with their implementation of EU law and mutual recognition and enforcement of civil and criminal judgments across Europe with a view to contributing to the EU as an Area of Freedom, Security and Justice (obedience and maintenance of the status quo).[61] But certainly not every EU law infringement can amount to a rule-of-law breach. 'Defaulting' instances may, therefore, concern serious EU law implementation defects or purposeful ignorance of EU imported norms. 'Systemic' comes to mind when describing such breaches. For instance, in the midst of Europe's migration crisis, continuous and persistent failure of surveillance required by the Schengen *acquis* can jeopardise the whole EU system of border management and can put the lives of migrants at grievous risk.[62] Failing to protect human life may result in a perceived breach of the EU rule of law.

The third reason why the EU has been keen on enforcing the rule of law through a unitary and purpose-built system relates to the fact that the content of the principles and standards stemming from the rule of law, although similar, are not identical between the EU-28. Thus, depending on each Member State's constitutional system, diverse standards may apply throughout – some of them lower than others. There is also the impending danger that national mechanisms may at times malfunction or cease to operate effectively. By contrast to

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[59] See Adam Lazowski, 'EU Criminal Law and Enlargement' in Valsamis Mitsilegas, Maria Bergström and Theodore Konstadinides (eds) *Research Handbook on EU Criminal Law* (Edward Elgar 2016) 1.

[60] Art. 121 (1) TFEU provides that 'Member States shall regard their economic policies as a matter of common concern and shall coordinate them within the Council, in accordance with the provisions of Article 120 TFEU'.

[61] See EMH Hirsch Ballin 'Mutual Trust: The Virtue of Reciprocity. Strengthening the Acceptance of the Rule of Law through Peer Review' (2015) Tilburg Law School Research Paper No. 14, http://ssrn.com/abstract=2649856.

[62] See Case C‑44/14, *Spain v European Parliament and Council* ECLI:EU:C:2015:554.

the one of the key reasons regarding the EU's rule of law intervention (namely, ensuring effective transposition of its laws), anomic situations in the Member States may not always involve the implementation of EU law.

It follows that Member States may be defaulting while exercising their 'essential state functions' which, according to Article 4(2) TEU, include 'maintaining law and order' and 'safeguarding national security'.[63] Specifically, the degree of protection of national security as understood by a particular national executive may be not correspond to the standards set by Article 2 TEU. Not only diverse levels of rule-of-law protection may generate a conflict of 'rules of law', but also a clash between different Treaty obligations (prescribing the Member States' respect to the rule of law and the EU institutions' respect to national constitutional identities).[64] It is important, therefore, to emphasise again that the capacity of the EU to intervene is restrained by the limits of the powers conferred upon it by the Member States (Article 5 TEU).

Despite this, the application of the principle of conferral by the EU institutions is not always predictable. Take for example the Hungarian legislation concerning the registration and official recognition of churches and the autonomy of higher education establishments.[65] Despite the Commission's investigations, such law reforms were neither deemed to squarely fall within the scope of the Treaties nor comprise 'systemic threats'. This was notwithstanding the fact that the registration of churches appears to fall within the Article 17(1) TFEU derogation on the status under national law of churches in the Member States. As for the autonomy of higher education establishments, under Article 6 TFEU education consists of an area of supporting, coordinating and complementary action to justify EU scrutiny.

The concept of the rule of law enshrined in Article 2 TEU was deemed to be too vague to be the subject of EU infringement proceedings in Hungary's case. This is despite the fact that

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[63] See Armin von Bogdandy and Stephan Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' (2011) 48 *Common Market Law Review* 1417.

[64] Of course, this does not imply that Member States should not uphold the protection of fundamental rights. The CJEU even in relation to security issues has recently clarified in *LM* that essential State functions need to respect fundamental rights if there is a real risk that the individual concerned would suffer a breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial. See Case C-216/18 PPU *Minister for Justice and Equality v LM* ECLI:EU:C:2018:586; Case C-619/18 *Commission v Poland,* ECLI:EU:C:2019:531.

