

THE OPERATIONALISATION OF THE RULE OF LAW IN THE EU LEGAL ORDER

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The European project was founded on the advancement of liberal democracy where the rule of law and respect for human rights have a central place. In a period of 'instability' in the Union where organisational changes to national judiciaries have raised fears over rule of law backsliding among Member States threatening the functioning of the EU's legal order, the main aim of this article is to explore the operationalisation of the rule of law as a founding value of the EU and its connection to European integration. To demonstrate that there is a developing jurisprudence in the EU legal order towards increased justiciability of the rule of law. The article in part 2 examines the proposition that the operationalisation of the rule of law and European integration is linked to a substantive rights based conception of the rule of law as a basis for the jurisprudential shift. Part 3 looks at the normative arguments for protecting the rule of law in the EU. Finally, Part 4 analyses the operationalisation of the rule of law in the jurisprudence of the CJEU, in which it is argued there is three lines of argumentation for the operationalisation of the rule of law in the case law of the CJEU.

1 INTRODUCTION

The Preamble of the Treaty on European Union (“TEU”) begins by ‘recalling the historic importance of the ending of the division of the European continent and the need to create firm bases for the construction of the future Europe’.¹ Therefore, the Member States’ Heads of States ‘confirmed their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law’.² The European project was founded on the advancement of liberal democracy where the rule of law and respect for human rights have a central place. However, of late, the wave of populist movement that has swept over the European continent has seen the rise of far-right political movements and the emergence of illiberal states within the European Union (“EU”). The developing scenarios in Hungary and Poland have therefore brought into the spotlight the rule of law and whether we can allow these illiberal Member States to flourish putting into jeopardy the very values the EU was founded upon.

The main aim of this article is to demonstrate that there is a developing jurisprudence in the EU legal order towards increased justiciability of the rule of law, where the rule of law is being used as a stick to enforce compliance with recalcitrant ‘illiberal’ Member States. The rule of law is traditionally not seen as *a* rule of law actionable before a court, in particular lacking justiciability in the EU legal order due to the open ended nature of the values expressed in

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¹ Consolidated version of the Treaty on the European Union [2012] OJ C 326/01.

² *ibid.*

Article 2 TEU.³ Therefore, a departure from this traditional understanding represents a jurisprudential shift by the Court of Justice of the European Union (“CJEU”), towards what will be termed as the operationalisation of the rule of law. This article is divided into three parts. The first part examines the argument that the operationalisation of the rule of law and European integration is linked to a substantive rights based conception of the rule of law as a basis for the shift. The second part looks at what the normative arguments are for protecting the rule of law in the EU is, or in other terms why it is necessary for increased justiciability of the rule of law in the EU. The third part analyses the operationalisation of the rule of law in the jurisprudence of the CJEU, in which it is argued there are three lines of argumentation for the operationalisation of the rule of law in the case law of the CJEU.

2 A RIGHTS BASED CONCEPTION – A FOUNDATION FROM WHICH TO BUILD

2.1 THE RULE OF LAW, DEMOCRACY, AND FUNDAMENTAL RIGHTS IN THE EU

The rule of law is a ‘legally binding constitutional principle’ of the EU.⁴ Its place in the EU primary law is one of the founding values of the EU common to the Member States according to Article 2 TEU. The rule of law in the EU is inspired by the common constitutional traditions of the Member States and by international treaties.⁵ It is integral in forming the constitutional framework which provides the uniqueness that is the autonomous EU legal order, and driving European integration towards an ‘ever closer union’,⁶ despite the threat of European disintegration. This has been reaffirmed by the CJEU sitting as a full court in its recent *Opinion 1/17*.⁷ The Opinion of the CJEU and its recent jurisprudence serves to reinforce further and strengthen our understanding of the rule of law within the EU legal order. It echoes back to its landmark judgment in *Les Verts* which emphasised that the EU is a Union ‘based on the *rule of law*’,⁸ making explicit the constitutional character of the rule of law in the EU legal order.

It must be pointed out the rule of law is not mentioned as a stand-alone principle in the Treaties and the EU Charter of Fundamental Rights (“Charter”), it is importantly accompanied by the values of democracy, and respect for fundamental rights. The rule of law, democracy and respect for fundamental rights, the prominent elements in Article 2 TEU which, although

³ Dimitry Kochenov and Laurent Pech, ‘Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality’ (2015) 11 European Constitutional Law Review 512, 519 and 520.

⁴ Annex I to the Communication from the Commission to the European Parliament and the Council, ‘A New EU Framework to Strengthen the Rule of Law’, COM (2014) 158 final, 1.

⁵ Koen Lenaerts, ‘The Court of Justice as the Guarantor of the Rule of Law within the European Union’, in G. De Baere and J. Wouters (eds) in *The Contribution of International and Supranational Courts to the Rule of Law* (Edward Elgar Publishing, 2015), 243; Communication from the Commission to the European Parliament, the European Council and the Council, ‘Further Strengthening the Rule of Law within the Union: State of Play and Possible Next Steps’, COM (2019) 163 Final, 1.

⁶ Article 1(2) TEU, which states: This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.

⁷ *Opinion 1/17* EU:C:2019:341, para 110.

⁸ Case 294/83 *Parti Ecologiste “Les Verts”* [1986] EU:C:1986:166, para 23 (emphasis added).

fundamental in their own right, are to be seen as interdependent,⁹ and like the other values referred in Article 2 TEU must be construed in light of each other.¹⁰ This is because as put by Wilms that ‘the modern Rule of Law can only serve its purpose as a fundamental value when it is understood as a tool for the protection of other fundamental values and democracy. These three concepts are inseparably linked.’¹¹ This means due to the intrinsic linkage between the respect for these values ‘there can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa. Fundamental rights are effective only if they are justiciable.’¹² This informs our understanding of how the EU and in particular the CJEU understand the rule of law. It has not been expressly defined in the Treaties but left to the EU institutions to elaborate on, with the CJEU, and in recent years the Commission also taking the lead.¹³ Indeed, the CJEU has seized upon this opportunity even before the rule of law was explicitly referred to in the EU Treaties.¹⁴

2.2 A SUBSTANTIVE RIGHTS BASED CONCEPTION OF THE EU RULE OF LAW

It is argued the operationalisation of the rule of law and European integration in the EU is heavily reliant on a substantive rights based conception of the rule of law. The position the CJEU has taken in terms of defining the rule of law in the EU legal order through its case law has progressed significantly since “*Les Verts*” developing from a “formal” understanding of the rule of law towards one that encompasses “substantive” qualities.

The rule of law based on a Dworkinian ‘rights based’ conception has the citizen or individual at its centre by conferring rights on individuals.¹⁵ The language of Dworkin is reminiscent of the CJEU’s seminal judgment in *Van Gend en Loos*, where the citizen and individual, and their corresponding rights are a key part of the rationale of the CJEU’s decision.¹⁶ Such a fundamental judicial decision of the CJEU in setting up an integral component of the EU legal order has a substantive rights based conception of the rule of law undertones.

In support of the notion that the CJEU has then developed an understanding of the rule of law with substantive qualities it is necessary to look at the case law of the Court. In *UPA* the CJEU made the first explicit reference to fundamental rights in connection to the rule of law.¹⁷ Specifying that due to the EU being a Union based on the rule of law, judicial review of the acts of the EU institutions are not just subject to the compatibility with the Treaties, but also with

⁹ Günter Wilms, *Protecting Fundamental Values in the European Union Through the Rule of Law Articles 2 and 7 TEU from a Legal, Historical and Comparative Angle* (EUI, Robert Schuman Centre for Advanced Studies, 2017), 4.

¹⁰ Laurent Pech, ‘The Rule of Law as a Constitutional Principle of the European Union’(2009) Jean Monnet Working Paper Series No. 4/2009, 52.

¹¹ Wilms (n 9) 57.

