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What about fundamental rights? Security and fundamental rights in the midst of a rule of law breakdown

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Abstract

This article considers the balance between security and fundamental rights that characterises EU criminal law and examines how processes of rule of law backsliding have re-shaped it. Traditionally, EU criminal law has been characterised by its securitisation, which crystallised in the prioritisation of the principle of mutual trust over concerns for the rights of defendants. However, processes of rule of law breakdown at Member State level have challenged this balance and demonstrated the flawed foundations of mutual trust. This paper explores how the CJEU is addressing these contradictions through case law that, nonetheless, continues to prioritise security over the right to a fair trial, whilst Member State courts challenge these interpretations and develop decentralised interpretations of the right to a fair trial. The goal is to evaluate whether judicial dialogue provides an adequate framework to counter the securitisation of EU criminal law and protect the right to a fair trial in the midst of a process of rule of law breakdown.

Keywords

European arrest warrant, criminal law, human rights, rule of law, fair trial

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Introduction

The rule of law breakdown experienced by some Member States has been at the centre of the EU debate for some time now.[1] This breakdown has been articulated through reforms that include, *inter alia,* the dismantling of the checks and balances that guarantee judicial independence, the limitation of press freedoms, and restrictions on the rights of minorities.[2] The inability of political instruments and the limited success of infringement proceedings in redressing these breaches[3] have exposed pre-existing contradictions in the definition of the rule of law and inadequacies in its enforcement within the EU's constitutional framework. However, the literature has only rarely considered the impact that these ineffective instruments have on the defence rights of the individual, mostly through a case-specific analysis.[4] This article contributes to this growing body of literature examining the impact of processes of rule of law backsliding, by focusing how these processes affect the individual in an area that has Member States and their interests at the centre, i.e. EU criminal law.

Within EU criminal law, judicial cooperation is a prominent field set up to tackle cross-border and fight impunity within a borderless area.[5] The preeminent role of Member States within this Area that has courts at the centre and limited fundamental rights counterbalances, has questioned the balance between security and fundamental rights.[6] Traditionally, this balance prioritised security objectives pursued through a quasi-absolute notion of mutual trust, by assuming that Member States share equivalent rule of law and fundamental rights standards that enable them to cooperate with limited safeguards.[7] However, the evidence that these assumptions are sometimes flawed has

1. On the latest developments on this crisis, see: P. Bárd, B. Grabowska-Moroz & V. Zoltán Kazai*, Rule of Law Backsliding in the European Union Lessons from the Past, Recommendations for the Future* (Reconnect Working Paper, July 2021). Available at https://reconnect-europe.eu/blog/rule-of-law-backsliding-in-the-european-union-lessons-from-the-past-recommendations-for-the-future/ last accessed 12 July 2022; A. Gora and P. de Wilde, 'The essence of democratic backsliding in the European Union: deliberation and rule of law' (2022) 29 Journal of European Public Policy 342; O. Polanski, 'Poland - Another episode of "rule of law backsliding" - Judgment P 7/20 and a threat to the integrity of the EU legal order' (2022) 1 Public Law 153; T. Theuns, 'The Need for an EU Expulsion Mechanism: Democratic Backsliding and the Failure of Article 7' (2022) Res Publica 1.
2. C. Emmons and T. Pavone, 'The rhetoric of inaction: failing to fail forward in the EU's rule of law crisis' (2021) Journal of European Public Policy 1611, 1612.
3. D. Kochenov and L. Pech, 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality' (2015) 11 EuConst 512; B. Bugarič, 'On Article 7 TEU and the Hungarian turn to authoritarism', in M. Closa and D. Kochenov, *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2017).
4. See, e.g., P. Popelier, G. Gentile & E. van Zimmeren, 'Bridging the gap between facts and norms: mutual trust, the European Arrest Warrant and the rule of law in an interdisciplinary context' (2022) European Law Journal 1; T. Konstadinides, 'Judicial independence and the Rule of Law in the context of non-execution of a European Arrest Warrant: *LM'* (2019) 56 Common Market Law Review 543; M. Boese, 'The European arrest warrant and the independence of public prosecutors: *OG & PI, PF, JR &YC'* (2020) 57 Common Market Law Review 1259.
5. European Council of Tampere, Presidency Conclusions, 15 and 16 October 1999, paras 43-45.
6. On the balance between security and fundamental rights in the AFSJ, see: E. Herlin-Karnell, 'The domination of security and the promise of justice: on justification and proportionality in Europe's 'Area of Freedom, Security and Justice' (2017) 8 Transnational Legal Theory 79; A. Ripoll Servent*, Institutional and Policy Change in the European Parliament* (Palgrave Macmillan 2015), Ch 4; S. Lavenex and W. Wagner, 'Which European Public Order? Sources of Imbalance in the European Area of Freedom, Security and Justice' (2007) 16 European Security 225.
7. V. Mitsilegas, 'The symbiotic relationship between mutual trust and fundamental rights in Europe's area of criminal justice' (2015) 6 New Journal of European Criminal Law 457, 458; A. Efrat, 'Assessing mutual trust among EU members: evidence from the European Arrest Warrant' (2019) 26 Journal of European Public Policy 656, 657.

permitted the articulation of limitations to these security goals under 'exceptional' fundamental rights circumstances.[8] The rule of law crisis experienced by some Member States has uncovered new circumstances that further question the underpinning of mutual trust, prompting EU courts to develop limits to cooperation to preserve fundamental rights, primarily the right to a fair trial of the defendant.[9]

These exceptions have been developed, primarily, through the engagement between courts that is at the centre of the field of judicial cooperation in criminal matters. The aim of this paper is to analyse whether this mechanism provides an adequate framework to examine the impact that a rule of law breakdown has on the position of the individual within EU criminal law. This requires an in-depth evaluation of the fundamental rights safeguards implemented within this field, their adequacy to protect the individual in criminal proceedings, such as the European arrest warrant (EAW), and their impact on the key principles that underpin the Area of Freedom, Security and Justice (AFSJ).

This analysis will proceed as follows: Section 2 examines the definitional and enforcement gaps surrounding the rule of law under Article 2 of the Treaty on European Union (TEU)[10] and considers how the Court of Justice (CJEU) has contributed to redressing these outside the AFSJ. This Section draws on the different interpretations of the rule of law and examines how the CJEU has prioritised an instrumental understanding of this founding value that favours the uniformity and coherence of EU law over the protection of fundamental rights. Then, Section 3 examines how the security versus fundamental rights dichotomy affects the CJEU's instrumental interpretation of the rule of law when faced with systemic breaches that challenge the rights of the defendant. Finally, Section 5 examines how Member State courts are re-shaping the notion of mutual trust and security within this Area, by favouring interpretations of the right to a fair trial that put the individual at the centre.

The instrumental interpretation of the rule of law

The rule of law as a coherence instrument

The rule of law encompasses multiple legal principles,[11] such as legality, judicial review, or fundamental rights, which define the ideal of a liberal democracy.[12] The definition of the rule of law largely depends on the values and principles that are contained within this 'umbrella concept', which determines the priorities that are pursued through its implementation. Widely speaking, this decision is determined by the adscription to 'thick' or 'thin' conceptions of the rule of law.[13] Thin conceptions of the rule of law equate it to the principle of legality and conceive it as an obstacle to

8. Joined Cases C-404/15 and C-659/15 *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen*, ECLI:EU:C:2016:198, para 78; Case C-216/18 *Minister for Justice and Equality v LM*, ECLI:EU:C:2018:586, para 73.
9. See the critiques to mutual trust in the context of a rule of law breakdown: P. Bard, 'Canaries in a Coal Mine: Rule of Law Deficiencies and Mutual Trust' (2021) 2 Pravni zapisi 371; M. Wendel, 'Mutual Trust, Essence and Federalism – Between Consolidating and Fragmenting the Area of Freedom, Security and Justice after LM' (2019) 15 European Constitutional Law Review 17; A. Miglionico & F. Maiani, 'One principle to rule them all? Anatomy of mutual trust in the law of the Area of Freedom, Security and Justice' (2020) 57 Common Market Law Review 7, 21.
10. Consolidated Version of the Treaty on European Union [2012] OJ C326/1 (TEU).
11. J. Waldron, 'The Concept and the Rule of Law' (2008) 42 Georgia Law Review, 1.
12. L. Pech, 'A Union Founded on the Rule of Law: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law' (2010) 6 European Constitutional Law Review 359, 369.
13. A. Williams, *The ethos of Europe: values, law and justice in the EU* (Cambridge University Press 2010), 73.

the exercise of arbitrary power.[14] For this goal to be achieved, laws should be prospective, adequately publicised, clear, and relatively stable, whilst law making should be guided by open, stable, clear, and general rules.[15] Thick definitions of the rule of law, instead, adopt a substantive approach that encompasses guarantees, such as the principles of equality, human dignity, or the protection of human rights.[16] This second definition is the one that can be used to counterbalance the exercise of state power and preserve the position of the individual in securitised areas in which the position of the defendant is inherently weak, such as EU Criminal Law.