[65] See Lili Bayer, 'Orban's War of Attrition against Churches' (*Politico*, 11 July 2016), www.politico.eu/article/orbans-war-of-attrition-against-churches/; Petra Bard, 'The Rule of Law and Academic Freedom or the Lack of it in Hungary' (2018) European Political Science 1, 25 May 2018, https://link.springer.com/article/10.1057/s41304-018-0171-x#citeas.

the breaches committed by Hungary are in essence EU law tribulations. Academic freedom is intimately related to a Member State's performance under Article 13 of the EU Charter of Fundamental Rights and requires the Hungarian government to take steps to cease any amendment to the national higher education law that would outlaw the Central European University. The same is true about taking steps to address the ongoing violations of the right of religious freedom in Hungary as manifested in the Charter and as highlighted by the ECtHR in *Magyar Keresztény Mennonita Egyház v Hungary* regarding the legal status of churches stripped of their legal personality.[66] Notwithstanding these examples and despite the initial EU rule of law warning shots, the primary responsibility for action in these cases rested with Hungary's authorities regardless of whether or not they felt inclined to remedy the alleged breach.[67]

The above example proves the point that the more abstract the principle is, the more indeterminate its application. While the legal competence to intervene in order to prevent risks in the legislation of a Member State and ensure that European values are adhered to was present, the EU institutions chose to stay put than re-establishing the rule of law. A very different approach was adopted in the case of Hungarian legislation on the compulsory retirement of judges. Despite the absence of direct legislative competence over the independence and impartiality of national judiciaries, the Commission took action against Hungary under Article 258 TFEU. In order to put Hungary back on track, it relied on the EU principle of non-discrimination on the ground of age which falls squarely within the EU's competence (instead of generic rule of law grounds).[68] The EU responses to the Hungarian challenges to the rule of law are useful not least because they demonstrate that Article 7 TEU is not the only weapon to ensure compliance with the EU rule of law. Deducing from these cases, instead of taking a holistic approach to breaches of the rule of law, the EU institutions can achieve better results in compartmentalising the problem by isolating and only dealing with the aspects of a case that fall within the scope of EU law. The decision by the

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[66] 70945/11, 23611/12, 26998/12 et al. (ECtHR 8 April 2014).

[67] See FOREF, 'Hungary: Two Years after ruling by ECtHR Church Law Remains Unaltered', OSCE Human Dimension Implementation Meeting, Fundamental Freedoms (2016), www.osce.org/odihr/268711?download=true.

[68] I.e. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, 16). See Case C-286/12, *Commission v Hungary* EU:2012:687. See comment by Uladzislau Belavusau, 'On Age Discrimination and Beating Dead Dogs: *Commission v Hungary'* (2013) 50 *Common Market Law Review* 1145.

Commission to refer Hungary to the CJEU for non-compliance of its asylum and return legislation with EU Directives is another recent case in point.[69]

Still, the procedure under Article 7 TEU has not been declared redundant, although it has proved hard to lift off. While the Commission launched its first probe to examine whether Poland had undermined the rule of law in 2016, no sanctions have been imposed by the EU institutions against the Polish Government. This can be perceived as evidence of the fact that the EU institutions are acutely aware of the broader political issues surrounding the procedure under Article 7 TEU. But, even if the EU institutions finally launch Article 7 TEU, the mechanism will soon prove impracticable. This is due to a combination of the high thresholds needed to adopt a decision in the Council and the Member States' political unwillingness to resort to it. Also, the Commission seems to lack a set of conceptual boundaries to the rule of law which could categorise a Member State's breach as a violation of the rule of law. It can be contended, for instance, that the Commission has treated Poland more harshly than Hungary in its rule of law review.[70] The EU institutions, therefore, must ensure that when they tolerate a Member State's erratic behaviour and another Member State starts acting in a similar manner, no adverse precedent is created that can potentially erode the rule of law. We shall note here that the general principle of equality is of fundamental importance to the EU.[71] This entails *inter alia* equality between Member States under the law which is guaranteed by the Treaty (Article 4(2) TEU).

