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Corresponding Author	Family Name	**Perez**
	Particle	
	Given Name	**Cristina Saenz**
	Suffix	
	Division	
	Organization/University	University of Leeds, School of Law
	Address	Leeds, UK
	Email	C.SaenzPerez@leeds.ac.uk
Abstract	The chapter examines the impact of this multi-level judicial engagement on tackling rule of law violations at Member State level, while considering the dangers of an over-reliance on the judicial enforcement of the rule of law. This judicialisation of the rule of law has contributed to the operationalisation of substantive safeguards of the rule of law, such as the right to a fair trial under Article 47 Charter of Fundamental Rights of the European Union (CFR) or the right to effective remedies under Article 19(1) Treaty on European Union (TEU). However, the role of the CJEU as the primary enforcer of the rule of law presents risks of politicisation that are, arguably, the result of the ineffectiveness of EU political enforcement tools under Article 7 TEU. Instead, the CJEU through the preliminary reference mechanism and infringement proceedings (vertical judicial dialogue) and Member States' courts in their horizontal judicial dialogue contributes to bridging this gap and enforcing fundamental rights as safeguards of the rule of law.	

Judicialising the Rule of Law Through the Preliminary Ruling

Cristina Saenz Perez

1 Introduction

The rule of law crises experimented by some EU Member States have exposed pre-existing contradictions in the definition of the rule of law and inadequacies in its enforcement mechanisms within the EU (Kelemen and Blauberger 2016; Müller 2015; Kochenov and Pech 2015). This chapter analyses these controversial issues and evaluates how the preliminary reference is contributing to settling these contradictions. Relying on judicial dialogue, the preliminary ruling regulated in Article 267 of the Treaty on the Functioning of the European Union (TFEU) is becoming instrumental to flagging systemic deficiencies of the rule of law at Member State level. This process has been favoured by the ineffectiveness of the political enforcement instrument of the rule of law in Article 7 of the Treaty of the European Union (TEU). The high majorities required by this provision (unanimity in the European Council to determine "the existence of a

C. S. Perez (✉)
University of Leeds, School of Law, Leeds, UK
e-mail: C.SaenzPerez@leeds.ac.uk

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serious and persistent breach by a Member State of the values referred to in Article 2 (TEU)" and qualified majority in the Council to adopt sanctions) have limited the effectiveness of this political instrument. Instead, the preliminary reference mechanism is emerging as an alternative to analyse the compatibility of systemic violations of the rule of law at Member State level with EU law.

Although there have been examples of rule of law violations at EU level throughout its history, the systemic breaches analysed in this chapter exceed isolated reforms which may challenge specific safeguards of this founding value of the EU. This analysis is focused on articulated programmes of legislative or constitutional reforms aimed at weakening internal checks and balances that shape the separation of powers at Member State level (Pech and Scheppele 2017). Examples of these reforms can be found in the constitutional amendments introduced by Hungary[1] or the legislative reforms completed in Poland.[2] These comprehensive processes pose a threat to founding values of the EU such as democracy or the rule of law that EU political institutions (primarily the European Commission and the Council) struggle to contain. It is for this reason that examining the vertical judicial dialogue facilitated by Article 267 TFEU as a rule of law enforcement tool is more pertinent than ever. This analysis starts by defining the rule of law as a founding value and constitutional principle of the EU in Sect. 2 to, then, examine its relevance to the functioning of the preliminary reference mechanism in Sect. 3. Building on this analysis, Sect. 4 outlines how the preliminary reference is emerging as a rule of law enforcement tool, whereas Sect. 5 consider its limitations beyond the areas in which primary legislation is being implemented, such as the Area of Freedom, Security and Justice (AFSJ).

2 Defining the Rule of Law

The rule of law constitutes a founding value of liberal democracies and, as such, one of the constitutional principles shared by EU Member States. However, defining its scope and meaning is far more complex. On the one

[1] On the rule of law backsliding in Hungary: Scheppele, *Understanding Hungary's Constitutional Revolution*,

[2] On the rule of law backsliding in Poland: The Venice Commission for Democracy through Law, Opinion on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, CDL-AD(2016)001 of 11 March 2016; Sadurski, *How Democracy Dies (in Poland)*.

hand, the rule of law encompasses multiple legal principles that define the ideal of a democratic state (Waldron 2008). It is for this reason that the rule of law is conceived as umbrella concept that includes different sub-principles, such as legality, judicial review, or fundamental rights (Pech 2010, 369). On the other hand, choosing the values or principles that are contained within this 'umbrella' determines the conception and priorities that are pursued through the rule of law. Widely speaking, this decision is determined by the adscription to 'thick' or 'thin' conceptions of the rule of law (Williams 2010, 73).

