

OPERATIONALISATION OF THE RULE OF LAW

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The European Union is an international organisation, a derivative structure, the existence of which depends on its Member States. It is an economic and political entity as well as a community of values, but first and foremost, it is a legal entity. It is a community of law, and it is only through the compliance of all states and the EU itself with values, principles, and rules, including the rule of law, that this non-state entity exercising public authority is able to function and develop. And even if the Treaty on the European Union did not encompass the rule of law, the latter would still apply as a general principle of EU law derived from the constitutional traditions common to its Member States. In the EU, the rule of law has been elevated to the rank of a value, a leading axiological category underpinning the entire structure – an element of European constitutional identity. Based on the recent jurisprudence, the article shows how the rule of law as a value enshrined in Article 2 TEU, has been operationalized by the Court of Justice. On the one hand, there is a judicial mechanism to the extent that other provisions of the treaty and secondary law confirm this competence, while on the other, there is a political mechanism applicable in matters not covered by substantive EU law. In the EU, the judicial mechanism is by far the most effective of the two, while the political mechanism does not work as its effectiveness depends on the goodwill and cooperation of the Member States.

1 INTRODUCTORY REMARKS

As the EU is a ‘Union based on the rule of law’, it establishes a multilevel system of governance of laws, not men.¹

The rule of law is an analytical category, which, in principle, should be an inherent feature of national constitutions. However, as it turns out, this does not necessarily have to be the case. This is due to the fact that a reference to the rule of law can also be found in the founding documents, i.e. treaties of international law, of certain non-state entities. One such non-state entity is the European Union (hereinafter: EU), an international organization exercising public authority. Applying a domestic analogy, we can even say that the EU exercises legislative, executive, and judicial powers derived from its competences previously reserved for the Member States.

It ought to be pointed out that the rule of law, as a value enshrined in Article 2 TEU, is an abstract category, which requires substantiation – or operationalisation as some wish to call it. Operationalization of Article 2 TEU not only entails the substantiation of this abstract

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¹ Koen Lenaerts, ‘On Checks and Balances: The Rule of Law within the EU’ (2023) 29(2) Columbia Journal of European Law 28.

category, i.e. its translation into principles and rules (operationalisation *sensu stricto*) but also, and perhaps even more so, its enforcement (operationalisation *sensu largo*). This, in turn, should help promote good governance, and, as a consequence, the smooth functioning of the entire supranational structure.

To ensure state compliance with values (themselves a somewhat vague category), their operationalization is required. One of the principles comprising the rule of law as a value is the independence of the judiciary, which follows from Article 19(1) subparagraph 2 TEU. At the present time, the judicial mechanism provided for under Articles 258, 259 and 267 TFEU seems to be the most effective means of its enforcement, as opposed to the political mechanism provided for in Article 7 TEU, the effectiveness of which depends on the goodwill of the Member States.

This article begins with some remarks on the rule of law, followed by an analysis of the judgment in the case *Associação Sindical dos Juizes Portugueses* together with its implications, a discussion of the various ways in which the rule of law is protected, as well as some concluding remarks. The research area is limited to the EU and its Member States. The research problem itself comes down to the question of how the rule of law can be operationalised in a non-state, i.e. supranational context. In turn, the research questions focus on the role of institutions in operationalizing the rule of law, the various ways of protecting this very value and, in particular, the role of the Court of Justice (hereinafter: CJEU/Court) in this process.

So far, numerous studies have been devoted to the rule of law² and jurisprudence on this matter,³ above all to the case of *Associação Sindical dos Juizes Portugueses* – one of the most important rulings in the history of European integration. Hence, why is there a need for another study addressing this issue? It needs to be pointed out that the rule of law not only remains a relevant topic involving many important issues demanding resolution but is also a very sensitive one. Hence, there are a variety of ways of dealing with it. For the purpose of the present study the following thesis was adopted: the ruling in the Portuguese case stemmed from the pressing circumstances of the time, i.e. the urgent need to counteract systemic violations of the rule of law and opened the way for the Court to apply a judicial mechanism.

² There is a lot of literature on the subject, see e.g.: András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member State Compliance* (Oxford University Press 2017); Carlos Closa and Dimitry Kochenov (eds), *Reinforcing the Rule of Law Oversight in the European Union* (Cambridge University Press 2016); Laurent Pech, 'Article 7 TEU: From "Nuclear Option" to "Sisyphian Procedure"?' in Uladzislau Belavusau and Aleksandra Gliszczynska-Grabias (eds), *Constitutionalism under Stress* (Oxford University Press 2020); Barbara Grabowska-Moroz et al, 'Reconciling Theory and Practice of the Rule of Law in the European Union' (2022) 14(2-3) Hague Journal on the Rule of Law 101; Kim Lane Scheppele et al, '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' (2020) 39 Yearbook of European Law 3; Koen Lenaerts, 'Upholding the Rule of Law through Judicial Dialogue' (2019) 38 Yearbook of European Law 3.