¹² Communication from the Commission to the European Parliament and the Council, ‘A New EU Framework to the Strengthen the Rule of Law’, COM (2014) 158 final, 4.

¹³ Theodor Konstantinides, *The Rule of law in the European Union: the Internal Dimension* (OUP, 2017), 15 and 16.

¹⁴ The judgment of “*Les Verts*” proclaiming the [EU] is a [Union] based on the rule of law preceded any reference in the Treaties to the rule of law. The first reference to the rule of law being made in the Preamble of the Maastricht Treaty in 1992, and with the rule of law being referred to in Article 6(1) of the Amsterdam Treaty (Article 6(1) corresponding now to Article 2 TEU in the latest Treaty revision).

¹⁵ See Ronald Dworkin, ‘*A Matter of Principle*’ (OUP 1985) 11 and 12.

¹⁶ Case 26/62 *Van Gend en Loos* EU:C:1963:1, 12.

¹⁷ Pech (n 10) 55.

the ‘general principles of law which include fundamental rights’.¹⁸ *Kadi* further built on a substantive understanding, with the CJEU relying on the rule of law in stating that in a Union based on the rule of law, the review of the validity of Union measures subject to fundamental rights must be considered to be the expression of a constitutional guarantee, in which the autonomous EU legal order and its protection of human rights cannot be prejudiced by an international agreement.¹⁹ Moreover, since the entry into force of the Lisbon Treaty fundamental rights enjoy a prominent place in Article 6(1) TEU and Article 6(3) TEU. *Opinion 2/13* of the CJEU reaffirms post Lisbon the importance of fundamental rights in the EU legal order and to the rule of law by recognising that ‘at the heart of that legal structure are the fundamental rights recognised by the Charter, respect for those rights being a condition of the lawfulness of EU acts, so that measures that are incompatible with those rights are not acceptable in the EU.’²⁰ It is clear from its decisions, that the CJEU does not understand the rule of law in the EU legal order as merely encompassing formal and procedural requirements but has substantive qualities for ensuring compliance with and respect for democracy and human rights.²¹ The Commission affirmed this position by stating in its Communication that the rule of law is a ‘constitutional principle with both formal and substantive components’.²² Yet, the EU conception of the rule of law has an added layer to its substantive understanding, that the CJEU applies an ‘integrative conception of the rule of law by interpreting EU law’s formality in light of its rational ends, *ie* promoting European integration,²³ moreover, the effectiveness of EU law. The coherence and the functioning of the EU legal order is dependent on these rationales, particularly the effectiveness of EU law being maintained.

In this way it becomes evident the operationalisation of the rule of law in the EU legal order, and its connection to European integration is reliant on a substantive rights based conception of the rule of law with this added layer. Firstly, as these normative ideals are incompatible with a formalistic conception. Secondly, the rule of law is intertwined with the effectiveness of EU law, as the rule of law supports the effectiveness of EU law and the functioning of the EU legal order. The principle of independent and impartial courts considered a core part of the rule law ensures the effectiveness of EU law is maintained, such as the preliminary ruling mechanism under Article 267 Treaty on the Functioning of the European Union (“TFEU”), and the principles of mutual trust and mutual recognition.²⁴ Whereby, these essential structures of EU law also assist in ensuring the independence and impartiality of Member State’s courts and tribunals is enforced, thus protecting the rule of law. Lastly, for the rule of law to move beyond its general expression as a value in Article 2 TEU to something more justiciable has required the CJEU in its approach thus far to rely on other Treaty provisions and substantive elements of the rule of law such as fundamental rights to give

¹⁸ Case C-50/00 P *Unión de Pequeños Agricultores* EU:C:2002:462, para 38; See also, Case C-583/11 *Inuit Tapiriit Kanatami* EU:C:2013:625, para 91.

¹⁹ Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation* EU:C:2008:461, paras 281-284 and 316.

²⁰ *Opinion 2/13* EU:C:2014:2454, para 169.

²¹ Pech (n 10) 55; COM (2014) 158 final (n 12) 4.

²² COM (2014) 158 final (n 12) 4.

²³ Konstadinides (n 13) 16.

²⁴ See to that effect the recent decisions of the CJEU: Case-64/16 *Associação Sindical dos Juizes Portugueses [Portuguese Judges]* EU:C:2018:117; Case C-216/18 PPU *Minister for Justice and Equality [LM]* EU:C:2018:586; C-284/16 *Achmea* EU:C:2018:158.

specific expression and be capable of being enforced. The CJEU's approach in this way by use of Art 19 TEU and the right to effective judicial protection emphasises individual rights for the protection of the rule of law and vice versa.²⁵ As put by Konstadinides, 'in this respect the rule of law forms more than part of a bundle of overlying principles together with democracy and human rights in that it places the individual at the forefront of EU integration'.²⁶ Whereby, the individual not only advances European integration towards an 'ever closer union' by becoming a core part of the system in promoting and enforcing the rule of law but involving the individual also facilitates the operationalisation of the rule of law via fundamental rights protection.²⁷

3 NORMATIVE ARGUMENTS FOR PROTECTING THE RULE OF LAW IN THE EU

3.1 THE IMPACT OF RULE OF LAW DEFICIENCIES ON THE FUNCTIONING OF THE EU LEGAL ORDER

The Commission recently stated that 'if the rule of law is not properly protected in all Member States, the Union's foundation stone of solidarity, cohesion, and the trust necessary for mutual recognition of national decisions and the functioning of the internal market as a whole, is damaged'.²⁸ The crux of the contention relates to the fact that the rule of law is essential to the functioning of the EU legal order. Deficiencies in the rule of law not only have the potential to disrupt the functioning of the EU legal order but may also cause serious irreparable damage to the EU legal order,²⁹ since it is based on 'mutual legal interdependence and mutual trust'³⁰ that flows from the principle of sincere cooperation in Article 4(3) TEU.

Why deficiencies in the rule of law can have such an impact is due to the unique structure of the EU legal order.³¹ EU law is built upon the fundamental premise that Member States of the EU share and that they recognise they share, on a reciprocal basis with all others, the common values the EU is founded on as referred to in Article 2 TEU.³² A defining feature of the EU legal order that is not only its strength in facilitating European integration, but also its source of vulnerability. In *Commission v Poland* the CJEU powerfully stated that, that premise justifies the existence of *mutual trust* between the Member States that the EU's founding values, 'including the *rule of law*, will be recognised, and therefore that the EU law that implements those

²⁵ *Portuguese Judges* (n 24) para 32 – 36; *LM* (n 24) paras 50 and 51; *Achmea* (n 24) para 36; Case C-619/18 *Commission v Poland* EU:C:2019:531, paras 46-49.

²⁶ Konstadinides (n 13) 17.

²⁷ See also Xavier Groussot and Anna Zemskova, 'The Resilience of Rights and European Integration' in Antonina Bakardjieva-Engelbrekt and Xavier Groussot (eds), *The Future of Europe: Legal and political Integration Beyond Brexit* (Hart Publishing, 2019), Forthcoming, 7. In regards to the doctrine of direct and individuals serving as an effective tool of European integration and becoming a driving force of the integration process.

²⁸ COM (2019) 163 final (n 5) 2.

²⁹ Case C-619/18 R *Commission v Poland* ECLU:EU:C:2018:1021, order of 17 December 2018, paras 64-70.

³⁰ Christophe Hillion, 'Overseeing the Rule of Law in the EU: Legal Mandate and Means' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016) 61.

³¹ See to that effects the pronouncements made by the CJEU in: *Achmea* (n 24) para 33; Case C-621/18 *Wightman* EU:C:2018:999, para 45; Opinion 1/17 (n 7) para 109; Opinion 2/13 (n 20) paras 166 and 167.