Thin conceptions of the rule of law are also conceived as formalistic definitions that equate it with the principle of legality. This notion is in line with Raz's definition of the rule of law that conceived it as an obstacle to the exercise of arbitrary power (Raz 1979). For this goal to be achieved, laws should comprise the following characteristics: these should be prospective, adequately publicised, clear, and relatively stable, whilst law-making should be guided by open, stable, clear, and general rules (Raz 1979). Thick definitions of the rule of law, instead, define a more substantive notion of the rule of law that encompasses guarantees, such as the principles of equality, human dignity, or the protection of human rights (Raz 1979). For instance, Allan states that the separation of powers, the principles of legality, judicial review, or judicial independence should be accompanied by substantive safeguards, such as the protection of civil and political rights (Raz 1979). Other authors go beyond this definition and incorporate social, cultural, and economic rights as essential safeguards of the rule of law (Weeramantry 2000, 53). These discrepancies regarding the scope and meaning of the rule of law also exist within EU law, complicating any analysis of its enforceability and nature.

Under Article 2 TEU, the rule of law has now been enshrined to the status of a founding value of the EU, together with "respect for human dignity, freedom, democracy, equality and respect for human rights, including the rights of persons belonging to minorities". This provision does not provide a definition of the rule of law and requires, instead, a wider analysis of the CJEU's case law to clarify what is the understanding of this value within the EU to, then, examine its possible enforcement. Traditionally, the definition of the rule of law has been influenced by the primary objective of the EU (the creation of an internal market) and its development after the Cold War in which the EU and its liberal conception of Western democracies seemed uncontested. In this context, the CJEU developed a notion of the rule of law that was essentially linked to

a formalistic or thin definition. According to this view, the rule of law constituted, primarily, an instrument to ensure the coherence of the EU project, according to which the guarantees of uniformity, primacy, and effectiveness of EU law required that Member States were constrained not by the use of force but by the primacy of the law (Bertea 2005).[3]

The CJEU examined this thin notion of the rule of law in its early rulings in *Van Gend and Loos*[4] or *Costa v Enel*.[5] These judgements established the creation of a new legal order of international law that binds Member States and individuals.[6] This "new legal order" followed a formalistic view of the rule of law, according to which EEC institutions and Member States were subject to EEC law. This definition was linked to guaranteeing the integrity of the internal market, as "there can be no unified market without a common law, no common law without a uniform interpretation, no uniform interpretation unless the common law takes precedence".[7] These initial definitions of the rule of law guaranteed the consistency of EEC law but did not consider substantive safeguards of this value, such as the protection of fundamental rights. The priority was to guarantee the functioning of the internal market.

The Court's first attempt at providing a comprehensive definition of the rule of law as a principle of EEC law appears in *Les Verts*.[8] According to this judgement, "the European Economic Community is a community based on the rule of law, inasmuch as neither its member states nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the treaty".[9] In other words, the Court concluded that the EEC had set up a system based on the rule of law, whereby all decisions adopted by Member States and its own institutions were subject to judicial review. Ultimately, the existence of a system of effective remedies had the aim of guaranteeing the consistency and uniform interpretation of EEC law. The

[3] See also President Commission lecture,"Uniting in peace: the role of law in the European Union". Available online at https://cadmus.eui.eu/bitstream/handle/1814/22135/JMLecture25_BarrosoEUI.pdf?sequence=1 last accessed 30 September 2021.

[4] Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

[5] Case 6/64 *Flaminio Costa v E.N.E.L.* [1984] ECR 585.

[6] *Costa v Enel* (n 17).

[7] President of the ECJ Robert Lecourt, "Speech on the X anniversary of the ECJ" (1968) EC Bulletin 12-1986, 23.

[8] Case 294/83 *Parti écologiste "Les Verts" v European Parliament* [1986] ECR 1339.

