NORDIC JOURNAL OF EUROPEAN LAW

Volume 2
Issue 2 · 2019

LUND UNIVERSITY
FACULTY OF LAW

ISSN 2003-1785

NORDIC JOURNAL OF EUROPEAN LAW
ISSUE N 2 OF 2019

njel@jur.lu.se

http://journals.lub.lu.se/njel

Lund University

TABLE OF CONTENT

ARTICLES

CASE NOTES

Editorial Note

Theodore Konstadinides*

This is my first editorial for the Nordic Journal of European Law. It is both an honour and a pleasure to be part of the editorial team. In synch with the topic of this special issue I would like to start by saying the following: The principle of the rule of law through the lenses of EU Membership has a huge influence upon our rights as citizens, the conditions of our individual prosperity and ability to plan and make decisions for the future, as well as the way our governments can change and apply the law. Hence this issue of the NJEL is not just an "academic" exercise - each contribution deals with a topic that carries important implications in practice. While both the rule of law and EU membership are highly contested, they encompass virtues or, to put slightly differently, a valued state of affairs that the law should conform to. Still, despite our shared values which have found their way into the EU Treaties, we are all entitled to our views, especially during these turbulent times, about the mission of the rule of law or the EU as a polity of states, institutions and people and how they can pave the way to a better world.

While the "rule of law" language in Articles 2 TEU and 7 TEU is therefore open to legal interpretations, we can hardly disagree that it expands our traditional rule-of-law perception about what the rule of law entails. The branding of the CJEU somewhat fifty-six years ago of the EU (the EEC back then) as a "new legal order" for the benefit of which states have limited their sovereign rights is crucial to the regional and international evolution of the rule of law. The wise choice of words by the CJEU is key both to our renewed understanding of the rule of law as a measure of civilisation for state behaviour and the EU as an autonomous legal order monitoring such behaviour. It is, therefore, particularly important for us lawyers that the Union was conceived in terms of law. This is because, the EU legal order seeks incrementally to assure to the individual certain rights which may be neglected by her national system and which protects her against any arbitrary use of power. To be conceived in terms of law also means that both private and public bodies are under a duty to comply with EU law even when, as we often witness, the demands of EU law run contrary to the requirements of national law.

Having said that, the authority of EU law is not a smash and grab exercise. Not only national constitutional identity is preserved but it has been upgraded into a constitutional requirement under EU law (Art. 4 (2) TEU) next to the principle of sincere cooperation. Of course there is a flip side to Article 4 (2) TEU which comprises an umbrella provision making it sometimes impossible to single out areas of EU action (from public procurement to how to transliterate *Konstantinidis* in latin characters[1]) that may not encroach upon aspects of national identity. This opens countless opportunities for Member States to scrutinise the obligations stemming from EU

*Professor of Law, School of Law, University of Essex and Senior Editor of the journal.

[1] See Advocate General Poiares Maduro Opinion delivered on 8 October 2008 in Case C-213/07 *Michaniki* EU:C:2008:544 and Case C-168/91 *Konstantinidis* EU:C:1993:115.

membership through the lenses of national identity. There is an obvious risk there: For example, if a government decides to launch an attack against the independence of the judiciary, it can claim that such matters fall within its exclusive competence and cite the "identity clause" (Article 4(2) TEU) to justify its position. Hence, the idea is that each side (both the EU and its Member States) needs to exercise a degree of self-restraint in order to accommodate rival claims to primacy. Accordingly, a number of scholars including Piet Eeckhout are perhaps right to claim that "the principle of limited and shared jurisdiction" shall be the main tool for quietly resolving conflicts in this domain without having to resort to pompous hierarchy claims from either side.[2]

Of course it is easy to discount the EU as a "legal order" and its claim for legitimacy and authority. This is especially since after all these years the EU still derives its authority from the Member States - the nation-state being the dominant form of political power in EU law. Nostalgia, which is having a lot of appeal these days, is a powerful political force but does not have to become a motor of legal patriotism or 'a place for solace in [the] old, imagined, certainties' of the state.[3] Nostalgia can also be a way of reshaping the constitutional landscape around us. I would like to bring the reader's attention to what Lord Mackenzie Stuart said back in 1977 (he was the first UK judge appointed to the ECJ in Luxembourg): "to speak of EU law as a "legal order" may risk confusion with " law and order" and that it would be better, rather, to invoke the well-known expression "rule of law." He adds that "legal order" implies that you will not be the victim of arbitrary conduct whether by your fellow citizens or public authorities. He concludes that "Order" 'has a wider sense, a sense of a system with defined characteristics and definite tendencies, the sense of Arthur's answer from the barge, "the old order changeth, yielding place to new."'[4] Lord Mackenzie Stuart drew inspiration from Alfred Tennyson's famous poem "Idylls of the King" which is about the rise and fall of Arthur's kingdom. I am cautious of oversimplifying King Arthur's words in Tennyson's beautiful poem but my understanding of it is in its plain positive message that we shall not lament the end of an "old" order (the knights of the round table in the poem) but, while treasuring the past, we shall embrace the "new" walking forward in anticipation of new knowledge, experiences and challenges. After all, an old order that is reminiscing and refuses to think of its succession is bound to become parochial and ultimately irrelevant.

The above observation dovetails with the reception in the Member States' of the CJEU's case law some thirty-three years ago which solidified the EU as a new legal system based on a "constitutional charter" and following the principle of the "rule of law".[5] Following this relatively young legacy, national courts have made positive steps towards applying EU law correctly: lower courts abstain from following incorrect decisions of higher courts because to do otherwise would impact on, inter alia, individuals' right to a remedy and add ambiguity to the rules of recognition within the

---

[2] See Piet Eeckhout, 'Human Rights and the Autonomy of EU Law: Pluralism or Integration?' *Current Legal Problems*, Volume 66, Issue 1, 2013, Pages 169–202

[3] Philip Stephens, 'Nostalgia has stolen the future', FT, 26 July 2018.

[4] *European Communities and the Rule of Law* (Hamlyn Lecture, 1977) Available from: https://socialsciences.exeter.ac.uk/media/universityofexeter/schoolofhumanitiesandsocialsciences/law/pdfs/The_European_Comminuties_and_the_Rule_of_Law.pdf

[5] Case 294/83 *Le Verts* EU:C:1986:166

EU legal order. To use Tennyson's words national courts have *yielded place to new*. While this is true, in a marginal set of cases some national courts have entertained the possibility of resorting to 'counter-measures' (specifically, *ultra vires* or *intra vires* identity 'locks') in order to protect the State's constitutional order from transgressions of powers and EU arbitrariness.[6] Such 'locks', however, are last resort weapons that may pose the danger of ultimately 'constrain[ing] the institution imposing them, not just the institution that is the target of the constraint.'[7]

This editorial aspires to open up the debate and put a few questions on the table that I feel are both pertinent and relevant. The first question relates to how the rule of law manifests itself in the EU legal order. The EU rests on the concept that Member States are free and democratic societies which share the view that relations between citizen and state should rest upon the rule of law. Yet, as we know, there are current threats to this rule of law premise both internally and externally: There are financial, migration, security crises in the continent which challenge the conceptual and practical limits of the rule of law. There are equally constitutional and institutional reforms in certain Member States which have posed a clear risk of a serious breach of the rule of law. The second question is about the current rule of law tensions and limits, especially with reference to the rather idle pace of the rule of law's political enforcement at the EU level. The third and final question deals with judicial enforcement of the rule of law as an alternative but still imperfect way of enforcing it. For instance, what do we learn about the rule of law from the CJEU's adjudication on EU's fundamental principles and values in recent cases on judicial independence? There are more questions to be asked but this is a good start I hope.

[6] R *(on the application of HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3; Case C-62/14 *Gauweiler v Deutscher Bundestag* EU:C:2015:400; [2016] 1 C.M.L.R. 1.

[7] See P Craig and M Markakis, '*Gauweiler* and the legality of outright monetary transactions' (2016) 41(1) *European Law Review* 4-24.

AN OLD PROCEDURE WITH NEW SOLUTIONS FOR THE RULE OF LAW CRISIS

FRANZISKA-MARIE LAURA HILPERT*

While commentators for the past years, have highlighted that there is no effective enforcement mechanism after accession for the values of the European Union which are enshrined in Article 2 TEU, the Juncker Commission has announced in 2017 that it will be 'bigger and more ambitious on big things, and smaller and more modest on small things' thus applying a more strategic approach to enforcement in terms of handling infringements. This Article thus analyses two cases brought by the Juncker Commission after 2017 and on their bases seeks to show that the infringement procedure, when applied strategically, is and remains an effective enforcement mechanism even for the values enshrined in Article 2 TEU in the 'rule of law crisis'. Thus, by way of analysis of the case C-619/18 Commission v Poland and its comparison with similar cases which have not been as effective, it is shown how the infringement procedure can prevent the enforcement of the most controversial provisions regarding the judiciary in Hungary and Poland and ensure the separation of powers, which is essential for the rule of law. Moreover, by comparison of the Commission's request and the decision of the Court of Justice of the European Union in C-235/17 Commission v Hungary it is shown how the Charter could become a significant legal instrument in the Commissions infringement policy towards Member States that are undermining fundamental rights and the rule of law. This Article thereby aims to contribute to the discussion on how to effectively enforce the values of the EU enshrined in Article 2 TEU through an existing enforcement mechanism.

1 INTRODUCTION

Europe's rule of law crisis has worsened over the past years and remains the most urgent issue that needs to be solved within the European Union.[1] Unfortunately, most efforts taken by the European Institutions towards safeguarding the rule of law, fundamental rights and democracy in Poland and Hungary, have been too late, such as triggering Article 7(1) TEU,[2] or proven to be ineffective,[3] a worrying example for this, is the case C-286/12 *Commission v Hungary*.[4] Thus so far the Commission's intervention has been ineffective towards ensuring

* Trainee at the European Patent Office, Dept. Institutional and general legal matters. The author would like to thank Xavier Groussot for his support and input throughout the writing process as well as for the time that he spent discussing and reviewing the article.

1 Matthias Schmidt and Piotr Bogdanowicz, 'The infringement procedure in the rule of law crisis: How to make effective use of Article 258 TFEU' (2018) 55 Common Market Law Review 1061, 1061.

2 Laurent Pech and Kim Lane Scheppele, 'Poland and the European Commission, Part I: A Dialogue of the Deaf?' (*Verfassungsblog*, 3 January 2017) <https://verfassungsblog.de/poland-and-the-european-commission-part-i-a-dialogue-of-the-deaf/> accessed 26 March 2019.

3 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.

4 In Case C-286/12 *European Commission v Hungary* EU:C:2012:687 the Commission successfully brought infringement proceedings on the grounds of age discrimination against Hungary's legislation that radically lowered the retirement age of Hungarian judges. But the threat to the independence of the judiciary could not

the protection of democracy, the rule of law and fundamental rights.[5] This is why especially the Commission, as the 'guardian of the Treaties',[6] who should ensure not only that the acquis but also that the fundamental values on which the EU is founded are observed,[7] has received much criticism over the past years.[8]

Commentators, however, have not only criticised the Commission but also at the same time highlighted weaknesses and limitations regarding Article 258 TFEU when dealing with breaches of the rule of law, fundamental rights and other values enshrined in Article 2 TEU.[9] The criticism regarding the effectiveness of the Infringement procedure under Article 258 TFEU has encouraged commentators to put forward many proposals to enhance rule of law enforcement. Besides the 'Reverse Solange' approach,[10] the proposal for a 'Copenhagen Commission',[11] 'the Fundamental Rights Agency',[12] and the 'Horizontal Solange'[13] concept the 'systematic infringement actions'[14] proposed by Scheppele, has received much attention.[15] While some of these proposals built upon existing legal bases and merely require a reinterpretation of existing tools (such as 'the systematic infringement action') others require Treaty or legislative amendments (eg the proposal to amend Article 51 of the Charter) or the creation of new institutions (eg 'the Copenhagen Commission').[16] Thus while these approaches are innovative and some more likely to be effective than others, especially in the

be averted as the judges affected by the legislation have already been retired and were not reinstated in their previous positions; (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) 24 Robert Schuman Centre for Advanced Studies Research Paper 512 4).

[5] Kochenov (n 3) 166.

[6] Dimitry Kochenov and Laurent Pech, 'Better Late than Never? On the Commission's Rule of Law Framework and its First Activation' (2016) 54 Journal of Common Market Studies 1062, 1062.

[7] Kochenov and Pech, 'Better Late than Never? On the Commission's Rule of Law Framework and its First Activation'(n 6) 1062.

[8] Michael Blauberger and R. Daniel Kelemen, 'Can courts rescue national democracy? Judicial safeguards against democratic backsliding in the EU' (2017) 24 Journal of European Public Policy 321.

[9] Blauberger and Kelemen (n 8) 323.

[10] Armin Von Bogdandy and others, 'Reverse Solange—Protecting the Essence of Fundamental Rights against EU Member States' (2012) 49 Common Market Law Review 489.

[11] Jan-Werner Müller, 'Should the EU Protect Democracy and the Rule of Law inside Member States?' (2015) 21 European Law Journal 141.

[12] Gabriel N. Toggenburg and Jonas Grimheden, 'Upholding Shared Values in the EU: What Role for the EU Agency for Fundamental Rights?' (2016) 54 Journal of Common Market Studies 1093.

[13] Iris Canor, 'My brother's keeper? Horizontal solange: "An ever closer distrust among the peoples of Europe"' (2013) 50 Common Market Law Review 383.

[14] 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).

[15] Carlos Closa, Dimitry Kochenov and J.H.H. Weiler, 'Reinforcing Rule of Law Oversight in the European Union' (2014) 25 Robert Schuman Centre for Advanced Studies Research Paper-11; Scheppele (n 14) 105–132; Blauberger and Kelemen (n 8) 324, 330; Schmidt and Bogdanowicz (n 1) 1066-1069.

[16] Closa, Kochenov and Weiler (n. 15) 10; Daniel Hegedüs, 'Is there a New Impetus or a Political Paralysis regarding the protection of the EU's Fundamental Values? A comparative analysis of policy proposals and adopted procedures from the Copenhagen Commission proposal to the Rule of Law Initiative of the European Commission' (*Friedrich-Naumann-Stiftung*, 2015) <https://www.academia.edu/15151337/Is_there_a_New_Impetus_or_a_Political_Paralysis_regarding_the_protection_of_the_EU_s_Fundamental_Values_A_comparative_analysis_of_policy_proposals_and_adopted_procedures_from_the_Copenhagen_Commission_proposal_to_the_Rule_of_Law_Initiative_of_the_European_Commission> accessed 31 March 2019.

current context of urgency,[17] they are still dependent on the willingness of the EU institutions and the Member States to use them.

Due to the fact, that the Commission announced in 2017 that it will be using the infringement procedure more strategic and more efficient in line with the Juncker Commission`s commitment to be 'bigger and more ambitious on big things, and smaller and more modest on small things'[18] this Article will not propose that there is need for a new instrument. In the contrary, it is argued that the infringement procedure when applied strategically is and remains an effective enforcement mechanism which provides a solution to existing problems, even in the 'rule of law crisis'. In this regard it shall be shown how the Commission has found new ways to use, the traditional and the best-explored enforcement mechanism,[19] the infringement procedure, effectively in order to address Member States failure to comply with fundamental rights and the rule of law. Concretely two ways in which the Commission is using the infringement procedure strategically and possibly also more effectively in regard to the rule of law have been identified and will be analysed. First exemplified on the basis of C-619/18 *Commission v Poland*[20] it will be shown how the infringement procedure can prevent the enforcement of the most controversial provisions regarding the judiciary in Hungary and Poland, and second exemplified by C-235/17 *Commission v Hungary*[21] it will be shown how the Charter could become a significant legal instrument in the Commissions infringement policy towards Member States that are undermining fundamental rights and the rule of law. Due to the fact that the cases are dealing with different issues related to the rule of law crisis, each case and thus approach related to the infringement procedure will be addressed separately. Section II will therefore deal with case C-619/18 *Commission v Poland* while Section III deals with case C-235/17 *Commission v Hungary*. Section IV is the conclusion.

2 PROTECTING JUDICIAL INDEPENDENCE - C-619/18 COMMISSION V POLAND

The Rule of law, as a common value of the EU as enshrined in Article 2 TEU, is a constitutional principle with both formal and substantive components, these include: legality, legal certainty, independent and impartial courts, effective judicial review including respect for fundamental rights, and equality before the law.[22] In Poland the 'rule of law crisis' concerns mainly attacks on the national judiciary.[23] The Polish Government of the Law and Justice Party (Prawo i Sprawiedliwość, PiS), has already successfully impaired the

---

17 For a comparative analyses, see eg Dimitry Kochenov, 'On Policing Article 2 TEU Compliance - Reverse Solange and Systemic Infringements Analyzed ' (2013) 33 Polish Yearbook of International Law 145; Closa, Kochenov and Weiler (n 15) 15-20.

18 European Commission, 'EU law: Better results through better application (Communication)' (OJ 2017 C 18/10, 19 January 2017).

19 Blauberger and Kelemen (n 8) 323.

20 Case C-619/18 *European Commission v Republic of Poland* EU:C:2019:531.

21 Case C-235/17 *European Commission v Hungary* EU:C:2019:432.

22 European Commission, 'A new EU Framework to strengthen the Rule of Law (Communication)' (COM(2014) 158 final, 2014).

23 Matteo Bonelli and Monica Claes, 'Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical dos Juízes Portugueses' (2018) 14 European Constitutional Law Review 622 623.