³² *Commission v Poland* (n 25) para 42; *Wightman* (n 31) para 63; *Achmea* (n 24) para 34; *LM* (n 24) para 35; *Portuguese Judges* (n 24) para 30; Opinion 2/13 (n 20) para 168.

values will be respected.³³ Member States are obliged to recognise each other's legal structures or to assume that they are at least as good as their standards in terms of governance, democracy and the rule of law.³⁴ The manner in which the rule of law is implemented and protected by Member States at the national level therefore plays a key role in respect to the functioning of mutual trust.³⁵

In the context of the Area of Freedom, Security and Justice ("AFSJ"), the principle of mutual trust is fundamental, and in particular to the European arrest warrant system. It allows for the creation of an area without internal borders to be maintained.³⁶ Only exceptional circumstances justifies derogation due to the assumption that all Member States are in compliance with EU law and particularly with fundamental rights.³⁷ Deficiencies in the rule of law can result in a loss of confidence where that mistrust may manifest in the fragmentation of the AFSJ if Member States refuse to recognise and enforce judicial decisions.³⁸ Cogent evidence of this risk lies in *Commission v Poland* where the CJEU stated that 'the risk of loss of confidence in Polish judicial system is not fictional or hypothetical but very real,' drawing on the case giving rise to *LM*.³⁹

Where rule of law deficiencies are related to concerns about the independence and impartiality of a Member State's judiciary, it impacts the EU's own judicial system. To preserve the specific characteristics and the autonomy of the EU legal order the Treaties established a judicial system to ensure the effectiveness of EU law.⁴⁰ In that respect, that the judicial system has as its 'key stone' the preliminary ruling procedure under Article 267 TFEU.⁴¹ That is because the procedure is an instrument for cooperation between the CJEU and the national courts.⁴²

If Member States fail to respect the rule of law in this way, that is liable to have an effect on the proper working of the system of judicial cooperation embodied by the preliminary ruling procedure under Article 267 TFEU.⁴³ It would have a chilling effect on judicial cooperation under Article 267 TFEU due to the role that national courts occupy. National courts occupy a crucial role in the EU's judicial system as guardians of the EU legal order and the judicial system

³³ *Commission v Poland* (n 25) para 43. See also to that effect: *Achmea* (n 24) para 34; *LM* (n 24) para 35.

³⁴ Carlos Closa, 'Reinforcing EU Monitoring of the Rule of Law: Normative Arguments, Institutional Proposals and the Procedural Limitations' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016) 16.

³⁵ COM (2014) 158 final (n 12) 2.

³⁶ Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* EU:C:2016:198, para 78; *LM* (n 24) para 36.

³⁷ *ibid*, paras 78 and 82; *ibid*, paras 36, 37 and 43. See also: Koen Lenaerts 'La Vie Après L'Avis: Exploring the Principle of Mutual (Yet Not Blind) Trust' (2017) 54 CML Rev 805, 821, 822 and 828-837. Lenaerts emphasises mutual trust is not absolute and is subject to strict limitations to strike a correct balance between the principle and the protection of fundamental rights. Limitations of mutual trust should operate in such a way as to restore mutual trust due to its importance as the cornerstone of the AFSJ.

³⁸ Lenaerts 'La Vie Après L'Avis: Exploring the Principle of Mutual (Yet Not Blind) Trust' (n 37) 821.

³⁹ *Commission v Poland* order of 17 December 2018 (n 29) paras 75 and 77.

⁴⁰ *Achmea* (n 24) para 35; *Commission v Poland* (n 25) para 44; Opinion 2/13 (n 20) para 174.

⁴¹ *Achmea* (n 24) para 37; *Commission v Poland* (n 25) para 44; Opinion 2/13 (n 20) para 176.

⁴² Case C-102/17 *Secretaria Regional de Saúde dos Açores* EU:C:2018:294, para 23; *Achmea* (n 24) para 37; Case C-370/12 *Pringle* EU:C:2012:756, para 83; Case C-83/91 *Meilicke* EU:C:1992:332, para 22.

⁴³ Case C-619/18 *Commission v Poland* EU:C:2018:910, order of 15 November 2018, para 21; Case C-522/18 *Zakładowi Ubezpieczeń Społecznych Oddział w Jasle* EU:C:2018:786, para 15; Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Strengthening the rule of law within the Union: A blueprint for action', COM (2019) 343 final, 4.

alongside the CJEU,⁴⁴ they are responsible in the first instance for applying EU law and for initiating the preliminary ruling procedure under Article 267 TFEU to secure the consistent and uniform interpretation of EU law.⁴⁵ Ensuring cases through Article 267 TFEU reach the CJEU that could not otherwise,⁴⁶ complementing the infringement action procedure under Article 258 TFEU, to protect individual rights in the specific case.⁴⁷ The importance of the preliminary ruling procedure for the functioning of the EU legal order is apparent in the way it is dual-tied to the protection of the rule of law, because it also a means to enforce the rule of law against a Member State through national courts. Further, the preliminary ruling procedure is inherently connected to European integration in the way it integrates citizens in the EU legal order for the enforcement of individual rights under EU law. The confidence of citizens depends on their ability to access the EU judicial system.

3.2 WE ARE ‘ALL AFFECTED’

Due to the way the EU legal order is structured and operates, rule of law deficiencies in a Member State are not restricted to its borders but have a knock-on effect in the way Member States of the EU are *all affected*. Not only those that come in direct contact with the judicial system are affected by rule of law violations but it also affects all EU citizens indirectly. The involvement of an illiberal Member State in the decision making processes in a way ‘govern[s] the lives of *all* citizens’.⁴⁸ That Member State will take decisions in the EU institutions such as the European Council and the Council of Ministers,⁴⁹ the illiberal values of that Member State can also influence EU legislation which is applicable across the EU.⁵⁰ Legitimacy of EU decision making is endangered due to the EU being built on the premise that all Member States share the common values the Union is founded upon.⁵¹ Therefore, rule of law violations indirectly affect EU citizens regardless if they are residing in that Member State or not, threatening the exercise of rights granted to EU citizens.⁵²

A normative argument for protecting the rule of law in the EU and its increased justiciability is based on the ‘all affected’ principle. The principle connotes in the context of the EU, that all those affected from the consequences of the erosion of the EU’s common values including the rule of law have an interest in limiting the externalities created by offending Member States.⁵³ This argument is also supported by primary law. The ‘all-affected’ principle

⁴⁴ Opinion 1/09 EU:C:2011:123, para 66

⁴⁵ COM (2019) 343 final, (n 43) 4.

⁴⁶ Opinion 1/09 (n 44) para 80; Xavier Groussot and Johan Lindholm, ‘General Principles: Taking Rights Seriously and Waving the Rule-of-Law Stick in the European Union’ in K Ziegler et al (eds), *Constructing Legal Orders in Europe: General Principles of EU Law*, (Edward Elgar, 2019) Forthcoming, 27.

⁴⁷ Case 28/67 *Mölkerei-Zentrale Westfalen-Lippe* EU:C:1968:17, 153.

⁴⁸ Jan-Werner Müller, ‘Should the EU Protect Democracy and the Rule of Law inside Member States’ (2015) 21 *ELJ* 141, 145; Carlos Closa, Dimitry Kochenov and J.H.H. Weiler, ‘Reinforcing Rule of Law Oversight in the European Union’ *EUI Working Papers RSCAS 2014/25*, 5.

⁴⁹ *ibid*; Kochenov and Pech, ‘Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality’ (n 3) 521.

⁵⁰ *Wilms* (n 9) 60.

⁵¹ Hillion, ‘Overseeing the Rule of Law in the EU: Legal Mandate and Means’ (n 30) 60 and 61.

⁵² Kochenov and Pech, ‘Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality’ (n 3) 521.

