

# Union based on the rule of law: the Court of Justice of the European Union and the (future of) European integration

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## Abstract

*The judicial contribution to the dynamic process of European Integration was especially important, as the Court of Justice of the EU, through its creative and extensive interpretation of the Treaties, became an important catalyst for the integration process. The next phase of the European integration seems to be the 'integration through the rule of law', as the further development of this process must be based on a secure and solid ground, reaffirming the Union as a community of values. Given its importance for the confidence of citizens in the Union and the effective delivery of policies, the rule of law is of central relevance to the future of Europe. The main aim of this paper is to examine the progressive and influential role of the CJEU regarding the integration process, as a starting premise for determining its potential as an actor in the process of overcoming the following challenges.*

**Keywords:** European Integration, CJEU, Rule of Law, Integration through Law

## Introduction

The great and truly ambitious European unification project that has led to the creation of the European Union as a specific sui generis construct of the international law went through a multi-year and multi-layered process of integration. European integration as the essence of the process taking place within the European Union (EU) is the product of the selective pooling of national sovereignty, or ultimate

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jurisdiction over a separate entity (Peterson, 2001, p. 4923). It has yielded the European Union the most successful experiment in international cooperation in modern history and “the most important agent of change in the modern process of governing and creating policies in Europe” (Wallace *et al.*, 2005, p. 4). The creation and maintenance of peace and security on European soil after World War II was the *raison d’être* of this complex European integration process which began with the founding of the European Communities. The achievement of this primarily *peace-maintaining idea* was intended to take place through the economic integration of the Member States, which would then lead to their mutual solidarity (Schuman Declaration, 1950). <sup>1</sup>Nevertheless, in neofunctionalists’ terms, integration in one sphere created pressure for integration in other areas (*spillover concept*) so that this complex process imposed the deepening of the degree and scope of integration, which goes beyond the economic and even political union. European integration has long ago moved on from the internal market paradigm and seeks to establish an area of freedom, security, and justice (Lenaerts, 2020, p. 32). But as Closa, Kochenov and Weiler (2014, p. 2) indicate, “the EU was explicitly established not just to be a community based on the common interests of its Member States, but also a community of values, reflected in the way how integration progresses, as well as in the *ethos* of rights and freedoms that the EU officially guarantees”. The European Union, in fact, represents unification through a set of common values, on the basis of which common policies are developed so as to achieve common goals and interests. In this context, the EU’s credibility and even its very *raison d’être* related to economic integration and also to values and rights (de Búrca, 2013, as cited in Closa *et al.*, 2014, p. 12) requires the development of mechanisms for their protection and for facing the impending challenges.

The judicial contribution to this supranational dynamic process was especially important, as the Court of Justice of the EU (CJEU)<sup>2</sup>, through its creative and extensive interpretation of the Founding Treaties, became an important catalyst for the integration process. In accordance with its basic competence to ensure that in the interpretation and application of the Treaties the law is observed<sup>3</sup>, CJEU has managed to break the barriers that occurred due to the incapacity of the Member States to react/respond with unanimity in order to complete the phases of the integration process. The result was that the legal system began to evolve along paths

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<sup>1</sup> Schuman, R. (1950). The Schuman Declaration.

<sup>2</sup> Prior to the Lisbon Treaty, the Community Courts comprised the Court of Justice (ECJ), the Court of First Instance (CFI) and judicial panels. Their nomenclature has been changed by the Lisbon Treaty. Pursuant to Article 19 (1), the Court of Justice of the European Union shall consist of the Court of Justice, the General Court and the specialized courts. Given the jurisdiction of these courts established by the Lisbon Treaty, especially in the preliminary ruling process, when it comes to the European Court of Justice or Court of Justice, the General Court is usually included.

<sup>3</sup> Article 19(1) TEU.

that could not be predicted from the constellation of Member States' preferences at any given time (Sweet, 2011, p. 131). The Founding Treaties - the Union's primary law - were often inspired by a functionalist strategy stipulating that once set, goals will be further developed and achieved in a way that best suits the actors involved in the process. But, based on the jurisprudence built through their interpretation, CJEU granted it the role of innovator (Dehousse, 1998, p. 117). The doctrine of direct effect and the doctrine of supremacy of the EU Law are the two most influential legal concepts that contributed to the legal development of the Union. The role of the CJEU in the integration process can be defined as *integration through law* – to give meaning to the provisions of the Union's primary law which increases the efficiency of the Union *acquis* and promotes its integration into the legal systems of the Member States. Hence, it is said that the history of the CJEU reveals the history of the European Union and is, at the same time, directly connected to European politics (Tamm, 2012, p. 9).

This paper supports the thesis that the next phase of the European integration seems to be the 'integration through the rule of law'. The rule of law is one of the founding values of the European Union as enshrined in Article 2 of the Treaty on European Union, but it is also a reflection of the European identity and common constitutional traditions. A special Eurobarometer on the rule of law (April 2019)<sup>4</sup> showed overwhelming popular support for this value among EU citizens. If the rule of law is not properly protected in all Member States, the Union's foundation core of solidarity, cohesion and trust, necessary for mutual recognition of national decisions and functioning of the internal market as a whole, is damaged. Given its importance for the confidence of citizens in the Union and the effective delivery of policies, the protection of the rule of law is crucial to the future of the European Union (Communication from the Commission to the European Parliament, the European Council and the Council: Further strengthening of the Rule of Law within the Union-*State of play and possible next steps*, 2019). In short, the rule of law is a central pillar for the future of Europe. The next phase of European integration must not be built on unstable foundations, but it must rather be based on secure and solid values, in particular, on respect for the rule of law (Lenaerts, 2020, p. 29). The expression 'community of law' (*Rechtsgemeinschaft*)<sup>5</sup> was popularised by Walter Hallstein<sup>6</sup> in the 1960s, emphasizing that the Community, and now the European Union, is founded on the 'rule of law' principle. This phrase was literally embedded in the ECJ's landmark judgment in the case of *Les Verts v Parliament* (C-294/83). However, the foundations of the EU as a community/union of law have been

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<sup>4</sup>Results are available at: <https://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/survey/getsurveydetail/instruments/special/surveyky/2235> (accessed on 19.05.2020).

<sup>5</sup> The expression 'community of law' alludes to the notion of a 'state of law' which is the equivalent, in continental legal cultures, of the Anglo-American notion of the 'rule of law'.

<sup>6</sup> Walter Hallstein (1901-1982) was the first President of the European Commission (1958-1967) who referred to the term 'community of law' in a speech delivered in March 1962.

gradually developed within the Court's case law from the very beginning of the integration process. But, at the same time, it is evident that today the respect for the Union's fundamental values, including the rule of law, is subject to serious scrutiny in the Member States and one of the greatest challenges to the unity and stability of the EU is posed by Member States violating the rule of law.<sup>7</sup> Therefore, there is a common understanding within the European discourse on the need to improve the way respect for the rule of law is ensured in the EU.

This paper builds on the well-known pattern of the European integration (argued by the Lenaerts, 1992; also Pescatore, 1974; Lecourt, 1976; Dehousse, 1998) - "In times when the necessary actions were not pursued in the realm of politics, the CJEU stepped in as an 'engine of integration' to safeguard the core of the European integration agenda" (as cited in Spieker, 2019, p. 1185). Hence, the progressive and influential role of the CJEU regarding the integration process is the starting premise for determining its potential as an actor in overcoming the following challenges - which are assumed to be towards building a strong 'union of values', especially, a 'union of law'. The first part of this paper reviews the legal literature on the theories of European integration, the position of the Court of Justice of the EU as an actor in the process as well as the concept of *integration through law* in the European context through the most important landmark cases and their impact on achieving integration goals. The second part of this paper concentrates on the 'rule of law' concept in the EU and the judicial protection of the rule of law as one of the values enshrined in Article 2 TEU. Finally, it sums up the main highlights on the function of the rule of law in European integration and the role of the CJEU in that regard.