Constitutional Court in Poland, and it recently attempted to continue this impairment with the Ordinary Courts by introducing its Law of 12 July 2017 (amending the Law on the Organisation of Ordinary Courts) and with the Supreme Court by introducing its law of 8th December 2017 (lowering the retirement age of Supreme Court judges to 65 years, also for those who were appointed before the date of entry).[24]

While the Infringement Procedure, Article 258 TFEU, empowers the Commission to bring matters before the CJEU where it considers that a Member State has failed to fulfil an obligation under the Treaties, including the values enshrined in Article 2 TEU,[25] it was believed for a long time that the substantively vague, political and programmatic provision of Article 2 TEU does not create obligations that could be enforced.[26] Due to this widely spread understanding of Article 2 TEU, situations that pose a systematic threat to the rule of law, such as in in C-286/12 *Commission v Hungary,* could not be addressed as a breach of an obligation under the Treaties when they did not infringe a specific and concrete provision of EU law at the same time as the rule of law.[27] In C-286/12 *Commission v Hungary,* the absence of a concrete provision over independence and impartiality of the national judiciary, has led to ineffective protection of the rule of law, as the fall back on the principle of non-discrimination on the ground of age has led to compensation of the Judges instead of restoration into their former positions.[28] A similar problematic seemed to arise from case C-192/18 *Commission v Republic of Poland*[29], addressing the concerns of the Commission with the Law of 12 July 2017 (amending the Law on the Organisation of Ordinary Courts), thus leaving the most controversial measures on the judiciary planned by Poland not enforceable through Article 258 TFEU.[30]

The CJEU in last year's Grand Chamber Judgement in *Associação Sindical dos Juízes Portugueses*[31] ensured, however, that the most controversial measures on the judiciary planned by Poland can be enforceable.[32] The CJEU by answering the question whether the temporary reductions of remuneration of the judges infringed the principle of judicial independence enshrined in Article 19(1) TEU and Article 47 of the Charter,[33] referred to it by the Supreme Administrative Court of Portugal, where an association of Portuguese magistrates brought

---

[24] Court of Justice of the European Union, *Advocate General's Opinion in Case C-619/18 Commission v Poland* (Press Release No 48/19, Luxembourg 11 April 2019); Schmidt and Bogdanowicz (n 1) 1061.

[25] Petra Bárd and others, 'An EU mechanism on democracy, the rule of law and fundamental rights Annex II - Assessing the need and possibilities for the establishment of an EU scoreboard on democracy, the rule of law and fundamental rights' (European Parliamentary Research Service, 2016).

[26] Müller; 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; 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); Schmidt and Bogdanowicz (n 1) 1080.

[27] European Commission, 'A new EU Framework to strengthen the Rule of Law (Communication)' (n 22) 5; 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 4) 4; *Commission v Hungary* (n 4).

[28] 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 4) 4.

[29] Case C-192/18 *European Commission v Republic of Poland*, Action brought on 15 March 2018 .

[30] Maciej Taborowski, 'CJEU Opens the Door for the Commission to Reconsider Charges against Poland' (*Verfassungsblog*, 13 March 2018) <https://verfassungsblog.de/cjeu-opens-the-door-for-the-commission-to-reconsider-charges-against-poland/> accessed 3 April 2019.

[31] Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* EU:C:2018:117.

[32] Bonelli and Claes (n 23) 628; Case C-64/16 *Portuguese Judges* EU:C:2018:117.

[33] *Portuguese Judges* (n 32) para 13.

an action for annulment against the implementation of administrative measures which reduced their remuneration of the judges of the Court of Auditors,[34] held that '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'.[35] Thus the CJEU established that, Member States are under an obligation, contained in primary EU law (Article 19(1)(2) TEU), to ensure that their courts and judges meet the requirements of effective judicial protection, independence being an essential requirement thereof,[36] while at the same time affirming that Article 2 TEU is a legally binding provision which is obligatory and can create concrete duties on Member States.[37] The judgement of the CJEU in *Portuguese Judges* can therefore be seen as a signal to the Commission to use Article 19(1)(2) TEU directly in infringement proceedings where a measure undermines the independence of the national judiciary as part of the EU judiciary.[38]

With sending a Letter of Formal Notice to Poland, the Commission on 2nd October 2018 launched infringement proceedings based on Article 19(1)(2) TEU, read in conjunction with Article 47 of the Charter,[39] concerning the Polish law on the Supreme Court which lowered the retirement age for Supreme Court judges, also for those who were appointed before the date of entry, to 65 years, thus, forcing possibly 27 out of 72 Supreme Court judges into retirement.[40] Case C-619/18 *Commission v Poland* thus presented the Court 'with the opportunity to rule, for the first time within the context of a direct action for infringement under Article 258 TFEU, on the compatibility of certain measures taken by a Member State concerning the organisation of its judicial system with the standards set down in Article 19(1)(2) TEU, combined with Article 47 of the Charter, for ensuring respect for the rule of law in the Union legal order'.[41] Thus this case provides the CJEU with the opportunity to address the topic of judicial independence, as the Commission contests that the national measure lowering the retirement age infringes the principle of security of tenure (irremovability) of judges, and that the powers of the President of Poland to prolong the mandate of the Supreme Court judges, infringes the principle of judicial independence.[42]

---

[34] ibid, para 12; Michal Krajewski, 'Associação Sindical dos Juízes Portugueses: The Court of Justice and Athena's Dilemma' (2018) 3 European Papers A journal on law and integration 395.

[35] *Portuguese Judges* (n 32), para 32.

[36] Bonelli and Claes (n 23) 623; Alessandra Silveira and Sophie Perez Fernandes, 'A Union based on the rule of law beyond the scope of EU law – the guarantees essential to judicial independence in Associação Sindical dos Juízes Portugueses' (*UNIO EU Law Journal*, 3 April 2018) <https://officialblogofunio.com/2018/04/03/a-union-based-on-the-rule-of-law-beyond-the-scope-of-eu-law-the-guarantees-essential-to-judicial-independence-in-associacao-sindical-dos-juizes-portugueses/> accessed 5 April 2019.

[37] 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 (ed), *Constructing Legal Orders in Europe: General Principles of EU Law* (Edward Elgar Forthcoming 2019) 10; Dimitry Konchev and Marcus Klamert, 'Article 2 TEU' in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The Treaties and the Charter of Fundamental Rights – A Commentary* (Oxford University Press 2019) 6.

[38] Taborowski (n 30).

[39] European Commission, 'Rule of Law: Commission launches infringement procedure to protect the independence of the Polish Supreme Court' (*European Commission Press Release Database*, 2 July 2018) <https://europa.eu/rapid/press-release_IP-18-4341_en.htm> accessed 18 September 2019.

[40] European Commission (n 39); Court of Justice of the European Union (n 24).

[41] Case C-619/18 *European Commission v Republic of Poland* EU:C:2019:325, Opinion of AG Tanchev, para 2.

[42] Case C-619/18 *European Commission v Republic of Poland*, Action brought on 2 October 2018; Jakub Jaraczewski, 'Age is the limit? Background of the CJEU case C-619/18 Commission v Poland'

Respectively it provides the opportunity to address whether Poland has breached the rule of law and the relationship between Article 258 TFEU and Article 7 TEU as well as to clarify the material scope of Article 19(1)(2) TEU.[43] Before considering these aspects and their meaning and consequences for the case and an effective rule of law enforcement in Europe, five events need to be highlighted that followed the application by the Commission for infringement proceedings in C-619/18 *Commission v Poland*.

First, with the application of the infringement procedure, the Commission also applied for interim measures pursuant to Article 279 TFEU and Article 160(2) and (7) of the Rules of Procedure of the Court of Justice.[44] The Vice-President of the Court, on the request that it be decided *inaudita altera parte*, on 19th October 2018 provisionally granted the interim measures[45] and on 17th December 2018 the CJEU sitting in Grand Chamber, after hearing the observations of Poland, confirmed his decision.[46] Second, on 15th November 2018, the President of the Court ordered, following the request of the Commission,[47] that case C-619/18 *Commission v Poland* shall be determined pursuant to the expedited procedure.[48] Third, on 21st November 2018, the Sejm (lower house) approved an amendment of the Law of the Supreme Court; the Commission, however, did not withdraw the infringement action.[49] Fourth, Advocate General Tanchev delivered his opinion on 11th April 2019.[50] Most noteworthy, the Advocate General, first rebutted the arguments concerning admissibility, recalling that in order to determine whether a Member State has failed to fulfil its obligations under Article 258 TFEU, it is not the situation at the time of the judgement given that matters but the situation on 14th September 2018, as this is the end date of the period laid down in the reasoned opinion.[51] Since the amendment entered into force only on 1st January 2019 the Advocate General found that the Law passed on 21st November 2018 does not eliminate the need for the CJEU to rule on this case.[52] Second, the Advocate General held, that the engagement of Article 7(1) TEU mechanism does not preclude the infringement actions.[53] Third, the Advocate General subsequently considers that a separate assessment of Article 19(1)(2) TEU and Article 47 of the Charter is required.[54] In consequence, the Advocate General found that the complaints are well founded in so far as they are based on Article

(*Verfassungsblog*, 28 May 2019) <https://verfassungsblog.de/age-is-the-limit-background-of-the-cjeu-case-c-619-18-commission-v-poland/> accessed 20 August 2019.

43 Jaraczewski (n 42).

44 European Commission, 'Rule of Law: European Commission refers Poland to the European Court of Justice to protect the independence of the Polish Supreme Court' (*European Commission Press Release Database*, 24 September 2018) <http://europa.eu/rapid/press-release_IP-18-5830_en.htm> accessed 18 September 2019.

45 Case C-619/18 R *European Commission v Republic of Poland* EU:C:2018:852, Order of the Vice-President of the Court, para 26.

46 Case C-619/18 R *European Commission v Republic of Poland* EU:C:2018:1021, Order of the Court (Grand Chamber), para 118.

47 European Commission, 'Rule of Law: European Commission refers Poland to the European Court of Justice to protect the independence of the Polish Supreme Court' (n 44).

48 Case C-619/18 *European Commission v Republic of Poland* EU:C:2018:910, Order of the President of the Court (Expedited procedure).

49 Opinion of AG Tanchev (n 41), para 25.

50 ibid.

51 ibid, para 44.

52 ibid, paras 46-47.

53 ibid, paras 48-51.

54 ibid, para 54.

19(1)(2) TEU but that they are not admissible in so far as they are based on Article 47 of the Charter, due to the fact that the Commission has not provided any arguments to illustrate that Poland has implemented EU law in the sense of Article 51(1) of the Charter.[55] Thus, the Advocate General proposed that the Court should declare that Poland, by passing the new Law on the Supreme Court, that lowered the retirement age for Supreme Court judges to 65 years and which also granted the President of the Republic the discretion to prolong the time before retirement, failed to fulfil its obligations under Article 19(1)(2) TEU to 'provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'.[56]

Last, on 24th June 2019 the CJEU sitting in Grand Chamber delivered its judgment in case C-619/18. The Court, following the Opinion of the Advocate General, found, that the Republic of Poland has failed to fulfil its obligations under Article 19(1)(2) TEU on the one hand by providing that the measure consisting in lowering the retirement age of the judges of the Sąd Najwyższy (Supreme Court, Poland) is to apply to judges in post who were appointed to that court before 3 April 2018 and on the other hand by granting the President of the Republic the discretion to extend the period of judicial activity of judges of that court beyond the newly fixed retirement age.[57]

In regard to the question of admissibility, the Court, siding with and providing similar arguments then the Advocate General, found the case to be admissible.[58] Thereafter, the Court continued to analyse the applicability and the scope of Article 19(1)(2) TEU. On this subject the Court held that the national rules called into question by the Commission in its action may be reviewed in the light of Article 19(1)(2) TEU,[59] and that Article 19(1)(2) TEU refers to 'the fields covered by Union law', irrespective of whether the Member States are implementing Union law within the meaning of Article 51(1) of the Charter.[60] The Court also confirmed thereby, that Article 19(1) TEU requires Member States to provide remedies that are sufficient to ensure effective legal protection, within the meaning in particular of Article 47 of the Charter, in the fields covered by EU law.[61]

Regarding the first complaint,[62] the Court, recalling what it has previously stated namely that Article 19(1)(2) TEU requires that the Courts must be independent, recalled not only its well established case law on independence previously developed in *Wilson*[63], but also to its recent statements on independence and impartiality in paragraph 67 of C-216/18 PPU *Minister for Justice and Equality (Deficiencies in the system of justice)*[64], thus linking the requirement of independence established in the context of assessing the admissibility of references with the requirement that are necessary to safeguards the rights under Article 47 and 48 of the Charter.[65] The Court found that the reform which was being challenged, raised reasonable concerns as regards compliance with the principle of the irremovability of judges, which

---

55 ibid, paras 61-67.
56 ibid, para 99.
57 *Commission v Poland* (n 20), para 126.
58 Opinion of AG Tanchev (n 41) , para 44.
59 *Commission v Poland* (n 20), para 59.
60 ibid, paras 50-54.
61 ibid, paras 50-54.
62 The first complaint is that the lowering the retirement age of Supreme Court judges violates the principle of irremovability of judges (*Commission v Poland* (n 20), paras 25-26).
63 Case C-506/04 *Graham J. Wilson v Ordre des avocats du barreau de Luxembourg* EU:C:2006:587, para 53.
64 Case C-216/18 PPU *Minister for Justice and Equality, LM* EU:C:2018:586, paras 64-67.
65 *Commission v Poland* (n 20), paras 71-77.

requires in particular, that judges may remain in post provided that they have not reached the obligatory retirement age or until the expiry of their mandate, where that mandate is for a fixed term.[66] In order to come to the conclusion that the measure lowering the retirement age of the Supreme Court Judges is not justified by a legitimate objective, the Court not only held that the reform by Poland raises doubts as to its legitimate objectives, that Poland has failed to show that the measure constitutes an appropriate means for the purpose of the objective, that the measure is not satisfying the proportionality requirement, but also, similar to the Advocate General, distinguished the circumstances of the case from those in *Portuguese Judges*.[67] Finding that it does not follow from the judgement in *Portuguese Judges* that provisions applicable to judges related to general policies are automatically contrary to the principle of judicial independence, but rather that this depends on the circumstances of the specific case and that the effects of the limited and temporary salary reduction are in no way comparable to the effects of the measure of lowering the retirement age of the judges.[68]

In regard to the second complaint,[69] the Court, referring to its previously cited case law,[70] stated, that the concept of independence and impartiality presuppose 'that the body concerned exercises its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions'.[71] Based thereof, the Court finds, after a detailed analyses of the procedure, that the contested measures violate the requirements of judicial independence, dismissing Poland's arguments based on the laws of the other Member States and the appointment of Judges at the Court of Justice, as on the one hand Poland, cannot rely on the possible infringement of EU law by another Member State and on the other hand, that the conditions set under the Treaties cannot modify the scope of obligations imposed on the Member States.[72]

2.1 The Significance of C-619/18 Commission v Poland

After having addressed the important events following the application of the Commission it will be explained why this judgement of the Court will have precedent-setting character and a fundamental importance for the protection of the rule of law. In this regard three aspects shall be addressed. First, the fact that the judgment undoubtedly clarifies that the Commission can bring infringement proceedings under Article 258 TFEU even where Article 7(1) TEU has been initiated. Second, that the Commission can rely on Article 19(1)(2) TEU autonomously in infringement proceedings while further substantiating the

---

[66] ibid, paras 76-78.
[67] *Commission v Poland* (n 20) paras 92-93; in comparison to Opinion of AG Tanchev (n 41) paras 74-81.
[68] *Commission v Poland* (n 20) paras 92-93; see for a similar assessment see Opinion of AG Tanchev (n 41), paras 74-81.
[69] The second complaint by the Commission is that the President of the Republic's discretion, to extend the active mandate of Supreme Court judges upon reaching the lowered retirement age allows him to exert influence on the Supreme Court and its judges, violates the principle of judicial independence (*Commission v Poland* (n 20), para 84).
[70] *Wilson* (n 63), para 51; *Portuguese Judges* (n 32), para 44.
[71] *Commission v Poland* (n 20) para 108.
[72] ibid, paras 120-124.

interpretation of Article 19(1)(2) TEU through Article 47 of the Charter and third, most importantly, that the judgment by applying a strong rule of law didactic not only shows the national governments that the organisation of the national judiciary is not a purely domestic matter which the Court is willing to protect but also that the independence of the judiciary, and the effective judicial protection and ultimately the rule of law are essential values to European Union that are enforceable.

2.1 [a] Relationship between Article 258 and Article 7 TEU

First, even though not specifically addressed by the Court, the judgement clarifies the relationship between Article 258 TFEU and Article 7 TEU. This is important as it resolves any remaining discussion on the applicability of Article 258 TFEU where Article 7(1) TEU has been triggered.[73] This is a significant aspect, in relation to future cases brought by the Commission under Article 258 TFEU against Poland and Hungary where Article 7(1) TEU has been invoked, as the Commission might otherwise not bring further infringement proceedings where these are unlikely to be effective due to fear of its credibility.[74] This clarity regarding the relationship between Article 258 TFEU and Article 7 TEU thus strengthens the Rule of Law Framework as it adds the infringement procedure as one of the best explored and successful mechanisms to the tools the Commission can use against Member States that are failing to fulfil their obligations while also breaching the rule of law and which, in contrast to Article 7(1) TEU, can further lead to financial consequences.[75]

2.1 [b] The Material Scope of Article 19(1)(2) TEU

Second, this judgement is noteworthy because it clarified the applicability and the material scope of Article 19(1)(2) TEU and its relationship with Article 47 of the Charter.[76] Three solutions were possible in this regard. Firstly, a combined application of Article 19(1)(2) TEU and Article 47 of the Charter in the absence of assessment under Article 51(1) of the Charter (which would mean that Article 47 of the Charter and Article 19(1)(2) TEU have the same scope of application). Secondly, the Court had the option to follow the Opinion of the Advocate General, who found that a separate assessment of the material scope of Article 19(1) TEU and Article 47 of the Charter is required while avoiding Article 47 of the Charter completely, instead the Advocate General draw on the principles of EU law stemming from the case law of the ECtHR and guidelines issued by European and international bodies when interpreting the meaning of Article 19(1)(2) TEU.[77] Or, thirdly, the Court could have in line with the view of the Commission,[78] required a separate assessment of the material scope of

[73] Piotr Bogdanowicz, 'Three Steps Ahead, One Step Aside: The AG's Opinion in the Commission v. Poland Case' (*Verfassungsblog*, 11 April 2019) <https://verfassungsblog.de/three-steps-ahead-one-step-aside-the-ags-opinion-in-the-commission-v-poland-case/> accessed 18 April 2019 .
[74] Heather Grabbe, 'Six Lessons of Enlargement Ten Years On: The EU's Transformative Power in Retrospect and Prospect' (2014) 52 JCMS: Journal of Common Market Studies 40.
[75] Blauberger and Kelemen (n 8) 323.
[76] *Commission v Poland* (n 20), paras 42-59.
[77] Opinion of AG Tanchev (n 41), para 54, 71.
[78] ibid, para 26; see also in regard to the use of Article 47 of the Charter in connection with Article 19 TEU the argument reteirated from the hearing of the Ordinary Courts case in Femke Gremmelprez, 'Does Poland infringe the principle of effective judicial protection? Recent developments in the CJEU' (*EU Law Analysis*,

Article 19(1)(2) TEU and Article 47 of the Charter while using Article 47 of the Charter as an interpretative tool of the substance of Article 19(1)(2) TEU.[79] This would mean that Article 19(1)(2) TEU constitutes an *autonomous* standard for ensuring effective judicial protection, including judicial independence as interpreted by the second subparagraph of Article 47 of the Charter.