Article 2 of the Treaty on European Union (TEU)[17] enshrines the rule of law to the status of a foundational value of the EU, but it does not clarify the content of this value. A systematic interpretation of Article 2 TEU would require that the rule of law be interpreted together with fundamental rights, as an essential tool to preserve the position of the individual within and beyond the AFSJ. Nevertheless, most of the early rule of law definitions produced by the Court of Justice provide a thin and teleological interpretation of the rule of law, which prioritises the attainment of EEC goals with little regard to the position of the individual and their rights.[18] This, in turn, largely corresponds to the evolution of the fundamental rights' framework within the EU's integration project.

In early judgments, the Court of Justice devised the rule of law as an instrument to guarantee the coherence of the EEC project and the attainment of its primary goal: the completion of the internal market.[19] This teleological interpretation appears in landmark judgments,[20] which established the principles that underpin the EEC as a "new legal order".[21] Achieving the goals of this new legal order required an instrumental interpretation of the rule of law that resembled the principle of legality: EEC institutions and Member States were all subject to EEC law. Such an interpretation was essentially finalistic, 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".[22] The primacy of EEC law over national legal orders was essential to guarantee the coherence of the EEC.

Les Verts,[23] instead, constitutes the first explicit judgment that defines the rule of law as a fundamental principle of EU law.[24] However, its interpretation of this principle remains essentially finalistic, prioritising the uniformity and effective enforcement of EU law. Accordingly, the rule of law entails that "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".[25] This reveals a thin definition of the rule of law in which, 'the key to the notion of the rule of

14. J. Raz, 'The rule of law and its virtue', in R. L. Cunningham, *Liberty and the rule of law* (Texas A&M University Press 1979), 12.
15. J. Raz, *The Authority of Law. Essays on Law and Morality* (Oxford University Press 1979), 214-218.
16. R. S. Allan, 'The rule of law as the rule of reason: consent and constitutionalism' (1999) 115 (2) Law Quarterly Review 221.
17. Consolidated version of the Treaty on European Union [2012] OJ C 326/1.
18. Case 26/62 *Van Gend en Loos* v *Nederlandse Administratie der Belastingen* [1963] ECR 1; Case 6/64 *Flaminio Costa* v *E.N.E.L.* [1964] ECR 585; Case 294/83 *Parti écologiste "Les Verts" v European Parliament* [1986] ECR 1339.
19. S. Bertea, 'Looking for Coherence within the European Community' (2005) 11 European Law Journal 154.
20. *Van Gend en Loos*, *supra* n. 18*; Costa v E.N.E.L.*, *supra* n. 18.
21. ibid.
22. President of the ECJ Robert Lecourt, *Speech on the X anniversary of the ECJ* (1968) EC Bulletin 12-1986, 23.
23. *Les Verts v European Parliament, supra* n. 18.
24. ibid, para 23.
25. ibid para 23.

law is the reviewability of decisions of public authorities by independent courts'.[26] Ultimately, judicial review constitutes an instrument to guarantee the uniform interpretation and supremacy of EU law, which were essential to achieve the completion of the internal market.[27]

The provision of effective remedies as the guarantee of uniformity and supremacy of EU law has now been embedded into Article 19(1) TEU. This provision became essential to assess the effect of breaches of the principle of judicial independence on EU law.[28] In *Associação Sindical dos Juízes Portugueses*,[29] the Court clarified that Article 19(1) TEU imposes impartiality and independence obligations on national courts adjudicating in fields covered by EU law, which are essential to guarantee the right to an effective remedy within the EU.[30] This means that, externally, the judiciary must be safeguarded against any intervention or pressure, particularly from the executive, liable to jeopardise the independent judgment of its members (including salary reductions).[31] Internally, the independence of the judiciary requires impartiality that entails objectivity and absence of conflict of interest with the case adjudicated.[32] Such requirements constitute the "concrete expression" of the rule of law as a founding value of the EU.[33] According to this interpretation, judicial independence is instrumental to guaranteeing effective judicial review under Article 19(1) TEU and, thus, the uniformity and effective enforcement of EU law. However, Article 47 of the Charter and the fundamental rights of individuals undergoing proceedings in front of these courts are not given equal importance. Indeed, this decision focuses on the impact of judicial independence as a safeguard of other EU principles, e.g. effective enforcement of EU instruments. It does not provide any solution to cases in which preserving the rule of law may effectively result in the inapplicability of EU instruments to safeguard the rights of the defendant, such as the Framework Decision on the European Arrest Warrant (the Framework).[34]

This interpretation of the rule of law has been predominant in infringement proceedings arising as a result of the Polish 'constitutional breakdown',[35] such as *Commission v Poland*.[36] These cases have prioritised the coherence and effective enforcement of EU law over an analysis of the rights of the individuals involved in the proceedings.[37] In *Commission v Poland*, the CJEU had to rule on the lawfulness of reforms that lowered the retirement age of public prosecutors, judges serving in lower

26. F. Jacobs, *The sovereignty of law: The European way* (Cambridge: Cambridge University Press 2007), 35.
27. *On Les Verts* and the role of effective remedies, see: A. Alemanno, 'What Has Been, and What Could Be, Thirty Years after Les Verts/European Parliament', in M. Poiares Maduro & L. Azoulai (eds), *The Past and Future of EU Law The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010), 331-332; P. Van Elsuwege & F, Gremmelprez, 'Protecting the Rule of Law in the EU Legal Order: A Constitutional Role for the Court of Justice' (2020) 16 European Constitutional Law Review 8.
28. Case C-64/16 *Associação Sindical dos Juízes Portugueses,* ECLI:EU:C:2018:117, paras. 32-34.
29. ibid.
30. ibid, paras. 34-38.
31. ibid, para. 44.
32. Case C-506/04 *Wilson v Ordre des Avocats du Barreau de Luxembourg* [2006] ECR I-08613, para. 52.
33. ibid, para. 32.
34. 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 (The Framework Decision).
35. See Wojciech Sadurski, *Poland's Constitutional Breakdown* (OUP 2019).
36. Case C-619/18 *European Commission v Republic of Poland*, ECLI:EU:C:2019:531
37. P. Martín Rodríguez, ´Poland Before the Court of Justice: Limitless or Limited Case Law on Art. 19 TEU? (2020) 5 European Papers 331, 333-334.

Polish courts, and judges of the Sąd Najwyższy (Supreme Court). Conversely to *Commission v Hungary,*[38] which was argued on grounds of age discrimination, *Commission v Poland* was decided on the basis of Article 19(1) TEU. In it, the Court ruled that national reforms lowering the retirement age of judges, together with the capacity attributed to the Minister for Justice to authorise extensions to the period of active service as a judge, weakened the external safeguards protecting the independence of the judiciary.[39] This compromised the independence of the Polish Supreme Court and ordinary judges and, thus, their capacity to provide effective remedies under Article 19(1) TEU.[40] Although this reasoning has become essential to enforce judicial independence within the CJEU, the instrumental interpretation of the rule of law shows the flaws in this mechanism: it only examines the lack of judicial independence insofar as it challenges the uniform and effective enforcement of EU law.