## **1. The role of the Court of Justice of the EU through the Prism of EU integration theories**

Theories of European integration tend to explain the rationale for EU integration, the causes and the logic of the process in order to determine the future perspectives. However, such consensus on these issues remains elusive and the literature is still evolving. As Hooghe and Marks (2019, p. 1) observe, the grand theories should rather be seen as schools, which are 'flexible bodies of thought that resist decisive falsification'. But the emergence and evolution of different theories of European integration was in fact influenced by the different phases of this complex process. The European Union has undergone economic, political and legal integration through accomplishments such as the internal market and the expansion of the number of Member States (twenty-seven at this moment). Neofunctionalism

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<sup>7</sup> See for example, Viktor Orbán, Speech at the 29th Bálványos Summer Open University (July 28, 2018), available at: [www.kormany.hu/en/theprime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-speech-at-the-29th-balvanyos-summer-openuniversity-and-student-camp](http://www.kormany.hu/en/theprime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-speech-at-the-29th-balvanyos-summer-openuniversity-and-student-camp) (accessed on 19.05.2020).

and intergovernmentalism are two dominant schools of European integration on the basis of which other theories (or their updated versions) in the later stages of the process appeared, such as liberal intergovernmentalism, institutionalism, constructivism, postfunctionalism etc.

The speed and breadth of regional integration in Europe in the 1950s and 1960s inspired the neo-functionalists led by Haas (1958) to interpret the phenomenon as a process of spill-over in which the initial decision to place a certain sector (usually non-controversial) under the authority of central (supranational) institutions creates pressure to extend this authority into other sectors of possibly greater political salience (*functional spill-over*). The second wave of the spill-over process was identified as *political spill-over* (George, 1991) where the pressure for further integration is driven by the supranational actors (such as Commission or Court of Justice) and subnational actors (interest groups or others within the Member States). Over time, regional integration will outcome if substate actors have trust that supranational institutions are more promising in achieving their mutual interests. Hence, neofunctionalism predicts that the drivers of the EU legal integration are the supranational and substate actors pursuing their own self-interest and, as the integration proceeds and supranational actors get stronger, this dynamic can take a life of its own. But the limitations of neofunctionalism were apparent by the late 1960s and when the ‘empty chair crisis’<sup>8</sup> that severely jeopardized this theory occurred and gave rise to intergovernmentalism. In the light of Charles de Gaulle’s opposition to supranationalism and accession of new members, intergovernmentalists conceived regional integration as an outcome of bargaining among national states. Hoffman (1966) claimed that the nation-state, far from being obsolete, proved ‘obstinate’, while Milward (1992) supported the thesis that EU member governments actually played the central role in the integration process.

The ‘relaunch of the integration process’ in the late 1980s and 1990s, in both its internal and external dimensions, revived the theoretical debate. Liberal intergovernmentalism combines a liberal theory of domestic preference formation with an institutionalist account of intergovernmental bargaining in which states are instrumental and driven chiefly by economic interests. Moravcsik (1993) produced the fullest version of the liberal intergovernmentalism theory. The central message is that states are the driving forces behind integration, that supranational actors are there largely at their behest, and that these actors have little independent impact on the pace of integration. It sets the foundations of *principle/agents* analysis. The core of liberal intergovernmentalism is composed of three elements, ‘the assumption of rational state behaviour, a liberal theory of national preference formation, and an intergovernmentalist analysis of interstate negotiation’. Later, Moravcsik (1998)

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<sup>8</sup> See more at Jourdain, J. (2015), *How Crucial Was the ‘Empty Chair Crisis’ in the Course of European Integration?* (retrieved from <https://www.e-ir.info/pdf/57972>, accessed on 28.05.2020).

revisited his theory and modified it in a way so as to acknowledge that supranational institutions might indeed have greater powers over agenda setting. Liberal intergovernmentalism is, in fact, a state-centric theory. As such, it has been challenged by new institutionalism (March and Olsen, 1989) and multi-level governance (Marks, Hooghe, and Blank, 1996) which can, indeed, be seen as a manifestation of new institutionalist thinking applied to the EU integration process. They cannot be considered separate theories of integration, but rather approaches. New institutionalism posited a more independent role for political institutions and argued that such institutions served to ‘define and defend values, norms, interests, identities and beliefs’ within society. Multi-level governance drew on that approach, arguing that integration was a ‘polity creating process in which authority and policy-making are shared across multiple levels of government - subnational, national and supranational’. National governments are major players in this process, but do not have a monopoly of control.

The integration theory was developed further in the late 1990s and into the new millennium. Further deepening of the integration process changed the discourse on the grand theories based on the supranationalism-intergovernmentalism dichotomy. Rather than focusing debate principally on whether it is Member States’ governments or Europe’s supranational institutions that drive the integration process, increased attention has been paid to the wide range of actors and institutions involved at different levels in lawmaking and policy-making within the European Union (Craig and de Búrca, 2011, p. 4). In this context, a range of alternatives to or variants on the dominant integration theories have emerged, such as rationalists who view decision-making as driven by the pursuit of material interests by strategic actors and constructivist approaches which lay more emphasis on the influence of norms, ideas and principles in the process of integration. In this context, the theory of social constructivism is one of the most important theories and was developed by Thomas Risse (2004). Constructivists are interested in the construction of identities and interests and, as such, take a rather sociological than economic approach. On this basis, they have argued that states are not structurally or exogenously given but constructed by historically contingent interactions (Wendt, 1994, p. 385). This has also happened in the process of European integration when the *sui generis* character was achieved as a construction within special conditions and interactions among states in a particular historical moment.

Finally, Hooghe and Marks (2008) presented a postfunctionalist theory of European integration to make sense of new developments in European politics that can neither be explained by neo-functionalism nor by intergovernmentalism. They argue (p. 2) that while regional integration might be triggered by a ‘mismatch between efficiency and the existing structure of authority’, the outcome is a result of political conflict around collective identities rather than reflecting efficiency. European integration has become a highly politicized issue, and policy makers today cannot ignore the public opinion (as cited in Kuhn, 2019, p. 1220).

### 1.1. The Court of Justice of the EU as an actor in the integration process

*It is no secret that the case law of the Court has been a major driving force towards European integration.*<sup>9</sup> European integration is predominantly considered an economic and political unification project led by economic and political institutions. Indeed, law, as a tool distinct from economy and politics, played a crucial role in integrating the Member States into the Union as we know it. It is based on a system of rules in different policy areas, binding for all Member States. Different stadiums of integration, especially those related with building an *economic* union - such as the creation of the internal market and the Euro-zone, were achieved by using *the law* as an instrument of integration. *Integration through law* (or *legal integration*) considers law not only as a system of rules that regulate the conduct of the subjects, create or prevent certain behaviours, but also as a system (or bearer) of values.<sup>10</sup> The European Union is a cooperation developed on treaties and based on the rule of law so that much of the integration between the Member States is through the process of law. Through the prism of neofunctionalists' explanation of the integrational spillover to other areas linked by something they have in common, the law is in fact the interconnecting tool (Sweet, 2005, p. 48). The possibility for non-compliance with the EU law was eradicated and further integration was enabled. The transformation of the European legal system provided tools for influence on national and supranational policies, thus creating integration through law. On the other hand, intergovernmentalists consider the law as a dependent variable (*on Member States' interests*) which reflects rather than creates, having in mind that the EU treaties are adopted by the Member States so the integration between states is based on other factors, not on law (Dehousse, 1998, p. 78). But besides the process of agreeing on treaties, rules are further implemented by the institutions that create the EU supranational structure. Hereby, the role of the Court of Justice comes to the fore. The Court's primary function is to make sure that the other institutions, as well as Member States, comply with the rules set out in the different treaties, when they act within the sphere of EU law (Bomberg *et al.*, 2008, p. 62).