But what kind of behaviour can potentially erode the rule of law? In an attempt to provide some guidelines, Closa et al. argue that problems of fundamental nature are characterised by, *inter alia*, the dismantling of the liberal democratic state and systemic corruption.[72] Such malfunctions undermine the common values enshrined in Article 2 TEU. But, do they necessarily relate to identifiable substantive breaches of EU law? The latter is important to justify EU institutional involvement in national affairs and therefore avoid acting *ultra vires.* Accordingly, although it may be premature to lament the practical contribution of Article 7 TEU, it can hardly be denied that there is scope for clarification in the enforcement of the EU rule of law. On the one hand, the EU institutions appear equipped to act in order to suppress

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[69] European Commission Press Release, Migration and Asylum: Commission takes further steps in infringement procedures against Hungary. 19.07.2018, http://europa.eu/rapid/press-release_IP-18-4522_en.htm.

[70] Agata Gostyńska-Jakubowska, 'Why the Commission is treating Poland more harshly than Hungary in its rule of law review' (*European Politics and Policy*, 4 February 2016), http://bit.ly/1o9D4Pj.

[71] See Claes, Chapter 6 above.

[72] Carlos Closa, Dimitry Kochenov and Joseph Weiler, 'Reinforcing Rule of Law Oversight in the European Union' (2014) EUI Working Paper RSCAS No. 25, 5, www.eui.eu/RSCAS/Publications/.

rule-of-law crises and on the other hand their capacity to act is reduced by the EU's lack of competence to interfere in national affairs. This makes the question of whether the rule of law (and which conception of the rule of law) should be enforceable in the first place, more prominent. Of course, this question is not unique to the current rule of law crises. One could connect this dynamic to the analysis of the general principles discussed in this volume, that is, beyond the rule of law as their foundation.

Any discussion about an EU rule-of-law political framework needs to take stock of the EU's limited powers. It is important to stress again that, in relation to the EU institutions' potential corrective response, any action by the EU has to be compatible with the principle of conferral (Article 4(3) TEU) and has to be respectful of the constitutional specificities (Article 4(2) TEU) and the rule of law conception, which may be particular in the Member State in question. In this respect, it could even be argued that the EU's conception of the rule of law cannot be fully autonomous in the same sense as many other conceptions of EU law that might also exist in national constitutions.

What is more, the EU must be careful about attempting to restore domestic constitutional order even by using its soft hand. For instance, one could claim that the EU may have little to do with the composition of national courts in a Member State. As such, even if one or several rule-of-law values inherent in the constitution of a Member State are challenged by a national executive, the EU shall be very vigilant about intervening to restore constitutional order in that State. By the same token, EU institutions shall also be cautious about imposing constitutional euphony in areas that fall outside EU law and therefore do not have competence to act. The only window to EU action or interference is, therefore, the identification of a link with a breach of EU law (however tenuous this link may be) related to safeguarding a substantive policy (such as one of the four freedoms)[73] or a general EU objective or principle of EU law (e.g. equality, proportionality, fundamental rights, transparency, effective remedies and so on). We will look into both situations in turn.

First, any EU action to restore the rule of law needs a convincing narrative which observes the principles underpinned in Article 4 TEU. Where the political rule-of-law enforcement has been slow in response, the CJEU has been more effective in addressing substantive breaches of EU law put forward by the Commission through an action for failure to fulfil obligations under Article 258 TFEU. For instance, in the *Białowieża Forest* case, the CJEU justified the

[73] See for instance: Case C-3/17 *Sporting Odds Ltd* ECLI:EU:C:2018:130.

imposition of a fine on Poland in interim proceedings as a means to guarantee the effective application of EU law (the Habitats Directive 2013/17/EU and the Birds Directive 2009/147/EC), describing such application as 'an essential component of the rule of law, a value enshrined in Article 2 TEU and on which the European Union is founded'.[74] This is a good example where the EU, through judicial review, has shown its teeth in the Polish constitutional crisis by employing its rule-of-law narrative alongside a Member State's compliance over secondary legislation.