Some commentators[80] hoped for the first possibility, a combined application of Article 19(1)(2) TEU and Article 47 of the Charter in the absence of assessment under Article 51(1) of the Charter, as this could lead to a wider application of the Charter and potentially make the EU become a 'community of fundamental rights' which would in turn strengthen the respect for the rule of law.[81] However, this solution, to use the words of Advocate General Tanchev, 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 as a "subterfuge" to circumvent the limits of the scope of application of the Charter as set out in Article 51(1) thereof'.[82] Furthermore, this interpretation would not only be contrary to the wording and meaning of Article 51(1) of the Charter but also most likely be received as an unjustified competence creep by the CJEU, as this would intervene in Member States, where constitutional Courts consider it their 'sovereign' entitlement to ensure the protection of fundamental rights enshrined in the national constitution.[83] Thus one could argue, that it was due to this expected controversy between the constitutional courts and the CJEU, which could due to the lack of legitimacy give grounds for attack to the parties with conflicting interests, as well as in the light of the findings of the Advocate General, that the Court chose to avoid this solution.

The Court, however, affirmed, what commentators have interpreted from *Portuguese Judges*[84]*,* namely that the material scope of Article 19(1)(2) TEU requires an independent assessment from Article 47 of the Charter, as Article 19(1)(2) TEU applies unrelatedly of the Charter, while finding that 'Article 19(1)(2) TEU requires Member States to provide remedies that are sufficient to ensure effective legal protection, within the meaning in particular of Article 47 of the Charter'.[85] By aligning the substantive content of Article 19(1)(2) TEU and

15 April 2019) <https://eulawanalysis.blogspot.com/2019/04/does-poland-infringe-principle-of.html> accessed 21 April 2019..

[79] Opinion of AG Tanchev (n 41), para 26.

[80] In this regard see eg : András Jakab, 'Application of the EU CFR by National Courts in Purely Domestic Cases' in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (1 edn, Oxford University Press 2017) 252, 253; Von Bogdandy and others (n 10) 508 ff.

[81] Jakab (n 80) 255.

[82] Opinion of AG Tanchev (41), para 57.

[83] Thomas Von Danwitz, 'The Rule of Law in the Recent Jurisprudence of the ECJ' in Werner Schroeder (ed), *Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation* (1 edn, Hart Publishing 2016).

[84] See for this interpretation of ASJP Judgement eg :Bonelli and Claes (n 23) 642; Krajewski (n 34) 397; Laurent Pech and Sébastien Platon, 'A. Court of Justice: Judicial independence under threat: The Court of Justice to the rescue in the ASJP case' (2018) 55 Common Market Law Review 1827; Koen Lenaerts, 'The Court of Justice and National Courts: a Dialogue Based on Mutual Trust and Judicial Independence' *Speech at the Supreme Administrative Court of the Republic of Poland* (Poland, 19 March 2018) <http://www.aca-europe.eu/index.php/en/114-library> accessed 18 April 2019 7-8.

[85] *Commission v Poland* (n 20), para 54; Similar to *Portuguese Judges* (n 32), paras 41-42 where the CJEU referred to CJEU judgements; Case C-685/15 *Online Games Handels GmbH and Others v Landespolizeidirektion Oberösterreich* EU:C:2017:452, para 60; Case C-403/16 *Soufiane El Hassani v Minister Spraw Zagranicznych* EU:C:2017:960, para 40; and in contrast to Opinion of AG Tanchev (n 41) para 71-72.

Article 47 of the Charter, the Court was not only able to provide a stronger reasoning in the assessment under Article 19(1)(2) TEU than was possible for the Advocate General, without creating controversy about any new scopes of application of the charter,[86] but also strengthened Article 19 TEU as it connected the principle of effective judicial protection to the fundamental right to an effective remedy under Article 47 of the Charter.[87]

2.1 [c] Making the rule of law more enforceable

Third, the Court used this judgement to elaborate further on the role and application of the rule of law its strong interrelationship with the Union judicial system and its connection to the EU legal order in general. In that manner the Court connected a variety of concepts of Union law, starting with Article 49 TEU, which entails the free and voluntary commitment to the values enshrined in Article 2 TEU by the States,[88] the court held that this premise both justifies and entails the existence of Mutual Trust, and that the values, including the rule of law, will be recognised and respected.[89] The Court than drew the attention to the importance of the autonomy and the specific characteristics of the EU legal order highlights the judicial system that was established in order to ensure the consistency and uniformity in the interpretation of EU law, which has as its keystone the preliminary ruling procedure.[90] Moreover, the Court recalls that it is apparent from the settled case law that the Union is based on the rule of law, which individuals have the right to challenge before the courts the legality of any decision or other national measure concerning the application to them of an EU act.[91] The Court then states that Article 19 (1) TEU, which gives concrete expression to the value of the rule of law affirmed in Article 2 TEU, entrusts the responsibility for ensuring the full application of EU law in all Member States and judicial protection of the rights of individuals under that law to national courts and tribunals and to the Court of Justice.[92]

By connecting these concepts in the way, the Court did it not only highlighted the importance of the rule of law as a value enshrined in Article 2 TEU but at the same time transforms the rule of law into an enforceable and invokable right, this transformation being incited through Article 19 TEU.[93] The judgement further confirms that that Member States have a duty under Union law, which is connected to the rule of law, to provide effective legal protection including judicial independence.[94] The Court also affirmed that all Article 267 Courts come under the protection of the Court of Justice, thus furthering the effectiveness of the EU legal order.[95]

---

[86] See in this regard:Bonelli and Claes (n 23) 637; *Portuguese Judges* (n 32), para 41.
[87] Groussot and Lindholm (n 37) 20.
[88] *Commission v Poland* (n 20), para 42.
[89] ibid, para 43.
[90] ibid, paras 44-45.
[91] ibid, para 46.
[92] ibid, para 47.
[93] In a similar way: Groussot and Lindholm (n 37) 29.
[94] Commission v Poland (n 20), *paras 47-48*.
[95] ibid, para 45 in addition with para 59.

2.2 KEY FACTORS WHICH MAKE THIS PROCEDURE EFFECTIVE IN THE RULE OF LAW CRISIS

So far, the significance of the judgment of the CJEU, and its importance for EU law as well as the rule of law has been established. Subsequently, it shall be highlighted why this Infringement Procedure was able to effectively protect the national judiciary and consequently the rule of law. It is argued, that the formula to success was the holistic approach to the infringement procedure by the Commission, more precisely that the Commission, drawing the right consequences from *Portuguese Judges,* based the procedure on Article 19(1)(2) TEU, asked for an expedited procedure and in addition requested interim measures. It follows, that this strategic use of the actions that are available to the Commission when using Article 258 TFEU make the Infringement Procedure effective, even in the rule of law crisis and without the construct of 'systematic infringement proceedings'.

As already described, relying on Article 19(1)(2) TEU in combination with Article 47 of the Charter makes it possible for the Commission and the CJEU to address concerns with the rule of law directly, which can help to prevent situations such as the one in C-286/12 *Commission v Hungary* where relying on a specific provisions of Directive 2000/78 did not eliminate the threat to the independence of the judiciary as the judges could be compensated instead of reinstated to their former positions.[96]

Better than hoping for reinstatement of the judges is, however, applying for interim measures (Article 279 TFEU) as well as requesting an expedited procedure (as referred to in Article 23a of the Statute of the Court of Justice of the European Union and Article 133 of the Rules of Procedure of the Court). In C-619/18 *Commission v Poland* the Commission requested both interim measures as well as the expedited procedure, as both measures were granted the interim measures effectively suspended the application of the law as well as ordered Poland to eliminate its effects,[97] while the expedited procedure is the reason why the judgment has been given so quickly.[98] Timing is important as always, since 'justice delayed is justice denied' also in the 'rule of law crisis'.[99] This holds true especially, when the judiciary is under threat and the Commission has not applied for interim measures, such as in case C-192/18 *Commission v Republic of Poland* on the Law on the Ordinary Courts.[100] Due to the fact that the Commission did not request interim measures, many judges were forced into retirement,[101] and since the Commission did also not request an expedited procedure, most of the changes will be invertible by the time the judgment will be passed as new presidents will have been appointed and the judges be replaced.[102]

---

[96] In analogy to Case C-286/12 *Commission v Hungary* (n 4); 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' 4.
[97] Opinion of AG Tanchev (n 41), para 33.
[98] In accordance with Article 133 of the Consolidated version of the Rules of Procedure of the Court of Justice of 25 September 2012.
[99] Schmidt and Bogdanowicz (n 1) 1097; William Penn, *Some fruits of solitude, in reflections and maxims relating to the conduct of human life* (2nd edn, Printed at London; and re-printed at Edinburgh : [s.n.], 1694); Hegedüs.
[100] Case C-192/18 *Commission v Poland*, Action brought on 15 March 2018 ; *Commission v Poland* Order of the President of the Court (n 48); *Commission v Poland* Order of the Court (n 46).
[101] European Commission, 'Commission action on the Rule of Law in Poland: Questions & Answers' (*European Commission Press Release Database*, 20 December 2017) <https://europa.eu/rapid/press-release_MEMO-17-5368_en.htm> accessed 18 September 2019; Schmidt and Bogdanowicz (n 1) 1079.
[102] To this effect: European Commission, 'Commission action on the Rule of Law in Poland: Questions & Answers' (n 101).

This shows that only a holistic approach of these measures can promise success where the judiciary is under threat. It is, therefore, a positive development, that the Commission has launched another infringement procedure, based on Article 19(1) TEU read in connection with Article 47 of the Charter, against Poland regarding the new disciplinary regime for judges.[103] If Poland does not reply within two months and further fails to discard the Commission's legal concerns it can be hoped that the Commission requests an expedited procedure as well as interim measures in order to have a chance to intervene effectively in the 'rule of law crisis'.

However, while we have seen that this approach is effective in the 'rule of law crisis' where the judiciary is under attack; scholarship has identified that in Hungary the 'rule of law crisis' is not only interfering with public institutions, such as the judiciary or ombudsman but also for example with the market economy.[104] This is why in regards to the 'rule of law crisis' in Hungary, other approaches are necessary. As interference with the market economy can also be an interference with the rule of law, it will be addressed how the Infringement procedure could also be effective when dealing with Member States that are undermining the market economy and at the same time the rule of law. This approach is exemplified by case C-235/17 *Commission v Hungary,* where the Commission is trying to rely on the Charter as a sole basis for infringement proceedings, in order to address concerns on the rule of law and not only the market economy.

3 Rule of Law Concerns and the Charter - C-235/17 Commission v Hungary

The 'rule of law crisis' in Hungary is not only concerning the judiciary but also interfering with the market economy, one of these interferences has been with the rights of cross-border investors in agricultural land.[105] The law passed in 2013 by Hungary terminated, on 1st May 2014, certain so-called 'usufruct rights' held by foreign and domestic investors in Hungary, without providing them with compensation.[106] The Commission finds that this law deprived existing investors, due to the very short period provided between the publication of the legislation and its date of entry into force, of their acquired usufruct rights and the value of their investments.[107] The Commission thus holds that this breaches the principle of legal certainty and the respect of the right to property under Article 17 of the Charter, as well as it breaches the principles of free movement of capital under Article 63 TFEU and freedom

[103] European Commission, 'Rule of Law: European Commission launches infringement procedure to protect judges in Poland from political control' (*European Commission Press Release Database*, 3 April 2019) <http://europa.eu/rapid/press-release_IP-19-1957_en.htm> accessed 18 September 2019.
[104] Schmidt and Bogdanowicz (n 1) 1086-1087.
[105] European Commission, 'Free movement of capital: Commission refers Hungary to the Court of Justice of the EU for failing to comply with EU rules on the rights of cross-border investors in agricultural land' (*European Commission Press Release Database*, 16 June 2016) <http://europa.eu/rapid/press-release_IP-16-2102_en.htm> accessed 18 September 2019.
[106] European Commission, 'Free movement of capital: Commission refers Hungary to the Court of Justice of the EU for failing to comply with EU rules on the rights of cross-border investors in agricultural land' (n 105).
[107] European Commission, 'Free movement of capital: Commission refers Hungary to the Court of Justice of the EU for failing to comply with EU rules on the rights of cross-border investors in agricultural land' (n 105).

of establishment under Article 49 TFEU.[108] On this ground the Commission has decided to bring infringement proceedings against Hungary and asked the CJEU to declare that by adopting the legislation, which restricts certain usufruct rights, Hungary has failed to fulfil its obligations under Articles 49 and 63 of the TFEU and under Article 17 of the Charter.[109]

The law from 2013 on the rights of usufruct over agricultural land has also already been subject to Hungarian court proceedings, and subsequently led to a judgement of the CJEU in a preliminary ruling procedure in *SEGRO*.[110] Even though, the preliminary ruling requests concern the interpretation of Articles 49 and 63 TFEU and of Articles 17 and 47 of the Charter the CJEU held that it was not necessary to examine the national legislation of concern in the light of the Charter in order to resolve the disputes in the main proceedings, as it found that Article 63 TEU must be interpreted as precluding legislation which restricts the free movement of capital.[111] However, the Commission stressed that the Court should give its opinion on Articles 17 of the Charter in case C-235/17 *Commission v Hungary*, irrespective of the examination of the freedoms of movement.[112] As the Advocate General Øe in paragraph 99 of his Opinion in C-235/17 *Commission v Hungary* has pointed out: such a review of the legislation of the Member States under the Charter in cases such as this would be necessary for the Commission in order to ensure respect for the rule of law in those states.*[113]* It follows therefrom that the Commission is trying to argue for (as in *SEGRO*) an independent examination of Article 17 of the Charter in relation to the Hungarian legislation in order to ensure respect for the rule of law.[114]

Advocate General Øe's Opinion was published on 29th November 2018[115] The Advocate General after quickly finding the case admissible, and not in conformity with the free movement of capital under Article 63 TFEU,[116] extensively analysed whether there can be an independent finding of an infringement based on the Charter, in this case Article 17 thereof.[117] The Advocate General applied a narrow interpretation of the ERT jurisprudence and therefore disagrees with the commission.[118] In his view, the ERT jurisprudence, allows the CJEU to examine fundamental rights when determining whether a Member State is entitled to make a derogation from the freedoms of movement, thus when fundamental rights are used as a shield and the issue therefore fall within the scope of EU law in their functional dimension.[119] In contrast what the Commission is asking would allow, in his view, the CJEU to review national legislation if there exists a restriction of freedoms of movement, thus opening a gateway to the scope of the Charter for the CJEU to rule independently on the compatibility of the national legislation concerned with each of the fundamental rights,

---

[108] European Commission, 'Free movement of capital: Commission refers Hungary to the Court of Justice of the EU for failing to comply with EU rules on the rights of cross-border investors in agricultural land' (n 105).
[109] *Commission v Hungary* (n 21).
[110] Joined Cases C-52/16 and C-113/16 *SEGRO' Kft v Vas Megyei Kormányhivatal Sárvári Járási Földhivatala and Günther Horváth v Vas Megyei Kormányhivatal*EU:C:2018:157.
[111] ibid, paras 127-129.
[112] *Commission v Hungary* (n 21), Opinion of AG ØE, para 3.
[113] ibid, para 99.
[114] ibid, para 99; *SEGRO* (n 110).
[115] Opinion of AG ØE (n 112), para 3.
[116] ibid, para 48-54.
[117] ibid, para 56.
[118] ibid, para 91.
[119] ibid, paras 97-98.

which would be an extension of the ERT jurisprudence.[120] In the alternative, the Advocate General further proposed that a separate examination of Article 17 of the Charter lacks relevance.[121] In the further alternative, the Advocate General held, that Paragraph 108(1) of the 2013 Law on transitional arrangements is incompatible with Article 17(1) of the Charter.[122] Thus the Advocate General proposed the Court to declare that Hungary has failed to fulfil its obligations under Article 63 TFEU and to dismiss the other aspects of the action, as for him the application of the Charter is subsumed by the application of the provisions on free movement of capital.[123]

The CJEU sitting in Grand Chamber found in its judgement in C-235/17 *Commission v Hungary*, that by adopting Paragraph 108(1) of the 2013 Law on transitional measures and thereby cancelling usufructuary rights previously created over agricultural land in Hungary, as between persons who are not close members of the same family, Hungary has failed to fulfil its obligations, arising from the principle of the free movement of capital under Article 63 TFEU and the right to property guaranteed by Article 17 of the Charter.[124]

Similar to the Advocate General the CJEU found the case to be admissible and that the conformity of the law does not need to be considered in regard to the freedom of establishment under Article 49 TFEU, as it is inextricably linked to the freedom of capital under Article 63 TFEU.[125] In contrast to the Advocate General the CJEU, however, continued by first analysing the applicability of Article 63 TFEU and thus the existence of a restriction of the movement of capital before subsequently considering whether the restriction of the free movement of capital is justified and whether Article 17 of the Charter is applicable.[126] In regard to whether Article 17 of the Charter is applicable, the CJEU first recalled with reference to *Åkerberg Fransson* that: 'the fundamental rights guaranteed by the Charter are applicable in all situations governed by EU law and that they must, therefore, be complied with inter alia where national legislation falls within the scope of EU law'.[127] The CJEU next reiterated that national legislation falls within the scope of EU law also where a Member State wishes to justify, on grounds envisaged in Article 65 TFEU, a derogation from a fundamental freedom.[128] The CJEU concluded therefrom, that where a Member State, just like Hungary in this case, seeks to justify a restriction of one or more freedoms of movement, 'the compatibility of the contested provision with EU law must be examined in the light both of the exceptions thus provided for by the Treaty and the Court's case-law, on the one hand, *and of the fundamental rights guaranteed by the Charter*, on the other hand'.[129] In the remaining judgment, the CJEU finds that the cancellation of usufructuary rights constitutes a deprivation of property within the meaning of Article 17 of the Charter, and further that this deprivation of property cannot be justified in the absence of a public-interest ground and of any arrangements for compensation.[130]

---

120 ibid, paras 97-98.
121 ibid, paras 113-116, 122, 124.
122 ibid, paras 131-183.
123 ibid, para 184.
124 *Commission v Hungary* (n 21), paras 130, 131.
125 ibid, paras 25-27, 51-53; in comparison with Opinion of AG ØE (n 112), paras 48-54.
126 *Commission v Hungary* (n 21), paras 54 ff; in contrast to Opinion of AG ØE (n 112), paras 41-55.
127 *Commission v Hungary* (n 21), para 63.
128 ibid, para 64.
129 ibid, para 66. (emphasis added).
130 ibid, paras 67-129.