⁵³ Closa, ‘Reinforcing EU Monitoring of the Rule of Law: Normative Arguments, Institutional Proposals and the Procedural Limitations’ (n 34) 19.

on some levels overlaps to the interests shared by the principle of sincere cooperation and the obligations that the Union and Member States have under Article 4(3) TEU. The Union and the Member States have an interest in putting a stop to rule of law violations since all are affected and they are to facilitate the achievement of Union tasks. Rule of law breaches question their ability to fulfil those obligations, where according to that provision they are to assist each other in carrying out the tasks that flow from the Treaties, and that Member States shall facilitate the achievement of the Unions tasks. A justification based on the ‘all affected’ principle is also consistent with the rationale and the functions of Article 7 TEU. As is viewed by Müller ‘the core of Article 7 consists of a mechanism to *insulate* the rest of the Union from the government of a particular Member State deemed to be in breach of fundamental values; it enables a kind of *moral quarantine*...’⁵⁴ Article 7(3) TEU allows for the suspension of certain rights deriving from the application of the Treaties where there has been a determination of the existence of a serious and persistent breach by a Member State of the values in Article 2, under Article 7(2) TEU. Therefore, this ‘moral quarantine’ limits the affects that the offending Member State can have in influencing the decision making across the EU institutions protecting in a way *all* citizens of the Union, safeguarding their individual rights. The ‘all affected’ principle presents a legitimate reason for securing the protection of the rule of law in the EU and justifies an approach in operationalising the rule of law which also protects European integration.

3.3 UPHOLDING VOLUNTARY COMMITMENTS

In addition to its role as a founding value of the EU in Article 2 TEU, the rule of law constitutes a standard where it has a prominent role in which prospective Member States must fulfil to accede to the EU. This membership conditionality is formalised in Article 49 TEU which ‘epitomises, and partly “constitutionalises”, the previously established Copenhagen conditionality.’⁵⁵ The rule of law is made explicit in the criterion alongside democracy and respect for human rights, where prospective states must be able to guarantee these principles by their institutions for their accession to the EU. The EU values, and in particular the rule of law have been increasingly expressed in the EU enlargement policy to satisfy the substantive requirements under Article 49 TEU.⁵⁶ The values that Member States committed to when they acceded to the Union must be continued to be upheld otherwise the accession criteria becomes redundant. Therefore, irrespective of provisions detailing enforcement there is an implied right to safeguard the constitutional structure of the EU.

In the full court decision in *Wightman*, and the landmark ruling in *Commission v Poland*, the CJEU has placed important emphasis on Article 49 TEU. Reminding Member States that as is clear from Article 49 TEU, ‘the European Union is composed of States which have *freely and voluntarily committed themselves* to the common values referred in Article 2 TEU, which respect those values and which undertake to *promote* them.’⁵⁷ Article 50 TEU on the right to withdrawal is the counterpart, thus Article 49 TEU and Article 50 TEU are two sides of the same coin.⁵⁸

⁵⁴ Müller (n 48) 144.

⁵⁵ Christophe Hillion, ‘The Copenhagen Criteria and Their Progeny’ in Christophe Hillion (ed), *EU Enlargement: A Legal Approach* (Oxford, Hart Publishing, 2004), 3; See also: Konstadinides (n 13) 78.

⁵⁶ Hillion, ‘Overseeing the Rule of Law in the EU: Legal Mandate and Means’ (n 30) 67.

⁵⁷ *Commission v Poland* (n 25) para 42; *Wightman* (n 31) para 63, (emphasis added).

⁵⁸ *Wightman* (n 31) para 63.

The CJEU notably stating in this regard that ‘given that a State cannot be forced to accede to the European Union against its will, neither can it be forced to withdraw from the European Union against its will.’⁵⁹ Although expressed in relation to the question on unilateral revocation of a notification to withdraw under Article 50 TEU. It implicitly refers to the fact in the Treaties, Article 7 TEU only provides the possibility to sanction a Member State. Absent is the possibility to force a Member State to leave the EU even if there is deliberate continual disregard for the rule of law and the common values in general, by a Member State.

If the Union is unable to eject an illiberal Member State when they embark on a course which is inconsistent with the values of the EU and can cause serious and irreparable damage to the functioning of the EU legal order. It justifies the need for a strengthening and enforcement of the rule of law in order to guide Member States back to fulfilling the obligations they agreed to.⁶⁰ After all, the integrity to the EU’s claim for autonomy ‘based on external delimitation and internal cohesion’ is dependent on the Copenhagen criteria and ‘membership conditionality based on the rule of law adherence’.⁶¹ It is this adherence to the rule of law and the common values including democracy and respect for humans rights that distinguishes EU Member States from third countries allowing for the advancement of European integration. It was fittingly put by Lenaerts in this respect, that ‘an EU Member State and a third country may be equals before international law, but they are *not equals* before the law of the EU as only the former is part of the EU understood as a *Union of values*’.⁶²

4 OPERATIONALISING THE RULE OF LAW IN THE EU LEGAL ORDER

To protect the rule of law and ensure commitment of the common values referred to in Article 2 TEU that the Member States have committed to requires the ability to respond and to take action in an effective manner by enforcing compliance and remedying deficiencies. The ability to do so is limited if there are inadequate tools to perform these functions. The EU has ‘an extremely limited set of legal tools to address systemic violations of the EU values at the national level’,⁶³ particularly where these violations are related to the rule of law. The jurisprudence of the CJEU has developed increasingly to respond to the challenges and lend a hand in providing the relevant tools – legal basis, to protect the rule of law. In this sense there has been a trend towards increased justiciability of the rule of law at the judicial level, separate from the political mechanism under Article 7 TEU. It is proposed in this part that there are three lines of argumentation for the operationalisation of the rule of law in the EU legal order. Firstly, the use of Article 19 TEU to concretise the rule of law under Article 2 TEU. Secondly, the realisation of the rule of law through the protection of fundamental rights. Lastly, the rule of law and its connection to European integration and the use of the ‘ever closer union’ clause in further operationalising the rule of law.

⁵⁹ *ibid* 65.

⁶⁰ See also: Müller, (n 48) 145.

⁶¹ Konstadinides, (n 13) 78.

⁶² Lenaerts ‘La Vie Après L’Avis: Exploring the Principle of Mutual (Yet Not Blind) Trust’ (n 37) 809.

⁶³ Dimitry Kochenov and Laurent Pech, ‘Upholding the Rule of Law in the EU: On the Commission’s ‘Pre-Article 7 Procedure’ as a Timid Step in the Right Direction’ (2015) EUI Working Paper RSCAS 2015/24, 4.

4.1 ARTICLE 19 TEU – A CONCRETE EXPRESSION OF THE RULE OF LAW

In 2011 the Hungarian government's early retirement policy of the judiciary led to the removal of ten percent of the judiciary's most senior in a blatant attempt to undermine the independence of the judiciary and the rule of law.⁶⁴ The Commission brought as a result infringement proceedings but the action was based on age discrimination.⁶⁵ Due to the absence of general EU competence over the independence and impartiality of national judiciaries, the Commission was forced to rely on the general principle of non-discrimination on the grounds of age to challenge the legislation implementing the compulsory retirement of the judges.⁶⁶ The Commission won the case, however, it did not solve the underlying issue of a violation of judicial independence by state interference, and a breach of the rule of law, resulting in reality in an ineffective intervention by the Commission under Article 258 TFEU.⁶⁷ A similar policy by the Republic of Poland has led to a vastly different outcome in terms of infringement proceedings brought against Poland, evident from the judgment in *Commission v Poland*.⁶⁸ In contrast to the outcome in Hungary it can be seen that the Commission has had more success tackling the issues related to judicial independence and the rule of law. The difference in result can be attributed to changes in the legal landscape facilitated by the CJEU by allowing the rule of law to be operationalised through key provisions in the Treaties and the Charter.