Secondly, upholding the rule of law by scrutinising general principles, such as judicial independence, has become key in the recent jurisprudence of the CJEU which has taken the view that effective judicial review to ensure compliance with EU law is 'of the essence of the rule of law'.[75] An interesting case in hand here is *Minister for Justice and Equality v LM*,[76] which concerns a preliminary reference made to the CJEU by the Irish High Court. The case was heard on 1 June 2018 by the Grand Chamber which demonstrates its gravity and the necessity for addressing the systemic rule-of-law problems in Poland. The question addressed to the CJEU concerns the enforcement of European arrest warrants issued by Poland, in particular, the objection of the person subject to them to surrender. This objection is based on the potential breach of the right to a fair trial on the grounds that recent legislative changes in Poland create a real risk of a flagrant denial of justice and the rule of law.[77] Hence, the Irish High Court asked the CJEU to clarify the test required to be applied in respect of an objection to surrender where there is cogent evidence in the issuing Member State that its justice system is no longer operating under the rule of law.

The CJEU in turn used this opportunity to confirm that maintaining the independence of judicial authorities is essential in order to ensure the effective judicial protection of individuals, including in the context of the European Arrest Warrant mechanism. Since there is evidence to the contrary in Poland, Ireland could refrain from executing the Warrant. Most

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[74] Case C-441/17 *Commission v Poland* ECLI:EU:C:2018:255; see Order of the Vice-President of the Court, ECLI:EU:C:2017:877, para. 102. It was held that the Polish logging in the forest breached the EU Habitats and Wild Birds Directives. The CJEU granted an order ex parte (without hearing Poland) to stop. Poland ignored the CJEU and the Court issued a second order imposing a €100,000 fine per day for failure to comply.

[75] See recent analysis by Sergio Carrera and Valsamis Mitsilegas, 'Upholding the Rule of Law by Scrutinising Judicial Independence' (CEPS Commentary, 11 April 2018), www.ceps.eu/system/files/SCandVM_ROL.pdf.

[76] Case 216/18 *Minister for Justice and Equality v LM* ECLI:EU:C:2018:586 13. See Theodore Konstadinides, (2019) 56 (3) *Common Market Law Review* 743.

[77] The person concerned relies upon a document of the European Commission entitled 'Reasoned proposal in accordance with Article 7(1) of the TEU regarding the rule of law in Poland'. He also relies on the Opinions of the Venice Commission, an advisory body of the Council of Europe.

significantly, the CJEU made a connection between political and juridical rule of law monitoring by supporting the idea that the launch of Article 7(1) TEU against the requesting state is particularly relevant for the purposes of the issuing judiciary authority's assessment vis-à-vis the existence of a clear risk of a serious rule-of-law breach.[78]

Despite difficulties in enforcing the rule of law in the courtroom, it would not be an exaggeration to claim that constitutional confrontations have so far been turned into a positive force vis-à-vis the development of the EU rule of law. The CJEU's human rights jurisprudence has obviously been inspired by the *Solange* case law of the German Federal Constitutional Court. Confrontation is still vital to EU performance enhancement and has also generated changes with regard to the development of the relevant national defences against the tidal effect of EU law in some areas. For instance, in recent years the German Constitutional Court's identity control has effectively replaced the *Solange* jurisdiction. Hence, while one may claim that such unilaterally imposed controls upon EU law may question the soundness of the EU rule of law claim, they have also succeeded in increasing dialogue between the national and European courts: in particular the role of national judges has been important in educating European judges about their levels of constitutional tolerance. Despite the fact that judicial reasoning is indeed performed in a rather constrained environment, it appears that the European judiciary has a better ability to wield power over the EU legal constitution by reviewing the compatibility of national legislation with the Treaty.