3.1 THE RELEVANCE OF C-235/17 COMMISSION V HUNGARY FOR AN EFFECTIVE RULE OF LAW ENFORCEMENT

While this judgement of the Court, in contrast to the judgement in C-619/18 *Commission v Poland*, might not necessarily be featured in the next EU textbooks, it is nevertheless relevant for an effective rule of law enforcement by the Commission. Thus, the most significant aspects of the judgement as well as what has been missed by the CJEU in order to protect the values of the Union shall be highlighted.

First, the importance of the fact that the action is admissible, shall be highlighted, as this not only confirms, that the Commission can bring an action for a declaration that a Member State has failed to fulfil an obligation under Article 258 TFEU based solely on the rights guaranteed in the Charter, but also that the Commission is now willing to bring such requests.[131] While almost ten years have passed since the Lisbon Treaty has entered into force and changed the legal status of the Charter, making it legally binding primary law (Article 6(1) TEU) which can be invoked not only by the EU institutions but also by individuals, the Commission so far had refrained from bringing actions under Article 258 TFEU based solely on the Charter against Member States.[132] Even though it has always declared that it is competent to do so.[133] Thus, the fact that the Commission has asked the CJEU for the first time in case *C-235/17 Commission v Hungary*, and in subsequent cases C-66/18 *Commission v Hungary*, and C-78/18 *Commission v Hungary*, to find that a Member State is breaching not only the freedoms of movement but in an independent assessment, to determine that the Member State is also breaching the Charter shows that the Commission takes respect for fundamental rights and consequently the rule of law seriously.[134]

Second, it is significant that the CJEU followed the request of the Commission to assess, under an infringement procedure, the compatibility of a national legislation with the Charter separately from the compatibility with a freedom of movement.[135] Thus, the CJEU has taken another step towards more fundamental rights protection in Europe and thereby ensured that the Charter can become a significant legal instrument in the Commission's infringement policy and its enforcement of fundamental rights. In order to achieve this result, the CJEU applied a broad interpretation of the ERT jurisprudence, in contrast to the Advocate General.[136] Unfortunately, the CJEU has not given many reasons for applying the Charter in this instance other than restating its previous case law in *Åkerberg Fransson* and *ERT*.[137] While it is precisely these judgments that justify a broad application of the Charter,[138]

---

131 Opinion of AG ØE (n 112), para 66; Frank Hoffmeister, 'Enforcing the EU Charter of Fundamental Rights in Member States : How Far are Rome, Budapest and Bucharest from Brussels?' in Armin von Bogdandy and Pál Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area : Theory, Law and Politics in Hungary and Romania* (1 edn, Hart/Beck 2015) 200.

132 Adam Łazowski, 'Decoding a Legal Enigma: The Charter of Fundamental Rights of the European Union and infringement proceedings' (2013) 14 ERA Forum 573 573-574.

133 European Commission, '2010 Report on the Application of the EU Charter of Fundamental Rights (Report)' (COM(2011) 160 final 30 March 2011) 4.

134 Opinion of AG ØE (n 112), para 99.

135 *Commission v Hungary* (n 21), paras 59 ff.

136 ibid, paras 63-66.

137 *Commission v Hungary* (n 21), paras 63-66; Opinion of AG ØE (n 112), paras 77 ff.

138 See in this regard: Case C-390/12 *Robert Pfleger, Autoart as, Mladen Vucicevic, Maroxx Software GmbH, Ing. Hans-Jörg Zehetner* EU:C:2013:747, Opinion of AG Sharpston, paras 63-70; C-390/12 *Robert Pfleger, Autoart as,*

the issue surrounding the uncertainty associated with the scope of application under Article 51 of the Charter, which is crucial for its application, to use the words of Łazowski, still 'amount to a risky round of poker'.[139] This uncertainty about Article 51 of the Charter can therefore still be an issue in the future, as the Commission usually brings infringement proceedings in cases where it is likely to win, in order not to put its legitimacy at risk.[140]

Third, even though the court found not only an infringement based on the freedom of capital but also on Article 17 of the Charter, the Court missed the point why this separate assessment would have been so important. The significance was not with the secondary issue of property rights, but on the arbitrary exercise of power of the State (arbitrary removing of property rights) which adversely affects the core meaning of the rule of law, as it breaches the principles of legal certainty and legality.[141] Thus the CJEU failed to apply a systemic approach of the rule of law, which would not only have been in line with its previous judgements in *Portuguese Judges* and C-619/18 *Commission v Poland,*[142] but also would have allowed the CJEU to address its concerns on the rule of law (in other areas than the judicial independence) directly. The CJEU could thus have applied a strong rule of law didactic in this case, in order to strengthen its credibility showing that *fundamental rights*, the *rule of law* and *democracy* are not only empty phrases but that the Union actively 'contributes to the preservation and to the development of these common values'.[143] Highlighting the triangular relationship between fundamental rights, the rule of law and democracy, [144] meaning that there cannot be respect for the rule of law and democracy without respect for fundamental rights.[145] In consequence, this case had the potential to not only enhance fundamental rights protection in the EU legal order but also to make the Charter a valuable tool for the Commission to enforce the values enshrined in Article 2 TEU including the rule of law.

3.2 WHAT THE CJEU CAN LEARN FROM THIS CASE IN THE RULE OF LAW CRISIS

The Commission has shown a high level of political will by insisting that the CJEU should not only consider the question of a breach of a fundamental freedom but also to engage with the question whether the Charter is applicable and a fundamental right breached as well as the rule of law, thus shifting the focus from the Economic Union to the Union of values.[146] This approach is remarkable as it provides new solutions to overcome challenges encountered during the past years in the rule of law enforcement as it allows the CJEU to

Mladen Vucicevic, Maroxx Software GmbH, Hans-Jörg Zehetner EU:C:2014:281, paras 57-60; *SEGRO* (n 110), Opinion of AG ØE EU:C:2017:410, para 141.

[139] Łazowski (n 132) 581-582.

[140] Łazowski (n 132) 585; Blauberger and Kelemen (n 8) 323.

[141] Lisa M. Austin, 'Property and the rule of law' (2014) 20 Legal Theory 79 especially 83-84; Groussot and Lindholm (n 37) 29.

[142] See in this regard Groussot and Lindholm (n 37) 29.

[143] In allusion to the preample of the Charter of Fundamental Rights of the European Union [2012] OJ C 326/02.

[144] Laurent Pech and others, 'An EU mechanism on democracy, the rule of law and fundamental rights Annex I -An EU mechanism on democracy, the rule of law and fundamental rights' (European Parliamentary Research Service April 2016) 22.

[145] European Commission, 'A new EU Framework to strengthen the Rule of Law (Communication)' (n 22) 4; Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union* EU:C:2008:461, para 316; *Stafford v United Kingdom* App no. 46295/99 (ECtHR, 28 May 2001), para 63.

[146] Opinion of AG ØE (n 112), paras 64, 99.

address concerns with the rule of law through concerns with fundamental rights. While this is the first time that the Commission has pursued such an approach, it will not be the last, as the Commission has already brought two more cases adopting the same approach.[147] The CJEU should thus follow the argumentation of the Commission in the next case. If the CJEU would apply a strong rule of law didactic and a systemic approach to the rule of law, the infringement procedure can deploy its full strength in the fight against measures breaching the rule of law that lie outside the independence of the judiciary. Such an approach can thus provide for an effective infringement procedure even where a measure breaches the rule of law. The Commission and the CJEU should thus continue to apply creative, but well-balanced approaches to the infringement procedure such as the one identified here as well as the approach identified in the previous chapter; in order for Article 258 TFEU to remain an effective measure even in times of the rule of law crisis.

To conclude, this case has provided the Commission with a significant legal instrument that can be used to address and enforce breaches of fundamental rights: The Charter. This enhances not only the importance of fundamental rights in the EU legal order but also make it a valuable tool for the Commission to enforce the values enshrined in Article 2 TEU. The case at hand already provides a step in the right direction as it has strengthening fundamental right protection and thereby strengthened the rule of law. Since this is the first of a series of actions that the Commission has launched,[148] it is hoped that the CJEU adhere to its previous systemic approach to the rule of law thus continuing to make the rule of law more visible, legitimate and enforceable.

4 CONCLUSION

Despite the effectiveness of the infringement procedure in thousands of cases, the procedure and the approach of the Commission has been subject to much criticism over the past years, as it was held to be ineffective when dealing with breaches of the rule of law, fundamental rights and other values enshrined in Article 2 TEU.[149]

However, case C-619/18 *Commission v Poland,* which has been analysed in the second chapter exemplified, how the Commission could use infringement proceedings effectively to protect the national judiciary and thus ensure the separation of powers, which is essential for the rule of law.[150] The judgement is ground-breaking for the enforcement of the rule of law in many reasons, for one as it clarified that the Commission can bring infringement proceedings under Article 258 TFEU even where Article 7(1) TEU has been initiated, second that Article 19(1)(2) TEU creates an obligation on Member States to provide an effective judicial protection which can be enforced through infringement proceedings and third that the organisation of the national judiciary is not a purely domestic matter which the Commission and the CJEU are eager to protect. In order to safeguard the national judiciary in the rule of law crisis it was found that a combined approach, of expedited procedure,

147 See in this regard Case C-66/18 *European Commission v Hungary*, Action brought on 1 February 2018; Case C-78/18 *European Commission v Hungary*, Action brought on 1 June 2018.
148 ibid.
149 Blauberger and Kelemen (n 8) 323.
150 On the importance of the Role of Courts for the rule of law and democracy see Susanne Baer, 'The Rule of—and not by any—Law. On Constitutionalism' (2018) 71 Current Legal Problems 335 358-360.

interim measures in combination with Article 19(1)(2) TEU is necessary. This approach is thus making the infringement procedure effective in the 'rule of law crisis' where the judiciary is under attack.

Moreover, case C-235/17 *Commission v Hungary* exemplified, how the Commission is determined to transform the Charter into a, possibly, significant legal instrument in the Commission's infringement policy and the rule of law crisis. The CJEU, by ruling that the Charter can be a sole ground for finding that a Member State has failed to fulfil its obligations under the Treaties, enables the Commission to achieve this result by making fundamental rights, which are a valuable component of the rule of law, more visible, legitimate and enforceable. Nevertheless, the CJEU failed to address the concerns of the arbitrary exercise of power and thus with the rule of law directly. Thus, this case differs from C-619/18 *Commission v Poland* in the way that there is no strong rule of law didactic. If the CJEU would have applied a strong rule of law didactic as well as finding that the Charter can be a sole ground for an infringement by a Member State, this could have further enhanced rule of law enforcement as well as maintained the credibility of the EU as it demonstrates that fundamental rights, the rule of law and democracy are not only empty phrases but that the EU actively 'contributes to the preservation and to the development of these common values'[151].

To conclude, it was shown that, on the one hand, the Commission should be able to address the most controversial provisions of Hungary and Poland regarding the judiciary through the infringement procedure (as exemplified by C-619/18 *Commission v Poland)*, and that on the other hand the Charter could become a significant legal instrument in the Commission's infringement policy towards Member States that are undermining fundamental rights and the rule of law (as exemplified by C-235/17 *Commission v Hungary).* Therefore, the infringement procedure is and remains an effective enforcement mechanism which provides a solution to existing problems, even in the 'rule of law crisis'. But its effectiveness depends more than ever on the Commission's willingness to continue bringing unprecedented proceedings and the CJEU's ability to give well-balanced and legally well-founded judgements.

[151] In allusion to the preample of the Charter of Fundamental Rights of the European Union [2012] OJ C 326/02.

LIST OF REFERENCES

Austin LM, 'Property and the rule of law' (2014) 20 Legal Theory 79
DOI: https://doi.org/10.1017/S1352325214000056

Baer S, 'The Rule of—and not by any—Law. On Constitutionalism' (2018) 71 Current Legal Problems 335
DOI: https://doi.org/10.1093/clp/cuy010

Bárd P and others, An EU mechanism on democracy, the rule of law and fundamental rights Annex II - Assessing the need and possibilities for the establishment of an EU scoreboard on democracy, the rule of law and fundamental rights (European Parliamentary Research Service, 2016)
DOI: https://doi.org/10.2861/21456

Blauberger M and Kelemen RD, 'Can courts rescue national democracy? Judicial safeguards against democratic backsliding in the EU' (2017) 24 Journal of European Public Policy 321
DOI: https://doi.org/10.1080/13501763.2016.1229357

Bonelli M and Claes M, 'Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical dos Juízes Portugueses' (2018) 14 European Constitutional Law Review 622
DOI: https://doi.org/10.1017/S1574019618000330

Canor I, 'My brother's keeper? Horizontal solange: "An ever closer distrust among the peoples of Europe"' (2013) 50 Common Market Law Review 383

Closa C, Kochenov D and Weiler JHH, 'Reinforcing Rule of Law Oversight in the European Union' (2014) 25 Robert Schuman Centre for Advanced Studies Research Paper

Grabbe H, 'Six Lessons of Enlargement Ten Years On: The EU's Transformative Power in Retrospect and Prospect' (2014) 52 JCMS: Journal of Common Market Studies 40
DOI: https://doi.org/10.1111/jcms.12174

Groussot X and Lindholm J, 'General Principles: Taking Rights Seriously and Waving the Rule-of-Law Stick in the European Union' in Katja Ziegleret al, (ed), Constructing Legal Orders in Europe: General Principles of EU Law (Edward Elgar, Forthcoming 2019)

Hillion C, 'Overseeing the Rule of Law in the EU: Legal Mandate and Means' in Closa C and Kochenov D (eds), Reinforcing rule of law oversight in the European Union (Cambridge University Press 2016)
DOI: https://doi.org/10.1017/CBO9781316258774.005

Hoffmeister F, 'Enforcing the EU Charter of Fundamental Rights in Member States : How Far are Rome, Budapest and Bucharest from Brussels?' in Von Bogdandy A and Sonnevend P (eds), Constitutional Crisis in the European Constitutional Area : Theory, Law and Politics in Hungary and Romania (1st edn, Hart/Beck 2015)
DOI: https://doi.org/10.5771/9783845261386-204

Jakab A, 'Application of the EU CFR by National Courts in Purely Domestic Cases' in Jakab A and Kochenov D (eds), The Enforcement of EU Law and Values: Ensuring Member States' Compliance (1 edn, Oxford University Press 2017)
DOI: https://doi.org/10.1093/acprof:oso/9780198746560.003.0015

Kochenov D, 'On Policing Article 2 TEU Compliance - Reverse Solange and Systemic Infringements Analyzed' (2013) 33 Polish Yearbook of International Law 145

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, '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) 24 Robert Schuman Centre for Advanced Studies Research Paper 512

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

Kochenov D and Pech L, 'Better Late than Never? On the Commission's Rule of Law Framework and its First Activation' (2016) 54 Journal of Common Market Studies 1062
DOI: https://doi.org/10.1111/jcms.12401

Konchev D and Klamert M, 'Article 2 TEU' in Kellerbauer M, Klamert M and Tomkin J (eds), The Treaties and the Charter of Fundamental Rights – A Commentary (Oxford University Press 2019)

Krajewski M, 'Associação Sindical dos Juízes Portugueses: The Court of Justice and Athena's Dilemma' (2018) 3 European Papers 395
DOI: https://doi.org/10.15166/2499-8249/218

Łazowski A, 'Decoding a Legal Enigma: The Charter of Fundamental Rights of the European Union and infringement proceedings' (2013) 14 ERA Forum 573
DOI: https://doi.org/10.1007/s12027-013-0331-y

Müller JW, 'Should the EU Protect Democracy and the Rule of Law inside Member States?' (2015) 21 European Law Journal 141

DOI: https://doi.org/10.1111/eulj.12124

Pech L and Platon S, 'A. Court of Justice: Judicial independence under threat: The Court of Justice to the rescue in the ASJP case' (2018) 55 Common Market Law Review 1827

Pech L et al, An EU mechanism on democracy, the rule of law and fundamental rights Annex I - An EU mechanism on democracy, the rule of law and fundamental rights (European Parliamentary Research Service April 2016)
DOI: https://doi.org/10.2861/647142

Penn W, Some fruits of solitude, in reflections and maxims relating to the conduct of human life (2nd edn, Printed at London; and re-printed at Edinburgh, 1694)

Scheppele KL, 'Enforcing the Basic Principles of EU Law Through Systemic Infringement Actions' in Closa C and Kochenov D (eds), Reinforcing Rule of Law Oversight in the European Union (Cambridge University Press 2016)
DOI: https://doi.org/10.1017/CBO9781316258774.007

Schmidt M and Bogdanowicz P, 'The infringement procedure in the rule of law crisis: How to make effective use of Article 258 TFEU' (2018) 55 Common Market Law Review 1061

Toggenburg GN and Grimheden J, 'Upholding Shared Values in the EU: What Role forthe EU Agency for Fundamental Rights?' (2016) 54 Journal of Common Market Studies 1093
DOI: https://doi.org/10.1111/jcms.12404

Von Bogdandy A and others, 'Reverse Solange—Protecting the Essence of Fundamental Rights against EU Member States' (2012) 49 Common Market Law Review 489

Von Danwitz T, 'The Rule of Law in the Recent Jurisprudence of the ECJ' in Schroeder W (ed), Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation(1st edn, Hart Publishing, 2016)
DOI: https://www.doi.org/10.5040/9781474202534.ch-009

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

JOSHUA CHUNG*

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

* Joshua Chung. LL.M. European Business Law, Lund University. The article is based on the author's master thesis written for the purpose of the LL.M. programme at Lund University. Contact: joshchung.07@gmail.com.
[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 the 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] Theordore Konstadinides, *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 Maastrict 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 Jaśle* 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 connotates 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 Schepelle, '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:C2017:236, 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 *Torubarov* 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 Zemskova (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: http://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

A CRITICAL ANALYSIS OF THE DUBLIN-IV PROPOSAL WITH REGARDS TO FUNDAMENTAL- AND HUMAN RIGHTS VIOLATIONS AND THE EU INSTITUTIONAL BATTLE: HOW CAN WE OVERCOME THIS OUTDATED DUBLIN MODEL?