The turning point to the changes of the role of the rule of law in the EU in this way stems from the case of *Portuguese Judges*, part of a series of cases in 2018 and 2019 that has seen the CJEU elaborate on the rule of law in the EU legal order.⁶⁹ In the process offering the Commission a life line and a means to engage with illiberal Member States in the backsliding of EU values and attacks on the rule of law. The case originated as a preliminary ruling from the Supreme Administrative Court, where the Associação Sindical dos Juizes Portugueses, a Trade Union of Portuguese Judges, acting on behalf of the members of the Court of Auditors brought an action seeking annulment of administrative measures that reduced the remuneration of those judges.⁷⁰ As a result the Supreme Administrative Court referred a question asking, must the principle of judicial independence, enshrined in the second subparagraph of Article 19(1) TEU, and in Article 47 of the Charter, and in the case law of the CJEU be interpreted as precluding the measures to reduce the remuneration that was applied to the judiciary in Portugal?⁷¹ Unknowingly lighting the first match for the future use and argumentation against rule of law violations. The significance of *Portuguese Judges* to the wider rule of law debate is that it

⁶⁴ Kochenov and Pech, 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality' (n 3) 514 ; Kim Lane Scheppele, 'Enforcing the Basic Principles of EU Law through Systemic Infringement Actions' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016), 109.

⁶⁵ Case C-286/12 *Commission v Hungary* EU:C:2012:687.

⁶⁶ Kochenov and Pech, 'Upholding the Rule of Law in the EU: On the Commission's 'Pre-Article 7 Procedure' as a Timid Step in the Right Direction'(n 63) 4.

⁶⁷ Dimitry Kochenov, 'Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool' (2015) 7 Hague Journal on the Rule of Law 153, 165 and 166.

⁶⁸ *Commission v Poland* (n 25).

⁶⁹ Groussot and Lindholm (n 46) 8; The series of relevant cases includes: *Achmea* (n 24); *LM* (n 24); Case C-220/18 PPU *Generalstaatsanwaltschaft* EU:C:2018:589; Case C-49/18 *Vindel* EU:C:2019:106; Case C-8/19 PPU *RH* EU:C:2019:110.

⁷⁰ *Portuguese Judges* (n 24) para 2 and 12.

⁷¹ *ibid* 18.

confirmed that Member States have a legal obligation to ensure judicial independence, and this is linked to the rule of law. It gave a foothold for the protection and enforcement of the rule of law, particularly where it is related to organisational changes to national judiciaries.

The CJEU has managed to operationalise the rule of law in Article 2 TEU in what can only be described as a remarkable feat of judicial engineering. The CJEU has capitalised on its earlier rulings such as *Les Verts*, *UPA*, and *Kadi* as discussed prior, where the CJEU has linked judicial review with the rule of law, it is a core rule of law principle. Stating that ‘the very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law’,⁷² or in the words of Advocate General (“AG”) Bobek, ‘effective judicial review constitutes the bedrock of the rule of law on which... the European Union is based’.⁷³ Article 19(1) TEU has become a key provision in that respect as the CJEU has stated that effective judicial protection is required by it. The CJEU further held that Member States are required by EU law to ensure that their courts and tribunals meet the requirements of effective judicial protection, which is a concrete expression of the rule of law.⁷⁴ That in order for that protection to be ensured the independence of national courts is essential as confirmed by Article 47 of the Charter.⁷⁵ Seen as the complementary case to *Portuguese Judges*, the case *LM* further defined in detail the requirements of the guarantees of independence and impartiality building on the previous jurisprudence of the Court in this area.⁷⁶ While noting that those guarantees are important for the proper working of the judicial cooperation system embodied by the preliminary ruling procedure under Article 267 TFEU and for the functioning of mutual trust.⁷⁷ Article 19(1) is further reinforced by recourse to Article 4(3) TEU where the obligation is supported by the principle of sincere cooperation.⁷⁸

In this way the CJEU has managed to capture the situations where there are changes to a Member State’s judiciary in a way that undermine judicial independence, that these situations are now a direct violation of Treaty provisions that are a concretisation of the rule of law. Thus the rule of law has been operationalised in the way it has been given specific effect in the EU legal order beyond the wording in Article 2 TEU. The effectiveness of this approach can be seen in the way that the material scope of Article 19(1) TEU has been interpreted, that the ‘provision relates to the “fields covered by Union law”, irrespective of whether Member States are implementing Union law, within the meaning of Article 51(1) of the Charter.’⁷⁹ Where the material scope is much broader and far encompassing. It opens up a gateway that the Commission was unable to contend in C-286/12 *Commission v Hungary*, that national courts fall within the scope of Article 19(1) TEU because the EU has opted for an ‘integrated system of judicial administration whereby national courts assume the task of applying EU law in cases

⁷² *ibid* 36; Case C-72/15 *Rosneft* EU:C:2017:236, para 73.

⁷³ Opinion Advocate General [AG] Bobek in Case C-556/17 *Torubarov* EU:C:2019:339, para 49.

⁷⁴ *Portuguese Judges* (n 24) paras 32, 34 and 37.

⁷⁵ *ibid* 41 and 42.

⁷⁶ *LM* (n 24) paras 63-67; For cases relating to the previous jurisprudence of the CJEU in respect of the requirements of independence and impartiality see: Case C-506/04 *Wilson*, EU:C:2006:587; Joined Cases C-58/13 and C-59/13 *Torresi* EU:C:2014:2088; Case C-222/13 *TDC A/S* EU:C:2014:2265; Case C-503/15 *Margarit Panicello* EU:C:2017:126.

⁷⁷ *ibid* 54; *Portuguese Judges* (n 24) para 41.

⁷⁸ *ibid* 34.

⁷⁹ *ibid* 29; *Commission v Poland* (n 25) para 50.

where it is relevant.⁸⁰ Therefore, because national courts act as ‘EU courts’ in that respect they fall within the fields covered by EU law due to the capacity to enforce EU rights within their jurisdiction.⁸¹ In C-619/18 *Commission v Poland* the CJEU further strengthened this argument in response to the claims by the Republic of Poland of competence creep. The CJEU stated that although ‘the organisation of justice in the Member States falls within the competence of those Member States, the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law and, in particular from Article 19(1) TEU.’⁸² This does not amount to competence creep because in requiring Member States to comply with those obligations the EU is not exercising that competence itself, neither is it aggregating that competence.⁸³

4.2 OPERATIONALISING THE RULE OF LAW THROUGH FUNDAMENTAL RIGHTS PROTECTION

Due to the way the rule of law is intrinsically linked to the principles of democracy and respect for fundamental rights it is no giant leap to state that the operationalisation of the rule of law is also achieved through the realisation of fundamental rights. This is aligned with the objectives of the Commission in *Commission v Hungary*, with the view that the examination of the legislation of the Member States under fundamental rights in rule of law cases would be necessary to ensure respect for the rule of law in those States. The finding of a violation of the Charter in these cases would constitute, for individuals affected by the legislation in question, a realisation of the rule of law. Such an application of the Charter would increase the visibility of fundamental rights and lead to the legitimisation of Union law in the ‘eyes of all citizens of the Union’.⁸⁴ The trend in the jurisprudence is one that reflects the operationalisation of the rule of law in this way, based on a substantive rights based conception of the rule of law.

The direction, however, taken by the CJEU is far from uncontroversial, it raises tensions over the relationship between the competence of the Union in fundamental rights protection under the Charter in EU law, and the handling of rule of law issues. A number of AGs have taken a narrow and restrictive approach in respect to these issues. In *SEGRO* the referring court put to the CJEU whether the national measures taken by Hungary violated the economic freedoms under Articles 49 and 63 TFEU but also notably the right to a fair trial and the right to property in respect of Articles 47 and 17 of the Charter.⁸⁵ AG Øe considered that an alleged infringement of Articles 17 and 47 of the Charter cannot be examined independently of the question of the infringement of the freedoms of movement as this would extend the competence of the Union beyond the limitations laid down in Article 6(1) TEU and Article

⁸⁰ Koen Lenaerts, ‘National Remedies for Private Parties in the Light of the EU Law Principles of Equivalence and Effectiveness’ (2011) 46 *Irish Jurist* (N.S.) 13, 13.