VI. Concluding remarks

This chapter has argued that the rule of law is the 'foundation' or the 'source' from which general principles are derived.[79] While, like general principles, it is common in all Member States' legal traditions it is not yet accepted that it is justiciable in its own right. Having said that, when the CJEU adjudicates on its sub-components (especially fundamental rights recognised as general principles of EU law), European judges do not let an opportunity pass

[78] Case C216/18 PPU *Minister for Justice and Equality v LM (Deficiencies in the system of justice)* ECLI:EU:C:2018:58.

[79] Takis Tridimas has identified general principles deriving from the rule of law. See Takis Tridimas, *The General Principles of EU Law* (2nd edn OUP 2006) 4; Armin von Bogdandy, 'Founding Principles of EU Law: A Theoretical and Doctrinal Sketch' (2010) 16 *European Law Journal* 95.

to expressly link those sub-component general principles back to the rule of law.[80] Still, the rule of law's justiciability as a principle in its own right remains a point of contention with sound arguments being put forward about the CJEU's potential jurisdiction over Article 2 TEU.[81] Simultaneously, the CJEU judges have not taken any steps to advance this option – perhaps out of self-restraint that doing so would give them too wide a scope to determine what EU constitutional law should encompass, trespassing into the domain of EU political institutions.[82] After all, the rule of law requires that all EU institutions, including the CJJEU, shall act in accordance with the law and apply the rules and procedures laid down in the Treaty.

With reference to national adherence to the rule of law, it is generally accepted that regardless of the type of government that may be in charge in each Member State, there is an explicit understanding that the rule of law is aimed at limiting the discretion of public administration by posing effective controls against any arbitrary exercise of power that fails to protect individuals with law. In this regard, the rule of law is a composite of general principles representing what Raz calls, a virtue by which a legal system is to be judged[83] but most important, for the purpose of this chapter, a positive duty to protect against arbitrariness. While, however, most rule-of-law theories emerge from a concern for the limitation of the constituent political power, we are yet to grasp fully how this limitation impacts upon the EU directly, because it is not the centre of political power per se but one derived from Member States pooled sovereignties.

Like with the enforcement of general principles, Member State compliance to the EU rule of law is shaped around the argument based on the scope of EU law, which poses limitations to the extent of EU intervention.[84] Given the gravity of the situation in Member States like Poland, one could duly argue in favour of EU 'rule of law' involvement in national affairs despite the absence of specific breaches of EU law provisions. The political ennui in enforcing the rule of law in the Member States provides further ammunition to contend that the CJEU should use its teleological interpretation tools to enforce Article 2 TEU against backsliding Member States. The CJEU's case law on the EU Charter of Fundamental Rights

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[80] See Koen Lenaerts, 'The Kadi Saga and the Rule of Law within the EU' (2014) 67 *SMU Law Review* 707, 711.
[81] See Christophe Hillion, 'Overseeing the Rule of Law in the EU: Legal Mandate and Means' (2016) *SIEPS* 7.
[82] Theodore Konstadinides, 'Judicial Independence and the Rule of Law in the Context of Non-execution of a European Arrest Warrant' (2019) 56 *Common Market Law Review* 743.
[83] Joseph Raz, 'The Rule of Law and its Virtue' (1977) 93 *Law Quarterly Review* 195.
[84] See Snell Chapter 21 below who criticises general principles being used to bypass limited EU competence.