DAVID KLAIBER*

The Dublin regime – in short – determines which EU Member State is responsible to examine an application for asylum. The former Dublin Convention was signed in 1990 and first came into force in 1997. Today, 22 years and several legislative generations later, the Dublin regime is determined by the Dublin-III Regulation. After the 2015 so called 'migration crisis' and the collapse of legal principles in the Regulation, European legislators called for a reform of the Dublin system. Beside the will to reform the whole Common European Asylum System (CEAS), special focus lies on the reform of the Dublin-III Regulation. Therefore, the Commission issued its proposal for a new Dublin-IV Regulation. The proposal led to enormous controversies not only in the academic world but also in the European Institutions themselves. The aim of this article is first to analyse the Dublin-IV proposal against the background of fundamental and human rights with the incorporation of relevant case law of the ECJ and the ECtHR. The analysis will show several such violations and contradictions to the relevant jurisdiction. Furthermore, it will be demonstrated that the European Institutions are far from consent with regards to the Commission's proposal. By showing the different approaches of the Institutions and of the academic world, finally, this article will provide guidelines on how to reform the Dublin regime adequately and in accordance with fundamental and human rights.

1 INTRODUCTION

> Today we have had a frank discussion on fundamental aspects of the asylum reform. We are no longer in the crisis situation we faced in 2015, but we must still make sure we are ready to face any future crisis. Discussions will now be continued by EU leaders on the basis of the work done so far.[1]

The foregoing quote reveals two valuable aspects: First of all, the Member States of the European Union do not face a 'migration crisis' anymore. Secondly, the EU is nevertheless eager to reform the asylum and migration system in case of future migration influx. While a question mark can already be put behind the wording 'migration crisis' – meaning was it really a crisis caused by migrants or not rather than by the EU itself? – an exclamation mark

* Policy Legal Adviser to the Bündnis 90/Die Grünen Parliamentary Group in the German Bundestag. This article reflects exclusively his personal opinion. The author would like to thank Professor Xavier Groussot at Lund University, Faculty of Law, who supervised the original thesis, from which this article derives. I also want to thank Jonah Mendelsohn for his very valuable feedback.

[1] Valentin Radev, Bulgarian minister of interior during the Justice and Home Affairs Council on the 04 and 05th of June 2018, see Tsetska Tsacheva, 'Justice and Home Affairs Council, 04-05/06/2018' (Justice and Home Affairs Council, 2018) <https://www.consilium.europa.eu/en/meetings/jha/2018/06/04-05/> accessed 22 September 2019.

follows the 'from the scratch' reform approach of the European Union institutions regarding the current secondary law instruments. Presently, 21 legislative procedures on a new policy on migration are pending.[2]

In this paper I will first of all explain the fundaments of the Common European Asylum System (CEAS) (2.). Secondly, I will elaborate, in what seems to play only a secondary role in the reform plans, even though it is primary law: The fundamental and human rights enshrined in the Charter of Fundamental Rights of the European Union ('the Charter'). The European Convention on Human Rights ('ECHR') – even though not primary law – also plays a major role, as every European Union Member State is a contracting party. In light of the foregoing, I will undergo a critical legal assessment of the so called 'Dublin-IV' reform plans with regards to fundamental and human rights (3.). Many voices of other European institutions have been raised against the Commission's proposal of Dublin-IV since 2016.Under point 4. I will therefore present these views and critically evaluate their reasonableness. What lessons learned can we take from the different approaches of the institutions and what can be a way out of the Dublin system? This questions will be examined in point 5. Finally, a conclusion will form point 6.

2 THE MOMENTARY LEGAL FRAMEWORK OF THE CEAS

Based on Articles 67(2), 78 and 80 of the TFEU and Article 18 of the Charter, the European Union, institutions have the competence to legislate and develop a common policy on asylum, subsidiary protection and temporary protection. The goal is to offer appropriate status to all third-country nationals who need international protection and to ensure the principle of *non-refoulement*. This principle is enshrined in Article 33(1) of the Geneva Convention of 28 July 1951.[3] As neither the term 'refugee' nor the term 'asylum' are defined in the TFEU or the Charter, they both refer to the Geneva Convention of 28 July 1951[4] and the Protocol thereto of 31 January 1967. Thus, all policy of the EU must be in consistency with the latter.[5]

Under this premise, the EU has provided several legal instruments in the area of asylum and migration. The most important – but surely not exclusive – ones are the following: The Dublin-III Regulation, the EURODAC Regulation (recast), the Qualification Directive (recast), the Asylum Procedures Directive (recast) and the Reception Conditions Directive (recast). All of the mentioned are currently under revision procedure by different proposals of the European Commission. To make them directly applicable, the Asylum Procedure Directive and the Qualification Directive are going to be transformed into Regulations.[6] Without doubt, the reform of the Dublin-III Regulation ('Dublin-IV') is not only the one

---

[2] 'Legislative Train Schedule - Towards a New Policy on Migration' (*European Parliament*, 2019) <http://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-single-permit-directive---possible-review>.

[3] 'No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'

[4] Hereinafter 'The Geneva Convention'.

[5] European Parliament, 'Migration and Asylum: A Challenge for Europe', 2018, 3. http://www.europarl.europa.eu/RegData/etudes/PERI/2017/600414/IPOL_PERI(2017)600414_EN.pdf.

[6] See for the aforementioned legislation and their actual review process: 'Legislative Train Schedule - Towards a New Policy on Migration' (n 2).

with the most impact but also the most controversial. The *de-facto* collapse of Dublin-III in the year 2015 and following is the cause of increasing calls for reformation[7] or even abandoning it.[8]

The so called Dublin-III Regulation of 2013 is the third generation instrument of its kind and established the criteria and mechanisms for determining the Member State responsible for examining an application for international protection. One of its main goals is that an application for international protection shall be examined by a single Member State. It imposes obligations on Member States responsible under the Regulation to 'take charge' of an applicant who has lodged an application in a different Member State or to 'take back', inter alia, applicants whose application is under examination and who made an application in another Member State or who are on the territory of another Member State without a residence document. The regulation applies not only to Member States of the European Union but currently also to Norway, Liechtenstein, Iceland and Switzerland.[9] Denmark is not bound by Dublin-III (recital 42) but by an agreement.[10] Article 13 of the Dublin-III Regulation forms the infamous 'irregular first entry' principle, where the Member State of the irregular border crossing is the responsible one to hear the asylum case, which among other factors led to drastic overcapacity problems in the EU external border countries.

3 THE REFORM PLANS OF THE DUBLIN SYSTEM

The focus will now turn to the reform plans of the Dublin system. The European Commission has issued reform proposals on all mentioned legal instruments except the Family Reunification Directive. This already shows the importance and priority approach of the European Commission towards a new CEAS. The following analysis will be limited to the proposal of a Dublin-IV regulation, as it created and still creates the most controversies between the European Union and the Member States. Furthermore, the Dublin system has the biggest impact on arriving asylum seekers in the territory of the European Union, as it allocates them to the responsible Member State, thus determining their lives until the asylum procedure is completed.

---

[7] European Parliament, 'Migration and Asylum: A Challenge for Europe' (n 5) 8.

[8] '[…] put an end to the practices shifting the responsibility to the Member States of first entry, or outside the Union.', Berfin Nur Osso, 'Towards the CEAS Reform: What Can Arendt Teach Us About the Dublin IV Regulation', *Jus Gentium* (Tampere, 2018), https://doi.org/10.13140/RG.2.2.16777.13923, 14.

[9] Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway [2001] OJ L 93/40; Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland [2008] OJ L 53/5; Protocol between the European Community, the Swiss Confederation and the Principality of Liechtenstein to the Agreement between the European Community, and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland [2009] OJ L 161/8.

[10] Agreement between the European Community and the Kingdom of Denmark on the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in Denmark or any other Member State of the European Union and Eurodac for the comparison of fingerprints for the effective application of the Dublin Convention [2006] OJ L 66/38.

3.1 THE COMMISSION'S DUBLIN-IV PROPOSAL (D-IV) – A CRITICAL ANALYSIS

The proposed Dublin–IV Regulation[11] builds up, overthrows and modifies the Dublin-III regulation. In the following, I will first list the relevant proposed provisions. Hereinafter, I will give a legal assessment of how fundamental and human rights are touched upon or possibly violated.[12]

The first important major change of the proposal lies within the forward displacement of an inadmissibility procedure by changing Art. 3(3) D-IV. The new provision cites Article 33(2)(b)-(c) and Article 31(8) of the 2013 Asylum Procedures Directive. According to the Commission, this procedure is meant 'to prevent that applicants with inadmissible claims or who are likely not to be in need of international protection, or who represent a security risk are transferred among the Member States'.[13] Basically, this provision states that 'before the start of the process of determining the Member State responsible, the Regulation introduces an obligation for the Member State of application to check whether the application is inadmissible, on the grounds that the applicant comes from a first country of asylum or a safe third country. If this is the case, the applicant *will be returned* to that first country or safe third country, and the Member State who made the inadmissibility check will be considered responsible for that application.'[14] *Young* sees the *non-refoulement* principle of Art. 33(1) of the 1951 Refugee Convention endangered[15] – one of the cornerstones of international asylum rights: If a Member States does not fully examine a substantive claim of an asylum seeker, the individual cannot become beneficiary of international protection. Consequently, the applicant's repatriation to the country of origin cannot be challenged as *refoulement*, nor will he or she have the opportunity to establish that it is *refoulement*.[16] This new concept of obliging Member States to send applicants back to third countries does not exist at the moment. It is left to the Member State to decide, if and if so, when they will apply their national laws regarding third countries.

In a next step, Art 3(4) D-IV declares the Member State responsible for the application, which considers the latter inadmissible or examines an application in accelerated procedure pursuant to Art. 3(3) D-IV. Finally, Art. 3(5) D-IV provides an 'eternity-clause' and makes the Member State which has examined an application for international protection responsible for examining any further representations or subsequent application of that applicant. This happens irrespective of whether the applicant has left or was removed from the territories of the Member State.

The next crucial change concerns Art. 9(1) D-IV which provides that the criteria for determining the Member State responsible shall be applied *only once* in the order in which they

---

[11] Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), COM/2016/0270 final - 2016/0133 (COD).

[12] The following analysis is inspired by ECRE, 'ECRE Comments on the Commission Proposal for a Dublin IV Regulation' (2016) <https://www.ecre.org/wp-content/uploads/2016/10/ECRE-Comments-Dublin-IV.pdf>.

[13] D-IV (n 11), recital 17.

[14] D-IV (n 11), 15.

[15] Sophie Capicchiano Young, 'Dublin Regulation IV and the Demise of Due Process', *Immigration, Asylum and Nationality Law (I.A.N.L.)* 31, no. 1 (2017) 34, 37.

[16] ibid.

are set out in Chapter III. Consequently, this carves the procedure of responsibility in stone as the wording of the proposed Art. 9(1) D-IV leaves no room for interpretation.

There is a serious threat of violations of Charter provisions regarding this 'one shot' procedure. First of all, despite the fact that the CJEU ruled in favour of an appeal possibility for an asylum seeker to contest the responsibility decision under Chapter III of Dublin III, the new Dublin IV proposal does not enlist such a remedy.[17] While the wording of Art. 28(1) D-IV is nearly equal to the former provision of D-III, the new Art. 28(4) D-IV openly contradicts the *Ghezelbash* decision as it limits the scope of the effective remedy to an assessment of whether Articles 3(2) in relation to the existence of a risk of inhuman or degrading treatment or Articles 10 to 13 and 18 are infringed upon. There is no indication that the case law of the CJEU allows such a limitation of effective remedy. Also, Article 47(1) of the Charter grants an 'effective remedy [to] everyone whose rights and freedoms guaranteed by the law of the Union are violated'. The limitation of contesting the responsibility application of a Member State endangers this fundamental right. Furthermore, Art. 9(1) D-IV will force Member States – especially these located at the external border of the EU – to raise their administrative resources significantly, as their responsibility decision becomes binding EU-wide irreversibly. It is highly unlikely, as could be witnessed in the years 2015 and following, that Member States at the external border invest into their administration by means of their national budgets. Thus, the 'only once' provision could lead to contradictions to the right of good administration. According to this provision, every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union. Article 41 (1) of the Charter is however, according to the CJEU case-law, not addressed to the Member States. Such a right [to be heard in all proceedings] is however inherent in respect for the rights of the defence, which is a general principle of EU law. That right also requires the authorities to pay due attention to the observations thus submitted by the person concerned, examining carefully and impartially all the relevant aspects of the individual case and giving a detailed statement of reasons for their decision.[18] Tendencies might be high, that the Member State with a high pressure of migration influx might declare itself not responsible for the application. In conjunction with slow procedures, these factors are highly likely to violate the right to good administration. Finally, the recast provision does not respect the circumstance that a personal situation of an applicant may have changed. With regards to family unity and the best interest of the child, Articles 7, 24 and 33 of the Charter are at stake. This derives from the 'only once' approach in Art. 9(1) D-IV. *Pro Asyl* mentions the following example: Under Dublin-III, if an asylum applicant travels from Italy to Sweden, where he has family relations, these circumstances are considered relevant for determining the responsible Member State (Italy or Sweden). If the asylum applicant then reaches Germany, again under Dublin-III, this could lead to Germany being the responsible Member State if family ties are established in its territory. The 'only once' approach in Art. 9(1) D-IV however would take the applicant's chance away to be reunited with his family in Germany under the Dublin procedure.[19] This

[17] Case C-63/15 *Ghezelbash* EU:C:2016:409 paras 46 and 61 with regards to Article 12 Dublin III.
[18] Case C-166/13 *Mukarubega. v Préfet de Police, Préfet de la Seine-Saint-Denis* EU:C:2014:2336, paras 43-48.
[19] Pro Asyl, 'Stellungnahme von PRO ASYL Zur Geplanten Reform Der Dublin-Verordnung (Dublin-IV, COM (2016) 270)' (2016) <https://www.proasyl.de/wp-content/uploads/2015/12/Stellungnahme_Dublin-IV-PRO-ASYL.pdf>.

clear trend of hindering family bonds can also be witnessed with the removal of Art. 9(2) D-III, where authorities are obliged to respect evidence of family ties before a decision to take charge or take back the person concerned.

Even the rather sensitive matter of unaccompanied children is part of the Commission's will to reform the CEAS. In the new Art. 8(2) D-IV, the obligation of the Member States to ensure representation and assistance to unaccompanied children on their territory is limited to 'where an unaccompanied minor is obliged to be present.' In other words: Minors who participated in secondary movement and who are 'not obliged to be present' could be no longer entitled to the protection of assistance and representation. Another detail with a lot of impact brings the change of Art. 10(5) D-IV: This provision determines that the responsible Member State in the absence of a family member or a relative is where the unaccompanied minor first has lodged his or her application for international protection. While the mirror provision of Art. 8(4) Dublin III presumes in favour of the unaccompanied minor that this responsibility of the Member State must be in the minor's best interest, Art. 10(5) D-IV inverses this presumption, assuming that the decision of the Member State is in the minor's best interest.[20]

A conflict of these described provisions with Art. 24(2) of the Charter is inevitable. This provision states that in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration. Charter provisions have to be applied as primary law, according to Art. 6(1) TEU. Both legal presumptions of Art. 8(2) and 10(5) D-IV shift the burden of proof to the minor. It cannot be in the child's best interest, where legal presumptions are not in his or her favour. The CJEU confirmed that '[…] unaccompanied minors form a category of particularly vulnerable persons, it is important not to prolong more than is strictly necessary the procedure for determining the Member State responsible, which means that, as a rule, unaccompanied minors should not be transferred to another Member State.'[21] The only justification for this burden of proof shift can be read in Recital 20 D-IV, where the Commission is of the opinion that secondary movements of unaccompanied minors are not in the child's best interest. This explanatory attempt lacks of fundament though, as it does not explain, why the competent authorities are relieved from their *ex officio* responsibility enshrined in Art. 24(2) of the Charter.

Inaction can be witnessed in the area of unmarried partners in a stable relationship and same sex partners. Here, Art. 2(g) D-IV still leaves the discretion to the Member States and whether their law or practice treats the mentioned persons in a way comparable to married couples under its law relating to third country nationals. Furthermore, Art. 2(g) still excludes the reunification of adult children with their parents and leaves that matter to Art. 18 D-IV (dependant persons) and Art. 19 D-IV (discretionary clause).