The Court's reasoning has continued in subsequent case law on judicial independence safeguards that,[41] nonetheless, recently includes references to Article 47 of the Charter to support the centrality of the rule of law within the EU's constitutional framework.[42] However, the legal reasoning relies on the instrumentality of Article 19(1) TEU and judicial independence as one of its pre-requisites to guarantee the uniformity of EU law.[43] For instance, in *Repubblika*, the Court reiterated that "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 as provided for by Article 47 of the Charter".[44] Although the Court of Justice's mention of Article 47 of the Charter seems to introduce some analysis of the impact that these breaches have on the individual and their right to a fair trial, the reasoning focuses on a teleological interpretation of Articles 19(1). The Court interprets the duty of Member States to guarantee the independence of the judiciary in line with Article 49 TEU,[45] reinforcing the centrality of judicial independence as a pre-requisite for EU membership.[46]

With Article 49 TEU, the Court adds a new provision to the rule of law enforcement toolkit, which reinforces the centrality of the rule of law as a founding value of the EU. This decision has prompted debates about the existence of an implicit right to expulsion[47] but, in practice, it seems to do nothing but reinforce the instrumental interpretation of the rule of law through Article 19 TEU, which is linked to accession requirements. According to this case law, an EU Member State must have an independent judiciary that guarantees the uniform and effective enforcement of EU law and prevents any risk of fragmentation. This is a pre-condition to access the EU and, as some argue,[48] it

38. Case C-288/12 *European Commission v Hungary*, ECLI:EU:C:2014:237 on the dismissal of the Hungarian Data Protection Officer; Case C-286/12 *European Commission v Hungary,* ECLI:EU:C:2012:687 on the forceful retirement of judges, notaries and prosecutors.
39. *European Commission v Poland supra* n. 36, para 124.
40. For a discussion on the CJEU's judgment in *European Commission v Poland*: P. Wennerås, 'Saving a forest and the rule of law: *Commission v. Poland'* (2019) 56 CML Rev 541.
41. Case C-791/19 *Commission v Poland*, ECLI:EU:C:2021:596, paras 52-55; Joined Cases C-748/19 to C-754/19 WB, XA & others, ECLI:EU:C:2021:931, paras 82-83; Case 585/18 *A. K. and Others v Sąd Najwyższy,* ECLI:EU:C:2019:982, para 168-169.
42. *A. K. and Others v Sąd Najwyższy, supra* n. 41, para 162-170; *Repubblika v Il-Prim Ministru*, *supra* n. 45, para. 51-52.
43. *A. K. and Others v Sąd Najwyższy, supra* n. 41, para 168.
44. *Repubblika v Il-Prim Ministru*, *supra* n. 45, para. 51.
45. Case C-896/19 *Repubblika v Il-Prim Ministru,* ECLI:EU:C:2021:311.
46. ibid, paras. 60-62.
47. Theuns, *supra* n. 1.
48. ibid.

may also provide a ground for expulsion if not guaranteed. In these cases, nonetheless, the fact that EU law is not being implemented prevents the application of the Charter, and any fundamental rights assessment takes a back seat.

The preliminary ruling and the instrumental interpretation of judicial independence

The preliminary ruling is an essential tool to enforce an instrumental interpretation of the rule of law, which guarantees the uniform and effective implementation of EU law. This instrument includes the judicial independence of EU courts as a pre-requisite,[49] so that domestic courts can refer preliminary questions under Article 267 Treaty on the Functioning of the European Union (TFEU). The independence of the judiciary in this context includes the protection against arbitrary removal from office[50] and the provision of a remuneration commensurate to the tasks undertaken.[51] If national reforms remove these external protections, Member State courts may lose their capacity to refer questions to the Court, as they will lose their status as EU courts.[52] Ultimately, the need for independence and impartiality is instrumental: only independent courts can be trusted with applying EU law loyally and maintaining the uniformity of EU law.[53] In turn, the loss of access to the Court via the preliminary ruling constitutes a challenge to the uniformity and effective enforcement of EU law and should be avoided.[54] This interpretation tends to favour an instrumental analysis of the rule over the position of the individual affected by systemic breaches of rule of law, as Section 4 demonstrates. Even in areas in which EU law is being implemented and in which the impact of these breaches on the fundamental rights is assessed, instrumental interpretations of the rule of law may prevail may to favour the effectiveness of EU law that the preliminary reference mechanism facilitates, e.g. through the execution of EAWs.[55]

This instrumental interpretation of judicial independence pervades recent cases, such as *A.B. and Others,*[56] which concerns the so-called Polish "Kamikaze Judges" challenging their unsuccessful judicial nominations to the Supreme Court of Poland. In the preliminary reference lodged by the Polish Supreme Administrative Court asking about the compatibility of national judicial reforms underlying this refusal with EU law,[57] the Court focused on the analysis of the right to an effective remedy under Article 19(1) TEU as instrumental to ensuring effective legal protection for individuals in the field of EU law.[58] It re-stated the importance of this principle as the underpinning of

49. Case C-54/96 *Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH* [1997] ECR I-4961, para. 23; Case C-246/80 *C. Broekmeulen v Huisarts Registratie Commissie* [1981] ECR 2311; Case C-394/11 *Valeri Hariev Belov v CHEZ Elektro Balgaria AD & Others*, ECLI:EU:C:2013:48, para. 38.
50. *European Commission v Poland*, *supra* n. 36, para. 45.
51. *Associação Sindical dos Juízes Portugueses*, *supra* n. 28, para. 43.
52. 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.
53. K. Lenaerts, , 'The Court of Justice and national courts: a dialogue based on mutual trust and judicial independence' (Speech at the Supreme Administrative Court of the Republic of Poland, Warsaw, 19 March 2018), 4. Available at www.nsa.gov.pl/download.php?id=753&mod=m/11/pliki_edit.php. Accessed 24 October 2021.
54. Joined Cases C-354/20 and C-412/20 *L and P*, ECLI:EU:C:2020:1033, para 44.
55. See Section 4 and the prioritisation of mutual trust following *Minister for Justice and Equality v LM and Minister for Justice and Equality v OG and PI*.
56. Case C-824/18 *A.B., C.D., E.F., G.H., I.J. v Krajowa Rada Sądownictwa*, ECLI:EU:C:2021:153.
57. Case C-824/18 *A.B., C.D., E.F., G.H., I.J. v Krajowa Rada Sądownictwa,* request for a preliminary reference ruling from the Naczelny Sąd Administracyjny (Poland) lodged on 28 December 2018,
58. *A.B., C.D., E.F., G.H., I.J. v Krajowa Rada Sądownictwa*, *supra* n. 56, paras. 110-115.

sincere cooperation under Article 4(3) TEU,[59] upon which the preliminary reference mechanism relies. This, again, draws on the instrumentality of the preliminary reference as a tool to maintain the uniformity of EU law. However, there was no mention to the right to a fair trial or the position of the individual within domestic proceedings led by the newly appointed judges. Although the Court's focus on the instrumentality may be explained by the limited scope of the Charter in areas in which EU law is not being implemented,[60] these interpretations shifts the focus away from the impact that systemic violations of judicial independence have on the right to a fair trial to favour an instrumental interpretation of Article 19(1) TEU.

An additional limitation of the preliminary ruling is its limited scope, which became clear in *Miasto Lowicz and others,*[61] which had its origin in two preliminary references issued by Polish judges who had to rule in cases in which the Polish state was a party. These judges were concerned that their independence would be compromised, as disciplinary proceedings by the newly established Polish Disciplinary Chamber could be initiated against them (as they effectively were) if they ruled against the State.[62] The Court, nonetheless, found the references inadmissible, as it considered the main disputes in the proceedings to have no connection with EU law.[63] This, again, shows the difficulties that the Court has in considering the fundamental rights implications of systemic processes of rule of law. In this case, the Court's interpretation of Article 19(1) TEU shows a particularly restrictive scope of the notion 'field covered by EU' that limits the possible analysis of issues surrounding the lack of external judicial independence safeguards. Advocate General (AG) Tanchev's Opinion,[64] which stated that the reference's inadmissibility did not arise from the nature of the main proceedings but from the hypothetical nature of the concerns expressed by the referring judges, nonetheless, would have been more consistent with previous case law.[65] This solution would provide a possibility to re-evaluate the main decision adopted in these proceedings now that the Polish Disciplinary Chamber has initiated proceedings against both judges.