⁸¹ *ibid*; *Portuguese Judges* (n 24) para 40; *Commission v Poland* (n 25) para 51.

⁸² *Commission v Poland* (n 25) para 52; Joined Cases C-202/18 and C-238/18 *Rimševičs and ECB v Latvia* EU:C:2018:139, para 57.

⁸³ *ibid* 52.

⁸⁴ Opinion of AG Øe in Case C-235/17 *Commission v Hungary* EU:C:2018:971, para 99.

⁸⁵ Joined Cases C-52/16 and C-113/16 *SEGRO and Horváth* EU:C:2018:157. See also for a detailed examination Xavier Groussot, ‘*SEGRO* and its Aftermath: Between Economic Freedoms, Property Rights and the “Essence of the Rule of Law”’ (2019) in this contribution.

51(2) of the Charter.⁸⁶ Likewise, AG Wathelet and AG Bobek take a narrow approach in direct support of AG Øe, to the effect that fundamental rights are the ‘shadow’ of EU law and can only be enforced when a Member State is ‘implementing Union law’ in their view.⁸⁷ While the CJEU refrained from being drawn in on examining the national legislation in light of Articles 47 and 17 of the Charter due to the finding of a breach under Article 63 TFEU in *SEGRO*.⁸⁸ The Commission put the issue at the forefront of its claim in *Commission v Hungary* inviting the CJEU to rule on a failure to comply with the Charter independent from the economic freedoms,⁸⁹ therefore forcing the CJEU to choose ‘between two different theories with regard to how to apply the fundamental rights in situations where a violation of primary EU law has already been found.’⁹⁰

For AG Øe and AG Bobek the central issue is the competence of the CJEU in regards to the application of fundamental rights under the Charter and the inherent fundamental rights jurisdiction vested in national constitutional courts and the ECtHR, and the extent to which the CJEU can exercise fundamental rights review.⁹¹ In this connection there is the concern that a review of fundamental rights on an independent ground based on a broad interpretation of ‘implementing Union law’ would act as a *gateway* to the field of application of the Charter in which ‘the Member State[s] undertakes to comply with the catalogue of fundamental rights contained therein,’ and amount to expanding the scope of obligations beyond its ‘functionally’ defined dimension in an overreach of competence by the CJEU.⁹² The same underlying concern is present in the argumentation of AG Tanchev in the infringement proceedings against Poland where the position was taken that a separate assessment of the material scope is required under both Article 19(1) TEU and Article 47 of the Charter, rejecting the claim based on a cumulative application in absence of an assessment under Article 51(1) of the Charter.⁹³ Taking the view that otherwise it would ‘undermine the current system of review of the compatibility of national measures with the Charter and open the door for Treaty provisions such as Article 19(1) TEU to be used a “subterfuge” to circumvent the limits of the scope of application of the Charter.’⁹⁴

In responding to these concerns the CJEU has continued its progressive approach laid down in *Portuguese Judges* framing fundamental rights as a key tenet as part of the obligations on Member States particularly where the matters touch upon rule of law issues, opting to not follow the restrictive interpretation of the AGs. The CJEU in *Commission v Hungary* stated that since Hungary is actively invoking an exception provided by EU law, Article 17 of the Charter applies as it must be regarded as ‘implementing Union law’ under Article 51(1) of the Charter.⁹⁵ Putting

⁸⁶ Opinion of AG Øe in Joined Cases C-52/16 and C-113/16 *SEGRO and Horváth* EU:C:2017:410 paras 121 and 138.

⁸⁷ Opinion of AG Wathelet in Case C-284/16 *Achmea* EU:C:2017:699, para 220; Opinion AG Bobek in Case C-298/16 *Ispas* EU:C:2017:650, paras 29-34; Opinion of AG Bobek in Case C-646/17 *Moro* EU:C:2019:95, paras 80-89.

⁸⁸ *SEGRO* (n X) paras 127 and 128.

⁸⁹ Case C-235/17 *Commission v Hungary* EU:C:2019:432, paras 1 and 37-39.

⁹⁰ Groussot (n 85) 21; Opinion of AG Øe in *Commission v Hungary* (n 84) para 96.

⁹¹ Opinion of AG Øe in *Commission v Hungary* (n 84) para 67 and 68; Opinion of AG Bobek in *Moro* (n 87) paras 91 and 99.

⁹² *ibid*, paras 97 and 98; *ibid*, paras 88-90.

⁹³ Opinion of AG Tanchev in Case C-619/18 *Commission v Poland* EU:C:2019:325, paras 42, 54-56; Opinion of AG Tanchev in Case C-192/18 *Commission v Poland* EU:C:2019:529, paras 4, 67-70 and 114.

⁹⁴ Opinion of AG Tanchev in C-619/18 *Commission v Poland* (n 93) paras 57.

⁹⁵ *Commission v Hungary* (n 89) paras 62-66; For more on this point see Groussot (n 85).

the right to property front and centre and reaffirming a substantive approach to the rule of law. Further, in responding to the judicial reforms in Poland the CJEU's judgment in *Commission v Poland* continues in the same manner, enforcing a substantive rights based conception of the rule of law finding the Republic of Poland failed to fulfil its obligations under Article 19(1) TEU for the first time.⁹⁶ In doing so the CJEU inherently acknowledges a rule of law deeply rooted in a respect for fundamental rights that can be enforced against a Member State. It does so by recognising that the principle of effective judicial protection of individual rights referred to in Article 19(1) TEU is a *general principle* of EU law which arises from the constitutional traditions common to the Member States,⁹⁷ in which the principle has been enshrined in Articles 6 and 13 of the ECHR, and Article 47 of the Charter which corresponds to those provisions, confirming the fundamental rights connection.⁹⁸ The judgment reaffirms what was established in *Portuguese Judges*. In that regard, the arguments of AG Tanchev that allowing the direct influence of Article 47 of the Charter on the meaning of Article 19(1) TEU would interfere with the competence in relation to fundamental rights review becomes weakened.⁹⁹ When as acknowledged by the AG himself that a '*constitutional passerelle*' between those provisions exists given the common sources as a basis for those fundamental rights and must be interpreted in harmony, it would otherwise create an unnecessary division in fundamental rights review.¹⁰⁰ In any event, where matters concern the rule of law and persistent actions of illiberal Member States violating the common values that underpin the foundation of the Union arguments regarding scope become futile. As AG Bobek aptly states in the context of national measures affecting the judiciary, 'any such transversal, horizontal measures that will by definition affect each and every operation of the national judiciaries are a matter of EU law... largely irrespective of whether the specific procedural point that gave rise to that litigation is or is not within the scope of EU law in the traditional sense.'¹⁰¹ In that light it is important to not lose sight that those constitutional and institutional guarantees are ultimately there to ensure the effective judicial protection of EU law rights for individuals, the essence of the rule of law.¹⁰²

The operationalisation of the rule of law through the realisation of fundamental rights is further supported in the jurisprudence of the Court. The CJEU has recently held that some fundamental rights are self-executing and establishing that a broader range of legal persons are required to comply with the Charter by holding that it applies to 'a field covered by EU law,' even in horizontal situations.¹⁰³ This is evidenced by the cases of *Egenberger* and *Bauer* where the Court stated that Article 21 and Article 47 of the Charter is 'sufficient in itself and does not need to be made more specific by provisions of EU or national law to confer on individuals a right which they may rely on as such',¹⁰⁴ adding bite to the Charter with the direct effect of

⁹⁶ *Commission v Poland* (n 25) para 124;

⁹⁷ *ibid*, para 49.