In line with the case-law of the ECtHR, 'family' is regarded as a wide concept under Article 8 ECHR. [22] Additionally, it becomes already apparent from the wording of Art. 7 of the Charter that 'family life' is a wide concept. Especially in countries with very conservative

[20] D-IV (n 11), art 10(5) '[…] unless that this is not in the best interest of the minor'.
[21] Case C-648/11 *M.A. v Secretary of State for the Home Department* EU:C:2013:367 para. 55.
[22] *Lebbink v. the Netherlands* App no 45582/99 (ECtHR, 1 June 2004), para 36; *Schalk and Kopf v. Austria*, App no 75/1995/581/667 (ECtHR, 22 April 1997).

views to same sex marriages or general mistrust of refugees and their religious marriages in their countries of origin (*ie* Hungary and Poland), a discretion clause can lead to different treatment of applicants, which are in tension or breach of the ECHR and/or the Charter. Consequently, where Member States have a margin of manoeuvre, the CJEU stated in the context of the Family Reunification Directive that this margin 'must not be used by them in a manner which would undermine the objective of the Directive, which is to promote family reunification, and the effectiveness thereof.'[23] The matter of family reunification and adult children is also left to exceptional circumstances (Article 18 D-IV) and discretion of the Member States (Article 19 D-IV). The scope of Art. 19 D-IV is now narrowed down, as it seems, to be a general clause for family matters, even though the provision in D-III does not limit the scope to family matters. Furthermore, now the discretionary clause can also be invoked *as long as no Member State has been determined responsible*. As recital 21 shows, the COM fears that the effectiveness and sustainability of the system could be undermined for examining an application lodged with it in cases when such examination is not its responsibility under the criteria laid down in D-IV. These restrictions may be justifiable under the law but may fuel severe integration problems and social exclusion. The Commission limits the positive effect for improving the chance of integration of applicants to the sibling(s) of the applicant.[24] A distinction between the reunification of siblings and the one of parents with their adult children seems arbitrary.[25] Both family ties are essential for the emotional and integrational status of the applicants and their family, especially where they shared the same destiny of war, famine, etc. The UNHCR therefore considers family unity crucial in providing "social, psychological, and economic support needed for effective integration" in the host country.[26]

Another inaction, combined with the reformation of Dublin-III is the obligation to take back a beneficiary of international protection under certain circumstances, while the 'systemic flaw' exception is not applicable to these persons: Art. 3(2) D-IV is unchanged with regards to the systemic flaw principle, meaning that a transfer of an applicant is not permitted in risk of inhuman or degrading treatment within the meaning of Art. 4 of the Charter. As Art. 3(2) D-IV refers to the definition of 'applicant' in Art. 2(c) D-IV, only *applicants* for international protection but not *beneficiaries* of international protection are covered and protected by the 'systemic flaw' clause. In its detailed explanation of the specific provisions of the proposal, the Commission states that an obligation for the Member States responsible has been added to take back – under certain circumstances – a beneficiary of international protection. This is now codified in Art. 20(1)(e) D-IV in conjunction with Art. 26 and Art. 30 D-IV.

It becomes apparent, especially from German case law,[27] that Member States have the obligation under Art. 3 ECHR (and Article 4 of the Charter) to halt the transfers of people

---

[23] Case C-578/08 *Rhimou Chakroun v. Minister van Buitenlandse Zaken* EU:C:2010:117, para 43.
[24] D-IV (n 11), recital 19.
[25] Even though a distinction between siblings and adult children could be justified, there need to be substantive grounds for the distinction to be in compliance with the fundamental right of equality of Art. 20 of the Charter.
[26] UNHCR, 'Integration – A Fundamental Component in Supporting Diverse Societies' (2016) <https://www.unhcr.org/56a9decf5.pdf>.
[27] German Constitutional Court, Decision 2 BvR 273/16, 21 April 2016; Osnabrück Administrative Court, Decision of 4 January 2016, Az.5 A 83/15; Saarland Administrative Court, Decision of 4 January 2016, Az.

who enjoy international protection status where there is a risk of violation of being subject to torture or inhuman degrading treatment or punishment. In its *N.S.* judgement, the CJEU ruled that the Member States, including the national courts, may not transfer an *asylum seeker* where they cannot be unaware that systemic deficiencies would lead to a violation of Art. 4 of the Charter.[28] The ECtHR takes a different approach than the CJEU as the former is not bound by the 'systemic flaw' exception of Dublin-III.[29] In *Tarakhel v Switzerland*, the ECtHR made clear that the source of the risk of violation of Art. 3 ECHR is irrelevant to the level of protection guaranteed by human rights. Furthermore, a State is not exempted from 'carrying out a thorough and individualised examination of the situation of the person concerned and from suspending enforcement of the removal order should the risk of inhuman or degrading treatment be established.'[30] Even though in the cases of 'Dublin-transfers', Art. 4 of the Charter is used by the CJEU as the legal basis, the reasoning of the ECtHR can be found in Art. 19(2) of the Charter as well. The mentioned provisions are (partly) stemming from the *non-refoulement* principle. However, the *non-refoulement* has a wider application than being a mirror of Art. 4 of the Charter. For example, the right to a fair trial,[31] the prohibition of slavery,[32] the right to liberty,[33] the right to private life[34] and freedom of religion,[35] were upheld as being enshrined in the *non-refoulement* principle by both, the CJEU and the ECtHR. Finally, Recital 28 D-IV seems to acknowledge the need to respect fundamental rights where deficiencies or the collapse of asylum systems appear. As *ECRE* analyses correctly, beneficiaries of international protection are covered by Art. 26 and 30 D-IV – as both refer to Art. 20(1)(e) D-IV ("take back […] a beneficiary of international protection") – it is only consequent, to broaden the scope of Art. 3(2) D-IV in the sense that people with this status have to enjoy the same protection than "applicants" for international protection.[36] On the contrary, "an obligation for the Member State responsible has been added to take back a beneficiary of international protection, who made an application or is irregularly present in another Member State. This obligation will give Member States the necessary legal tool to enforce transfers back, which is important to limit secondary movements."[37] This goes in line with the recent case law of the CJEU with regards to Art. 33(2)(a) of the directive on common procedures for granting and withdrawing international protection. The court ruled that a Member State is allowed "to reject an application for the

3K 86/ 15; Oldenburg Administrative Court, Decision of 4 November 2015, 12 A 498/15; Osnabrück Administrative Court, Decision of 17 December 2015, 5 B 432/15.

[28] Case 411/10, *N.S.* EU:C:2011:865, para 94.

[29] See Art. 3(2) Dublin III.

[30] *Tarakhel v Switzerland*, App no 29217/12 (ECtHR, 4 November 2014 Judgment), para 104.

[31] Article 47 of the Charter and Article 6 ECHR, *Othman (Abu Qatada) v United Kingdom*, App no 8139/09 (ECtHR, 9 May 2012); *El Haski v Belgium*, App no 649/08 (ECtHR, 25 September 2012); *Al Nashri v Poland*, App no 28761/11 (ECtHR 24 July 2014).

[32] Article 5 of the Charter and Article 4 ECHR, *Ould Barar v Sweden*, App no 42367/98 (ECtHR, 19 January 1999).

[33] Article 6 of the Charter and Article 5 ECHR, *Tomic v United Kingdom*, App no 17387/03 (ECtHR, 14 October 2003).

[34] Article 7 of the Charter and Article 8 ECHR, *F v United Kingdom*, App no 17341/03 (ECtHR, 22 June 2004).

[35] Article 10 of the Charter and Article 9 ECHR, *Z and T v United Kingdom*, App no 27034/05 (ECtHR, 28 February 2006). Notably, this case is cited by Advocate-General Bot in joined Cases C-71/11 and C-99/11 *Bundesrepublik Deutschland v Y and Z*, para 71 on the concept of persecution for reasons of religion.

[36] ECRE (n 12), 18-20.

[37] D-IV (n 11), 17.

grant of refugee status as being inadmissible on the ground that the applicant has been previously granted subsidiary protection by another Member State, where the living conditions that that applicant could be expected to encounter as the beneficiary of subsidiary protection in that other Member State *would not expose him to a substantial risk of suffering inhuman or degrading treatment, within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union.*"[38] There is no reasonable explanation why beneficiaries of international protection should be exempted from this level of protection in D-IV, even though they are mentioned explicitly when it comes to transfer decisions.

The most striking changes in Dublin-IV are introduced by - what can be called – the 'sanction approach' in Art. 4, 5 and 20 as well as Recital 22 D-IV. While Art. 4 D-IV as a new provision sets out different obligations of asylum seekers in the Dublin procedure, Art. 5 D-IV follows with the sanction module, if the applicant is not acting in conformity with these obligations. The already mentioned Art. 20 D-IV then clarifies the procedures for persons 'taken back'. These Art. 5 D-IV sanctions contain the mandatory use of the accelerated procedure upon return to the responsible Member State, the withdrawal of reception conditions except emergency health care if the applicant absconds and inadmissibility of information submitted after the Dublin interview. The new sanction approach in Dublin-IV clearly shows that the once 'formalistic' legal instrument of distributing applicants for international protection, becomes more and more a 'substantive' legislative piece. Article 4 can be understood against the background that the Commission fears an abuse of the Dublin system in case there are no consequences for not complying with the applicant's obligation.[39]

It is argued that the automatic sanction approach of D-IV can lead to a violation of Art. 31 of the Refugee Convention. This provision obliges States not to impose penalties, on account of their illegal entry or presence, on refugees under certain conditions.[40] In substance, Art. 20(5) D-IV withdraws all rights to an effective remedy under Chapter V of the Directive 2013/32/EU, where a third-country national or a stateless person whose application has been rejected and who made an application in another Member State or who is on the territory of another Member State without a residence document. As the rejection of an application could lead to a violation of the law, it remains unclear, how this provision can be interpreted in line with the right to a fair trial in Art. 47(1) of the Charter. This specific provision caused UNHCR's significant concern and led to their suggestion, to delete Art. 20(5) D-IV.[41] The biggest threat to a human rights violation forms Art. 5(3) D-IV. It deprives the applicant of any reception conditions, laid out in Art. 14 to 19 of the Reception Conditions Directive with the exception of emergency health care, or in other words: Schooling and education of minors, employment, vocational training, housing and health care. This 'sanction reflex' in a situation of non-compliance by the applicant, is in harsh

[38] Joined Cases C-297/17, C-318/17, C-319/17 and C-438/17 *Ibrahim et al. v Bundesrepublik Deutschland and Bundesrepublik Deutschland v Taus Magamadov* EU:C:2019:219, para 103. (emphasis added).
[39] D-IV (n 11), 3.
[40] ECRE, 'ECRE Comments on the Commission Proposal for a Dublin IV Regulation', 2016, 23. https://www.ecre.org/wp-content/uploads/2016/10/ECRE-Comments-Dublin-IV.pdf.
[41] UNCHR, 'UNHCR Comments on the European Commission Proposal for a Regulation of the European Parliament and of the Council Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protecti', 2016 1, 12 https://www.refworld.org/pdfid/585cdb094.pdf.

contradiction with Art. 1 of the Charter as it touches upon the dignity of an applicant: The applicant becomes pure object to the public authorities and is literally 'left alone' with the exception of emergency health care. On top, the term of emergency health care itself is neither defined in the D-IV proposal nor in Art. 19(1) of the Reception Conditions Directive. *Pro Asyl, Amnesty International et al.* therefore consider the exclusion of the named rights as not only unconstitutional but inhumane.[42] Besides, the CJEU ruled in *Cimade and GISTI* that the Member States' obligations to provide reception conditions to the applicant only cease 'when the applicant has actually been transferred by the requesting Member State'.[43] This case-law has been confirmed in *Saciri*, where the Court referred to *Cimade and GISTI* and ruled that in 'particular the requirements of Article 1 of the Charter of Fundamental Rights of the European Union, under which human dignity must be respected and protected, preclude the asylum seeker from being deprived – even for a temporary period of time after the making of the application for asylum and before being actually transferred to the responsible Member State – of the protection of the minimum standards laid down by that directive.'[44] Article 5(3) D-IV interferes with the Charter and settled case-law of the CJEU. It is obvious that beside Art. 1 of the Charter, the deprivation of Art. 14 to 19 of the Reception Conditions Directive also hinders the applicants to execute his rights under Art. 14 (Right to education) and Art. 34 (social security and social assistance) of the Charter. While the reform of other provisions may be object to political debates and different opinions, with Art. 5(3) D-IV, the Commission has overstepped the mark. There is no indication that this provision would hold in (national) Courts and it only provokes again the ever-lasting question of the principle of primacy of European Union law over national constitutional law: Where a national constitutional court rules that an applicant is granted more rights than envisaged in Art. 5(3) D-IV, this would infringe the Regulation and therefor create a conflict of both legal orders.

The reform plans are also directed against the appeal mechanisms of the Dublin procedure. In its new Art. 28(2) in conjunction with Recital 24, the Dublin-IV proposal now limits the right to an effective remedy against a transfer decision to seven days after the notification of a transfer decision. Article 27(2) Dublin-III gives the Member States a 'reasonable time' to contest the decision. Thus, Art. 28(2) D-IV is streamlined with the existing, least favourable national systems of Austria, Germany, the Netherlands, Bulgaria and Switzerland.[45] It comes with little surprise that the Commission chose a very narrow approach for the appeal deadlines, as this concept fits into the overall restrictive manner of the Dublin-IV proposal. Nearly half of the Member States have more favourable rules, with up to 60 days to lodge an appeal.[46] The CJEU did not render a judgement yet on what is considered to be a 'reasonable time' under Dublin-III. However, in *Diouf*, the Court found that a 15-day time-limit for appealing a decision in an *accelerated procedure* 'appears reasonable

---

[42] Pro Asyl and Amnesty International et al., 'Flüchtlingspolitik in Europa - Nein Zu Dieser "Dublin IV Verordnung"!', 2016 1, 3, https://www.proasyl.de/wp-content/uploads/2015/12/Nein-zu-dieser-Dublin-IV-VO_Dezember-2016.pdf.

[43] Case C-179/11 *Cimade, Groupe d'information et de soutien des immigrés (GISTI) v Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration* EU:C:2012:594, para 58.

[44] Case C-79/13 *Federaal agentschap voor de opvang van asielzoekers v. Selver Saciri and others* EU:C:2014:103, para 35.

[45] See exemplary for Germany, AIDA - Asylum Information Databasa, 'Country Report : Germany', 2017 , 16.

[46] See exemplary for Spain, AIDA - Asylum Information Databasa, 'Country Report : Spain', 2010, 29.

and proportionate in relation to the rights and interests involved.'[47] There must be several concerns expressed with this 7 day approach. First of all, a transfer decision has a very strong impact on the applicant as he or she will be transferred to another country. Secondly, not all applicants are able to find legal assistance in seven days, who can contest the Dublin-decision, served by the public authorities. Thirdly, for the appointed lawyer(s), a seven days-period with often highly complex facts of the case and complicated legal questions, is hardly sufficient to work on professionally. These circumstance point to a violation of Art. 47 of the Charter and are clearly the consequence of the Commission's overall sanction approach of the Dublin-IV proposal.

As pointed out before, the remedy mechanism of Art. 28(4) D-IV limits the scope of appeal against transfer decisions to the assessment of risks of inhuman or degrading treatment under Article 3(2) or to infringements of the family provisions set out in Articles 10 until 13 and 18 D-IV. This is in direct contradiction to the *Ghezelbash* judgement of the CJEU, where it ruled that the Dublin III Regulation allows an applicant to challenge a transfer decision on the basis of misapplication of the responsibility criteria.[48] Such a scope of appeal, according to *AG Sharpston* stems from the respect of rights of defence and the right to be heard under Article 41 of the Charter in 'all proceedings likely to culminate in a measure adversely affecting a person.'[49] The wording of Art. 41 of the Charter is clear, thus there is no justification to limit the remedy possibilities to a certain catalogue. One inherent rule of law principle is the right to be heard and have an effective remedy against any measure adversely affecting a person (Art. 47 of the Charter). There is no reason why this principle should not be applied to applicants of international protection.

3.2 INTERIM RESULT: A DRACONIC, OBJECTIFYING, SANCTION MODEL

The legal analysis above has shown a clear shift in the new Dublin-IV proposal from a responsibility mechanism in Dublin-III, designed to allocate applicants of international protection to the responsible Member States, to a substantive sanction mechanism against people who search protection in the European Union. Nearly all examined provisions interfere with fundamental and human rights, which are protected by the Charter and the ECHR, respectively the case-law of the CJEU and the ECtHR. A lack of individual assessment makes room for a protective (border) approach. Despite the assertion in Recital 53 of D-IV that 'this Regulation respects the fundamental rights and observes the principles which are acknowledged, in particular, in the Charter of Fundamental Rights of the European Union', the close examination of the reform plans leads to the opposite assumption. The Commission's proposal aims at making an application for international protection as hard as possible. Every incentive to enter the European Union is choked off. The most blatant example is the deprivation of the reception conditions in case of secondary movement of an applicant, where only emergency health care shall be granted. Apart from clear legal indications of the Charter and the ECHR, the Commission's approach is morally deeply questionable. Modern legal systems are united in one standard: An individual shall never

[47] Case C-69/10 *Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration* EU:C:2011:524, para 67.
[48] Case C-63/15 *Ghezelbash* EU:C:2016:409 paras 46 and 61.
[49] Case C-63-15, *Ghezelbash* EU:C:2016:186, Opinion of AG Sharpston, para 82.

become an object to the actions of a state.[50] *Radović* and *Čučković* observe correctly that 'the [Commission's] focus is thus on improving the position of MS and not the position of individuals […]'.[51] Therefore, it seems urgent to remind the European Union institutions of Art. 2 TEU:

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

4 THE EUROPEAN INSTITUTIONS DISCREPANCIES: AN OVERVIEW

Instead of making applicants for international protection objects to the actions of the European Union and the Member States, a humanitarian and individualised concept should be adopted. As bearer of the Nobel Peace Prize, the EU certainly has a great responsibility towards the protection of human rights.

While the first part of this article consisted of a (rather technical) legal analysis, I will now analyse the proposed solutions of different EU institutions and how to overcome the flawed Dublin-III mechanism. The Dublin system had placed unprecedented pressure on southern border Member States, causing asylum seekers to be concentrated in those ones, while other Member States accepted varying levels of movement requests, creating a lack of solidarity and fairness in a system initially created to unite the EU. The problem of disproportionate pressure on some Member States' asylum systems must be addressed, as it leads to the endangerment of fundamental rights of asylum seekers and creates political tensions between Member States. There have been several proposals on how to tackle the issue of the failure of the Dublin system. I will demonstrate their concepts and at the same time evaluate their reasonableness.

4.1 THE EUROPEAN PARLIAMENT I: 'SUPRANATIONALIZATION'

A recently published European Parliament Briefing dealing with the Reform of the Dublin system, provides the essentials of the different views.[52] First of all, the European Parliament in 2016 adopted a Resolution with clear indicators on how to reform the Dublin system.[53]

---

[50] See Marx, who already concludes that applicants for international protection will be degraded to pure objects oft he state: Reinhard Marx, 'Reform Des Dubliner Systems – Kritische Auseinandersetzung Mit Den Plänen Der Europäischen Kommission', *Zeitschrift Für Ausländerrecht Und Ausländerpolitik (ZAR)*, 2016 366, 375.

[51] Maja Lukić Radović and Bojana Čučković, 'Dublin IV Regulation, The Solidarity Principle and Protection of Human Rights - Step(S) Forward or Backward?', *Eu and Comparative Law Issues and Challenges Series*, no. 2 (2018) 14.