³ See e.g.: Aida Torres Pérez, 'From Portugal to Poland: The Court of Justice of the European Union as watchdog of judicial independence' (2020) 27(1) Maastricht Journal of European and Comparative Law 105; Laurent Pech and Sébastien Platon, 'Judicial independence under threat: The Court of Justice to the rescue in the ASJP case' (2018) 55(6) Common Market Law Review 1827; Matteo Bonelli and Monica Claes, 'Judicial serendipity: How Portuguese judges came to the rescue of the Polish judiciary' (2018) 14(3) European Constitutional Law Review 622.

2 RULE OF LAW – GENERAL REMARKS

The rule of law is both a fundamental principle and a value defined by treaty,⁴ which underpins democratic societies and ensures the protection of individual rights and liberties. While it is a political concept, it is first and foremost a legal one. However important the rule of law may be, until recently it lacked a legal definition. Hence, efforts have been made to specify and substantiate this very term. The first institution to tackle the problem was the European Commission (hereinafter: EC/Commission) (2014),⁵ followed later by the European Parliament (hereinafter: EP/Parliament) and the Council of the EU (hereinafter: Council) (2020). The first attempt to provide a legal definition of the rule of law came with the ‘conditionality’ regulation adopted by the EP and Council. In the said regulation we read:

the rule of law refers to the Union value enshrined in Article 2 TEU. It includes the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law. The rule of law shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU.⁶

However, some Member States, while not necessarily questioning the very existence of the rule of law as a value at the EU level, are at least trying to assign it their own meaning and understanding in line with national traditions. And this is where, among other things, a problem arises, for, as a rule, national traditions refer to a state, which the EU is not.⁷ And since the rule of law was not included in the founding treaties (Treaty of Paris (1951), Treaties of Rome (1957)), the task of introducing this principle into the EU legal order, or value as it is defined in the treaty, i.e. establishing its meaning and understanding (or its manifestations)⁸ as a general principle of EU law, fell to the CJEU.

A reference to the principle of the rule of law to which all Member States are bound as well as to the goal of the Community and Union regarding external development policy and common security and defence policy can already be found in the Treaty of Maastricht.⁹ Later, the Treaty of Amsterdam (hereinafter: TA) contained a catalogue of principles on which the EU was based, among them the rule of law.¹⁰ However, greater emphasis was

⁴ See Article 2 TEU.

⁵ See European Commission, ‘Communication from the Commission to the European Parliament and the Council: A new EU Framework to strengthen the Rule of Law’ COM (2014) 0158 final.

⁶ See Regulation (EU, Euratom) 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 (Conditionality Regulation) Art 2.

⁷ There are two leading traditions, namely German *Rechtsstaat* and French *état de droit*, see Danuta Kabat-Rudnicka, ‘The rule of law in the national and supranational context’ (2023) 2023(2) *Przegląd Europejski* 9; Martin Sunnqvist, ‘“EU’s legal history in the making”. Substantive Rule of Law in the Deep Culture of European Law’ (2023) 45(1) *Giornale di Storia costituzionale* 5.

⁸ See Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* EU:C:2018:117 para 35, where the Court refers to the principle of the effective judicial protection of individuals’ rights under EU law as a general principle of EU law stemming from the constitutional traditions common to the Member States.

⁹ See Preamble to the TEU, Article 130u TEC and Article J1 TEU.

¹⁰ See Article 6(1) TEU.

placed on the rule of law in the Treaty of Lisbon (hereinafter: TL) which contains the catalogue of values underlying the Union, including the rule of law. In Article 2 TEU we can read: ‘The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities’.