in areas of national competence provides useful guidance about how to bring close to the scope of the Treaty what seemingly appears to be a policy area which lies outside its textual boundaries.[85] The potential dangers included in taking a very broad view of the application of EU law in the Member States with regard to the universality of the values underpinned in Article 2 TEU are numerous. Therefore, as discussed in this chapter, there are alternative strategies that can be considered to render the values inherent in Article 2 TEU justiciable before the CJEU.[86] Compartmentalisation of EU law substantive breaches (including breaches of general principles) linked with rule of law backsliding problems is a good start. Cases emanating from direct actions or preliminary reference cases can provide the CJEU a platform to confirm or constitutionalise the findings of the Commission and other international bodies with regard to a Member State's defiant attitude towards EU fundamental values. Outside alternative strategies to enforce the values inherent in Article 2 TEU, it has been my conviction in this chapter that if the EU can, and should, go further in the direction of enforcing the rule of law, either based on Article 2 TEU or some general notion of mutual trust between Member States, the Member States through their representatives in the Council would need to find a legal basis for such powers. They would also need to determine the corresponding procedure, nature of the Member States' obligations and consequences of non-compliance. It needs to be noted that the suggestion to apply the EU rule of law beyond the scope of EU law clashes with the perennial argument made by certain national judges that the EU should be wary of adopting an unduly expansive conception of its own powers in a way that might antagonise the Member States concerned about the principle of conferral. Conversely, and given that there is political consensus at the EU level, Article 7 TEU could be envisaged in the post-accession context as a broad rule-of-law obligation reaching beyond the scope of substantive EU powers. It could be recast into a broad EU monitoring power regarding the EU rule of law. To this effect, we could claim that such a power would be similar to economic coordination to the extent that the EU institutions could hold coordination and monitoring powers beyond substantive ones.

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[85] Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* ECLI:EU:C:2013:105. See also the relevant chapters in this volume on the expansion of fundamental rights in EU law and the importance of general principles.
[86] Christophe Hillion, 'Overseeing the Rule of Law in the EU' in Carlos Closa and Dimitry Kochenov, *Reinforcing Rule of Law Oversight in the EU* (CUP 2016) 59; see also more recently Gráinne de Búrca and Wojciech Sadurski, 'Open Letter to Vice-President Frans Timmermans' (*VerfBlog*, 9 June 2018), https://verfassungsblog.de/open-letter-to-vice-president-frans-timmermans/.

Referring to Sartori's work on conceptual 'traveling' and conceptual 'stretching', it was argued in this chapter that the rule of law has been amenable to such tendencies in Europe. Yet, while the EU institutions have reticently perorated about taking the first step towards possible rule-of-law sanctions, they are yet to provide Member States with sufficient assurances regarding the extent to which the conceptual stretching of the rule of law in the EU is accompanied by an alternative systematic attempt to distinguish between different elements of the rule of law. There are no express guarantees at present that that EU rule-of-law action remains sensitive to the domestic rule-of-law properties and that domestic constitutional traditions will not become hostages to compliance by EU law and its general principles. This is important because even Member States that are not even close to being scrutinised for rule-of-law breaches may support the view that the EU institutions are encroaching dangerously on domestic constitutional traditions.[87]

Following the above trail of thought, this chapter highlighted the dangers pertaining to the EU–Member States vertical delimitation of powers that are looming large with a politicised rule of law enforcement. While the direct judicial enforcement of the values inherent in the rule of law and, in particular, the general principles of EU law, can produce more immediate results, a lot depends on how CJEU judges acknowledge Articles 4 and 5 TEU in the relevant case law. A breach by the CJEU of the principles of constitutional identity and conferral of powers would not just be a structurally significant shift to the peril of Member State competences, but would be detrimental overall to the rule of law itself and enforcement of general principles as a whole.

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[87] See AG Sharpston's response to such UK Eurosceptic claims in, www.theguardian.com/law/2016/apr/19/we-dont-decide-national-cases-ecj-veteran-swipes-away-eurosceptic-barbs, accessed 22 August 2021; see also Theodore Konstadinides, 'Dealing with Parallel Universes: Antinomies of Sovereignty and the Protection of National Identity in European Judicial Discourse' (2015) 34 *Yearbook of European Law* 127, 145.