[9] Ibid., para 23.

Court followed here a formalistic conception that considers that "the key to the notion of the rule of law is the reviewability of decisions of public authorities by independent courts" (Jacobs 2007, 35). Its priority was to maintain the supremacy and uniformity of EU law.

The EU's compliance with this thin conception of the rule of law has been questioned within the field of Justice and Home Affairs (JHA) in which the option of review through the preliminary reference mechanism was limited before the Lisbon Treaty (Peers 2001). Such limitations were removed by this Treaty, but these still remain within the Common and Foreign Security Policy (CFSP) despite the CJEU's emphasis on the status of the rule of law in the *Kadi* saga.[10] Within these areas, nonetheless, the Court prioritises a formalistic interpretation of the rule of law that is tied to Article 19(1) TEU. According to this provision, "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law". This interpretation of Article 19(1) TEU seeks to guarantee that EU law is uniformly and effectively applied across the EU, which is achieved through a system of effective remedies at Member State and EU levels.

Despite the prevalence of this thin or formalistic view of the rule of law, recent case law and institution documents show an evolution towards a substantive definition consistent with the status of fundamental rights within the EU constitutional framework. A systematic interpretation of Article 2 TEU, for instance, would require that the rule of law is interpreted together with other values, such as human rights, human dignity, freedom, democracy, or equality. The CJEU has analysed this connection,[11] acknowledging that "the review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a Community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system".[12] This demonstrates that judicial review as a safeguard of the rule of law may also be instrumental to protecting fundamental rights when EU law is being implemented. This CJEU's case law in these areas

[10] Joined cases C-402/05 and C-415/05 *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-06351 (*Kadi I*); Joined Cases C-584/10, C-593/10 and C-595/10 *European Commission and Others v Yassin Abdullah Kadi* ECLI:EU:C:2013:518 (*Kadi II*).

[11] Lenaerts, *The Kadi Saga*, 707-715.

[12] *Kadi I*, para 316.

ties a formal interpretation of the rule of law that prioritises the uniformity and effectiveness of EU law to the protection of fundamental rights when EU law is being implemented, reflecting a thicker or substantive conception of the rule of law. This is consistent with definitions developed by the Commission, according to which the "[the rule of law] makes sure that all public powers act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts".[13] However, the actionable nature of the rule of law remains essentially connected with Article 19(1) TEU and the right to an effective remedy.

3 The Preliminary Reference Mechanism and the Definition of Judicial Independence

The preliminary reference mechanism has played an essential role in defining the meaning and limits of the rule of law within the EU. This mechanism sets in motion a process of judicial dialogue between the CJEU and national courts that has contributed to defining the fundamental principles of EU law, for example supremacy or the right to an effective remedy (Tridimas 2003, 11). At the same time, the preliminary reference as an instrument that guarantees the uniform and effective implementation of EU law is essential to the guarantee of the formal or thin conception of the rule of law. One of the essential components of this thin notion of the rule of law, namely the judicial independence of courts, constitutes a precondition to the operation of the preliminary reference mechanism.[14]

The preliminary reference mechanism relies on the sincere cooperation and mutual trust that must exist between EU courts provided that two requisites are met. First, the Member State court must identify a relevant question of EU law that needs clarification.[15] Second, the referring court must be an 'EU court' within the meaning of the CJEU.[16] The notion of what constitutes an EU court was first examined in *Broekmeulen*.[17]

[13] European Commission, *A new EU Framework to strengthen the Rule of Law* (Communication) COM/2014/0158 final, 4.

[14] Case C-54/96 *Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH* [1997] ECR I-04961, para 23.

[15] TFEU, art 267; Case C-224/01 *Gerhard Köbler v Republik Österreich* [2003] ECR I-10239, para 118.

[16] *Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH* (n 29).

[17] Case C-246/80 *C. Broekmeulen v Huisarts Registratie Commissie* [1981] ECR 2311.

According to this decision, an EU court must fulfil the following requirements: decide in proceedings that could affect the exercise of Community rights, operate with the consent of public authorities and with their cooperation, and deliver decisions which are final in matters concerning Community law after a proceeding *inter partes*.[18] The Court's case law delimiting what constitutes an EU court under Article 267 TFEU has been developed in subsequent cases. According to it, a court or tribunal can refer questions to the CJEU if it is established by law and permanent, has compulsory jurisdiction, rules in proceedings *inter partes*, applies rules of law, and is independent.[19] This last requirement constitutes one of the essential safeguards of formal notions of the rule of law which may be questioned by national reforms that seek to undermine its protection at Member State level.