The Treaty on the EU (hereinafter: TEU) in the Lisbon version refers to the rule of law – the term having been ‘borrowed’ from the constitutional law (or rather constitutional traditions) of the Member States, abandoning in this way the term earlier used by the CJEU, which, however, seems more appropriate, i.e. less controversial, namely a community of law.¹¹ It is also worth noting that the catalogue of values was placed at the very beginning of the TEU, which proves not only the importance the authors (high-contracting parties) attached to axiology, but also that the entire ‘edifice’ is founded on values the EU and its Member States should respect in all their activities. Such a positioning resembles the structure of national constitutions, which usually place guiding principles at the very beginning, i.e. in the preamble and in the very first articles, i.e. principles, which regulate the most prominent issues – cardinal issues as some would argue – for the entire legal order, and which constitute its very foundation. And unlike the TA, which refers to principles, the TL refers to values. What is more, the Charter of Fundamental Rights (hereinafter: CFR/Charter) refers to the principles of democracy and the rule of law on which the Union is founded, as opposed to the values of human dignity, freedom, equality, and solidarity.¹²

As has already been said, the rule of law is a value; however, it is also a general principle of EU law. It is a constitutional principle¹³ and an axiological norm. Not only does it require laws to be clear, transparent, and applied equally to everyone within *ex ante* defined limits but it also requires an independent judiciary and effective law enforcement – a value (principle) which is to be respected and adhered to by both the Member States and the EU itself. In other words, on the one hand, it is about accountability and, on the other, about guarantees regarding its enforcement.

It should be pointed out that respect for the rule of law has become an even more pressing issue following the establishment of the area of freedom, security, and justice (hereinafter: AFSJ) under the TL. The point namely is that the absence of judicial independence will cause national courts to lose confidence in one another, which will, in turn, lead to the fragmentation of the AFSJ.¹⁴ Also – according to Koen Lenaerts – with the disappearance of internal borders in Europe the long arm of the law should take on a supranational dimension.¹⁵ What is more, because the EU’s constitutional structure would

¹¹ In one of the Court’s first judgments we read: ‘the European Economic Community is a Community based on the rule of law’ - Case 294/83 *Parti écologiste Les Verts v European Parliament* EU:C:1986:166 para 23.

¹² See Preamble to the Charter of Fundamental Rights of the European Union [2012] OJ C326/391, and also Jacek Barcik, *Ochrona praworządności w Radzie Europy i Unii Europejskiej ze szczególnym uwzględnieniem niezależności sądów i niezawisłości sędziów* (C.H. Beck 2019) 107.

¹³ See Laurent 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(3) *European Constitutional Law Review* 359.

¹⁴ See Koen Lenaerts, ‘On Values and Structures: The Rule of Law and the Court of Justice of the European Union’ in Anna Södersten and Edwin Hercock (eds), *The Rule of Law in the EU: Crisis and Solutions* (Swedish Institute for European Policy Studies 2023) 15.

¹⁵ See Lenaerts, ‘On Checks and Balances’ (n 1) 43.

fall apart in the absence of the rule of law, two essential conditions for a Member State's participation in this structure are value alignment and prohibition of value regression.¹⁶

What makes the rule of law special is the fact that it has become a dominant organisational paradigm of modern constitutional law not only in Member States but also in the EU as a whole – a meta-principle which provides the foundations for an independent and effective judiciary and justifies the subjection of public power to formal and substantive legal constraints.¹⁷

3 RULE OF LAW IN NEED OF OPERATIONALISATION

It is worth noting that enforcing values is a challenging task, hence the need for operationalizing them. In the context of the rule of law, it entails the translation of this abstract concept into not only principles and rules but also into practical measures facilitating their enforcement.

The rule of law means that all public authorities must operate within the limits of the law, i.e. they are bound by legal norms which are beyond their control.¹⁸ It also means the subordination of arbitrary power to laws and the containment of the guardians of the law to serve the interests of the law, i.e. the interest of the whole community.¹⁹

In the EU, the rule of law has become one of these issues, which is the subject not only of legal and political debate, but also of in-depth analysis.²⁰ The rule of law is a constitutional principle characterized by both formal and substantive elements. However, the doctrine also entails a three-fold division into formal, procedural, and substantive components, emphasizing that it involves not only compliance with the law but also ensuring that the content meets the standards of liberal democracies. What is more, it is inextricably linked to democracy and fundamental rights,²¹ as one cannot exist without the other.

In the EU, it was primarily the Court which identified and developed key elements defining the rule of law. In the *Les Verts* case, the Court held that, in a Community based on the rule of law, the Member States and their institutions are subject to scrutiny to ensure that the measures they adopt comply with the treaty.²² In turn, in the *Openbaar* case, we can read that the judiciary should be distinguished from the executive, in accordance with the principle of separation of powers which characterises the rule of law.²³ And in the most important ruling to date – the *Associação Sindical* case – the Court held that the very existence of effective

¹⁶ *ibid* 54.