In any case, this case law shows that the preliminary ruling has not been an effective tool for the CJEU to develop a thick interpretation of the rule of law linked to fundamental rights. Instead, the Court has used Article 19(1) TEU and Article 267 TFEU to prioritise interpretations that safeguard the coherence and effective enforcement of EU law.[66] This limits the extent to which a thick interpretation of the rule of law linked to fundamental rights can be developed within EU law. The limited scope of the Charter may explain some of these limitations, albeit not all, as the next Section demonstrates. Nevertheless, the Court has been hinting at pragmatic reasons, which may explain the restrain of the Court in developing

59. ibid, para 107.
60. Art. 51(1) Charter.
61. Joined Cases C-558/18 and C-563/18 *Miasto Łowicz v Skarb Państwa — Wojewoda Łódzki*, ECLI:EU:C:2020:234.
62. Joined cases C-563/18 and C-558/18 *Miasto Łowicz v Skarb Państwa — Wojewoda Łódzki*, request for a preliminary ruling from the Sąd Okręgowy w Łodzi (Poland) lodged on 3 September 2018.
63. *Miasto Łowicz and others*, *supra* n. 61, para. 49.
64. Joined Cases C-558/18 and C-563/18 *Miasto Łowicz v Skarb Państwa — Wojewoda Łódzki*, Opinion of AG Tanchev, ECLI:EU:C:2019:775.
65. ibid, paras 118-119.
66. On the preliminary ruling and the instrumental interpretation of this principle: Koen Lenaerts, 'The Rule of Law and the Coherence of the Judicial System of the European Union' (2007) 44 Common Market Law Review 1625; Koen Lenaerts, 'New Horizons for the Rule of Law Within the EU' (2020) 21 German Law Journal 29; Laurent Pech & Sebastian Platon, 'Judicial Independence under Threat: The Court of Justice to the Rescue in the ASJP' (2018) 55 Common Market Law Review 827.

a "thicker" interpretation of the rule of law, which may end dialogue with national courts completely. Lenaerts, for instance, has argued that an open confrontation, as an alternative to judicial dialogue and cooperation within this area, would damage even further the judicial network that underpins EU enforcement.[67] This could lead to a breakdown of this dialogue, which would challenge the uniform enforcement of EU law and its supremacy. Furthermore, such as breakdown could remove a valuable enforcement instrument, encouraging further impunity at Member State level.

Lenaerts' claims are also consistent with an analysis of the status of the rule of law as a founding value of the EU, which is primarily to be enforced through political instruments. Within the EU's constitutional framework, this task is to be accomplished, mainly, through the political enforcement mechanism of Article 7 TEU and, now, the EU conditionality mechanism. It is questionable whether, outside the instrumental interpretation of judicial independence examined in these Sections and the preservation of the right to a fair trial within the AFSJ, the CJEU has legitimacy to correct the inaction of EU institutions.[68]

Fundamental rights, the rule of law and EU Criminal Law

The Court of Justice and Member State courts on the rule of law

The field of judicial cooperation in criminal matters provides a unique opportunity to examine the impact that systemic breaches of the rule of law have on the individual and their right to a fair trial. This area is characterised by the pre-eminence of state interests and the tension between security and fundamental rights.[69] This materialises in cases of alleged breaches of the rule of law in which EU courts examine the impact that the lack of judicial independence may have on the defendant who may be surrendered to another Member State, in which his right to a fair trial may not be guaranteed.[70] This section analyses whether the engagement between executing courts and the CJEU facilitated by the preliminary ruling has created an adequate framework to evaluate the impact of rule of law violations on the rights of the defendant, or whether this still prioritises instrumental interpretations of the rule of law.

67. Koen Lenaerts, 'Keynote speech: EUnited in diversity: between common constitutional traditions and national identities' (Riga, 2-3 September 2021); Koen Lenaerts, 'Dinner Speech: EUnited in diversity: between common constitutional traditions and national identities' (Riga, 2-3 September 2021).
68. On the role of EU institutions within rule of law enforcement: Daniel Keleman, 'The European Union's authoritarian equilibrium' (2020) 27 Journal of European Public Policy 481; Lenaerts, 'New Horizons for the Rule of Law Within the EU' (n 66); Laurent Pech, 'The Rule of Law as a Well-Established and Well-Defned Principle of EU Law' (2022) Hague Journal on the Rule of Law.
69. On the balance between security and the protection of fundamental rights within the AFSJ: F. Trauner & A. Ripoll Servent, 'The Communitarization of the Area of Freedom, Security and Justice: Why Institutional Change does not Translate into Policy Change' (2016) 54 Journal of Common Market Studies 1417; M. Brkan, 'The Concept of Essence of Fundamental Rights in the EU Legal Order: Peeling the Onion to its Core' (2018) 14 European Constitutional Law Review 332; V. Mitsilegas, *EU Criminal Law after Lisbon: Rights, Trust and the Transformation of Justice in Europe* (Bloomsbury 2016), Ch 6;
70. For a discussion on the tension between mutual trust and fundamental rights, see: C. Saenz Perez, 'Chapter XX: Mutual Trust as a Driver of Integration: Which Way Forward?', in V. Moreno-Lax, P. Neuvonen and K. Ziegler, *Research Handbook on the General Principles of EU law* (Elgar Edward 2021).

The balance between security and fundamental rights in the field of EU criminal law has developed over time, particularly since the Lisbon Treaty, to question the presumption of equivalent standards that underpins mutual trust as the basis for cooperation in this area.[71] The case law that first developed it was set in the landmark cases of *Aranyosi and Caldararu*,[72] in which the CJEU analysed whether systemic breaches of Article 4 of the Charter due to poor prison standards could result in the refusal of an EAW. In this context, the Court implemented an exception to the principle of mutual trust to prevent (postpone, in the words of the Court) the surrender of an individual to a Member State whose prisons did not meet EU standards.[73] This entailed the introduction of a fundamental rights-based limitation to cooperation articulated through a two-stage test.[74] Firstly, the Court requires an *in abstracto* test, where the executing court must carry out an examination of the general risk that the individual may face in the issuing state,[75] relying on information that is 'objective, reliable, specific and properly updated'.[76] If this first requirement is fulfilled, then, the executing court must implement an *in concreto* test, examining whether there are substantial grounds to believe that there is a specific risk that the individual may be exposed to the systemic risk identified in the issuing Member State.[77] The executing court must assess this risk, primarily, through a horizontal dialogue with the issuing court that relies on the principles of sincere cooperation and mutual trust.[78]

This two-stage test shows how the priorities within the AFSJ shifted from an absolute conception of mutual trust that would favour the presumption of equivalent standards and the effective enforcement of the EAW, to attribute an increasing importance to fundamental rights and the position of the individual.[79] However, this test has an exceptional character,[80] which does not permit an individual evaluation of the human rights implications of every surrender decision (this is different

71. On the evolution of mutual trust: Auke Willems, *The Principle of Mutual Trust in EU Criminal Law* (Hart Publishing 2020), Ch 4; Ermioni Xanthopoulou, 'Mutual Trust and Rights in EU Criminal and Asylum Law: Three Phases of Evolution and the Unchartered Territory beyond Blind Trust' (2018) 55 Common Market Law Review 489; Evelien Brouwer and Damien Gerard, *Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law* (EUI Working Papers MWP 2016/13). Available at https://cadmus.eui.eu/bitstream/handle/1814/41486/MWP_2016_13.pdf?sequence=1%26isAllowed=y last accessed 3 July 2022.
72. T. Marguery, 'Towards the end of mutual trust? Prison conditions in the context of the European Arrest Warrant and the transfer of prisoners framework decisions' (2019) 25 Maastricht Journal of European and Comparative Law 704 ; A. Willems 'Mutual trust as a term of art in EU criminal law: revealing its hybrid character' (2016) 9 European Journal of Legal Studies 211.
73. Joined Cases C-404/15 and C-659/15 *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen*, ECLI:EU:C:2016:198, para. 104.
74. On how the two-stage test is developed in the joined cases of *Aranyosi and Caldararu*: K. Bovend'Eerdt, 'The Joined Cases *Aranyosi and Caldararu*: A New Limit to the Mutual Trust Presumption in the Area of Freedom, Security, and Justice' (2016) 32 Utrecht Journal of International and European Law 112; G. Anagnostaras, 'Mutual confidence is not blind trust! Fundamental rights protection and the execution of the European arrest warrant: *Aranyosi and Caldararu'* (2016) 53 Common Market Law Review 1675.
75. *Aranyosi and Caldararu*, *supra* n. 71, para. 89.
76. ibid.
77. ibid, para. 95.
78. ibid, para. 96.
79. Bovend'Eerdt (n 72) 117-118.
80. *Aranyosi and Caldararu*, *supra* n. 71, para 78.

to what occurs within the field of asylum that permits an individualised fundamental rights assessment in surrender decisions).[81] Instead, a high threshold of systemic breaches threatening the position of the individual that are, then, verified in every specific case would has to be met. This shows that the prioritisation of effectiveness over the fundamental rights of the individual still prevails in this area and requires particularly grave fundamental rights breaches to be overturned.