The judicial development of the EU law by the Court of Justice has significantly contributed to the integration through law. In many cases, the development of the European integration can be attributed to the activity of the Court since much of the progress within the area of free movement of goods is due to the its interpretation contained in the delivered case law rather than to political decisions (Dehousse, 1998, p. 81). In the period of the so-called institutional malaise or

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<sup>9</sup> Vassilios Skouris quoted in Charlemagne (2004), Government by judges? The European Court of Justice emerges blinking into the limelight, *The Economist*, 15 January (retrieved from <https://www.economist.com/>).

<sup>10</sup> See e.g. Svensson, S. (2008), *European Integration and the ECJ The role of the European Court of Justice in the integration of the European Community* (retrieved from <http://lup.lub.lu.se/student-papers/record/1316466>, accessed on 31.05.2020).

stagnation, the Court used the method of ‘negative harmonization’ by its case law (Case 8/74 *Procureur du Roi v. Dassonville* and Case 120/78 *Cassis de Dijon*) in removing the legal obstacles and national trade barriers on the internal market which infringe the four fundamental freedoms, at a time when progress towards completing the single market (today’s internal market) through legislative harmonization was hindered by institutional inaction. Hence, the Court provided for the effectiveness of the EU law when the proper implementation of the provisions was not ensured by the institutions and the Member States. Another landmark case worth mentioning in this context is *Francovich v Italy* (Case 6/90) that established the principle of state liability in the sense that EU Member States could be liable to pay compensation to individuals who suffered a loss because of the Member State’s failure to transpose a EU directive into national law.

As interpreter of the Treaties, it is the CJEU that adjudicates on the limits of the EU competence as against the Member States. These accomplishments were achieved primarily by using the preliminary ruling procedure under Article 267 TFEU<sup>11</sup> which, in many cases, entails judicially active practice in the *majoritarian* sense<sup>12</sup> whereby the Court substitutes national public policy by replacing it with a new public policy in the form of EU legislation (Canon, 1983, p. 240). But the role of the Court regarding the European integration was not eminent only towards completing the internal market. Moreover, some of the fundamental principles of the EU law, such as direct effect and supremacy, were proclaimed by the (then) ECJ’s landmark decisions of the early 1960s - (Case 26/62 *Van Gend & Loos* and Case 6/64 *Costa v E.N.E.L.*), without having been spelt out previously in the Treaties (see e.g. Alter, 2003). In the name of preserving the *rule of law*, the Court has developed principles of a constitutional nature as part of the EU law that have defined its very nature, constitutionalizing it and distinguishing it from other international Treaties (Sweet, 2011, pp. 3-4). As CJEU stated in the mentioned landmark decisions “the (European Economic) Community constitutes a *new legal order* of international law for the benefit of which the (Member) States have limited their sovereign rights”. This allows describing the role of the CJEU not only as that of purely applying and interpreting EU law, but also contributing to its development. Furthermore, the interpretation of EU law provided by the CJEU is binding on national courts so it induces a harmonious interpretation by national courts as another instrument of integration through law. Therefore, it establishes a specific relationship between the CJEU, national courts and private litigants, which indeed encourages private litigants

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<sup>11</sup> Preliminary references from national courts or preliminary ruling procedure as a mechanism is established under Article 267 TFEU that allows national courts to seek an interpretation of the EU law, including guidance from the ECJ allowing them to assess, on their own authority, the conformity of specific national measures with the EU law. Its specific effect is legally binding interpretation of the EU law, empowering national courts to set aside non-compliant national legislation.

<sup>12</sup> Such case is the *Dassonville* case.

and national judges to pursue their own instrumental self-interest in a mutually reinforcing way (Burley and Mattli, 1993, pp. 58-65).

Scholars were particularly interested in the impact of the Court's case law on completing the single market and documented the impact of adjudicating free movement of goods provisions, in particular Article 34 TFEU<sup>13</sup>, on integration in the period between 1970 (when Article 34 TFEU entered into force) and 1986 (when the Single European Act was signed by the Member States). The methods of negative integration together with the rising tide of litigation produced a stream of decisions whose effect was to recast positive integration – *spillover* (Van Empel, 1992, as cited in Sweet, 2011, p. 137). The Court's views on 'mutual recognition', announced as dicta in *Cassis de Dijon*, were adopted by the Commission and used in their further activities towards completing the market, as the reliance on mutual recognition reduces the resources required to achieve this goal through harmonization. The Commission began to use the mechanism under Article 258 TFEU (infringement procedure) to exert pressure on the Member States. Prior to *Cassis de Dijon*, the Court had produced only two rulings in infringement proceedings on the basis of alleged violations of Article 34 of TFEU, compared with 82 suits filed by the Commission in the period after *Cassis* to the signing of Single Act, with 46 final judgments by the Court where Member States lost 85% of these cases while other suits were settled or withdrawn by defendants (Sweet, 2011, p. 138). As Kelemen (2006, pp. 101-127) has shown, with the completion of the internal market, the EU became even more rule-oriented (*rule of law*-oriented).

After the completion of the single market and defining the 'new legal order', the prevailing opinion among EU scholars in the mid-1980s was that the Court's most influential period was over. After the revival of the political process of integration leading to SEA in 1992, it was suggested that the Court should thereafter adopt a 'minimalist' role (Koopmans, 1986, pp. 930-331). Despite these expectations, new areas of friction and tension between the actors in the system have emerged and the Court has found itself, as a mitigator, in the midst of these (Sweet, 2005, p. 155). Under the Maastricht Treaty, Member States tried to limit the Court's extensive interpretation leading to the expansion of the integration process in sensitive areas, such as those within the *third pillar*, so whole areas have been excluded from the jurisdiction of the Court. But along with the protection of the four freedoms on the basis of which the single market is built, provided within the Court's case law, the focus has shifted to other areas which have not yet been under consideration, for example, human rights issues and environmental protection. By

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<sup>13</sup> Article 34 TFEU (ex Article 28 TEC) is dedicated to the prohibition of quantitative restrictions between Member States: quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.

extensive interpretation of the Treaty, the Court's case law inevitably introduced new policies and pressed for the development of legislation regarding new areas.

In the context of the above mentioned, neofunctionalist scholars have asserted the Court's legitimacy as an actor who has power and autonomy to rule against the Member States' interests (Alter, 1998, p. 121). One of the most influential work on the role of the Court in the European integration process (in a neofunctionalist manner) was produced by Burley and Mattli (1993), who demonstrated that the internal dynamics of the EU law - of litigation, jurisprudence and doctrinal discourse - have always been at the core of the politics of European integration and the Court was responsive to actors who pushed for more integration. So, the Court and the lower national courts of Member States are the key players involved in the development of a supranational legal order in the EU and the integration process itself. Explaining the spillover effect from a standpoint that constitutionalization enhanced the effectiveness of EU law, it intensified the interaction between the Court of Justice and national courts, as well as other institutions and the citizens as private litigators and encouraged the system. These claims were supported by Sweet and Brunell (1998) who provided quantitative and qualitative methods to prove the thesis on the causal connection between the constitutionalization, economic activity within the EU and development of the legal system. Maduro (1998, pp. 72-78) found that the CJEU engaged, systematically, in what he called 'majoritarian activism' and pursued a 'judicial harmonization' process that steadily put pressure on the EU organs to re-regulate certain policies at the EU level, which can be observed as spillover effect.

On the other side, however, intergovernmentalists claim that the Court simply applies Treaty provisions and rules formulated by the Member States of the EU (Hoffman, 1966) or, in other words, the Court is only carrying out their will through its interpretation. This theory undermines the (evident) role of the Court in the integration process. Having in mind the landmark cases such as *Les Verts*, *Van Gend en Loos*, and *Cassis de Dijon*, they seem to be rather inspired by the rule of law than by national interests. The Court has often ruled against (powerful) Member States. According to liberal intergovernmentalists (Moravcsik, 1998, pp. 482-490), the Court's policies make Europe quite powerful and unique as an international actor, but the Court is itself limited by the political and legal constraints imposed by Member States. Indeed, states remain important as the main political actors of the EU's decision making system and as the main agents that implement EU law. The supranational institutions are viewed as agents for the Member States, who grant power to such institutions for their own self-interest ('Principals-Agents' model). Garret (1992, pp. 533-560) recognizes the Court's contribution to market integration and overall process, but argues that the established *tools* were needed by the Member States and that the rulings are generally in accordance with the interests of powerful States. Like Moravcsik, Garrett offered its view on the integration that emphasized the primacy of state power, interests, and intergovernmental bargaining, while

denying the capacity of the EU's organs to generate outcomes that might oppose the preferences of (powerful) governments. These theoretical explanations have little support when it comes to the role of the CJEU in the integration process; moreover, the empirical data refutes such claims. Even through the prism of the principal-agent model, as Sweet claims, principals are not a unified entity and they often have divergent interests on issues on which the Court takes a position. Moreover, the CJEU has never abandoned its constitutional positions nor retreated from its doctrines.