¹⁷ Laurent Pech, 'The Rule of Law as a Well-Established and Well-Defined Principle of EU Law' (2022) 14(2-3) *Hague Journal on the Rule of Law* 124.

¹⁸ Werner Schroeder, 'The Rule of Law as a Value in the Sense of Article 2 TEU: What Does It Mean and Imply?' in Armin von Bogdandy et al (eds), *Defending Checks and Balances in EU Member States* (Springer 2021).

¹⁹ Mortimer N S Sellers, 'What Is the Rule of Law and Why Is It So Important?' in James R Silkenat et al (eds), *The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)* (Springer 2014).

²⁰ See also Jens Meierhenrich and Martin Loughlin (eds), *The Cambridge Companion to the Rule of Law* (Cambridge University Press 2021); Dimitry Kochenov et al, 'Introduction: The Great Rule of Law Debate in the EU' (2016) 54(5) *Journal of Common Market Studies* 1045; Amichai Magen, 'Cracks in the Foundations: Understanding the Great Rule of Law Debate in the EU' (2016) 54(5) *Journal of Common Market Studies* 1050.

²¹ We find a similar reference in the Preamble to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 Nov. 1950, European Treaty Series - No. 5.

²² *Parti écologiste 'Les Verts'* (n 11) para 23.

²³ Case C-477/16 *Openbaar Ministerie v Ruslanas Kovalkovas* EU:C:2016:861 para 36.

judicial review to ensure compliance with EU law is of the essence of the rule of law.²⁴ The Court also acknowledged key elements of the rule of law, including the principles of legality,²⁵ legal certainty,²⁶ and the protection of legitimate expectations.²⁷

As evident, the rule of law is an integral facet of the EU legal order.

4 WAYS TO PROTECT THE RULE OF LAW

There are at least three ways in which the rule of law is protected. The first, and the least effective of these is the political mechanism for monitoring compliance with the rule of law, namely the procedure provided for under Article 7 TEU. As the Hungarian and Polish cases show, this procedure is not a sufficient measure for preventing serious breaches of the rule of law by Member States. What makes this procedure unique is the fact that it tries to reconcile sanctions with respect for sovereignty,²⁸ which is an extremely difficult, if not impossible task.

The procedure introduced by Article 7 TEU is complex, rigid, and difficult to initiate as it depends on the political will of the Member States, and most importantly, has a built-in intergovernmental component.²⁹ And it is because of the difficulties involved in its application that it became necessary to look for other ways. To this end, in March 2014 the Commission issued a communique entitled *A new EU Framework to strengthen the Rule of Law*, the main objective of which is to address systemic threats to the rule of law. According to the communique, the following must be under threat:

The political, institutional and/or legal order of a Member State as such, its constitutional structure, separation of powers, the independence or impartiality of the judiciary, or its system of judicial review including constitutional justice [...] as a result of the adoption of new measures or of widespread practices of public authorities and the lack of domestic redress. The Framework will be activated when national ‘rule of law safeguards’ do not seem capable of effectively addressing those threats.³⁰

As can be seen, this instrument is intended to be triggered when a Member State’s authorities take measures or tolerate situations, which may systematically and adversely affect the integrity, stability, or the smooth functioning of institutions and mechanisms aimed at protecting the rule of law.³¹

The other two instruments are judicial in nature. The CJEU can review compliance with the rule of law in two other ways, namely by direct action (complaint) – an instrument provided for in Articles 258 and 259 TFEU and by non-complaint proceedings – preliminary questions from national courts pursuant to Article 267 TFEU.

²⁴ *Associação Sindical dos Juizes Portugueses* (n 8) para 36.

²⁵ Case C-303/05 *Advocaten voor de Wereld* EU:C:2007:261 paras 49-50.

²⁶ Case C-550/07 P *Akzo Nobel Chemicals and Akros Chemicals v Commission* EU:C:2010:512 para 100.

²⁷ Case C-362/12 *Test Claimants in the Franked Investment Income Group Litigation* EU:C:2013:834 para 44.

²⁸ See *Barcik* (n 12) 152.

²⁹ *ibid.*

³⁰ Commission, ‘A new EU Framework to strengthen the Rule of Law’ (n 5) point 4.1.