[52] Anja Radjenovic, 'Reform of the Dublin System' (2019) <http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/586639/EPRS_BRI(2016)586639_EN.pdf >.

[53] European Parliament, 'European Parliament Resolution of 12 April 2016 on the Situation in the Mediterranean and the Need for a Holistic EU Approach to Migration (2015/2095(INI))' (2016)

Diametrically opposed to the Commission's view[54], the European Parliament is open to the idea to revise the 'first-entry' principle in favour of a central collection of applications for international protection at a Union level. This approach 'supranationalizes' the CEAS, because the individual would seek asylum in the Union and not in a single Member State. In order to achieve this, a central system for the allocation of responsibility shall be established. The distribution would be based on certain thresholds per Member State relative to the number of arrivals. The latter would be involved fully into this centralised mechanism, while the distribution of the applicants itself is thought to function on a basis of 'Union hotspots'. To ensure family ties, the allocation mechanism must respect family unity and the best interest of the child.

The European Parliament's proposal can be considered as progressive in comparison with the Commission's approach. It has – at its core – the necessary idea to abandon the 'first-entry' principle. *Di Filippo* aims in the same direction with the centralized proposal, calling it 'ambitious pragmatism'.[55] Not only would this change of procedure take away the pressure from the countries of the external border of the EU but also the incentive of arriving applicants to engage into secondary movement. Inversely, the Member States, which underlie great pressure in the case of irregular high migration influx, are not tempted to a 'laissez faire' politics. In other words: To not register arriving applicants. Another positive fact is the extended recognition of family ties and the right of the child.

One of the down-side however is, that the proposal of the European Parliament lacks concreteness. It remains open, how the Member States are involved in this idea of centralization. Furthermore, this approach runs the risk of creating exactly the same weaknesses as the momentary Dublin system with regards to the proposed 'Union hot spot' mechanism: The European Union has no own sovereign territory. Such hot spots must be based on the voluntary participation of certain Member States. Considering a scenario like 2015, these hot spots would very likely collapse in the same manner as some countries like Italy or Greece did back in the time. Despite the cursoriness of the European Parliament's resolution, it must be acknowledged that it is, after all, a *European* concept.

4.2 THE EUROPEAN PARLIAMENT II (LIBE)[56]: A GENUINE LINK

In a report from 2017[57], the LIBE committee made concrete proposals on how to reform the Dublin Regulation. First of all, asylum seekers who have 'a genuine link' with a particular Member State should be transferred to it. This is the first relocation criteria. If there is no such link, a distribution key decides automatically, to which Member State the applicant will be sent. Here, the asylum seeker has the option to choose between four countries, which, according to the distribution key, received the fewest applicants yet. However, the countries

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2016-0102+0+DOC+PDF+V0//EN>.

[54] See the first part of this article.

[55] Marcello di Filippo, 'Dublin "Reloaded" or Time for Ambitious Pragmatism?' (*EU Immigration and Asylum Law and Policy*, 2016) <http://eumigrationlawblog.eu/dublin-reloaded/> accessed 22 September 2019.

[56] Civil Liberties, Justice and Home Affairs Committee of the European Parliament.

[57] Cecilia Wikström, 'LIBE Commitee Report A8-0345/2017 on the Proposal for a Regulation of the European Parliament and of the Council Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protectio' (2017).

of first arrival must register all asylum-seekers and check their fingerprints as well as the likelihood of an applicant being eligible for international protection. Additionally, applications with a very small chance of receiving international protection, are examined in the country of arrival. Family and children interests should be always a priority to the examining country. When it comes to incentives and disincentives, a clear system should be established to avoid absconding and secondary movement. Another new approach would be the sanctioning of frontline Member States that fail to register applicants with a stop of the relocation system. Inversely, Member States who refuse to accept relocation of applicants, would face limits on their access to EU funds.

Following up on its resolution, the LIBE committee's approach abandons the centralized idea of collecting all asylum applications and process them on a Union level with the constant participation of the Member States. Now, a 'genuine link' shall decide, where applicants should and could file their request for asylum. In the light of feasibility, the LIBE's proposal is more realistic than the original European Parliament's one. This does not mean that it is necessarily more favourable. With respect to the resources – especially the European Union's budget – however, a complete shift to a responsibility mechanism solely conducted by the European Union, seems rather far away. Therefore, the theory of a genuine link offers a positive first approach to respect and 'de-objectivise' asylum seekers. What remains open, is the effect of the 'four country mechanism', where applicants can choose in the lack of a genuine link. It is not too far-fetched to say that the countries with the least allocated applicants – from which they can choose – are very probable also the countries with the least favourable conditions.[58] Where the LIBE report falls back into old habits is the duty-catalogue for Member States of first entry as well as the sanction in the case of non-compliance. Especially the criterion of 'likelihood of an applicant being eligible for international protection' would bring back dark memories of the Dublin-III Regulation. When is an applicant 'likely' eligible for international protection? This approach drifts again away from an individualized scheme to presumptions against applicants that they might have no right to enjoy protection. Finally, while the budget cutting sanction of countries, which refuse to take in allocated applicants, is positive, the reverse sanction mechanism is not. There is no apparent reason, why asylum seekers should be sanctioned by being obliged to stay in a frontline Member State, which fails to register them. When a frontline Member State actually fails to register the applicants, it is highly likely that there is already a disproportionate migration influx taking place. If the proposed sanction kicks in, it will only and again lead to scenarios like in 2015, where certain Member States were factually unable to handle the situation.

4.3 THE COMMITTEE OF REGIONS: 'INDIVIDUALISATION'

A 2016 opinion of the Committee of Regions (CoR) under Rapporteur *Bianco* concluded that the Commission's approach on reform of the Dublin Regulation is inadequate.[59] The CoR demands a highly individualised concept, where professional experience and subjective wishes of asylum seekers shall build the focus. This incentive approach would discourage

[58] As can be witnessed today in Italy, Hungary, Greece for example.
[59] Vicenzo Bianco, 'Opinion - Reform of the Common European Asylum System CIVEX-VI/013', 2016, 1.

secondary movement and at the same time avoid a hard sanctions approach. Additionally, in order to establish a Member State's real and current reception capacity, the number of arrivals in that country should also be taken into account, by incorporating this parameter into the reference key. Individualisation is also on the agenda of *di Filippo*, who suggests to consider language skills, previous study or work experience as well professional qualifications as factors to be respected and recognised for the allocation of a Member State to a certain country.[60]

In contrast to the Commission, an individual mechanism seems the most promising option to solve irregular high migration influx. First of all, it comes closest to safeguard human rights by abandoning the objectifying sanction approach of the Commission's proposal.[61] Secondly, the integration process sets in significantly earlier as, for example, language barriers are either not existent or easier to overcome. Another advantage of respecting professional skills is that even were communication might be an issue, a least common denominator can already be established by sharing a workplace: A Syrian cook in a Hungarian restaurant is unlikely to know the language but there is no reason to assume that he can't use the cooking tools as good as his Hungarian colleagues. Implicitly, incentives for secondary movements are reduced. Where asylum seekers can settle together with their family, share the language and/or professional experiences and even start to work, no plausible reasons seem apparent, to give up such a situation. Finally, it is naïve to assume that applicants of international protection will always and only aim for the 'generous' welfare states. In Germany alone, since 2015, nearly 400.000 refugees found work or an apprenticeship.[62] The latter indicates that most refugees are eager to start working upon arrival, which means no less than the fact that they pay taxes and social security contributions. To individualize the allocation system must enjoy the benefit of the doubt as *a contrario* the 'classic' Dublin approach was proved to failure.

4.4 THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE (EESC): ANALYTICAL APPROACH

With its opinion on the CEAS reform[63], the EESC partly approves the Commission's proposal with slight modifications with regards to procedural and human rights. While the EESC is in favour of a more efficient and effective reform of the CEAS, meaning the support of improved and speed up determination processes for asylum seekers, the opinion also expresses the need to protect people's human rights. Concretely, 'provisions should be clarified and included on procedural issues, individual treatment of applications, maintenance of discretionary clauses, maintenance of the deadline for the cessation of obligation for a Member State to assume responsibility, the rights of applicants, and the limitation of the

---

[60] di Filippo (n 55).
[61] di Filippo calls the Commission's proposal 'the strange idea of treating persons as objects', ibid.
[62] Patrick Gensing, 'Keine "Märchenstunde" Über Flüchtlinge' (*Faktenfinder tagesschau*, 2018) <https://faktenfinder.tagesschau.de/inland/kramer-fluechtlinge-arbeitsplaetze-101.html> accessed 22 September 2019; Bundesagentur für Arbeit, 'Fluchtmigration Statistik' (2018) <https://statistik.arbeitsagentur.de/Statischer-Content/Statistische-Analysen/Statistische-Sonderberichte/Generische-Publikationen/Fluchtmigration.pdf>.
[63] José Antonio Moreno Díaz, 'European Economic and Social Committee Opinion CEAS Reform I SOC/543' (2016) <https://webapi2016.eesc.europa.eu/v1/documents/eesc-2016-02981-00-00-ac-tra-en.docx/content>.

corrective relocation mechanism.'[64] The EESC further considers Article 5 D-IV (sanctions) as having disproportionate procedural and reception consequences which are not in line with the standards in the current Asylum Procedures -and the Reception Conditions Directive as well as with the Charter.[65] It also considers the admissibility procedure without prior analysis of family members in other Member States as being at odds with Art. 7 of the Charter and Art. 8 ECHR and criticises the safe third country concept, which could be discriminatory on the basis of nationality.[66] Finally, the EESC is in favour of keeping discretionary clauses for the Member States to determine themselves, whether they want to be responsible for the asylum seekers application.[67]

I consider the EESC's critique of the Commission's proposal as a positive sign but not as too profound or constructive. While the EESC opinion can be read more as a legal analysis, there are no concrete proposals on how to achieve a functioning new system of allocation of responsibilities in the European Union. Considering the EESC's role, which consists of employer's and employee's representatives, especially a more integration motivated opinion would have been preferable. To find work, is often considered to be the first step of an integration process. However, the opinion demonstrates the consensus of many European Union institutions that the protection of human rights disappeared from the Commission's view entirely.

5 THE LESSONS LEARNED AND THE WAY OUT

'At the European Council of June 2018, and at each subsequent meeting, in October 2018 and December 2018, however, EU leaders failed to achieve a breakthrough on internal aspects of migration and the EU's asylum policy, showing remaining differences among Member States as regards, in particular, the reform of the Dublin Regulation.'[68] This discord must be seen as a clear thread running through the EU institutions[69] and the Member States. We have seen that the Commission follows a fundamentally diametric approach than the other European Union institutions and stakeholders. Additionally, certain Member States take every chance to slow down or block the process of reforming the Dublin system.[70] Thus, a threefold problem structure is established since 2015: A minority of Member States is not willing to accept responsibilities of treating applications of international protection. The European Commission, giving in to these Member states, follows a hardliner approach which deprives individuals of fundamental and human rights. In contradiction hereto, this approach is heavily opposed, especially by the European Parliament, which also seeks to reform Dublin from the scratch, but with another vision. Polls have predicted that the far right (extremist)

[64] ibid.
[65] ibid, 6.
[66] ibid 9.
[67] ibid, 8.
[68] Radjenovic, 'Reform of the Dublin System' (n 52), 11.
[69] See analysis above.
[70] See for example Hungary, Péter Szijjártó and Ministry of Foreign Affairs and Trade, 'There Are 15 Million Internal Refugees and People in Need of Humanitarian Aid Living in the Immediate Vicinity of Europe' (2018) <http://www.kormany.hu/en/ministry-of-foreign-affairs-and-trade/news/there-are-15-million-internal-refugees-and-people-in-need-of-humanitarian-aid-living-in-the-immediate-vicinity-of-europe> accessed 22 September 2019.

parties will gain significantly for the 2019 European Parliamentary elections.[71] Now, after these elections, the group 'Identity and Democracy' was created, succeeding the European of Nations and Freedom group (ENF). It builds the fifth largest group in Parliament with 73 members and Italy's Lega party as well as the National Rally in France and Germany's AfD form the biggest part of it.[72] There is clear evidence that these 'Eurosceptics' are united in opposing any liberal refugee policy in their Member States. More ironically, the more the European Parliament shifts to the right, the higher the probability that the Commission's proposal will actually find consent. However, two key players have been left out: The European Court of Justice and the European Court of Human Rights. It is rather surprising, how the Commission seems to fade out both Courts. The Dublin-IV proposal likely violates Charter and ECHR provisions, as analysed above. Therefore, I suggest that the future negotiations of the European Union and the Member States should focus on an efficient reform of the Dublin system, instead of wasting more time and resources on provisions, which obviously are in contradiction to primary EU-Law as well as the ECHR.

In the light of the foregoing, a way out of Dublin can only be achieved by a drastic shift to a highly individualistic approach. Some proposals above have taken this into account already. This concept is not unknown either: In 1979, the UNHCR Executive Committee recommended already that the intentions of the asylum seekers as regards the country in which he wishes to request asylum should be taken into account. 'Meaningful links' between the asylum seeker and particular States could help to narrow down the responsible Member State.[73] One 'extreme' version of this meaningful link approach would be a 'free choice' model, where the applicant can actually decide freely, where to reside during his or her procedure. A free choice model has been described as the ideal type of light system.[74] Free choice in this context would save resources as a pre-transfer litigation as well as complex fact finding procedure simply disappear. Moreover, a full cooperation from the applicant can be expected and intra-EU smugglers are less likely to find 'clients'.[75] In accordance with the 'genuine link theory', applicants of international protection should no longer be allocated to Member States because of the irregular entry principle. It was proven to be not only inefficient but also lead to the collapse in some states, where a proper care of asylum seekers was not possible anymore. The respect for refugee rights – at the same time – are incentives for the latter, not to engage into secondary movement. If a stable, common CEAS is established and the conditions in every European Union Member State are the same, unjustified absconding is likely to be reduced. Additionally, any kind of separation of families

---

71 'Poll: EPP Still the Biggest Group after EU Elections, Far-Right to Make Gains' (*EURACTIV*, 2019) <https://www.euractiv.com/section/eu-elections-2019/news/poll-epp-still-the-biggest-group-after-eu-elections-far-right-to-make-gains/> accessed 22 September 2019.

72 European Parliament, 'Parliament Group Priorities: Identity and Democracy' (2019) <https://www.europarl.europa.eu/news/en/headlines/eu-affairs/20190712STO56963/parliament-group-priorities-identity-and-democracy> accessed 22 September 2019.

73 UNHCR Executive Committee, 'Refugees Without an Asylum Country No. 15 (XXX)' (1979) <https://www.refworld.org/docid/3ae68c960.html> accessed 22 September 2019.

74 Francesco Maiani, 'The Reform of Dublin III Regulation' (2016) <http://www.europarl.europa.eu/committees/en/supporting-analyses-search.html>.

75 See the benefits of the 'free choice' approach explained and supported in: German Bar Association and others, 'Memorandum: Allocation of Refugees in the European Union: For an Equitable, Solidaritybased System of Sharing Responsibility' (2013) <https://www.proasyl.de/material/memorandum-allocation-of-refugees-in-the-european-union-for-an-equitable-solidaritybased-system-of-sharing-responsibility/>.

and/or children as well as involuntary transfers should be avoided. Not only is the separation of families connected with psychological consequences but also the cause of irregular movement, mainly to reunite with family members. Furthermore, an early warning system should be established, where states can issue emergency help requests to the European Union and/or EASO, stating that basic care of asylum seekers cannot be guaranteed anymore. This notification should under no circumstances be connected with sanctions. On the contrary, such a procedure can trigger means of an EU fund, where the Member States in need can receive means on the basis of solidarity.

6 CONCLUSION

With its Dublin-IV reform, the European Union and especially the European Commission demonstrate, how unforeseen challenges in migration movements can at the same time lead to challenges of fundamental- and human rights. Contrary to its assigned role as the 'Guardian of the Treaties', the European Commission became the 'Attacker of the Treaties'.[76] With its severe change proposals, the Commission drafted a disproportionate reform which is unworthy in the light of the values, enshrined not only in the Treaties but also in the Charter, the ECHR and the case-law of Europe's highest courts. It is therefore a welcoming fact that there is a European counterbalance in the form of the European parliament and other institutions, which do not jump on the bandwagon of single European far right governments and parties, who essentially challenge the CEAS as a whole.

A functioning system of future migration movements to Europe can only work, when human beings are treated as individuals and not as objects. It is thus the most favourable approach, to abandon sanctions and to link the desire for protection with individual characteristics of asylum seekers. In 2017 and 2018, an estimated number of 313.540 migrants and asylum seekers arrived in Europe.[77] In comparison: The EU has a population of a total of 508 million people.[78] Its smallest country – Malta, with roughly 467 thousand residents would be responsible for around 1600 asylum seekers, equalizing 0.34% of the population, if all arriving asylum seekers would be distributed equally to the Member States. On the other hand, countries like Hungary or Poland strictly refuse to take in *any* responsibility under the CEAS. It becomes apparent, that this is not a problem of the number of refugees but an inherent problem of the behaviour of these Member States, which disrespect the core values and responsibilities deriving from the Treaties and international obligations. Referring to the mentioned numbers, a quick integration process of applicants of international protection is undebatable more promising than a sanction approach, where secondary movement is the consequence and thus, an imbalance of the equal share of

[76] To that extent, the role of the Commission as the 'Guardian of the Treaties is also compromised by Constantin Hruschka, 'Dublin Is Dead! Long Live Dublin! The 4 May 2016 Proposal of the European Commission' (*EU Immigration and Asylum Law and Policy*, 2016) <http://eumigrationlawblog.eu/dublin-is-dead-long-live-dublin-the-4-may-2016-proposal-of-the-european-commission/> accessed 22 September 2019.

[77] Mark Leon Goldberg, 'European Union Releases Facts and Figures for Migrant and Refugees Arrivals in 2018' (*UN Dispatch*, 2018) <https://www.undispatch.com/european-union-releases-facts-and-figures-for-migrant-and-refugees-arrivals-in-2018/> accessed 22 September 2019.