Judicial independence under Article 267 TFEU must be interpreted in accordance with the guidelines provided in the context of Articles 19(1) TEU and 47 CFR, which include internal and external safeguards against interference. If these requirements are not fulfilled, a court cannot be considered an EU court for the purposes of the preliminary reference, and thus, it cannot engage in a vertical dialogue with the CJEU.[20] The Court has an abundant case law that examines the relevance of external protections of judicial independence that, if removed, limit the capacity of a judicial body to act as an EU court.[21] These guarantees include the protection against arbitrary removal from office[22] and the provision of a level of remuneration commensurate to the tasks undertaken.[23] For instance, the Court has ruled that the elimination of safeguards against arbitral removal from office undermines the capacity of national courts to submit preliminary references under Article 267 TFEU.[24] In contrast, this possibility would challenge the coherence of EU law, as it would increase the risk of

[18] Ibid., para 17.

[19] Case C-394/11 *Valeri Hariev Belov v CHEZ Elektro Balgaria AD and Others* of 31 January 2013, ECLI:EU:C:2013:48, para 38.

[20] Ibid..

[21] Case C-503/15 *Ramón Margarit Panicello v Pilar Hernández Martínez* of 16 February 2017 ECLI:EU:C:2017:126, paras 36-43.

[22] Case C-619/18 *European Commission v Republic of Poland* of 24 June 2019 ECLI:EU:C:2019:531, para 45.

[23] Case C-64/16 *Associação Sindical dos Juízes Portugueses* of 27 February 2018 ECLI:EU:C:2018:117, para 43.

[24] Joined Cases C-558/18 and C-563/18 *Miasto Łowicz v Skarb Państwa — Wojewoda Łódzki and others*, Opinion of Advocate General Tanchev, ECLI:EU:C:2019:775, para 92.

fragmentation when national courts lose access to the CJEU through the preliminary reference mechanism.[25] It is an instrumental interpretation of the rule of law as a formal value of the EU which confers jurisdiction to the CJEU to examine the independence of the referring court.

At the same time, the preliminary reference can examine whether a national reform guarantees the independence of the judiciary, as this also constitutes a pre-requisite of the right to an effective remedy under Article 19(1) TEU. In *Associação Sindical dos Juízes Portugueses*,[26] the CJEU held that EU courts must fulfil EU standards of independence and impartiality to be able to provide effective remedies and guarantee the enforcement of EU law. In this case, the CJEU had to examine whether the measures adopted by the Portuguese legislature to reduce the remuneration of Court of Auditors' judges were compatible with Article 19(1) TEU. These measures, adopted in the context of the austerity measures implemented by Portugal during the financial crisis, were challenged by an association of judges who brought an annulment action in front of the Portuguese Supreme Court. This association alleged that national measures reducing the salary of the judges of the Court of Auditors challenged the principle of judicial independence. Following these allegations, the Supreme Court of Portugal referred a question to the CJEU asking about the compatibility of these national measures with Article 19(1) TEU.

In its decision, the Court did not deem these measures incompatible with EU law, but it held that Article 19(1) TEU imposes obligations on national courts adjudicating in fields covered by EU law.[27] According to the CJEU's case law, Article 19(1) TEU guarantees the independence and impartiality of the national judiciary in the fields covered by EU law. This provision "gives concrete expression to the value of the rule of law stated in Article 2 TEU",[28] insofar as it guarantees the judicial review of national decisions in areas covered by EU law. Conversely to Article 47 CFR, which permits the review of the independence of national courts when substantive EU provisions are being implemented, Article 19(1) TEU widens this possibility to situations of national courts that may eventually interpret EU law (Krajewski 2018, 404). In any case, both provisions have

[25] *European Commission v Republic of Poland* (n 37) para 45.
[26] *Associação Sindical dos Juízes Portugueses* (n 38) paras 32-34.
[27] *Associação Sindical dos Juízes Portugueses* (n 38) paras 34-38.
[28] Ibid., para 32.

developed equivalent notions of judicial independence,[29] according to which the judiciary must be protected against internal and external pressures.[30] Externally, the judiciary must be safeguarded against any intervention or pressure, particularly from the executive, liable to jeopardise the independent judgement of its members[31] (including salary reductions).[32] Internally, the independence of the judiciary requires impartiality that is equated to objectivity and absence of conflict of interest with the case adjudicated.[33] These requirements guarantee that EU courts can participate in the vertical dialogue with the CJEU under Article 267 TFEU and provide effective remedies under Article 19(1) TEU.