The role of the Court in the European integration process can also be observed through the prism of constructivists, as the Court could not be seen as a non-affected actor by other social actors beside the EU's institutions or Member States, as well as other factors such as values and identity. In the background of all those Court's decisions that determined certain policies, the main efforts were directed towards protection of certain values on which the Union is founded. Landmark decisions of the early 1960s - *Van Gend & Loos* and *Costa v E.N.E.L.* that were mentioned in the context of the Court's contribution to the creation of the common market, also affirmed that the EU is not only a legal order between states or classic international organization, but a community of states and citizens. The doctrines of direct effect and supremacy of EU law recognize EU citizens and legal persons as subjects of the EU law along with the Member States. The special status of individuals in the EU legal order was confirmed by the Member States by introducing the concept of EU citizenship in the Treaty of Maastricht (1992). Also, the Court's role in expanding integration in other areas, such as fundamental rights, is an argument that supports the constructivism theory. Constructivism claims that, in contrast to material reality, social realities exist only by human agreement (Searle, 1995; Collin 1997, as cited in Christiansen *et al.*, 2001, p. 3). This accounts for social realities being both potentially 'changeable' and 'contestable', as well as durable. In this context, the role of the CJEU can be considered as a catalyst for the changeable, contestable and durable European integration process, having in mind the normative function of the CJEU respective to the stabilization and promotion of the EU integration objectives. The value-based foundation of the 'rule of law' is also in line with the constructivist theories, as it was introduced by the Lisbon Treaty in order to strengthen the EU identity.

As constructivist theories impose, the actions are guided by principles, norms and identities, not only by self-interest, as the rationalists explain (Checkel, 2001; Egeberg, 1999; Onuf, 1989; Wendt, 1999). According to constructivists, institutions shape our preferences by creating and re-creating our identities, as the CJEU delivers outcomes that result from the interaction of the concerned actors.

Following the progressive and integrative role of the CJEU, constructivists understand integration as a process unfolding primarily through law in which, therefore, rules and norms play a key role. As pointed out by Christiansen *et al.*, (1999), such rules and norms are not limited to treaties, secondary legislation and the case law of the European Court of Justice. They also encompass unwritten

administrative procedures of the policy processes, common understandings and inter-institutional agreements, as well as more informal modes of behaviour produced and reproduced every day in the political and administrative practice of the EU<sup>14</sup>.

The study of rules and norms can be set into a constructivist framework of analysis by applying Giddens's structuration theory to the European integration (see more in Christiansen et al., 2001, p. 13). The goal of this approach is to study the impact of norms on actor's identities, interest and behaviour. The polity formed through rules and norms is permanently transforming. The dynamic interaction between institutional norms and political action is an aspect of the integration process that has made in-roads into both institutional and policy analysis of the EU (Aspinwall and Schneider 2000).

Hence, the analyses on the CJEU's role as an actor in the European integration process presented above adopt the neofunctionalist thesis, while the further elaboration on its potential in overcoming the following challenges towards building a Union based on values, primarily on the rule of law, is broadly compatible with the views expressed by the constructivists.

## **2. The role of the Court of Justice of the EU in ensuring the rule of law**

As Aristotle said many centuries ago "the rule of law is much better than the rule of man". Today, the principle of the rule of law is enshrined at the core of modern constitutionalism as a founding basis of the European legal system. The most prominent international and supranational organizations such as the United Nations, Council of Europe (especially through the case law of the European Court on Human Rights) and Organization for Security and Co-operation in Europe are actively involved in promoting the rule of law and provide valuable contribution to its development, emphasizing its significance for the proper functioning of the democratic system and protection of fundamental rights. Although its content and scope is still surrounded with vagueness, it is understood as comprising three basic elements:<sup>15</sup> *government limited by law* - officials must operate within the framework of the existing law, and if they wish to change the law, they must follow the

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<sup>14</sup> See more in Barberio, V. et al., (2017), *Report on a Social Constructivist and Discursive Approach to EU Identity Emergence and Integration* (retrieved from [https://www.perceiveproject.eu/wp-content/uploads/2017/11/Del-5.1-Barberio\\_Mollona\\_Pareschi.pdf](https://www.perceiveproject.eu/wp-content/uploads/2017/11/Del-5.1-Barberio_Mollona_Pareschi.pdf) , accessed on 20.10.2020).

<sup>15</sup> See e.g. Stein, R. (2009), *Rule of Law: What Does it Mean?*. Minnesota Journal of International Law, 18.2, pp. 293-303; Tamanaha, B.Z. (2012), *The History and elements of the Rule of Law*, Singapore Journal of Legal Studies, pp. 232-247; Stimson, S.C. (2008), *Constitutionalism and the Rule of Law*, The Oxford Handbook of Political Theory, pp. 317-332; Krygier, M. (2012), *The Rule of Law*, The Oxford Handbook of Comparative Law, pp. 233-249.

prescribed procedures; *formal legality* - laws must be laid down in advance (no retroactive laws), they must be general (applicable to everyone in a similar situation), and they must be publicly available (promulgated); *rule of law, not men* - the task of applying the law must be entrusted to an independent and unbiased judiciary, which acts in a manner free of passion, prejudice and arbitrariness, and is neutral towards the parties; the judiciary also has the power of judicial review over other branches of government, ensuring that the principles of government limited by law and formal legality are duly followed. The core components of the rule of law were listed by the Venice Commission and include legality, legal certainty, equality before the law and non-discrimination, and access to justice.<sup>16</sup> In its latest Annual Report for 2019<sup>17</sup>, the CJEU states that “the rule of law is based on the premises that no one is above the law, and its essential corollaries are legality, equality before the law, legal certainty, prohibition of arbitrariness, access to justice before an independent and impartial court, and respect for human rights, which are principles guaranteed under the Charter of Fundamental Rights of the European Union”.

The Rule of Law in the European Union’s legal system has gained considerable importance and has undergone a gradual process of definition, affirmation and development, with reference to its internal and external dimension. It is not only simply extracted from the Member States’ constitutional traditions as ‘lowest common denominator’. The European model of rule of law accepted the basic elements of the generally accepted model, but also defined it in the light of the general principles on which the Union law is founded, such as EU law supremacy, protection of fundamental rights and freedoms and promotion of the rule of law in external relations. The Rule of Law is the pillar on which the Union is based and it upholds all the other values and principles<sup>18</sup>. Some EU scholars are of the view that the EU is not about values such as rule of law, democracy or human rights (Williams, 2009, as cited in Kochenov, 2017, p. 8) – supremacy and autonomy are the main characteristics of the EU as a political and legal union, and it emerged as a promoter of a particular type of constitutionalism based on the rule of law (Perju, 2012, as cited in Kochenov, 2017, p. 9). In our opinion, these principles can be seen as instrumental for ensuring the proper functioning of the *sui generis* system within the EU that stands primarily for and on these values; the rule of law is a pre-condition for these principles to be applicable.

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<sup>16</sup> Venice Commission (2016), Rule of Law Checklist, 11-12 March, Venice (retrieved from [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)007-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e), last accessed on 09.06.2020).

<sup>17</sup> Court of Justice of the European Union, Annual Report 2019, Luxembourg (retrieved from [https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/ra\\_pan\\_2019\\_interieur\\_en\\_final.pdf](https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/ra_pan_2019_interieur_en_final.pdf), accessed on 13.06.2020.).