This threshold has now been implemented to evaluate the impact that systemic breaches of the rule of law at Member State level may have on the right to a fair trial of the defendant in EAW proceedings.[82] The Court of Justice clarified this in *Minister for Justice and Equality v LM,* which examined whether EAWs issued by Polish courts should be executed, despite the doubts concerning the independence of the judiciary in this Member State.[83] In its response, the CJEU rejected the full suspension of this surrender mechanism, which would require a decision of the Council pursuant to Article 7(1) TEU under Recital 10 of the Framework Decision.[84] Instead, it accepted that executing courts might postpone surrenders on a case-by-case basis, following the two-stage test developed in *Aranyosi and Caldararu*.[85] This means that individualised analysis of the implications of rule of law breaches remained limited to 'exceptional circumstances' of systemic violations of the rule of law that can be equated to a rule of law breakdown. This limits the cases in which fundamental rights can be considered, excluding, for instance, analyses of politically motivated prosecutions occurring outside a situation of generalised rule of law backsliding which could, nonetheless, threaten the rights of the individual.[86] In practice, the Court requires that the executing court examines, firstly, the existence of 'systemic deficiencies, or, at all events, generalised deficiencies, which, according to him, are liable to affect the independence of the judiciary in the issuing Member State'.[87] This excludes any analysis that falls short of this a standard[88] that seems to go as far as to suggest the initiation of Article 7 TEU proceedings.[89]

Then, if the *in abstracto* test is met, the *in concreto* risk should be examined.[90] Despite the nature of the rule of law violations considered here, the Court has established that executing courts shall rely on information provided by the issuing court to assess the specific risk during the second stage of the test.[91] However, in processes of rule of law backsliding, the existence of evidence concerning, *inter alia*, the removal of external safeguards preserving the judicial independence of the issuing

81. On the conception of mutual trust and the individualised fundamental rights implications of surrender decisions within asylum: E. Xanthopoulou, 'Mutual trust and rights in EU criminal and asylum law: Three phases of evolution and the uncharted territory beyond blind trust' (2018) 55 CML Rev 489; Case C-578/16 *C. K. and Others*, ECLI:EU:C:2017:127; Case C-163/17 *Abubacarr Jawo v Bundesrepublik Deutschland,* ECLI:EU:C:2019:218.
82. Case C-216/18 *Minister for Justice and Equality v LM*, ECLI:EU:C:2018:586.
83. Case C-216/18 *Minister for Justice and Equality v LM,* reference for a preliminary ruling from the High Court (Ireland) made on 27 March 2018.
84. *Minister for Justice and Equality v LM*, *supra* n. 80, paras. 70-73.
85. ibid, para. 78-79.
86. These discussions have arisen in the context of the EAWs issued by Spain against Carles Puigdemont. See: Case C-158/21 Puig Gordi and others, Opinion of Advocate General De La Tour, ECLI:EU:C:2022:573, paras 117-119; V. Falletti & M. Nizzero, 'Fostering Integration in AFSJ: assessing the effectiveness and legitimacy of European criminal law. The case of the European Arrest Warrant' (2021) 5 Peace Human Rights Governance 229, 241-243; I. Josifovic & I. Kambovski, 'The Puigdemont Case: The European Arrest Warrant and Mutual Trust at Risks' (2018) 20 Review of European Law 75.
87. *Minister for Justice and Equality v LM*, *supra* n. 80, paras 60 and 69.
88. See *Puig Gordi and others*, Opinion of AG De la Tour, *supra* n. 84, paras 133-134.
89. *Minister for Justice and Equality v LM*, *supra* n. 80, para. 61
90. ibid, paras. 68-69.
91. ibid, para. 75.

courts questions the issuing court's ability to cooperate sincerely with the executing court. In other words, if the issuing court's existence relies on the executive, it has no incentive to provide accurate information concerning its own (lack of) independence to another EU court. Any assurance provided by the issuing court thereof may be tainted by the breaches identified in the *in abstracto* test and mutual trust should cease to apply. Furthermore, the Central Authority of the issuing Member State appointed to assist in these cases is likely to be appointed by the Ministry of Justice and, thus, tainted by the systemic deficiencies of that Member State. This risk is evident in Poland in which the reforms and extended powers of the Ministry of Justice of Poland, upon which the Central Authority relies, question its independence.[92] Despite these contradictions, the Court has prioritised the principle of sincere cooperation and the dialogue between issuing and executing courts in the evaluation of this specific risk, over the implementation of an analysis that puts the individual and their right to a fair trial at the centre.[93]

'Issuing judicial authorities' and the autonomous interpretation of the rule of law under the EAW

Despite the narrow exception developed by the Court when examining the right to a fair trial in situations of rule of law breakdown, this section will show that Member State courts are challenging this security-centric vision when executing EAWs. It explores how Member State courts are accomplishing this goal through their engagement with the CJEU and how this may be forcing the development of an alternative analysis of the security v. fundamental rights dichotomy. This has occurred, primarily, through recent case law that examines what constitutes an issuing judicial authority under Article 6(1) of the Framework Decision.[94] This case law initially concerned whether police authorities,[95] justice ministries,[96] or the Public Prosecutor's Office (PPO)[97] constituted 'issuing judicial authorities' within the meaning of the Framework Decision. However, later cases have considered how the lack of independence or impartiality may affect the status of issuing authorities, opening the possibility of an individualised analysis of the implications that breaches of Article 47 of the Charter may have on the individual undergoing criminal proceedings.

The first cases evaluating the status of issuing authorities in the EU concerned the Public Prosecutor's Offices (PPO)[98] and prioritised the principle of mutual trust and the security interests of the state over any fundamental rights consideration. In these cases, the presumption of equivalent standards determined that discussions over the right to a fair trial in the issuing Member State were

92. Joined Cases C-748/19 and C-754/19 *WB, XA, YZ and others,* ECLI:EU:C:2021:931.
93. *Minister for Justice and Equality v LM*, *supra* n. 80*,* paras. 76-78.
94. 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.
95. Case C-452/16 *Criminal proceedings against Poltorak*, ECLI:EU:C:2016:858.
96. Case C-477/16 *Criminal proceedings against Kovalkovas*, ECLI:EU:C:2016:861.
97. See, inter alia, Case C-453/16 *Criminal proceedings against Özçelik,* ECLI:EU:C:2016:860; Joined Cases C-508/18 and C-82/19 *Minister for Justice and Equality v OG and PI,* ECLI:EU:C:2019:456; Joined Cases C-566/19 and C-626/19 *Parquet général du Grand-Duché de Luxembourg and Tours*, ECLI:EU:C:2019:1077.
98. See A. Willems, 'The Court of Justice of the European Union's Mutual Trust Journey in EU Criminal Law: From a Presumption to (Room for) Rebuttal' (2019) 20 German Law Journal 468, 492-493.

side-lined.[99] In *Özçelik*, for instance, the Court recalled *Poltorak*[100] and *Kovalkovas,*[101] in which the Court held that a police authority[102] or the Justice Ministry[103] did not fulfil the requirements of independence and impartiality under Article 6(1) of the Framework Decision. In these cases, the Court found that "a confirmation by the PPO, of a national arrest warrant issued previously by a police force in connection with criminal proceedings, constitutes a "judicial decision".[104] It did not discuss whether the hierarchical dependence of the PPO from the executive during an incipient process of rule of law backsliding posed any risks to the judicial independence of the issuing authorities or the rights of the accused. A thick interpretation of the rule of law that has the fundamental rights of the individual at the centre would have required an analysis of the functional independence of national authorities and their impact on the right to a fair trial of the defendant. But the effectiveness of EU criminal law instruments was, once again, prioritised.