⁹⁸ *ibid*.

⁹⁹ Opinion of AG Tanchev in C-192/18 *Commission v Poland* (n 93) para 70.

¹⁰⁰ *ibid*, 96 and 97.

¹⁰¹ Opinion of AG Bobek in Case C-556/17 *Tornbarov* EU:C:2019:339, paras 55.

¹⁰² *ibid*, 56.

¹⁰³ Daniel Sarmiento, 'The Year of the Infringement' *Despite our Differences* (10 January 2019)

<<https://despiteourdifferencesblog.wordpress.com/2019/01/10/the-year-of-the-infringement/>> (Accessed 20 October 2019); Opinion of AG Bobek in Case C-171/18 *Safeway* EU:C:2019:272, para 45.

¹⁰⁴ Case C-414/16 *Egenberger* EU:C:2018:257, paras 76 and 78; Joined Cases C-569/16 and C-570/16 *Bauer* EU:C:2018:871, para 89.

fundamental rights under the Charter in horizontal cases. The approach of the CJEU is also reaffirmed in *Cresco* earlier this year.¹⁰⁵ In choosing a progressive approach to the application of fundamental rights the CJEU in effect has reinvented the wheel in a ‘game of shadows’. Fundamental rights are more than just a ‘shadow’ of EU law, they form part and parcel of the substantive rights based conception of the EU rule of law, where the enforcement of fundamental rights undoubtedly leads to the strengthening and protection of the rule of law based on their inherent connection in the constitutional framework of the EU legal order.

4.3 THE RULE OF LAW AND AN EVER CLOSER UNION

In the EU legal order there is an inherent connection between the rule of law and European integration. The relevance of European integration to the rule of law debate arises from the fact European integration is historically seen as ‘one of the principal means with which to consolidate democracy.’¹⁰⁶ In relation, the Commission has stated that ‘European integration has itself made a significant and lasting contribution to a rule-based order in Europe’.¹⁰⁷ Therefore, it is argued that due to those connections and the way in which it is perceived, European integration has a role in the operationalisation of the rule of law and this is evident from the jurisprudence of the CJEU.

The relationship of the rule of law to European integration can be understood as operating as part of a feedback loop, reinforcing one another. The rule of law protects and facilitates European integration allowing for the proper functioning of the EU legal order and preventing the fundamental principles of mutual trust and mutual recognition from being undermined. Allowing for judicial cooperation between Member States and the Union to flourish. The strengthening of European integration also protects the rule of law. Through the consolidation of national courts into the EU judicial system acting as EU courts, and the direct involvement of citizens through the protection of individual rights allows for the means to actively challenge rule of law violations by a Member State and protect the rule of law.

The CJEU has played an active role in facilitating European integration and the protection of the rule of law in this regard. Reflecting again on *Van Gend en Loos*, the resulting doctrine has put the courts and individuals, ‘two set of actors in the epicentre of EU law,’¹⁰⁸ the CJEU steadily building upon this. The judgments key to the operationalisation of the rule of law through Article 19 TEU are also relevant in this respect. Post *Portuguese Judges* and *LM* national courts have a more active role in protecting the EU rule of law due to the ability to raise issues with national legislation and structural changes that undermine the rule of law through the preliminary ruling mechanism. The judgments of *Portuguese Judges* and *Commission v Poland* reveal the institutionalisation of national courts within the EU judicial system affirming the national courts’ part in European integration and the protection of rule of law.¹⁰⁹ In doing so it takes judicial cooperation to new heights where it becomes evident that it is a core component of EU legal order. The development towards deeper integration of national courts participation in the

¹⁰⁵ Case C-193/17 *Cresco* EU:C:2019:43, para 76.

¹⁰⁶ J.H.H Weiler, ‘Federalism and Constitutionalism: Europe’s “Sonderweg”’ (2000) Jean Monet Center for International and Regional Economic Law and Justice, Working Paper, 10.

¹⁰⁷ COM (2019) 163 Final (n 5) 2.

¹⁰⁸ *Groussot and Zemsanova* (n 27) 13.

¹⁰⁹ *Commission v Poland* (n 25) para 51; *Portuguese Judges* (n 24) para 40.

EU judicial system is also clear from the CJEU judgment in *Eurobolt*. The CJEU stated that national courts can request to the EU institutions evidence and documents for the purpose of deciding on the validity of a contested act in proceedings before them as interpreted by Article 267 TFEU and Article 4(3) TEU.¹¹⁰ *Eurobolt* reinforces the institutionalisation in the EU judicial system with a more integrated judiciary where the involvement of EU institutions in national proceedings represents a positive feature, when national courts are to decide on issues of EU law.¹¹¹ It demonstrates the dual obligation of Article 4(3) TEU and principle of sincere cooperation, where involvement of the EU institutions in fulfilment of their obligation strengthens the judicial review process and by virtue the rule of law.¹¹² The principle of sincere cooperation holds together the two levels of the EU judicial system in this regard.¹¹³

In addressing the ‘second set of actors’ of European integration involved in the protection of the rule of law, the individual. It has already been explained earlier in the discussion the role of the individual in facilitating European integration and promoting and enforcing the rule of law, however, it is worth noting again. ‘[I]ndividuals have been more than citizens of one of the Member States. They have occupied a central role in the shaping of the constitution of the European Union.’¹¹⁴ Just as that centrality contributed to driving the increasing significance of fundamental rights in the Union,¹¹⁵ it is now moving into the next phase, enforcing the rule of law. Recognising this Weiler stated ‘the secret of the rule of law in the legal order of the European Union rests... in the genius of the preliminary reference procedure’.¹¹⁶ Weiler could not have been more accurate in that regard given use of Article 267 TFEU in a number of cases to address rule of law issues.

How then does European integration have a role in further operationalising the rule of law in the EU? European integration is itself embodied in EU primary law through the ‘ever closer union’ clause in Article 1(2) TEU. The connection between Article 1(2) TEU and the rule of law is apparent from the CJEU’s opinions in *Opinion 2/13* and *Opinion 1/17* which acknowledge that the rule of law and fundamental rights are at the heart of the EU’s legal structure that contribute to the process of integration under Article 1 TEU.¹¹⁷ It is proposed that the Article 1 TEU can be used to further operationalise the rule of law and develop the scope of claims under EU law to challenge rule of law violations. This would be entirely consistent with the jurisprudence of the CJEU. In *Pupino* Art 1 TEU was used to develop the scope of individual rights in EU law within the previous third pillar, where the jurisdiction of

¹¹⁰ Case C-644/17 *Eurobolt* EU:C:2019:555, paras 30-32.

¹¹¹ Daniel Sarmiento, ‘National Courts and the Review of Validity of EU Acts After Eurobolt’ *Despite our Differences* (4 July 2019) < <https://despiteourdifferencesblog.wordpress.com/2019/07/04/national-courts-and-the-review-of-validity-of-eu-acts-after-eurobolt/> > (Accessed 1 October 2019).

¹¹² Indeed judicial review being an important part of the rule of law, and the EU being a Union founded based on the rule of law featured as the context of which Advocate General Hogan came to the same conclusion as the CJEU that EU institutions are to provide the relevant information when requested by national courts, see Opinion of Advocate General Hogan in Case C-644/17 *Eurobolt* EU:C:2019:164, paras 25 – 29 and 35 – 37.

¹¹³ Sarmiento (n 111).

¹¹⁴ Robin CA White ‘Reshaping the Human Rights Landscape of the European Union’ in Niamh Nic Schuibhne and Laurence W Gormley (eds), *From Single Market to Economic Union: Essays in Memory of John A Usher* (OUP 2012), 357.

¹¹⁵ *ibid.*

¹¹⁶ J.H.H. Weiler, ‘Van Gend en Loos: The Individual as Subject and Object and the Dilemma of European Legitimacy’ (2014) 12 *International Journal of Constitutional Law* 94, 103.