<sup>18</sup> As the Commissioner Barosso stated in March 2014, on introducing the new framework for safeguarding the rule of law in the European Union (press release is available on: [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_14\\_237](https://ec.europa.eu/commission/presscorner/detail/en/IP_14_237)).

The rule of law lacked a clear reference in the early versions of the Treaties establishing the European Community, but was developed through the judicial activism of the ECJ and considered to be inherent to the nature of the legal system established within the European integration process even before it was actually recognized by the primary law of the Union. The first judicial reference to the rule of law was in the case known as *Les Verts* (mentioned above as a landmark case) introducing the concept of ‘Community based on the rule of law’, thus embedding the formal meaning of the rule of law as the existence of a complete system of mechanisms to ensure compliance (by the institutions and Member States) with the Treaty but also the right of individuals to judicial protection of their rights and freedoms. This possibility for individuals to seek effective judicial review is ‘of the essence of the rule of law’ in the Union (Case 72/15 *Rosneft*, para. 73). Before the codification of the rule of law in the EU primary law, the basic principles of the rule of law were laid down in early ECJ case law: four *substantive principles* of the rule of law, including the principle of *legality* (Case 7/56 *Algera*); *legal certainty* (Case 7/56 *Algera*; Case 42/59 *SNUPAT*; Case 265/78 *Ferwerda*); *confidence* in the stability of a legal situation (Case 23/68 *Klomp*, para. 12-14); and *proportionality* (Case 11/70 *Internationale Handelsgesellschaft*; Case 147/81 *Merkur*; Case 15/83 *Denkavit*); accompanied by a number of *procedural guarantees* embodying the rule of law, such as the right to *be heard* (Case 32/62 *Alvis*), the right of *defence* (Case 155/79 *AM & S Europe*), the right of *access to the file* (Case 85/76 *Hoffmann-La Roche*).<sup>19</sup> This concept promoted by the Court is similar to the rule of law paradigm conceived in the Anglo-Saxon legal tradition. As established under the case law of the Court, the rule of law concept is interconnected with the *Area of Freedom, Justice and Security* (as Second Pillar under the Maastrich Treaty) based on mutual trust and recognition of judgements in criminal and civil matters.

These elements of the rule of law, as developed by the Court of Justice of the EU and also stemming from the common traditions of the Member States but improved in the context of the Union’s law, have been codified in primary law – the Treaty on European Union (TEU) and Charter of Fundamental Rights (CFR). In 1997, the Amsterdam Treaty inserted the provision into the EU Treaty which provided that the Union is founded on the *principles* of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles that are common for the Member States (Ex-Article 6(1) TEU) – *the internal dimension*. A mechanism for taking enforcement measures in the event of a serious and persistent breach of these principles by the Member States was also envisaged (Ex-Article 7 TEU). By stipulating the mentioned provisions, these principles, including the rule of law, were introduced as founding principles of the Union as a whole. Moreover,

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<sup>19</sup> See e.g. Mańko, R. (2017), *The EU as a community of law: Overview of the role of law in the Union* (retrieved from [https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS\\_BRI\(2017\)599364](https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2017)599364), accessed on 06.06.2020).

respect for the same principles has become a necessary precondition for the admission of new Member States (Article 49 TEU), as the development and consolidation of democracy and rule of law were already established as general objectives of the Common Foreign and Security Policy under the Maastricht Treaty (1992) and required by the Copenhagen Criteria (known as Accession Criteria from 1993) – *the external dimension*. The Constitutional Treaty reviewed the formula and opted for a concept of founding *values* instead of principles.

This concept was reproduced by the Lisbon Treaty (2007) which entered into force on 1 December 2009, containing a provision known as Article 2 TEU:

“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”

As the EU values were enshrined, the Lisbon Treaty has strengthened the horizontal legal unity within the EU and supported the development of European identity. Article 7 of TEU establishes a procedure to sanction a Member State which does not uphold the values, through the suspension of membership rights. Elements of the rule of law are also codified in the Charter. In particular, Article 41 provides for the right to good administration, and Article 47 provides for the right to an effective remedy and a fair trial. Furthermore, the Lisbon Treaty also has strengthened the external dimension of the rule of law - by virtue of Article 21(1) TEU the rule of law (among other values, such as democracy and human rights) is to guide the EU action on the international scene. According to Article 21(2)(b) TEU, the EU defines and pursues its external policies and actions, inter alia to ‘consolidate and support democracy, rule of law, human rights and principles of international law’. Respect and commitment to promote these *values* continues to be, as stated in Article 49 TEU, a necessary precondition for the admission of new members in the Union. This statement leads to the conclusion that the enlargement of the Union will be based on achieving and respecting certain values: the fundamental values of the EU. The rule of law is at the core of the EU’s conditionality policy regarding the enlargement process with the Western Balkans states.<sup>20</sup>

The abovementioned rules clearly provide evidence of the fundamental character of the rule of law within the EU legal order. The Lisbon Treaty envisioned

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<sup>20</sup> Consequently, the proposal of a new methodology for the EU enlargement process prepared by the European Commission and presented on 20 February 2020 was focused on the rule of law. For further information, see: [https://ec.europa.eu/commission/presscorner/detail/en/statement\\_20\\_208](https://ec.europa.eu/commission/presscorner/detail/en/statement_20_208).

greater commitment by the Union in regard of respecting and promoting European values both internally and externally. Thus, this commitment evolves from the political will level, expressed in the preamble, to a legally binding article. Consequently, mechanisms for the protection of the rule of law as the Union's founding value will be examined with the main focus on the role of the Court of Justice of the EU, as its position as an actor in the process and contribution to the European integration was previously analysed.

## 2.1. The European Union's Rule of Law Toolkit

Insofar as its internal dimension is concerned, the respect for the rule of law challenges not only the EU, but also the institutions of Member States, whose commitment for democratic principles and constitutional values is a fundamental basis for EU membership Schroeder (as cited in Baratta, 2016, p. 359). The mechanisms which can be deployed by various institutional actors in case of a suspected breach of the rule of law by a Member State can be divided into political ones, which do not give rise to legally binding effects, and legal ones, which produce legal effects.<sup>21</sup> Political mechanisms refer to the: (1) Commission Rule of Law Framework (pre-Article 7 procedure) introduced in 2014; (2) Council Annual Rule of Law Dialogues, established in 2014; (3) Cooperation and Verification mechanism for Bulgaria and Romania, as a temporary mechanism set up in 2017. Legal mechanisms include: (1) a legally binding declaration that a Member State has violated a given rule of EU law – infringement procedure (Articles 258-260 TFEU); (2) a legally binding interpretation of the EU law confirming that a given Member State's laws, regulations or practices violate the rule of law – preliminary references from national courts (Article 267 TFEU); (3) a financial penalty imposed on a Member State (Article 260(2) TFEU) for non-respect of a judgment rendered at the end of an infringement procedure; as well as (4) the suspension of a Member State's voting rights in the EU (Article 7 TEU). Some authors claim that the last-mentioned mechanism is political due to the requirement of unanimity and the presence of a 'diplomacy feature' in the mechanism (Konstadinides, 2017, p. 163).

The existence of different procedures raises the question of which procedure should be used, i.e. the soft law instruments, such as the Commission's Rule of Law Framework or infringement procedures before the CJEU? The Rule of Law Framework was set out by the Commission in 2014<sup>22</sup> in order to prevent the emergence of a systemic threat to the rule of law, at which point an Article 7 TEU

<sup>21</sup> See more in Maňko, R. (2019), *Protecting the rule of law in the EU: Existing mechanisms and possible improvements* (retrieved from [https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS\\_BRI\(2019\)642280](https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2019)642280) , accessed on 09.06.2020).