However, the prevalence of security goals was questioned following *Minister for Justice and Equality v LM.*[105] In *Minister for Justice and Equality v OG and PI*, for instance, the CJEU considered that German prosecutors did not offer sufficient guarantees of independence to be regarded issuing judicial authorities within the meaning of Article 6(1) of the Framework Decision. Contrary to *Özçelik*, the Court carried out an in-depth examination of the appointment, structure, and hierarchy of PPOs under German law.[106] These requirements were considered essential to guarantee the right to a fair trial of the accused, as this requires that the issuing of an EAW is open to the review of a court capable of guaranteeing the rights of the individual.[107] This demands that the issuing authority "must be capable of exercising its responsibilities objectively, taking into account all incriminatory and exculpatory evidence without being exposed to the risk that its decision-making power be subject to external directions or instructions, in particular from the executive".[108] This development, albeit limited in subsequent case law, should be welcomed, as it prioritises the position of the individual and their right to a fair trial over the security interests of the state, even when this limits the effectiveness of inter-state cooperation through the EAW.

Minister for Justice and Equality v OG and PI shifts the balance between justice and security within EU criminal law, providing an instrument to implement in situations in which the structure of the judiciary may question the right to a fair trial of the individual. Contrary to the two-stage test developed in *Minister for Justice and Equality v LM*, this judgment opened the door to individualised analyses of right to a fair trial of the defendant via Article 6(1) of the Framework Decision. According to this judgment, the existence of a risk that the decisions of the issuing authority could be subject to external directions or instructions from the executive, would affect the status of issuing judicial

99. *Özçelik, supra* n. 95.
100. *Poltorak, supra* n. 93.
101. *Kovalkovas, supra* n. 94.
102. *Poltorak, supra* n. 93.
103. *Kovalkovas, supra* n. 94.
104. *Özçelik, supra* n. 95, para. 38.
105. See *Minister for Justice and Equality v OG and PI*, *supra* n. 95. For an in-depth analysis of this case, see: M. Böse, 'The European arrest warrant and the independence of public prosecutors: *OG & PI, PF, JR &YC*" (2020) 57 Common Market Law Review 1259.
106. ibid, paras. 76-83.
107. *Minister for Justice and Equality v OG and PI*, *supra* n. 95, para. 70.
108. ibid, para. 73.

authority under Article 6(1) of the Framework Decision without any "*in concreto*" test.[109] This, in turn, would constitute a ground for refusal under the Framework Decision.

In the joined cases of *L and P,*[110] the Amsterdam District Court (the referring court) explored this option further to clarify whether the executing court should continue applying the 'two-step test' developed in *Minister for Justice and Equality v LM* before refusing the execution of an EAW issued by a Member State experiencing systemic rule of law violations.[111] In its question, the Dutch court seemed to challenge the prioritisation of security objectives within this test and sought an alternative in the Court of Justice's decision in *Minister for Justice and Equality v OG and PI*. The alternative anticipated in this case would provide a fundamental rights-centred approach that prioritises the position of the individual over the interests of the state. Nevertheless, the Court refused this possibility and maintained the two-stage test developed in *Minister for Justice and Equality v LM*.[112] Although it held that an 'issuing court' under the Framework Decision must conform with EU standards of independence and impartiality,[113] it ruled out individualised analysis that put the right to a fair trial of the individual at the forefront in situations of systemic or generalised rule of law deficiencies.[114] Instead, the Court maintains the two-stage test in these cases, prioritising dialogue and cooperation between issuing and executing authorities over the protection of the right to a fair trial of the individual.

Although this decision is consistent with the exceptionality of the two-stage tests developed in previous case law, it maintains this reasoning at the expense of limiting the coherence of the rule of law within the AFSJ.[115] Firstly, the Court imposes different standards to evaluate the notion of 'issuing judicial authority', whereby the protection of the judiciary against external interferences varies depending on whether threats are the result of the institutional framework of the issuing Member State,[116] or whether these are the result of a process of systemic violations of the rule of law.[117] In the first case, the existence of a hierarchical dependence from the executive would determine the non-execution of EAWs from that Member State without the implementation of the two-stage test of *Minister for Justice and Equality v LM*. Conversely, if this dependence is the consequence of systemic rule of law deficiencies in the justice system of the issuing Member State, the two-stage test that relies on the dialogue between issuing and executing courts would be necessary to decide whether to reverse mutual trust or not. This decision offers different levels of protection to the individual depending on the origin of the lack of independence affecting the issuing authority. This, in turn, offers fewer protections to the individual when the risk of a fundamental

109. ibid, para. 73.
110. Joined cases *L and P*, supra n. 54.
111. Case C-354/20 *European arrest warrant issued against L,* request for a preliminary ruling from the Rechtbank Amsterdam (Netherlands) lodged on 31 July 2020; Case C-412/20 *European arrest warrant issued against P*, request for a preliminary ruling from the Rechtbank Amsterdam (Netherlands) lodged on 3 September 2020.
112. ibid, para 69.
113. *L and P*, supra n. 54, para. 38.
114. *Minister for Justice and Equality v LM, supra* n. 80, paras. 76-77.
115. P. Bárd and E. Van Ballegooij, 'Judicial independence as a precondition for mutual trust? The CJEU in *Minister for Justice and Equality v. LM' (*2018) 9 *New Journal of European Criminal Law* 353, at p. 361; T. Konstadinides, 'Judicial independence and the Rule of Law in the context of non-execution of a European Arrest Warrant: *LM'* (2019) 56 Common Market Law Review 743, 766-767; A. Baude, 'Protecting the Union Rule of Law through National Court Scrutiny? A Comment on Joined Cases C-354/20 and C-412/20 *L and P'* (2021) 4 Nordic Journal of European Law 112, 129-130.
116. ibid, paras. 47-48.
117. ibid, paras. 50-51.

right violation has the origin in a situation of rule of law breakdown, despite the weaker position of the individual in these cases.

The Court's justification here seems to lie in the "domino effect" that determining that Polish Courts do not meet EU independence standards may have on the preliminary ruling.[118] As analysed in Section 2, judicial independence constitutes a pre-requisite so that Member State courts are deemed EU courts and can participate in the preliminary ruling mechanism. If such a requirement were no longer met by Polish courts, these courts would lose access to the Court of Justice through Article 267 TFEU with the subsequent risk of fragmentation. This imposes a finalistic interpretation of the rule of law that prioritises maintaining the uniformity of EU law, at the expense of side-lining the individual and their fundamental rights in a situation in which limited rule of law enforcement mechanisms are available (and effective).[119]

Furthermore, there are incoherencies in defining judicial independence as a pre-condition for issuing authorities under judicial cooperation instruments. This became clear in *Staatsanwaltschaft Wien,*[120] in which the Court held that a PPO constitutes an issuing judicial authority under Articles 1(1) and 2(c) of the Directive on the European Investigation Order (the DEIO),[121] regardless of any relationship of legal subordination.[122] In other words, the judicial independence of the issuing authority, which demands protection against external interferences from the executive, does not constitute a pre-requisite in the context of the European Investigation Order (EIO). The different interpretation of the notion of 'issuing judicial authority' in the DEIO may be justified by the additional fair trial safeguards included within this instrument. For instance, the DEIO establishes that compliance with fundamental rights and proportionality in the issuing Member State is a pre-condition, so that any cooperation request is granted.[123] Nevertheless, this decision obviates an important factor: the DEIO does not provide a solution as to how executing courts should evaluate cases in which issuing judicial authorities may be affected by systemic rule of law violations that compromise their independence. In these cases, the executing court may face difficulties in assessing whether the issuing court can guarantee compliance with Charter rights, and the Court does not provide an alternative that may be implemented by executing courts.

118. ibid, para. 44.
119. On the limited success of the EU's rule of law framework, see: A. Nowak-Far, 'The Rule of Law Framework in the European Union: Its Rationale, Origins, Role and International Ramifications', in A. von Bogdandy et al. (eds.), Defending Checks and Balances in EU Member States: Taking Stock of Europe's Actions (Springer 2021); M. Blauberger Icon & V. van Hüllen, 'Conditionality of EU funds: an instrument to enforce EU fundamental values?' (2020) 43 Journal of European Integration 1; K.L. Scheppele, D. Kochenov & B. Grabowska-Moroz, 'EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement actions by the European Commission and the Member States of the European Union' (2021) 39 Yearbook of European Law 3.
120. Case C-584/19 *Staatsanwaltschaft Wien*, ECLI:EU:C:2020:1002.
121. Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters [2014] OJ L 130/1.
122. *Staatsanwaltschaft Wien, supra* n. 118, para. 75.
123. ibid, para. 56.