³¹ *ibid.*

With regard to direct action and prior to the ruling in the *Associação Sindical* case, it was not clear whether the judicial route provided for in Article 258 TFEU could be used to protect the rule of law in connection with the independence of the judiciary and judges. The question namely was whether Article 19 TEU, which obliges Member States to introduce measures necessary to ensure effective judicial protection in areas covered by EU law may constitute an independent legal basis for a complaint where no other norm of EU substantive law is alleged to have been breached.³² Following the Court's judgment, Article 258 TFEU can be used, in parallel with, and independently of Article 7 TEU,³³ to protect the independence of national courts and judges. In other words, the issue at stake is judicial independence, the independence of which is a precondition for any judicial dialogue between EU courts and national courts.

As for non-complaint proceedings under Article 267 TFEU, it needs to be said that until 2018 the preliminary ruling instrument was not used as a means of protecting the rule of law in the case of judicial independence and the impartiality of judges. The reason was that the question referred to the Court must concern an interpretation of EU law, and hence when submitting a question, a national court had to indicate a substantive (material) norm of EU law. Since the organization of the judiciary does not fall within the catalogue of competences transferred to the EU, it could not be the subject of a request for a preliminary ruling – an approach that has been changed following the judgment in the case of *Associação Sindical*. When ruling on the case, the Court decided to refer only to Article 19(1) TEU, thus significantly expanding the scope of legal protection. *Ipsa facto* Article 19(1) TEU has become an independent legal basis for assessing allegations regarding possible failures in ensuring effective judicial protection, including legal regulations not related to the application of EU law but falling within the fields covered by EU law.³⁴

In summary, it can be argued that the intellectual construction adopted by the CJEU 'revolutionizes' the way in which the rule of law is protected in the EU. More importantly, in addition to the centralized model provided for in Articles 258 and 259 TFEU, and above all in Article 7 TEU, it is now possible for national courts to provide decentralized judicial protection.³⁵ What is more, the way in which the values under Article 2 TEU have been operationalised is not only a manifestation of how the EU functions as a polity but also

³² In Case C-619/18, the first direct action for an infringement under Article 258 TFEU on the compatibility of certain measures taken by a Member State concerning the organisation of its judicial system, the Commission, when launching the procedure referred to Article 19 TEU and Article 47 CFR; see Case C-619/18 *European Commission v Republic of Poland* EU:C:2019:531. It was AG Tanchev who in his opinion stated: 'Article 19(1) TEU constitutes an autonomous standard for ensuring that national measures meet the requirements of effective judicial protection, including judicial independence', see Opinion of AG Tanchev in Case C-619/18 *European Commission v Republic of Poland* EU:C:2019:325 para 58. See also Barcik (n 12) 169.

³³ It should be pointed out that Article 7 TEU plays a somewhat different role, as according to the Court: 'Article 7 TEU, however, plays a very specific role in the system of remedies provided for by the Treaties, since it exceptionally authorises the EU institutions to monitor compliance by the Member States with the fundamental values of the European Union in areas which fall within the exclusive competence of the Member States' – Case C-157/21 *Republic of Poland v European Parliament and Council of the European Union* EU:C:2022:98 para 96.

³⁴ See Barcik (n 12) 173-176.

³⁵ *ibid* 176.

shows how the very operationalisation of common values is most likely the most important development since the Court's judgment in the *Costa* case.³⁶

It is also important to emphasize that initiating judicial procedures is not always an easy task, particularly when dealing with those that carry political undertones. The lack of political will to proceed under Article 7 TEU has given rise to a search for other ways to respond to threats to the rule of law in Member States. One such solution is the use of economic tools – the latest mechanism for protecting the rule of law in the EU, combining the protection of the rule of law with budgetary sanctions.³⁷ This, in turn, is possible due to the regulation protecting the EU budget in the event of generalized deficiencies in the rule of law in Member States. However, Poland³⁸ and Hungary³⁹ appealed to the CJEU against this mechanism.

5 OPERATIONALISATION OF THE RULE OF LAW

Article 2 TEU not only contains the values on which the EU is based, including the rule of law, but also underlines the importance of upholding these values both within the EU as a whole and within its Member States. Operationalizing the rule of law involves translating this abstract concept into principles and rules as well as practical measures, which can be used to assess compliance with the rule of law in a given legal system, either EU or national. It is important to add that compliance with this value is also indispensable for ensuring the EU's legitimacy, effectiveness, and protection of fundamental rights.