<sup>22</sup> European Commission (2014), *Communication from the Commission to the European Parliament and the Council A new EU Framework to strengthen the Rule of Law of COM(2014) 158 final*, 11 March, Brussels.

procedure would be required. The first – and so far only – time the Rule of Law Framework was used came with the beginning of a dialogue with Poland in January 2016. The dialogue took place from January 2016 until December 2017 and the Commission adopted one opinion and four recommendations. Although the dialogue helped to identify problems and to frame the discussion, it did not solve the detected rule of law deficiencies and the Commission triggered the Article 7(1) TEU procedure in December 2017. So, under the current treaty law, the EU has two main options to tackle rule of law violations in the Member States. It may initiate infringement proceedings in pursuance of Article 258 of the TFEU or it may trigger the mechanism of Article 7 TEU by relying predominantly on decisions by political institutions. The Article 7 TEU procedure is concerned, strictly speaking, not only with the rule of law, but also with breaches of EU values. The activation of sanction mechanism requires unanimity in the Council, as the key decision maker under Article 7 TEU procedure, as well as obtaining the Parliament's consent by a two-thirds majority of the votes cast and absolute majority of Members, thus leaving space for political inertia in countering the illiberal acts in several Member States. The procedure to invoke a clear risk of a serious breach under Article 7(1) TEU has been triggered in two cases so far: in December 2017, by the Commission with respect to Poland<sup>23</sup> and in September 2018, by the European Parliament with respect to Hungary.<sup>24</sup> Since then, the Council has been dealing with the matter in both cases, but without concrete results<sup>25</sup>, while the rule of law in Poland and Hungary has worsened, as the European Parliament claims<sup>26</sup>. In the case of Poland, the Commission launched several infringement procedures against this Member State claiming that it had failed to fulfill its obligations under Article 19(1) of the TEU read in connection with Article 47 of the CFR, which enshrine the right to an effective remedy before an independent and impartial court.<sup>27</sup>

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<sup>23</sup> European Commission (2017), *Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law (COM(2017) 835 final*, 20 December, Brussels.

<sup>24</sup> European Parliament (2018), *Resolution calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL))*, 12 September, Strasbourg.

<sup>25</sup> See e.g. Michelot, M. (2019), *The "Article 7" Proceedings Against Poland and Hungary: What Concrete Effects?* (retrieved from [https://institutdelors.eu/en/publications/\\_\\_trashed/](https://institutdelors.eu/en/publications/__trashed/), accessed at 11.06.2020).

<sup>26</sup> European Parliament (2020), *Press Release from the Plenary Session of the European Parliament*, 16 January, Luxembourg (retrieved from <https://www.europarl.europa.eu/news/en/press-room/20200109IPR69907/rule-of-law-in-poland-and-hungary-has-worsened>, accessed at 11.06.2020).

<sup>27</sup> Most recently, European Commission has announced that it has launched an infringement procedure regarding the new law on the judiciary that undermines the judicial independence of Polish judges and which is incompatible with the primacy of EU law.

It can be concluded that the procedure foreseen in Article 7 TEU cannot, under any circumstances, be considered an operational or even suitable instrument to ensure the rule of law in the Member States of the EU and the observance of the values enshrined in Article 2 TEU (von Danwitz, 2014, p. 1337). In order to be operational, it has to be modified and sharpened - lower thresholds for triggering the Article 7 mechanisms have to be provided, but such actions require the revision of the Treaties. Therefore, scholars have focused on other instruments that can be made available. The CJEU enjoys considerable trust from both national courts and the public.<sup>28</sup> Consequently, by also having in mind the elaborated role of the CJEU in the European integration, especially its specific contribution to overcoming the challenges and to completing certain stages of the process, many scholars argued in favour of concentrating on judicial mechanisms – on employing the infringement procedure under Article 258 of the TFEU or to interact with brave national courts via the preliminary reference procedure (Article 267 TFEU). Their proposals are aimed at exploring the potential of the judicial mechanisms under the current Treaties to be fully functional by deploying together Article 2 TEU and Article 258 TFEU in systemic infringement actions or by operationalization of Article 2 TEU values and establishing their judicial applicability. In the next and final part of this paper, the effects and results of the Court's mechanisms for protecting the rule of law in the EU will be presented and the mentioned proposals for enhancing the judicial protection will be elaborated.

## 2.2. The Judicial Protection of the Rule of Law by the Court of Justice of the EU

As 'guardian of the Treaties', the European Commission is empowered to commence *infringement procedure* (Article 258 TFEU) against a Member State suspected of breaching the rule of law principles, if they are directly enshrined in the Treaties. The most important rules of primary EU law concerning the rule of law are Article 19(1) TEU and Article 47 CFR. According to Article 258 TFEU, the first step the Commission must take in such a situation is to deliver a reasoned opinion on the matter after giving the Member State concerned the opportunity to submit its observations (by letter of formal notice). Only if that Member State does not comply

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See European Commission (2020), *Press Release-Rule of Law: European Commission launches infringement procedure to safeguard the independence of judges in Poland*, 29 April, Brussels (retrieved from [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_772](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_772), accessed on 11.06.2020).

<sup>28</sup> According to the CJEU's Annual Report 2019, the total number of new cases brought before the Court of Justice and the General Court was greater than ever, that is, 1 905 cases (compared to 1 683 in 2018 and 1 656 in 2017).

Also, as was the case in spring 2012, standard Eurobarometer 78 showed that the Court of Justice is the only European institution trusted by a majority (after 2012, the Eurobarometer no longer includes specific data on trust in the CJEU).

with the opinion within the period laid down by the Commission, the Commission may launch a legal action against that state before the CJEU. But the infringement proceedings can only be based on the EU law - which often does not cover the relevant areas of the rule of law, which makes it much harder to address systematic problems. The *preliminary ruling procedure* (Article 267 TFEU) is the very 'keystone' of the EU judicial system (as the Court emphasized in Case 619/18, para. 45). The answer provided in the ECJ's ruling is not only binding on the individual national court which asked it but, as a precedent, it contains an authoritative interpretation of the EU law, binding on all Member States and their authorities (Craig and de Búrca, 2011, p. 456).

The first infringement case brought to the CJEU on a rule of law issue was Case 286/12 *Commission v Hungary (Compulsory retirement of judges)*, regarding the lowering of the retirement age of Hungarian judges and other legal professionals from 70 to 62 years. Technically, the Commission based its case on the Equal Treatment Directive<sup>29</sup>, but from the context, it appeared to observers that the removal of judges, prosecutors and notaries had adverse implications for judicial independence. The Court agreed with the Commission that the Hungarian compulsory retirement scheme violated the principle of proportionality, and therefore, that it was illegal under the Directive. The whole procedure (pre-litigation procedure and the procedure before the Court) took less than 1 year – it was launched on 17 January 2012 while the judgment was delivered on 6 November 2012.

The Polish example demonstrates that the jurisprudential solutions seem to prove successful. The Commission launched several infringement procedures against Poland on rule of law issues concerning the implementation of reforms of the Polish judicial system: Early retirement of ordinary judges in Poland (Case 192/18, Judgment of 5 November 2019); Early retirement of Supreme Court judges in Poland (Case 619/18, Judgment of 24 June 2019); New disciplinary regime for judges in Poland (Case 791/19, pending); as well as the newest infringement procedure regarding the new law on the judiciary of 20 December 2019, which entered into force on 14 February 2020<sup>30</sup>. In the first case, on 15 March 2018, the Commission took Poland to the CJEU on the issue of differentiated pension ages for male and female judges, as well as on the discretionary power of the Minister of Justice to extend the length of service for individual judges. The Commission not only based its case on the Equal Treatment Directive, but also on Article 19(1) TEU on judicial remedies and Article 47 CFR on access to justice. In the meantime, Poland modified its laws, providing for the same pension age for female and male judges, and

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<sup>29</sup> Council of the EU (2000), *Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation OJ 2000 L 303* (retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32000L0078>).