Member State Courts and the enforcement of the right to a fair trial

A decentralised enforcement of fundamental rights in the EAW

The principle of mutual trust that presumes that Member State courts share equivalent fundamental rights standards enabling them to cooperate[124] is challenged by the evidence of systemic rule of law violations analysed in this paper. The evidence of these violations and the binding nature of the Charter has provided an opportunity for executing courts to become enforcers of EU founding values, following the CJEU's case law.[125] In their analysis, nonetheless, some executing courts have challenged the Court's case law that defines the security v. right to a fair trial balance, redefining of how this trade-off is examined. This section examines this case law and analyses how it may favour the development of a fundamental rights-centred enforcement of the rule of law within this Area.

An early example of the case law challenging the CJEU's interpretation of the right to a fair trial is found in the German Federal Constitutional Court's (FCC) judgment in the so-called "*Solange III"* decision.[126] In *Solange III*, the FCC used the execution of an EAW issued by Italy to serve a custodial sentence rendered *in absentia* to challenge the Court of Justice's fundamental rights standards in *Melloni*.[127] In *Melloni*, the Court held that supremacy meant that national constitutional rights should be disapplied in areas of EU competence in which fundamental rights have been harmonised.[128] The Court held that the standards to guarantee the right to a fair trial in proceedings held *in absentia* under Article 4(a) of the Framework Decision superseded national provisions regulating these proceedings.[129] By contrast, in *Solange III,* the FCC challenged this view by holding that the absence of a new evidentiary trial in the executing Member State after a trial held *in absentia* violated the accused's right to human dignity under Article 1(1) of the German Constitution.[130] There was no reference to Article 4(a) of the Framework Decision, the principle of supremacy, or the principles set by *Melloni*. Instead, the FCC based its reasoning solely on the principle of individual guilt as the foundation of the German interpretation of the right to a fair trial.[131] Although the application of both Article 4a(1) of the Framework Decision and the German

124. See E. Herlin-Karnell, 'Constitutional Principles in the Area of Freedom, Security and Justice', in D. Acosta Arcarazo and C. Murphy, *EU Security and Justice Law after Lisbon and Stockholm* (Hart Publishing, 2014).
125. *Minister for Justice and Equality v LM*, *supra* n. 80; *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft, supra* n. 71.
126. BVerfG, Order of the Second Senate of the German Constitutional Court of 15 December 2015 - *2 BvR 2735/14 (Solange III)*.
127. Case C-399/11 *Melloni v Ministerio Fiscal*, ECLI:EU:C:2013:107.
128. ibid, paras. 62-64.
129. ibid.
130. *Solange III*, *supra* n. 124, para. 126.
131. ibid, para. 52.

Constitution led to the same decision, i.e. the non-execution of this surrender request, the FCC analysed this case exclusively on the basis national identity and domestic fundamental rights standards.[132] This decision provided an alternative to the 'race to the bottom' in fundamental rights standards that *Melloni* could generate based on national identity grounds,[133] but also raised questions about the security v. fundamental rights dichotomy within EU criminal law.

Similar challenges to the Court's case law re-emerge when executing courts consider the protection of the right to a fair trial in the context of requests issued by Member States experiencing processes of rule of law backsliding. Contrary to *Solange III*, these interpretations do not rely on domestic interpretations of constitutional rights and national identity claims, which may challenge the primacy of EU law and may be used to undermine its founding values.[134] Instead, these decisions rely on a decentralised application of Article 47 of the Charter. The Irish High Court's decision implementing *Minister for Justice and Equality v LM* provides an early example of this phenomenon.[135] In its ruling in *Celmer [No 4],* the Irish court relied on anecdotal evidence, such as the remarks made by the Deputy Minister of Justice regarding the case, to challenge the existence of a specific risk to the protection of Article 47.[136] In doing so, the executing court went beyond the judicial dialogue and the assurances provided by the issuing court, as *Minister for Justice and Equality v LM* requires, to examine the impact that a surrender decision may have on the individual. With this decision, it chose to prioritise the protection of the right to a fair trial over the principles of sincere cooperation, mutual trust, and effective enforcement that underpin the AFSJ. However, in its last judgment in *Celmer [No 5]* delivered after receiving assurances by the issuing court on its own independence, the High Court granted the surrender.[137] In doing so, it recognised that the principle of mutual trust should prevail when examining the independence of the issuing court in accordance with *Minister for Justice and Equality v LM.* Nevertheless, it is interesting that the Court used the last judgment of the *Celmer* saga to voice its doubts about the assurances received, whilst acknowledging the limitations of the test in *Minister for Justice and Equality v LM* as an instrument to interpret the independence of the issuing court. To this regard, the Court noted that the ECtHR was the judicial organ that should decide whether proceedings in Poland meet ECHR standards of independence and impartiality under Article 6 ECHR.[138]

Despite the limitations showed in the *Celmer* saga, the decentralised enforcement of the rule of law linked to the Charter has been developed quite clearly in the decisions delivered by the District

132. On the German Constitutional Court's decision: M. Hong, 'Human dignity, identity review of the European arrest warrant and the Court of Justice as a listener in the dialogue of courts: *Solange*-III and *Aranyosi*' (2016) 12 European Constitutional Law Review 549; G. Anagnostaras, '*Solange III?* Fundamental rights protection under the national identity review' (2017) 42 European Law Review 234.
133. On the risk of a race to the bottom in fundamental rights standards under *Melloni*: A. Tinsley, 'note on the reference in Case C-399/11 *Melloni* (2012) 3 New Journal of European Criminal Law 19, 28; A. Pliakos & G. Anagnostaras, 'Fundamental Rights and the New Battle over Legal and Judicial Supremacy: Lessons from *Melloni'* (2015) 34 Yearbook of European Law 97; A. Torres Pérez, '*Melloni* in Three Acts: From Dialogue to Monologue' (2014) 10 European Constitutional Law Review 308.
134. On how identity claims may accelerate processes of rule of law breakdown, see: D. Kelemen & L. Pech, 'The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland' (2019) 21 Yearbook of European Law 59; N. Neuwahl & C. Kovacs, 'Hungary and the EU's rule of law protection' (2021) 43 Journal of European Integration 17.
135. High Court of Ireland, *Minister for Justice and Equality and Artur Celmer* (No 4) [2018] IEHC 484.
136. ibid, para. 47.
137. *The Minister for Justice and Equality and Artur Celmer* (No.5) [2018] IEHC 639.
138. ibid, para 124.

Court of Amsterdam.[139] This Court has developed an in-depth analysis of the impact of the rule of law breakdown in Poland on the accused's right to a fair trial through a series of judgments delivered in the context of EAW proceedings.[140] For instance, in the District Court of Amsterdam's *Decision RK*,[141] the executing court refused an EAW on grounds that there was a serious risk that the right to a fair trial of the person surrendered may be violated despite the assurances provided by the issuing court. This decision was reached after verifying that the Polish Disciplinary Court had initiated proceedings against various judges intervening in this case, including the presiding judge.[142] It also referred to a memo addressed to the prosecutors of Poland with indications about this case, together with the unreliability of the information provided by the issuing court to some of the questions raised.[143] In this decision, the Court set aside the dialogical strategies prioritised by the CJEU and the principle of mutual trust between issuing and executing courts to assess specific fundamental rights' risks. In doing so, the Dutch Court favoured an interpretation of the rule of law that puts the right to a fair trial at its centre, at the expense of hindering inter-state cooperation in criminal matters. The District Court of Amsterdam has clarified these standards in subsequent case law, developing a set of criteria to balance the effectiveness of the EAW against the right to a fair trial.[144]

A similar decision was reached by the Higher National Court in Karlsruhe (Germany),[145] which refused the execution of an EAW over concerns that the right to a fair trial of the defendant would not be guaranteed in Poland. Other German courts, such as the Higher National Court in Nuremberg, have followed this line of reasoning and refused the execution of EAWs on similar grounds despite the assurances offered by Polish issuing courts.[146] In these judgments, there are an extensive analyses of the disciplinary proceedings initiated by the Disciplinary Chamber, the (then) pending infringement proceedings against Poland for the establishment of this Chamber,[147] and how these proceedings affect the independence of the courts and their capacity to provide accurate information and guarantee the right to a fair trial.[148] These arguments show the re-interpretation of the security v. fundamental rights balance during the second stage of the test developed in *Minister for Justice and Equality v LM.* In this process, instead of prioritising mutual trust and sincere cooperation with issuing courts, executing courts are favouring an individualised analysis of the right to a fair trial carried out through independent sources.