¹¹⁷ *Opinion 2/13* (n 20) paras 167 – 169; *Opinion 1/17* (n 7) para 110.

the CJEU was limited pre-Lisbon.¹¹⁸ Allowing the principle of conforming interpretation to be extended to framework decisions adopted in the context of Title VI.¹¹⁹ In a similar way the ‘ever closer union’ clause supports an interpretation that would lead to increased justiciability under Article 2 TEU, further concretising the provision or interpreting Articles 2 and 4(3) TEU in a way that supports systemic infringement actions under Art 258 TFEU.¹²⁰ Indeed, the objective of the ‘ever closer union’ clause ‘favours an interpretation of the rule of EU law which tends to strengthen, and not dissolve, the European Union.’¹²¹ Adopting such an approach would be consistent with the progressive stance the CJEU has recently taken, advancing the means of which to enforce the rule of law against recalcitrant States.

5 CONCLUSION

The European project is reliant on permanent respect for the rule of law in all Member States for the proper functioning of the EU legal order and its integrated judicial system.¹²² This necessitates for an approach which operationalises the rule of law to enforce compliance to uphold the voluntary commitments made by all Member States to respect the rule of law, and also to promote it. As shown by this discussion, the recent case law of the CJEU marks a jurisprudential shift towards this need which can be demarcated into three strands in operationalising the rule of law, each of which demonstrates the complex nature of the EU legal order in which there is also inherent overlap between the rule of law, fundamental rights and European integration with the underlying tensions present in balancing effective enforcement while staying within the boundaries of conferred competence. In embarking on a progressive approach towards a more justiciable rule of law to be enforced against Member States who seek to depart from the common values of the Union the CJEU has adopted a substantive rights based conception of the rule of law. The question while we await the further developments in the Polish saga is whether the CJEU will carry on this progressive path it has carved or has ‘rule of law fatigue’ set in like in the much maligned Brexit which has also gripped the Union.¹²³

¹¹⁸ Groussot and Zemskova (n 27) 5; Case C-105/103 *Pupino* EU:C:2005:386, para 36.

¹¹⁹ *Pupino* (n 118) paras 38 – 43.

¹²⁰ See Schepelle (n X) In which it is proposed that the Commission could pursue systemic infringement proceedings against offending Member States on the basis of Articles 2 and 4(3) TEU.

¹²¹ Opinion of AG Campos Sánchez-Bordona in Case C-621/18 *Wightman* EU:C:2018:978, para 133; The CJEU has also used Article 1 TEU as an interpretative guide in Case C-57/16 P *Client Earth* EU:C:2018:660, paras 73 and 74.

¹²² COM (2019) 343 final (n 43) 1.

¹²³ Daniel Sarmiento, ‘Limits of the Rule of Law: Is the Protection of Polish Judges Running out of Steam?’ *The EU Law Live Blog* (25 September 2019) < <https://eulawlive.com/2019/09/25/the-limits-of-the-rule-of-law-is-the-protection-of-polish-judges-running-out-of-steam/> > (Accessed 15 October 2019).

LIST OF REFERENCES

Closa C, Kochenov D and Weiler J, 'Reinforcing Rule of Law Oversight in the European Union' EUI Working Papers RSCAS 2014/25

Closa C, 'Reinforcing EU Monitoring of the Rule of Law: Normative Arguments, Institutional Proposals and the Procedural Limitations' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press, 2016)
DOI: <https://doi.org/10.1017/CBO9781316258774>

Dworkin R, '*A Matter of Principle*' (Harvard University Press, 1985)
DOI: <https://doi.org/10.1017/S002122370000933X>

Groussot X and Zemskova A, 'The Resilience of Rights and European Integration' in A Bakardjieva-Engelbrekt and X. Groussot (eds) in *The Future of Europe: Legal and political Integration Beyond Brexit* (Hart Publishing, 2019), (forthcoming)

Groussot X and Lindholm J, 'General Principles: Taking Rights Seriously and Waving the Rule-of-Law Stick in the European Union' in K Ziegler et al (eds), *Constructing Legal Orders in Europe: General Principles of EU Law*, (Edward Elgar, 2019), (forthcoming)
DOI: <http://dx.doi.org/10.2139/ssrn.3361668>

Groussot X, Kirst N and Leisure P 'SEGRO and its Aftermath: Between Economic Freedoms, Property Rights and the "Essence of the Rule of Law"' (2019) 2 Nordic Journal of European Law (forthcoming)

Hillion C, 'The Copenhagen Criteria and Their Progeny' in Christophe Hillion (ed), *EU Enlargement: A Legal Approach* (Oxford, Hart Publishing, 2004)
DOI: <https://doi.org/10.5040/9781472563026.ch-001>

Hillion C, 'Overseeing the Rule of Law in the EU: Legal Mandate and Means' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016)
DOI: <https://doi.org/10.1017/CBO9781316258774.005>

Konstadinides T, *The Rule of law in the European Union: the Internal Dimension* (OUP, 2017)
DOI: <https://doi.org/10.5040/9781509995516>

Kochenov D and Pech L, 'Upholding the Rule of Law in the EU: On the Commission's 'Pre-Article 7 Procedure' as a Timid Step in the Right Direction' (2015) Robert Schuman Centre for Advanced Studies Research EUI Working Paper RSCAS 2015/24

Kochenov D, 'Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool' (2015) 7 Hague Journal on the Rule of Law 153
DOI: <https://doi.org/10.1007/s40803-015-0019-1>

Kochenov D and Pech L, 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality' (2015) 11 *European Constitutional Law Review* 512
DOI: <https://doi.org/10.1017/S1574019615000358>

Lenaerts K, 'National Remedies for Private Parties in the Light of the EU Law Principles of Equivalence and Effectiveness' (2011) 46 *Irish Jurist* (N.S.) 13

Lenaerts K, 'The Court of Justice as the Guarantor of the Rule of Law within the European Union', in G. De Baere and J. Wouters (eds) in *The Contribution of International and Supranational Courts to the Rule of Law* (Edward Elgar Publishing, 2015)
DOI: <https://doi.org/10.4337/9781783476626.00018>

Lenaerts K, 'La Vie Après L'Avis: Exploring the Principle of Mutual (Yet Not Blind) Trust' (2017) 54 *CML Rev* 805

Müller J-W, 'Should the EU Protect Democracy and the Rule of Law inside Member States?' (2015) 21 *ELJ* 141
DOI: <https://doi.org/10.1111/eulj.12124>

Pech L, 'The Rule of Law as a Constitutional Principle of the European Union'(2009) Jean Monnet Working Paper Series No. 4/2009
DOI: <https://dx.doi.org/10.2139/ssrn.1463242>

Sarmiento D, 'The Year of the Infringement' *Despite our Differences* (10 January 2019) <<https://despiteourdifferencesblog.wordpress.com/2019/01/10/the-year-of-the-infringement/>> (Accessed 20 October 2019)

Sarmiento D, 'National Courts and the Review of Validity of EU Acts After Eurobolt' *Despite our Differences* (4 July 2019) < <https://despiteourdifferencesblog.wordpress.com/2019/07/04/national-courts-and-the-review-of-validity-of-eu-acts-after-eurobolt/>> (Accessed 1 October 2019)

Sarmiento D, 'Limits of the Rule of Law: Is the Protection of Polish Judges Running out of Steam?' *The EU Law Live Blog* (25 September 2019) < <https://eulawlive.com/2019/09/25/the-limits-of-the-rule-of-law-is-the-protection-of-polish-judges-running-out-of-steam/>> (Accessed 15 October 2019).

Schepelle K, 'Enforcing the Basic Principles of EU Law through Systemic Infringement Actions' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016)
DOI: <https://doi.org/10.1017/CBO9781316258774.007>