The *Associação Sindical* case is another landmark ruling towards legal integration in Europe, which is why it is often referred to as constitutional or even revolutionary. It is also seen as a fundamental (or a crucial) moment enabling effective monitoring of judicial independence in the EU.⁴⁰ It operationalizes Article 2 TEU, while at the same time interpreting it in connection with other treaty provisions. Consequently, Article 2 TEU becomes an effective tool for protecting the rights of individuals, which can now be effectively applied in proceedings before national and EU courts. Thus, the rule of law, which until now has been protected by the political, burdensome, ineffective, and, above all else, centralised mechanism provided for in Article 7 TEU acquires new opportunities for enforcement. These opportunities are decentralized as they can be applied by any national judge (functionally a European judge) when deciding on individual cases.⁴¹

As for the facts, in 2014 the Portuguese legislature temporarily reduced the remuneration of employees working in the Portuguese public administration, including judges. The Associação Sindical dos Juizes Portugueses (hereinafter: ASJP) acting on behalf of members of the Tribunal de Contas (Court of Auditors) decided to challenge these salary-cutting measures on the grounds that they infringed the principle of judicial independence enshrined in both the Portuguese Constitution and in EU law (according to Article 19(1)

³⁶ Marton Varju, *Member State Interests and European Union Law. Revisiting the Foundations of Member State Obligations* (Routledge 2020) 71-72.

³⁷ See Conditionality Regulation (n 6).

³⁸ Case C-157/21 *Republic of Poland v European Parliament and Council of the European Union* EU:C:2022:98.

³⁹ Case C-156/21 *Hungary v European Parliament and Council of the European Union* EU:C:2022:97.

⁴⁰ Stoyan Panov, 'Walking the line in times of crisis: EU fundamental rights, the foundational value of the rule of law and judicial response to the rule of law backsliding' (2023) 6(1) *Nordic Journal of European Law* 60, 67.

⁴¹ See Barcik (n 12) 112.

TEU ‘Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law’) as well as in the Charter (Article 47 CFR ‘Right to an effective remedy and to a fair trial’). The Portuguese Supreme Administrative Court referred the disputed issue to the CJEU and requested a preliminary ruling. Before concluding that the ‘salary-reduction measures at issue in the main proceedings cannot be considered to impair the independence of the members of the Tribunal de Contas’,⁴² the Court referred to several criteria, which should be adopted by national courts when reviewing measures that may infringe judicial independence.

This case stands out for two reasons. Firstly, by adopting Article 19(1) TEU as an independent legal basis for settling the issue and by applying a broad interpretation of the provisions of the article in question, the Court has broadened the scope of legal protection. However, to apply Article 19(1) TEU, the Court had to find a connecting element/link (‘in the fields covered by Union law’), which is where the second element comes into play. The Court applied a systemic interpretation while referring to the EU legal order and the EU itself. It also referred to the catalogue of values enshrined in Article 2 TEU, including the rule of law. Above all, however, it found that the principle of effective judicial protection of the rights individuals derive from EU law (referred to in Article 19(1) TEU) constitutes a general principle of law stemming from the common constitutional traditions of Member States, a fact which is also expressed in Articles 6 and 13 ECHR, and therefore it would apply even in the absence of any positive regulation in primary law.⁴³

To justify its decision, the Court referred to three provisions, namely to Article 19(1) TEU (an independent legal basis/ground for settling the issue) in conjunction with Article 2 TEU (the rule of law as an EU value) and Article 4(3) TEU (the principle of sincere cooperation).

The Court began its reasoning by referring to Article 2 TEU. It recalled that the EU is founded on values, including the rule of law, which are common to Member States in conditions where justice prevails and since

The European Union is a union based on the rule of law in which individual parties have the right to challenge before the courts the legality of any decision or other national measure relating to the application to them of an EU act.⁴⁴

Article 19 TEU, which gives concrete expression to the value of the rule of law stated in Article 2 TEU, entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals.⁴⁵

Adding that

The Member States are therefore obliged, by reason, *inter alia*, of the principle of sincere cooperation, set out in the first subparagraph of Article 4(3) TEU, to ensure, in their respective territories, the application of and respect for EU law. In that regard, as provided for by the second subparagraph of Article 19(1) TEU, Member

⁴² *Associação Sindical dos Juizes Portugueses* (n 8) para 51.

⁴³ *ibid* para 35, see also *Barcik* (n 12) 112-113.

⁴⁴ *Associação Sindical dos Juizes Portugueses* (n 8) para 31.

⁴⁵ *ibid* para 32.