4 The CJEU as an Enforcer of the Rule of Law

The preliminary reference has emerged as a powerful instrument to enforce the rule of law in the context of the populist regimes of Poland and Hungary, where it has filled the gap left by the ineffectiveness of political enforcement tools. An example of its implementation as a rule of law enforcement mechanism is found in *Minister of Justice and Equality v LM*,[34] in which the Court limited the enforceability of the European arrest warrant system (EAW) due to the existence of systemic violations of the rule of law in the issuing state (Poland). In this decision, the CJEU analysed the effects of judicial reforms that impair the capacity of the issuing court to guarantee the accused's right to a fair trial under Article 47 CFR on the execution of EAWs. In such cases, the Court refused a suspension of the system of horizontal judicial cooperation which characterises the AFSJ.[35] Instead, it established that the executing court should examine the effect that such systemic violations of the rule of law may have of the individual surrendered before refusing the execution of the EAW. This analysis built on the CJEU's judgement in the joined cases of *Caldararu and*

[29] Case C-506/04 *Wilson v Ordre des Avocats du Barreau de Luxembourg* [2007] ECR I-08613.

[30] Ibid. paras 51-53.

[31] Ibid. para 51; Case C-103/97 *Köllensperger and Atzwanger* [1999] ECR I-551, para 21; Case C-407/98 *Abrahamsson and Anderson* [2000] ECR I-5539, para 36.

[32] *Associação Sindical dos Juízes Portugueses* (n 38) para 45.

[33] *Wilson* (46) para 52; *Abrahamsson and Anderson* (n 48) para 32.

[34] Case C-216/18 *Minister for Justice and Equality v LM* of 25 July 2018, ECLI:EU:C:2018:586.

[35] Ibid. para 34.

Aranyosi,[36] which articulated as a two-stage test to evaluate situations in which the fundamental rights of the individual surrendered may be at risk.

In the first stage, the executing court has to examine whether there are "systemic or generalised deficiencies concerning the judiciary of that Member State, such as to compromise the independence of that State's courts".[37] During this first stage, the executing court could examine the Commission's reasoned proposal adopted against Poland under Article 7(1) TEU as an evidence of these systemic violations.[38] Once this first stage has been completed, the executing court has to analyse "whether, in the particular circumstances of the case, there are substantial grounds for believing that, following his surrender to the issuing Member State, the requested person will run that risk".[39] During this second stage, the CJEU empowers the executing court to examine the independence of another national court, turning the executing court into an enforcer of the rule of law. In these judgements, the conception of the rule of law is substantive and linked to the right to a fair trial: if the issuing court is not independent, then the individual's right to a fair trial in the Member State of surrender may be at risk.[40]

However, in recent preliminary references, the CJEU has gone a step further and characterised the independence of the judiciary as a requirement that defines the status of the issuing judicial authority under Article 6(1) of the Framework Decision on the European Arrest Warrant (FDEAW).[41] According to this case law, the independence of the issuing authority constitutes a pre-requisite so that a Member State authority can issue EAWs.[42] In this case law, the CJEU reproduces the standards set under Articles 267 TFEU and 19(1) TEU, according to which a Member State court has to be independent and impartial in order to be considered an EU court capable of establishing a judicial dialogue with the CJEU or provide effective remedies.

[36] Joined Cases C-404/15 and C-659/15 *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* of 5 April 2016, ECLI:EU:C:2016:198.

[37] *Minister for Justice and Equality v LM*, para 68.

[38] Ibid. para 69.

[39] Ibid. para 68.

[40] Ibid. para 79.

[41] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L 190/1.

[42] Joined cases C-354/20 and C-412/20 *L and P* of 5 February 2021, ECLI:EU:C:2020:1033 (*Openbaar Ministerie*).