<sup>30</sup> See note 23. The Polish Government has two months to reply to the Letter of Formal Notice from 29 April 2020.

transferring the power to extend service from the Minister of Justice to the NCJ, but in its judgment delivered on 5 November 2019, the Court upheld the action brought by the Commission for failure to fulfil obligations and held that Poland had failed to fulfil its obligations under EU law. The launching of the infringement procedure obviously imposed pressure on the Polish government; however, the Court decided to sanction the breach of EU law.

A separate case against Poland was filed by the Commission concerning the lowering of the retirement age of Supreme Court judges (Case 619/18) and the Commission referred to the same breaches of EU law as in the previous case. In this case, the Court introduced interim measures, effectively suspending the application of the Polish legislation and reinstating Supreme Court judges. After interim measures were ordered by the Court, the Polish government immediately reversed some parts of its reforms. The measures were implemented by a separate act of the Polish Parliament of 21 November 2018, reinstating the judges in question on the authority of the Polish legislature. Poland subsequently asked the Court to close the case as devoid of purpose (since the judges had already been reinstated by the mentioned act, a request to which the Court did not agree. On the substance, Poland, supported by Hungary, argued that the contested national rules do not fall within the scope of Article 19(1) TEU nor Article 47 CFR. The Court delivered its judgment on 24 June 2019 and found that by lowering the retirement age of the judges of the Supreme Court for judges in post appointed to that court before 3 April 2018 and, by granting the President of the Republic the discretion to extend the period of judicial activity of judges of that court beyond the newly fixed retirement age, the Republic of Poland had failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU. As the Court found, the requirement that courts be independent, which is inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the Member States' common values set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded (Case 619/18, para. 58).

In the case registered at the CJEU as (Case 791/19) regarding the new disciplinary regime for judges in Poland, the Commission also applied for an expedited procedure, which is also in line with its new concept to strengthen the rule of law, as presented in the Commission Communication of 17 July 2019<sup>31</sup>.

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<sup>31</sup> European Commission (2019), *Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions Strengthening the Rule of Law within the Union: A blueprint for action*, COM(2019) 343, 17 July, Brussels, (retrieved from <https://ec.europa.eu/transparency/regdoc/rep/1/2019/EN/COM-2019-343-F1-EN-MAIN-PART-1.PDF>).

The rule of law issues that occurred in Poland were also subject to references for preliminary ruling, as many Polish courts submitted references concerning the Polish reforms restricting the judiciary. Joined Cases C-585/18, C-624/18 and C-625/18 *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* concern appeals brought by Polish Supreme Administrative Court and Supreme Court judges who launched legal action regarding the lowering of their retirement age. The referring court in all three cases – the Labour Chamber of the Supreme Court – questions the independence of the newly created Disciplinary Chamber of the Supreme Court (DCSC). After finding that Article 47 of the Charter and the second subparagraph of Article 19(1) TEU were applicable, in the judgment delivered on 19 November 2019 in an expedited procedure, the Court held that the right to an effective remedy, enshrined in Article 47 of the Charter and reaffirmed, in the anti-discrimination field, by Directive 2000/78 (‘the Anti-Discrimination Directive’), precludes cases concerning the application of EU law from falling within the exclusive jurisdiction of a court which is not an independent and impartial tribunal. The Court relied again on the principles identified in its judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*. It also made clear that although each of the factors examined, taken in isolation, is not necessarily capable of calling into question the independence of that chamber that may, however, not be true once they are taken together. The new regime for disciplinary proceedings against judges in Poland was also referenced by two Polish judges who have sought guidance from the CJEU as to whether it meets the requirements of judicial independence under Article 19(1) TEU (joined Cases C-558/18 and C-563/18 *Miasto Łowicz v Wojewoda Łódzki*) but the request was found inadmissible.<sup>32</sup>

The mentioned cases show that governments in backsliding Member States remain responsive to the CJEU’s decisions. Also, they support the neofunctionalists’ views on the interaction between the national courts and the CJEU that caused further integration as the trust between judges is a new mechanism for enhancing the cooperation and compliance by national courts with the CJEU jurisprudence, promoting the Court in its role as a supreme adjudicator in the EU law system. In the context of the rule of principle, references to the CJEU used by the national courts are even more significant as the “accused” Member State is given a chance to defend itself and such possibility ensures a certain equality of arms, which is an element of the rule of law in itself (Spieker, 2019, p. 1197). In 2019, CJEU also delivered other interesting rulings on the concept of the rule of law – it found that, by contrast with the Prosecutor General of Lithuania and public prosecutors in France, German public prosecutor’s offices did not provide a sufficient guarantee of independence to be able

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<sup>32</sup> Whereas the legal questions fall within the scope of EU law (Article 19 TEU), they are nonetheless inadmissible, because the judges have failed to explain in what way the national legislation in question would affect their independence and have not provided any factual or legal elements to substantiate the need for a preliminary ruling for resolving the cases with which they are dealing.

to issue European arrest warrants (Judgment of 27 May 2019, *OG and PI*, C-508/18 and others; Judgment of 12 December 2019, *JR and YC*, C-566/19 PPU and others). These judgments are contrary to the intergovernmentalists' theory on prevailing interests of Member States, especially the most powerful ones. Another comment can be made about the classification of the infringement procedures regarding the rule of law issue - Case 286/12 *Commission v Hungary* as the first infringement case in that regard in the 2012 Annual Report on the Judicial Activity of the CJEU was classified as a case concerning the field of *Social Policy*, while the infringement cases against Poland are registered as cases against the Right to an impartial tribunal and a fair trial.

### **2.3. Possible Enhancements of the CJEU's Mechanisms for Protecting the Rule of Law within the Current Treaty Law**

However, the CJEU did not assess the rule of law in Poland in a systematic manner but left this task to the Member States' courts whose decentralized control could lead to diverging or incompatible decisions throughout the EU judicial space. One of the most remarkable cases on the rule of law is *Associação Sindical dos Juízes Portugueses* (Case 64/16) in which the Court adjudicated on the validity, in the light of the principle of judicial independence, of salary reductions applied to the judges of the Court of Auditors, Portugal. The National court sent a reference for preliminary ruling, asking the Court whether those measures were compatible with Article 19 TEU and Article 47 of the Charter. First of all, the Court pointed out that Article 19 TEU gave concrete expression to the value of the rule of law stated in Article 2 TEU. In that regard, it should be noted that mutual trust between the Member States and, in particular, their courts and tribunals is based on the fundamental premise that Member States share a set of common values on which the European Union is founded, as stated in Article 2 (para. 30). As the Court emphasized, the European Union is a union based on the rule of law in which individual parties have the right to challenge before the courts the legality of any decision or other national measure relating to the application of a EU act (para. 31). Article 19 in relation with Article 2 Article 19 TEU entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals (para. 32). Consequently, national courts and tribunals, in collaboration with the Court of Justice, fulfil a duty, jointly entrusted to them, of ensuring that, in the interpretation and application of the Treaties, the law is observed (para. 33). The Court established the Member States' obligation to guarantee the judicial independence of de facto the whole national judiciary irrespective of any specific link to EU law (para. 34).

The contribution of this judgment to the EU law, in general, and to the rule of law, in particular, is that without the principle of judicial independence, no effective judicial protection may be provided, nor may the uniform interpretation and

application of EU law be guaranteed. The Implementation of the EU law is based on the independence of the EU judicial system including the national courts. But the most important element of this judgment is the recognition of Article 2 TEU as a judicially applicable provision before the Court. As Spieker (2019, p. 1202) claims, the Court opted for a combined approach, operationalizing Article 2 TEU through a specific provision of EU law – particularly Article 19, as the Court states that “Article 19 TEU gives concrete expression to the value of the rule of law stated in Article 2”. In his opinion, this allows to review and sanction any Member State action violating the Union’s common values in judicial proceedings before the CJEU, although the Court opted for a combined approach – operationalization of Article 2 TEU through a specific provision of EU law. This approach could be extended to any norm of EU law containing a specific obligation and giving expression to a value enshrined in Article 2 TEU as the Court did in *Minister for Justice and Equality* (Case 216/18) where it establishes a nexus between the essence of Article 47 CFR and Article 2 TEU. Violations of operationalized Union values can reach the CJEU via infringement proceedings initiated by the Commission (constellation in *Commission v Poland*) but also through preliminary reference procedures.