States are to provide remedies sufficient to ensure effective judicial protection for individual parties in the fields covered by EU law.⁴⁶

Thus, the Court found a link between compliance with the rule of law and the principle of effective judicial protection, as one cannot exist without the other,⁴⁷ and hence

to the extent that the Tribunal de Contas (Court of Auditors) may rule, as a ‘court or tribunal’ [...] on questions concerning the application or interpretation of EU law [...] the Member State concerned must ensure that that court meets the requirements essential to effective judicial protection, in accordance with the second subparagraph of Article 19(1) TEU.⁴⁸

What stands out in the Court’s reasoning is the fact that it relied almost exclusively on Article 19(1) TEU, which, in the Court’s words gives ‘concrete expression to the value of the rule of law stated in Article 2 TEU’, rather than on Article 47 of the Charter. The recourse to Article 2 TEU, which justifies the extension of the operational scope of EU law, as well as to Article 19 TEU, which gives concrete expression to the value in question, has a dual effect, namely, that Article 19(1) TEU operationalizes the rule of law as a value, while the interpretation of Article 19(1) TEU in light of Article 2 TEU justifies its extensive reading.⁴⁹ What is more, the Court has chosen to operationalize Article 2 TEU by means of other treaty provisions rather than using Article 2 TEU as a freestanding standard. *Ipsa facto* the Court set a new standard, which gives judicial authorities, national and European, the possibility to challenge national measures violating EU law, including judicial independence, in cases where the link with EU law is very weak, or even almost non-existent. The mere fact of being a court with the competence to potentially decide on the interpretation or application of EU law is sufficient to fall within the material scope of Article 19 TEU. Is it not a prime example of integration through law, or rather, integration through the rule of law? Or, to put it yet another way, are we not dealing here with further centralisation, federalisation, and constitutionalisation of the EU through the Court’s operationalisation of Article 2 TEU, i.e. by way of judicial activism? Or is this perhaps the natural course of things, a mere functional spillover of integration processes?

Moreover, with the TL which confirmed the principle of conferral and made a clear assignment of competencies, it seemed that judicial activism would be consigned to history. However, the Charter could also provide the grounds for judicial activism but as is well known, its application is limited. It was in the case of *Associação Sindical* that the Court found new opportunities for developing its judicial activism. The Court proceeded with an interpretation of Article 2 TEU in connection with Article 19(1) TEU and Article 4(3) TEU, which justified the protection of judicial independence – a precedent, which can be used in

⁴⁶ *Associação Sindical dos Juizes Portugueses* (n 8) para 34.

⁴⁷ Koen Lenaerts, ‘On Judicial Independence and the Quest for National, Supranational and Transnational Justice’ in Gunnar Selvik et al (eds), *The Art of Judicial Reasoning. Festschrift in Honour of Carl Baudenbacher* (Springer 2019) 162.

⁴⁸ *Associação Sindical dos Juizes Portugueses* (n 8) para 40.

⁴⁹ Armin von Bogdandy and Luke Dimitrios Spieker, ‘Transformative Constitutionalism in Luxembourg: How the Court Can Support Democratic Transitions’ (2023) 29(2) *Columbia Journal of European Law* 71.

the future to link the value enshrined in Article 2 TEU to some other treaty provision⁵⁰ which has not, until now, been regarded as an independent legal basis. In this way, the Court opened up new possibilities for its adjudication.⁵¹ What is more, the judgment itself can be read in terms of further federalisation of the EU⁵² – an issue that some may find even more appealing. This is all the more so as some argue that the Court has made the principle of effective judicial protection, including judicial independence, a quasi-federal standard of review, which can be invoked before national courts in virtually any situation where national measures target national judges authorised to hear cases based on EU law.⁵³

6 ACTUAL AND FUTURE IMPLICATIONS

The case of *Associação Sindical* served as a catalyst, or to put it another way, a major factor leading to the development of an instrument protecting judicial independence which is, at the same time, a general principle of EU law. Portuguese judges, who embody both individual rights and the independence of the judiciary, were given an opportunity to challenge politically (or rather economically) motivated reductions in their salaries. In this way, an institutional barrier was created to protect the independence of the judiciary from attempts to subordinate it politically to the executive or the legislature. In its judgment, the Court also stated that the protection of judicial independence is not an exclusive domain of national regulations and states cannot, just as they wish, regulate the status of judges and the judiciary. They are constrained by the principle of judicial independence which, as a general principle of law, is also a constitutional value of the EU.⁵⁴ The judgment itself became a catalyst for efforts to protect the rule of law by means of direct action (a complaint) under Articles 258 and 259 TFEU and resulted in national courts raising further questions regarding the independence of the courts and the judiciary under Article 267 TFEU, i.e. within the framework of preliminary ruling proceedings.