The CJEU analysed the status of the issuing court in the context of a preliminary reference issued by the Amsterdam District Court when executing an EAW in the so-called *Openbaar Ministerie* decision.[43] In this case, the CJEU had to decide whether the issuing Polish court was affected by national reforms that might compromise its judicial independence and whether such events questioned its capacity to issue EAWs. In this decision, it held that an 'issuing court' within the meaning of Article 6(1) FDEAW must conform to EU standards of independence and impartiality in the execution of its responsibilities.[44] In other words, the concept of 'issuing judicial authority' under the FDEAW is linked to a formal notion of the rule of law that requires that the independence of national authorities is safeguarded.[45] This analysis had already been developed in previous cases in which the CJEU had to establish whether public prosecutors or police authorities fulfilled EU independence and impartiality standards to be deemed issuing judicial authorities.[46] In these analyses, the Court considered whether the functional dependence of public prosecutors from the executive could affect their ability to guarantee the fundamental rights of the accused in cross-border proceedings. These standards set by the CJEU are, then, implemented by executing courts in a decentralised manner, with national courts examining the judicial independence of equivalent courts in other Member States.

Beyond the AFSJ, the preliminary reference mechanism has become essential to analyse judicial reforms adopted by Member States. *A.K. and Others*[47] is a clear example of how this mechanism may be used to examine such reforms in areas in which Member State courts are not implementing EU law (Zelazna 2019).[48] In this case, the analysis concerned the compatibility of Disciplinary Chamber created within the Polish Supreme Court with EU requirements of independence and impartiality. In this decision,

[43] Ibid.

[44] Ibid. para 38.

[45] On the notion of judicial independence as a pre-requisite of mutual trust within the AFSJ: Mitsilegas, *Autonomous Concepts*, 67-70.

[46] See Joined Cases C-566/19 and C-626/19 *Parquet général du Grand-Duché de Luxembourg v JR and Openbaar Ministerie v YC* of 12 December 2019, ECLI:EU:C:2019:1077; Joined Cases C-508/18 and C-82/19 *Minister for Justice and Equality v OG and PI* of 27 May 2019, ECLI:EU:C:2019:45; Case C-453/16 *Criminal proceedings against Özçelik* of 10 December 2016, ECLI:EU:C:2016:860.

[47] Case C-585/18 *A.K. and Others v Sąd Najwyższy* of 19 November 2019, ECLI:EU:C:2019:982.

[48] Zelazna, *The Rule of Law Crisis Deepens in Poland*, 907-912.

the CJEU relied on ECtHR's case law to examine the judicial standards that must be guaranteed by EU courts under Article 19(1) TEU.[49] Although it ultimately left the application of these requirements in the Polish context to the referring court, the CJEU included the features of the Disciplinary Chamber that it deemed problematic under Article 19(1) TEU: the exclusive jurisdiction granted to the Disciplinary Chamber on the retirement of Supreme Court judges,[50] the limited jurisdiction of the Disciplinary Chamber outside this area,[51] and its high degree of autonomy from the Polish Supreme Court.[52]

In the context of the domestic implementation of *A.K. and Others*, nonetheless, some of the limitations of the preliminary ruling mechanism became evident. In this case, the Polish Supreme Court held that having regard to the circumstances and the criteria set by the CJEU, the Disciplinary Chamber was not an EU court within the meaning of EU law.[53] This analysis prevented any examination of the independence of the new Disciplinary Chamber, as the requirements set by the CJEU were only applicable to those courts that fulfil the standards set in *Broekmeulen*. As a consequence, even if the Court expressed its own doubts about the compatibility of this Chamber with EU law, it has continued performing its judicial tasks. The CJEU will have another opportunity to decide on the compliance of this Disciplinary Chamber with EU law in the proceedings lodged by the Commission following the decision of the Supreme Court of Poland in the domestic interpretation of *A.K. and Others*.[54]

The proceedings initiated by the Commission show some of the weaknesses of the preliminary ruling mechanism, particularly when the cooperation of national courts is questionable. These limitations are explored further in the CJEU's decision in *Miasto Lowicz and Others*.[55] These joined cases originated in preliminary references issued by two Polish judges who