National courts within EU Criminal Law: a risk of fragmentation?

The case law examined in the previous section provides just a few examples of how executing courts may provide alternative judicial independence analyses that integrate the Charter, the ECtHR's case

139. See A. Martufi and D. Gigengack, 'Exploring mutual trust through the lens of an executing judicial authority: The practice of the Court of Amsterdam in EAW proceedings' (2020) 11 New Journal of European Criminal Law 282.
140. Court of Amsterdam (International Legal Assistance Chamber) 10 February 2021, *Decision RK 20/771 13/751021-20*.
141. ibid.
142. ibid, para 5.3.7.
143. ibid, para 5.3.9.
144. Martufi and Gigengack, see *supra* n.135.
145. Higher Court of Karlsruhe 17 February 2020, *Ausl 301 AR 104/19*.
146. Higher National Court of Nürnberg 12 August 2020, Judgement *AuslAR 33/20*.
147. Case C-791/19 *Commission v Poland*, ECLI:EU:C:2021:596.
148. *Ausl 301 AR 104/19, supra* n. 141, para IV.

law[149] and the Council of Europe's recommendations.[150] These new approaches demonstrate the benefits of a decentralised fundamental rights enforcement in challenging the securitisation of the AFSJ and protecting the position of the individual, particularly when faced with situations of systemic rule of law breaches. Overall, this decentralised implementation of Charter and ECHR rights contributes to setting up a system of checks and balances that minimises the impact that processes of rule of law backsliding have on the individual undergoing cross-border criminal proceedings.

However, the interpretations that are emerging within the area of EU criminal law also threaten the goals that "thin" rule of law definitions seek to preserve, namely the effective enforcement of EU instruments and the coherence and uniform interpretation of EU criminal law. When executing courts question the assumptions that sustain integration in criminal matters, obstacles to the attainment of the security objectives set in Article 3(2) TEU emerge, as inter-state cooperation and the exchange of information may be limited. This paper argues that this may be necessary in the 'exceptional circumstances' of states undergoing processes of rule of law breakdown in which other enforcement instruments have proven ineffective. But this situation also raises a separate question: do Member State courts have the legitimacy to examine rule of law compliance of equivalent courts across the EU?

The legitimacy of EU courts in carrying out these analyses raises many questions that are beyond the scope of this paper.[151] However, it is worth noting that within the EU's constitutional framework, rule of law enforcement has an EU dimension accomplished, *inter alia,* through the political mechanism of Article 7 TEU, the Rule of Law Conditionality Regulation,[152] or infringement proceedings under Article 258 TFEU. Member State courts, nonetheless, have become protagonists of an emergency rule of law enforcement instrument linked to fundamental rights within the field of judicial cooperation in criminal matters, due to the ineffectiveness of these mechanisms. This decision has raised new legitimacy and competence issues through the intervention of Member State courts in the administration of justice of other Member States. This contradicts some of the constitutional principles that underpin the functioning of the AFSJ, such as sincere cooperation, the principle of equality or the presumption of mutual trust that provide the constitutional foundation of this area. Without these principles, the governance principle of mutual recognition upon which EU criminal law instruments rely, could not operate.

In any case, and despite the impact that a decentralised implementation of the Charter may have on the constitutional foundations of EU criminal law, this is not inconsistent with the CJEU's case law in other fields of the AFSJ, i.e. asylum decisions.[153] In this area, the existence of individualised fundamental rights analyses limits the possibilities of inter-state cooperation on a regular basis and challenges the assumptions of equivalent fundamental rights protections that underpin mutual trust.[154]

149. Case C-578/16 *C. K. and Others v Republika Slovenija,* ECLI:EU:C:2017:127; Case C-163/17*Abubacarr Jawo v Bundesrepublik Deutschland,* ECLI:EU:C:2019:218.
150. Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe, Resolution of 28 January 2020, para. 11.
151. On legitimacy and EU courts within the AFSJ, see: M. Blauberger & R. Kelemen, 'Can courts rescue national democracy? Judicial safeguards against democratic backsliding in the EU' (2017) 23 Journal of European Public Policy 321, 331-332; E. Herlin-Karnell, 'The concepts of non-domination and justification in EU security-related context', in E. Herlin-Karnell & M. Klatt (eds.), *Constitutionalism Justified: Rainer Forst in Discourse* (OUP 2019); E. Herlin-Karnell, 'The politics of EU law and the Area of Freedom, Security and Justice', in Paul James Cardwell & Marie-Pierre Granger, *Research Handbook on the Politics of EU Law* (Edward Elgar 2020)
152. Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget [2020] OJ L 433I/1.
153. See *C. K. and Others*, *supra* n. 79; *Abubacarr Jawo v Bundesrepublik Deutschland, supra* n. 79.
154. See Xanthopoulou, *supra* n 79, 496-498; G. Anagnostaras, 'The Common European Asylum System: Balancing Mutual Trust Against Fundamental Rights Protection' (2020) 21 German Law Journal 1180.

Contrary to asylum, this individualised analysis acts as an "emergency break" within EU criminal law: it merely addresses the gaps left by the ineffectiveness of the various EU rule of law enforcement instruments. Under these exceptional circumstances, Member State courts are merely developing emergency mechanisms that put the position of the individual and their defence rights at the centre of the area of EU criminal law, in accordance with Article 47 of the Charter. Whilst this may require an exceptional challenge to the principles of sincere cooperation and mutual trust, the situation of rule of law breakdown in some Member States, verified through the initiation of Article 7 TEU proceedings, justifies this action.

Conclusion

This article shows the limitations of the CJEU's security v. justice analysis when faced with systemic rule of law violations. In these cases, a decentralised enforcement of Article 47 of the Charter during the second stage of the CJEU's decision in *Minister for Justice v LM* provides an exceptional solution to protect the rights of the defendant. Through this mechanism, Member State courts develop thick analysis of the rule of law that favour the position of the individual and their defence rights in an area in which there is an evident imbalance between the interests of the state and the position of the individual. These analyses, as shown in Section 4.2, go beyond the initial limitations imposed by the CJEU in *Minister for Justice and Equality v LM* and re-shape the balance between security and justice that underpins the CJEU's case law in this area.

Nevertheless, this decentralised implementation of Article 47 of the Charter has a limited scope, and it is not designed to tackle systemic breaches of the rule of law emerging due to the constitutional breakdown of a Member State. In other words, it does not permit a systemic analysis of processes of rule of law backsliding articulated through a reform package that affects several areas, e.g. judicial independence, civil liberties, rights of minorities, etc.[155] In these cases, the EU constitutional framework still relies on the effectiveness of EU instruments, such as infringement proceedings, rule of law conditionality or Article 7 TEU, which have demonstrated incapable of redressing situations of systemic rule of law backsliding.

Furthermore, a decentralised interpretation of Article 47 of the Charter poses an additional challenge: the domestic enforcement of the right to a fair trial may question the principles that underpin inter-state cooperation, such as mutual trust, uniformity, or sincere cooperation. This raises new legitimacy and competence questions, such as the capacity of Member State courts to intervene in the domestic administration of justice of other Member States. This paper argues that this may be justified when exceptional circumstances concur, such as the existence of a rule of law breakdown verified through the initiation of Article 7(1) TEU proceedings. Beyond its use to preserve fundamental rights under these exceptional circumstances, its generalisation cannot occur without challenging general principles of EU law, such as the uniform and effective enforcement of judicial cooperation instruments or the principle of sincere cooperation.

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155. For a comprehensive analysis on these phenomena in both Hungary and Poland, see: J. Rupnik, 'Hungary's Illiberal Turn: How Things Went Wrong' (2012) 23 Journal of Democracy 132; W. Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019).