Scholars were inspired by the Court’s innovative stance and thus developed several proposals to strengthen the role of the Court in protecting the rule of law in the EU and fostering the European integration process. Closa, Kochenov and Weiler (2014, p. 9) also outlined the combined approaches: a) deploying Article 2 TEU in combination with 19 TEU; b) deploying Article 2 TEU in combination with 258 TFEU; c) adding fines along the lines of Article 260 TFEU. The first approach was actually employed by the Commission in the infringement proceedings against Member States. The second approach is based on the premise that Article 2 TEU can be taken as a rule, not just as a mere declaration but a legally binding article. It is noted that while the earlier Treaties kept the EU values out of the jurisdiction of the Court of Justice, the Lisbon Treaty subjects Article 2 TEU to it, which suggests that a breach of EU values could also be addressed through a legal approach. Kim Lane Scheppele (2013) proposes violations of the rule of law to be tackled in a ‘systemic infringement action’ which would allow gathering together numerous examples that Article 2 TEU is being seriously violated in a Member State and then it should be proceeded within the Article 258 TFEU. The main argument is that “the whole is more than the sum of the parts” and that the set of alleged infringements rises to the level of a systemic breach of basic values such as the rule of law, having in mind that this logic is often used by the Court in its judgments.<sup>33</sup> This proposal is a simple

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<sup>33</sup> For example, in one of the abovementioned cases C-585/18, C-624/18 and C-625/18 A. K. and Others (*Independence of the Disciplinary Chamber of the Supreme Court*) although each of the factors were examined, in isolation, is not necessarily calling into question the independence of that chamber, that may, however, not be true once they are taken together (para.153).

extension of an existing mechanism - the infringement action and if the CJEU confirms the systemic element of the infringement action and finds a violation of Article 2 TEU, compliance should be assessed in a way that addresses both the particular infringements and the larger breach of EU values. A systemic infringement action would enable the Commission to signal to the Court of Justice a more general concern about deviation from core principles than a single infringement action, by providing evidence for a pattern of violations. Adding Article 260 TFEU, sanctions would address the larger threat to the values of Article 2, not just small adjustments to correct individual violations and, at the same time, financial sanctions could be imposed, too.

Scheppele's suggestion on recognizing the systemic attacks on the rule of law instead of targeting only individual issues received significant support. Relying on this proposal, Petra Bárd and Anna Śledzińska-Simon (2019) examine the great potential of the rule of law infringement in tackling rule of law backsliding in the Member States, providing what rules should be applied.<sup>34</sup> First, the European Commission should identify the rule of law problem explicitly. Second, it should not waste time and postpone its legal actions, while a Member State openly violates the rule of law. Third, the CJEU should automatically prioritize and accelerate infringement cases with a rule of law element to avoid more harm being done by those in power. Fourth, interim measures should be used to put an immediate halt to rule of law violations that can culminate in grave and irreversible harm. Fifth, EU institutions should establish a periodic rule of law review. It should help them to determine if there is a systemic threat to the rule of law in a given Member State, and provide additional legitimacy to the European Commission for initiating rule of law infringement actions and to the CJEU for ruling on such matters. The rule of law mechanism could indicate when to start rule of law infringement procedures or whether it is necessary to request interim measures.

The technique proposed by Scheppele, was also taken by Dimitri Kochenov (2015) on the basis of which he developed the 'biting intergovernmentalism theory' that suggests using direct actions by Member States against other Member States violating the rule of law in a systematic manner and reinvention of Article 259 TFEU

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<sup>34</sup> In their opinion, in *Minister for Justice and Equality v. LM* (Case 216/18), the CJEU made a categorical mistake: it interpreted the case solely as a violation of the right to a fair trial and asked the executing court deciding on a surrender to engage in an assessment of the degree of an infringement of this right. The High Court judge in Ireland made a referral to the CJEU while refusing a warrant to extradite a Polish citizen on the grounds that the Polish government had undermined the independence of its court system. In July 2018, the CJEU issued a preliminary ruling that a judge should not implement a European arrest warrant to another EU Member State if they have reason to believe that this state's judicial system is compromised and if the extradited person would not face a fair trial. Thus, it sets up the court's right to query a EU Member State's justice system and lays down criteria for assessing judicial independence.

to make it a viable rule of law enforcement tool. He explores the potential of Article 259 TFEU, allowing for direct actions brought by the Member States of the EU against other Member States in the context of the enforcement of the rule of law in the Member States deviating from the principles of Article 2 TEU. Such direct action by a Member State against other Member States will be brought in the form of ‘systemic infringement actions’ before the CJEU and in his opinion, it could make a difference in the world of enforcement of the promise of compliance with the very basics contained in Article 2 TEU.

The presented proposals reveal that the existing legal mechanisms under the jurisdiction of CJEU have great potential in protecting the rule of law in the European Union. Such rule of law mechanisms do not require revisions of EU Treaties, but more effective and proactive use of the existing legal and procedural tools.

## Conclusions

It has been clear from the very beginnings of the Communities as predecessors of today’s European Union that, to succeed, the European integration process needs a common basis of values to secure a degree of homogeneity amongst the Member States. The EU values are supposed to be the basis for a common European ‘way of life’, facilitating integration towards ‘full’ Union. Today, the EU promotes itself as a key actor in guaranteeing fundamental rights, democracy and rule of law in Europe. As the legal framework of EU law stands today, the rule of law, alongside democracy and human rights protection, is one of the values commonly shared by the Union and its Member States. Thus, the European Union has to reinvent itself in order to explore new horizons for an ever-closer Union and the ‘integration through the rule of law’ is the only way forward (Lenaerts, 2020, p. 34). The Lisbon Treaty has introduced the EU’s fundamental values as rules which create legal obligations and parameters for both - the sanctioning mechanism under Article 7 TEU regarding breach of rule of law by Member States and the admission procedure for new Member States under Article 49 TEU. A failure to respect and comply with the common European values – primarily the rule of law - would be a step towards secession from the EU. Respect for the rule of law in the Member States is also a responsibility of the EU institutions and the EU and its citizens will only benefit if the EU strives to protect its core value.

The first part of this paper examined the progressive and influential role of the Court of Justice of the EU regarding the integration process and it was confirmed that, in more than sixty years of the functioning of this institution, it served only to the interests of the integration process. Hence, it supported the thesis that the CJEU could be the main actor in the process of overcoming the following challenges, namely the protection of the rule of law in the EU. Recent years have shown that the Court seems more than willing to protect this common value basis against illiberal developments in the Member States and is now hearing cases with major implications for illiberal governments. As the second part of this paper has shown, the judgment in *ASJP*

especially represents a decisive step towards a strong ‘Union of values’ and, due to its significance, it can be observed as a landmark case in the same line with *Gend en Loos*, *Costa/ENEL*, or *Les Verts*. The EU’s strong commitment in the Union with regard to respecting and promoting the rule of law both internally and externally found its expression in the Court’s legal methodology and reasoning. As *The Economist* points out in 2018<sup>35</sup>, ‘Judges in Europe have often been able to get to the parts that governments cannot reach’ and ‘as the EU clashes with governments that undermine the rule of law, the ECJ may be about to help again’.

Finally, there are possibilities for the Court to take even more decisive stances in protecting the rule of law in the European Union under the current legal mechanisms, even without any revision of the EU Treaties. It can be legitimately expected that the CJEU will once again prove that the creative judicial development of the law has been an accepted feature of its legal reasoning since the very beginning and it must apply especially in situations of unprecedented challenges that threaten the EU’s very foundation.

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<sup>35</sup> The Economist (2018), *Hear Luxembourg roar: The EU’s top judges take on Poland*, April 26 (retrieved from <https://www.economist.com/europe/2018/04/26/the-eus-top-judges-take-on-poland>, accessed on 14.06.2020).

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