[49] Ibid., para. 132.
[50] Ibid., para. 148.
[51] Ibid., para. 150.
[52] Ibid., para. 151.
[53] See Supreme Court of Poland, Judgment of 5 December 2019, III PO 7/18; Supreme Court of Poland, Judgment of 15 January 2020, III PO 8/18 and III PO 9/18.
[54] Case C-791/19 *European Commission v Republic of Poland*, Action brought on 25 October 2019.
[55] Joined Cases C-558/18 and C-563/18 *Miasto Łowicz v Skarb Państwa — Wojewoda Łódzki* of 26 March 2020, ECLI:EU:C:2020:234.

had to rule on cases in which the Polish state was a party.[56] In the light of the recent judicial reforms in Poland and the setting up of the Disciplinary Chamber, they raised concerns that their independence may be compromised, as disciplinary proceedings may be initiated against them if they ruled against the State. The Court, nonetheless, deemed these references inadmissible, as the main disputes in the proceedings had no connection with EU law.[57] At the same time, the Court held that despite these limitations, "provisions of national law which expose national judges to disciplinary proceedings as a result of the fact that they submitted a reference to the Court for a preliminary ruling cannot therefore be permitted".[58] Although these claims were obiter dicta, they show the Court's concerns over processes of rule of law backsliding and the lack of adequate instruments to redress them.

Although the CJEU exposed some of the limitations of the preliminary reference in this area, its interpretation of Article 19(1) TEU was quite restrictive and contrary to previous decisions, such as *Associação Sindical dos Juízes Portugueses* or *Vindel*.[59] A more coherent approach to the interpretation of Article 19(1) TEU may be found in the Opinion of Advocate General (AG) Tanchev in *Miasto Lowicz*.[60] A.G. Tanchev considered that the inadmissibility of this preliminary reference was not connected to the nature of the main proceedings but rather to the hypothetical nature of the concerns expressed by the referring judges.[61] The lack of ongoing disciplinary actions at Member State level when the preliminary references were submitted determined their inadmissibility, not the nature of the main proceedings in which the Polish judges were adjudicating. In other words, the questions referred were merely hypothetical, and this determined their inadmissibility. This interpretation of Article 19(1) TEU would widen the scope of the preliminary ruling as an enforcement

[56] Cases C-563/18 and C-558/18 *Miasto Łowicz v Skarb Państwa*, Request for a preliminary ruling from the Sąd Okręgowy w Łodzi (Poland) lodged on 3 September 2018 [2019] OJ C 44/8.

[57] *Miasto Łowicz and others*, para 49.

[58] Ibid., para 58.

[59] Case C-49/18 *Carlos Escribano Vindel v Ministerio de Justicia* of 7 February 2019, ECLI:EU:C:2019:106.

[60] Joined Cases C-558/18 and C-563/18 *Miasto Łowicz v Skarb Państwa — Wojewoda Łódzki,* Opinion of Advocate General Tanchev delivered on 24 September 2019, ECLI:EU:C:2019:775.

[61] Ibid., para 118.

instrument, as a similar reference would be admissible if the referring judges had been sanctioned by the Disciplinary Chamber, as they effectively were later in the proceedings.

5 The Preliminary Reference Mechanism and the Risk of Politicisation

The preliminary reference has been particularly successful in enforcing a substantive interpretation of the rule of law linked to fundamental rights such as the right to fair trial under Article 47 CFR, when EU secondary legislation is being implemented. Evidence of this development can be seen in recent judgements, such as *Minister of Justice and Equality v LM* or *Openbaar Ministerie*. But these judgements have also raised concerns about the role that the CJEU and national courts are playing in this process.

On the one hand, the CJEU has limited its judgements to providing guidelines on EU standards of judicial independence, but it has been rejected a blanket halt to judicial cooperation with Member States affected by these judicial reforms. The Court reasoned that halting judicial cooperation "would mean that no court of that Member State could any longer be regarded as a 'court or tribunal' for the purposes of the application of other provisions of EU law, in particular Article 267 TFEU".[62] In other words, the Court has shown its concerns that a blanket halt of judicial cooperation with Polish courts would also affect the preliminary reference mechanism, as it would challenge the status of these organs as 'EU courts' within the meaning of Articles 19(1) TEU and 267 TFEU.[63] Such a decision would increase the risk of fragmentation and would put the coherence of EU law at risk, as Polish courts (whether affected by these national reforms or not) would lose access to the CJEU when relevant questions of EU law arise.