When it comes to integration processes in Europe, two opposing tendencies have been present from the very beginning. At one end of the spectrum has been the tendency towards ever-deeper integration, an ever-closer union of states and peoples, while at the other end there has been the aspiration towards, at best, closer cooperation. The former tendency has been more legal in character albeit also with some political undertones, while the latter is more economically inclined. And since not everything could be written into the treaties, it was the Court, which has been assigned the role of interpreter of EU law, including the provisions of the treaties. In this way, the Court has made a significant contribution to deepening and strengthening inter-state ties at every possible level and in every possible dimension. This, in turn, has sparked opposition from some Member States, including from

⁵⁰ For example, Article 10 TEU, for the Court has recently alluded to Article 10 TEU in the context of operationalising democracy as a value enshrined in Article 2 TEU, see e.g.: Case C-502/19 *Criminal proceedings against Oriol Junqueras Vies* EU:C:2019:1115 para 63 where we read: ‘Article 10(1) TEU provides that the functioning of the Union is to be founded on the principle of representative democracy, which gives concrete form to the value of democracy referred to in Article 2 TEU’; and Case C-207/21 P *European Commission v Republic of Poland* EU:C:2022:560 para 81, where we find a similar statement.

⁵¹ See Barcik (n 12) 114-115.

⁵² *ibid* 115 and also Danuta Kabat-Rudnicka, *Zasada federalna a integracja ponadnarodowa. Unia Europejska między federalizmem dualistycznym a kooperatywnym* (Letra-Graphic 2010).

⁵³ Pech (n 3) 1847.

⁵⁴ See Barcik (n 12) 115.

their constitutional courts, which are resisting any extension of the operational scope of EU law – the aggrandizement of EU competences, or to put it another way, to any widening of the operational reach of EU law, which encroaches upon areas reserved for states.

The judgment in the *Associação Sindical* case is also revolutionary in the sense that it operationalizes the provisions of the treaty, which until now have been considered too vague and too general. One could even say that these have functioned as programmatic norms and as guiding principles for EU actions. And for these reasons alone, i.e. the combined reading of Article 2 TEU (the rule of law as a value) and Article 4(3) TEU (the principle of sincere cooperation) and Article 19(1) TEU (the principle of effective judicial protection), along with the requirement that there be a merely hypothetical link between national measures and EU law to bring a case based on Article 19(1) TEU alone,⁵⁵ the Court's reasoning is not only innovative but the judgment itself is the most important ruling since *Les Verts*.⁵⁶ It is also the first, albeit indirect, response to backsliding in the rule of law observed in some Member States.⁵⁷ Indeed, some see this judgment as a response to cases of non-compliance with EU law in Member States other than Portugal. Firstly, in the case at hand, it was not clear how the Court would ultimately decide (at least with regard to the Commission questioning the jurisdiction of the Court) and secondly, later that year, the Commission brought a case against Poland under Article 258 TFEU.

7 CONCLUDING REMARKS

As has been said, by far the most effective instruments for enforcing adherence to the rule of law are those that are judicial in character. Among them is the infringement procedure provided for under Article 258 TFEU, which can be launched by the Commission, or under Article 259 TFEU by a Member State, exclusively in situations where a breach of the rule of law is also a breach of a specific provision of EU law. However, the Court's ruling in the *Associação Sindical* case brought a change in this approach, as the so-called EU link does not have to be a specific provision of substantive law. However, when it comes to situations falling outside the scope of EU law which *ipso facto* cannot be considered a breach of obligations under the treaties, but which still pose a systemic threat to the rule of law, Article 7 TEU applies.

The political mechanism for counteracting violations of the rule of law referred to in Article 7 TEU has proved ineffective, which is why judicial instruments are also used – with reference to preliminary ruling and non-compliance proceedings. Moreover, one economic instrument, the 'conditionality' mechanism, has been put in place, which allows EU funds to be suspended if breaches of the rule of law in a Member State affect the sound management of EU finances or the Union's financial interests. However, the judicial mechanism seems to be by far the most effective, although economic means also play a role. The political mechanism does not work, however, since it depends on the goodwill and cooperation of Member States.

Lastly, it needs to be added that the Court also interprets and applies EU law in areas where the Member States have retained their competences. Hence, Member States must

⁵⁵ Pech (n 3) 1829.

⁵⁶ *ibid* 1827.

⁵⁷ *ibid* 1828 and also Bonelli and Claes (n 2) 628.

abide by EU law, even when they apply the laws that fall within areas reserved only for them. States must therefore respect the rule of law, which has been elevated to the rank of a value, i.e. the leading axiological category underpinning the Union – an element of European constitutional identity.

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