On the other hand, the preliminary ruling mechanism entails that Member States' courts have to interpret and apply EU requirements of judicial independence in connection with Articles 19(1) TEU and 47 CFR. This has a clear drawback when the referring court is affected by these national judicial reforms, as the *A.K. and Others* case demonstrates.

[62] *Openbaar Ministerie* (n 59), para 44.

[63] *Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH* (n 29), para 23.

In these cases, the domestic application of these standards may be hampered, and the intervention of the European Commission through infringement actions will be necessary. This limits the effectiveness of the preliminary reference as an alternative to political enforcement mechanisms or infringement proceedings.

In the AFSJ, nonetheless, the implementation of the standards set by the CJEU rests in the executing courts, which have to evaluate whether the issuing courts fulfil EU standards of judicial independence and impartiality. This, in turn, constitutes another challenge to the principle of mutual trust, according to which Member State courts should accept that courts in other Member States share equivalent independence and impartiality standards (Wendel 2018; Lenaerts 2020). The Court enables national courts to examine the independence of equivalent courts in other Member States under exceptional circumstances, an exception that questions the status of mutual trust as the underpinning of judicial cooperation in criminal matters.

When executing judicial cooperation instruments, this mechanism permits the creation of a decentralised system of checks and balances through which national courts can enforce the rule of law in connection with EU secondary legislation. Nevertheless, the generalisation of this mechanism as a rule of law enforcement mechanism also poses some risks. First, the legitimacy of the judiciary of another Member State in the process of deciding whether a foreign court fulfils EU standards of independence is dubious. Within the EU's constitutional framework, this task has, primarily, a political nature under Article 7 TEU. It is questionable whether, outside the CJEU, other EU courts have the legitimacy to intervene and decide on the organisation of the judiciary in another Member State. Furthermore, normalising this mechanism as a tool to counter rule of law violations entails attributing political decisions, such as the organisation of the judiciary or the definition of the rule of law, to the judiciary of 27 Member States which are not democratically accountable (Guild 2006, 272).

6 Conclusions

The preliminary ruling mechanism provides an instrument whereby the CJEU can interpret EU law and establish a dialogue with national courts. In the case of national rule of law crises, this instrument enables the Court to strike a balance between the rights to a fair trial under Article 47 CFR

and to an effective remedy under Article 19(1) TEU and the principles of sincere cooperation and mutual trust that should guide the judicial dialogue between courts. It is through this balancing exercise that the dialogue established between national courts and the CJEU becomes an indirect instrument to set EU standards of judicial independence and redress situations in which these minimum standards are not fulfilled.

Despite its relevance as a tool to redress systemic violations of the rule of law, particularly in the AFSJ, the preliminary reference mechanism has numerous limitations. On the one hand, it is not designed to tackle breaches of the rule of law emerging as a result of a systemic democratic crisis occurring at Member State level. In other words, it does not permit that the CJEU analyses a process of rule of law backsliding articulated through a reform package that affects, *inter alia*, the judiciary, press freedom, or academic freedom.[64] On the other hand, generalising the implementation of the preliminary reference mechanism as a rule of law enforcement tool would entail attributing political decisions, such as the organisation of the judiciary or the definition of the rule of law, to the judiciary of 27 Member States which are not democratically accountable. It is for these reasons that the preliminary reference mechanism cannot replace Article 7 TEU as a rule of law enforcement instrument without raising new challenges to the values of democracy and the rule of law within the EU.

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[64] For a comprehensive analysis on these phenomena in both Hungary and Poland, see respectively: Rupnik, *Hungary's Illiberal Turn*, 132-137; Sadurski, *Poland's Constitutional Breakdown*.

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Author Queries

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Queries	Details Required	Author's Response
AU1	Please check if "*Van Gend and Loos*" should be changed to "*Van Gend en Loos*" per the respective footnote or retain as given.	
AU2	References "Lenaerts (2014), Mitsilegas (2020), Raz (1979), Raz (1979), Rupnik (2012), Sadurski (2018), Sadurski (2019), Sáenz Pérez (2021), Scheppele (2015), Seaward Allan (1999)" were not cited anywhere in the text. Please provide in text citation or delete the reference from the reference list.	