[78] 'Living in the EU' (*European Union*, 2018) <https://europa.eu/european-union/about-eu/figures/living_en#tab-0-0> accessed 22 September 2019.

responsibilities between the Member States inevitable. It is a dangerous development of the European Commission to leave the sphere of fundamental and human rights for policy reasons. The Commission is well-advised to take the interventions of other institutions, NGOs and stakeholders seriously and to find a compromise which is worthy to be considered in the light of the Charter and the ECHR. Unfortunately, at the moment, this does not seem to be the case. In a December 2018 press release, the Commissioner for Migration, Home Affairs and Citizenship Dimitris *Avramopoulos* said: 'Four years on, we are better equipped than ever to protect our external borders and address migratory challenges inside and outside the EU. The time has come to consolidate the remaining building blocks of a comprehensive migration, borders and asylum system for the long run. A constantly evolving geopolitical context shows us that we cannot wait to react, but that we have to be ready for the future already now.'[79]

This sounds like a war to come – not like a humanitarian Union to protect individuals.

[79] European Commission, 'Managing Migration: Commission Calls Time on Asylum Reform Stalling' (2018) <http://europa.eu/rapid/press-release_IP-18-6627_en.htm> accessed 22 September 2019.

LIST OF REFERENCES

AIDA - Asylum Information Databasa, 'Country Report : Spain' (2010)
——, 'Country Report : Germany' (2017)

Bianco V, 'Opinion - Reform of the Common European Asylum System CIVEX-VI/013' (2016)m Bundesagentur für Arbeit, 'Fluchtmigration Statistik' (2018) <https://statistik.arbeitsagentur.de/Statischer-Content/Statistische-Analysen/Statistische-Sonderberichte/Generische-Publikationen/Fluchtmigration.pdf>

di Filippo M, 'Dublin "Reloaded" or Time for Ambitious Pragmatism?' (EU Immigration and Asylum Law and Policy, 2016) <http://eumigrationlawblog.eu/dublin-reloaded/> accessed 22 September 2019

ECRE, 'ECRE Comments on the Commission Proposal for a Dublin IV Regulation' (2016) <https://www.ecre.org/wp-content/uploads/2016/10/ECRE-Comments-Dublin-IV.pdf>

European Commission, 'Managing Migration: Commission Calls Time on Asylum Reform Stalling' (2018) <http://europa.eu/rapid/press-release_IP-18-6627_en.htm> accessed 22 September 2019

European Parliament, 'European Parliament Resolution of 12 April 2016 on the Situation in the Mediterranean and the Need for a Holistic EU Approach to Migration (2015/2095(INI))' (2016) < http://www.europarl.europa.eu/doceo/document/TA-8-2016-0102_EN.html >

European Parliament, 'Migration and Asylum: A Challenge for Europe' (2018) <http://www.europarl.europa.eu/RegData/etudes/PERI/2017/600414/IPOL_PERI(2017)600414_EN.pdf>

European Parliament, 'Parliament Group Priorities: Identity and Democracy' (2019) <https://www.europarl.europa.eu/news/en/headlines/eu-affairs/20190712STO56963/parliament-group-priorities-identity-and-democracy> accessed 22 September 2019

Gensing P, 'Keine "Märchenstunde" Über Flüchtlinge' (Faktenfinder tagesschau, 2018) <https://faktenfinder.tagesschau.de/inland/kramer-fluechtlinge-arbeitsplaetze-101.html> accessed 22 September 2019

German Bar Association and others, 'Memorandum: Allocation of Refugees in the European Union: For an Equitable, Solidaritybased System of Sharing Responsibility' (2013)

<https://www.proasyl.de/material/memorandum-allocation-of-refugees-in-the-european-union-for-an-equitable-solidaritybased-system-of-sharing-responsibility/>

Hruschka C, 'Dublin Is Dead! Long Live Dublin! The 4 May 2016 Proposal of the European Commission' (EU Immigration and Asylum Law and Policy, 2016) <http://eumigrationlawblog.eu/dublin-is-dead-long-live-dublin-the-4-may-2016-proposal-of-the-european-commission/> accessed 22 September 2019

'Legislative Train Schedule - Towards a New Policy on Migration' (European Parliament, 2019) <http://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-single-permit-directive-—-possible-review>

'Living in the EU' (European Union, 2018) <https://europa.eu/european-union/about-eu/figures/living_en#tab-0-0> accessed 22 September 2019

Maiani F, 'The Reform of Dublin III Regulation' (2016) <https://www.europarl.europa.eu/RegData/etudes/STUD/2016/571360/IPOL_STU(2016)571360_EN.pdf>

Mark Leon Goldberg, 'European Union Releases Facts and Figures for Migrant and Refugees Arrivals in 2018' (UN Dispatch, 2018) <https://www.undispatch.com/european-union-releases-facts-and-figures-for-migrant-and-refugees-arrivals-in-2018/> accessed 25 March 2019

Marx R, 'Reform Des Dubliner Systems – Kritische Auseinandersetzung Mit Den Plänen Der Europäischen Kommission' [2016] Zeitschrift für Ausländerrecht und Ausländerpolitik (ZAR) 366

Moreno Díaz JA, 'European Economic and Social Committee Opinion CEAS Reform I SOC/543' (2016) <https://webapi2016.eesc.europa.eu/v1/documents/eesc-2016-02981-00-00-ac-tra-en.docx/content>

Osso BN, 'Towards the CEAS Reform: What Can Arendt Teach Us About the Dublin IV Regulation' (Tampere 2018), DOI: https://doi.org/10.13140/RG.2.2.16777.13923

'Poll: EPP Still the Biggest Group after EU Elections, Far-Right to Make Gains' (EURACTIV, 2019) <https://www.euractiv.com/section/eu-elections-2019/news/poll-epp-still-the-biggest-group-after-eu-elections-far-right-to-make-gains/> accessed 22 September 2019

Pro Asyl, 'Stellungnahme von PRO ASYL Zur Geplanten Reform Der Dublin-Verordnung (Dublin-IV, COM (2016) 270)' (2016)
<https://www.proasyl.de/wp-content/uploads/2015/12/Stellungnahme_Dublin-IV-PRO-ASYL.pdf>

Pro Asyl and Amnesty International et al., 'Flüchtlingspolitik in Europa - Nein Zu Dieser "Dublin IV Verordnung"!' (2016)
<https://www.proasyl.de/wp-content/uploads/2015/12/Nein-zu-dieser-Dublin-IV-VO_Dezember-2016.pdf>

Radjenovic A, 'Reform of the Dublin System' (2019)
<http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/586639/EPRS_BRI(2016)586639_EN.pdf>

Radović ML and Čučković B, 'Dublin IV Regulation, The Solidarity Principle and Protection of Human Rights - Step(S) Forward or Backward?' [2018] Eu and Comparative Law Issues and Challenges Series 10
<https://hrcak.srce.hr/ojs/index.php/eclic/article/view/7097/4589>
DOI: https://doi.org/10.25234/eclic/7097

Szijjártó P and Ministry of Foreign Affairs and Trade, 'There Are 15 Million Internal Refugees and People in Need of Humanitarian Aid Living in the Immediate Vicinity of Europe' (2018)
<http://www.kormany.hu/en/ministry-of-foreign-affairs-and-trade/news/there-are-15-million-internal-refugees-and-people-in-need-of-humanitarian-aid-living-in-the-immediate-vicinity-of-europe> accessed 22 September 2019.

Tsacheva T, 'Justice and Home Affairs Council, 04-05/06/2018' (Justice and Home Affairs Council, 2018)
<https://www.consilium.europa.eu/en/meetings/jha/2018/06/04-05/> accessed 22 September 2019

UNCHR, 'UNHCR Comments on the European Commission Proposal for a Regulation of the European Parliament and of the Council Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protecti' (2016)
<https://www.refworld.org/pdfid/585cdb094.pdf>

UNHCR, 'Integration – A Fundamental Component in Supporting Diverse Societies' (2016)
<https://www.unhcr.org/56a9decf5.pdf>

UNHCR Executive Committee, 'Refugees Without an Asylum Country No. 15 (XXX)' (1979)
<https://www.refworld.org/docid/3ae68c960.html> accessed 22 September 2019

Wikström C, 'LIBE Commitee Report A8-0345/2017 on the Proposal for a Regulation of the European Parliament and of the Council Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection' (2017)
<https://www.europarl.europa.eu/doceo/document/A-8-2017-0345_EN.html>

Young SC, 'Dublin Regulation IV and the Demise of Due Process' (2017) 31 Immigration, Asylum and Nationality Law (J.I.A.N.L.) 34-50

HAS THE 'WAR ON TERROR' PUT DUE PROCESS ON THE STAND? WHY THE ECJ'S APPROACH IN *KADI II* SHOULD BE USED ACROSS THE ATLANTIC

PATRICK LEISURE[1]

The European Court of Justice (ECJ) struck a balance between due process rights and national security in the Kadi II case. Applying the ECJ's analysis to a case recently decided by the D.C. District Court – the Zaidan case – illustrates that a more rights-protective approach can be attained in US courts too. First, this article will explore due process in Europe via the four different versions of the Kadi case. Then, it will take an in-depth look at the Zaidan case. The article concludes by arguing that the D.C. Circuit Court of Appeals should adopt a stance on due process similar to that taken by the ECJ in the Kadi II case – which served to uphold the rule of law in Europe by making the actions of public officials reviewable before EU courts in the counter-terrorism context. By exercising a more 'muscular' attitude towards the other branches of government's counter-terrorism measures, the US judiciary might use this case to start a new line of precedent distinct from prior US cases with respect to US citizens' constitutional rights in the post 9/11 counter-terrorism paradigm.

1 INTRODUCTION

Two journalists recently brought a case before the D.C. District Court alleging that the US government has placed their names on the kill list without giving them any prior notice or an opportunity to challenge their inclusion therein.[2] One of those journalists is an American citizen. The allegation has put the meaning of due process, the US military's fight against terrorism, and the scope of national security measures to the test. On appeal, the D.C. Circuit Court should take the case as an opportunity to reaffirm the Constitution of the United States' protection of due process and uphold the rule of law by making actions of public officials reviewable before the courts, particularly when fundamental rights are under threat. The *Kadi II* case – in which the highest European Court upheld the ability of an EU citizen to challenge their inclusion on a terrorism blacklist – provides an effective *modus operandi* for this analysis. By illustrating what form a more rights-protective compromise between "the maintenance of international peace and security and the protection of the fundamental rights and freedoms of the persons concerned"[3] would take in the US, the *Kadi II* case exemplifies an equilibrium between security and due process. Furthermore, the more rights-friendly approach of the ECJ is particularly applicable in *Zaidan v. Trump* given the grave liberty interest at stake – the journalist's life.

[1] LL.M. University Paris II Panthéon Assas (2019), J.D. BU School of Law (2019). Contact at pleisure@bu.edu.

[2] *Zaidan v. Trump*, 317 F.Supp.3d.8 (D.D.C. 2018).

[3] Joined Cases C-584/10 P, C-593/10 P & C-595/10 P, *Commission v Kadi* EU:C:2013:518.

2 EU COURTS, DUE PROCESS, AND TERRORISM

2.1 THE KADI SAGA

The discussion of due process as it relates to terrorism has largely played out in the European Union via the so-called 'Kadi Saga'.[4] Mr. Yassin Kadi founded an organization which acted as a charity and part of Osama bin Laden's fundraising network in the 1990s.[5] After 9/11, Mr. Kadi was placed on a terrorism blacklist by the United Nations Security Council (UNSC) and his assets were frozen.[6] Security Council Resolution 1267 was transposed into EU legislation pursuant to Council Regulation (EC) No 881/2002 which allowed for Mr. Kadi to challenge the regulation (after exhausting domestic remedies) in EU courts. In 2005, the General Court of the European Union found that they could not review the EU Regulation since such a review would entail an evaluation of the UNSC measure.[7] The General Court simply looked at whether the UNSC had respected *jus cogens* norms of international law; ultimately, the Court found that the UNSC had met this minimum requirement and therefore ruled that Mr. Kadi's inclusion on the blacklist was legal.[8]

On appeal, the European Court of Justice rejected the approach taken by the General Court. The ECJ decided that it could review the legality of the EU Regulation—though this was not equivalent to reviewing a Security Council measure's legality – because fundamental rights "form the very basis of Union's legal order."[9] Upon reviewing the case, the ECJ found in 2008 that Kadi's right to be heard, right to effective judicial review and right to property had been infringed because he had not been informed of the grounds for why he was on the list and therefore had never been able to seek judicial review.[10] Following the judgment, the Security Council began publishing a 'summary of reasons' for inclusion on the terrorist blacklist. Thereafter, Kadi was provided an opportunity to be heard before the Commission again froze his assets.[11]

In 2010, the General Court heard Kadi's next challenge to Regulation No. 881/2002, which was newly amended to comply with the ECJ's 2008 ruling. The General Court in *Kadi II* found that the summary of reasons was not sufficient to vindicate Kadi's rights of defense.[12] A summary of reasons was not adequate to effectively allow for a challenge of the allegations made against him, in part because there was effectively no real possibility of altering the UNSC's finding.[13] The Court came to this conclusion despite the fact that the Security Council had created an independent Ombudsperson in 2009 who would, if the petitioner was refused removal from the blacklist, state the reasons why – provided they were

---

[4] See Koen Lenaerts, 'The Kadi Saga and the Rule of Law within the EU' (2014) 67 SMU L. Rev. 707.
[5] Douglass Cantwell, 'A Tale of Two Kadi's Kadi II, Kadi v. Geithner & U.S. Counterterrorism Finance Efforts' (2015) Columbia J Transnat'l L.
[6] ibid.
[7] Case T-315/01, *Kadi v Council* EU:T:2005:332; See Juliane Kokott & Christoph Sobotta, 'The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?' (2012) 23 Eur. J. Int. L. 1015, 1025.
[8] ibid.
[9] Joined Cases C-402/05 P and C-415/05 P, *Commission v Kadi* EU:C:2008:461, para. 207.
[10] ibid.
[11] ibid.
[12] Case T-85/09, *Commission v Kadi* [2010] EU:T:2010:418.
[13] ibid.

not confidential.[14] The role of the Ombudsperson was ostensibly "to guarantee fair proceedings and transparent standards to analyse information on the individuals concerned consistently and objectively."[15] Although the office of the Ombudsperson might be considered a "quasi-judicial role… her role has not attained the quality of a court of law."[16] Therefore, Mr. Kadi's due process rights were vindicated neither by the summary of reasons nor the creation of the office of the Ombudsperson.

On appeal, the ECJ in 2013 upheld the ruling of the General Court in finding that "the procedures provided for Kadi to appeal his listing by the United Nations in Europe were insufficient to meet European Union standards."[17] While the ruling was hugely debated for its confirmation of the General Court's evaluation of the place of EU law in the international legal order,[18] due process was also a large part of the decision and it is that aspect of the decision that will be explored further for its relevance to the *Zaidan* case.

2.2 DUE PROCESS AND KADI II

The European Court of Justice's counter-terrorism due process standard in the *Kadi II* decision includes three elements: a procedural notice and hearing requirement, an evidentiary burden shift and a balancing between national security and the 'rights of defense.' Together, these three elements establish a minimum standard for due process, but also establish a powerful role for the EU courts in setting the "maximum" amount of due process required. The ECJ's decision clarifies what these elements include.

In order to meet the first element, the person who has been subject to a deprivation must have access to both the decision taken against them and the reasons underpinning that decision.[19] This baseline requirement is meant to allow the person who has been subject to a deprivation to determine the reasons relied upon in the decision taken against them. The ECJ in *Kadi II* upheld the General Court's ruling that "(t)he principle of effective judicial protection had been infringed… since Mr Kadi was afforded no proper access to the information and evidence used against him."[20] In essence, the ECJ must have enough information to make sure that the decision was taken with "a sufficiently solid factual basis."[21] As such, the ECJ makes it clear that a verification by the EU Courts can include a review of the factual allegations included in the 'summary of reasons' given to the person on the terrorism blacklist upon which their listing is based. The result being that the EU Courts, when reviewing a counter-terrorism decision taken by another branch of the EU quasi-federal government, must find that at least one of the reasons relied upon in the blacklist placement is substantiated.[22]

---

[14] Ibid, para 128.
[15] Kokott (n 6) 1021.
[16] ibid.
[17] Cantwell (n 4) 659.
[18] See generally, Joris Larik, 'If The Legal Orders Don't Fit, You Must Acquit': Kadi II And The Supremacy Of The Un Charter,' European Law Blog (September 2013), https://europeanlawblog.eu/2013/09/13/if-the-legal-orders-dont-fit-you-must-acquit-kadi-ii-and-the-supremacy-of-the-un-charter/.
[19] *Commission v Kadi* (n 2), para 100.
[20] ibid, para 44.
[21] ibid, para 119.
[22] ibid.

In the second element, the ECJ clarifies that the 'rights of defense' places the burden of producing evidence confirming the claims against the persons subject to a deprivation on the accuser.[23] This means that, once the prospective terrorist brings a challenge to their listing, the burden shifts to the authority which has taken an adverse decision against the individual to establish that the reasons relied upon are well-founded.[24] It is not the duty of the individual making the challenge to produce evidence in the negative that they should not be listed. To this end, the EU Courts can request that authority to produce information or evidence that is necessary to make this finding, even if that information is confidential.[25]

Third, the ECJ provides for a limitation on the rights of defense by holding that there must be a balance struck between security interests and fundamental rights. Importantly though, the ECJ makes it clear that this balancing act is the job of the Court, not the authority which has taken an adverse decision against an EU citizen. The balancing act includes four elements. First, the ECJ held that if the authority deems that it cannot comply with the EU Court's request for access to evidence and information, then it is "the duty of those Courts to base their decision solely on the material which has been disclosed to them."[26] Second, the Court found that if the evidence or information that is disclosed by the authority is "insufficient to allow a finding that a reason is well founded, the Courts of the European Union shall disregard that reason as a possible basis for the contested decision to list or maintain a listing."[27] Third, the ECJ stated that it can assess whether a "failure to disclose confidential information to the person concerned and his consequential inability to submit his observations on them are such as to affect the probative value of the confidential evidence."[28] Finally, the ECJ held that in the event that the reasons for not disclosing information to the accused before the Courts are valid, then it is nonetheless "necessary to strike an appropriate balance between the requirements attached to the right to effective judicial protection, in particular respect for the principle of an adversarial process, and those flowing from the security of the European Union."[29] Therefore, the Kadi II judgment introduces a model under which the courts still have an important role to play in upholding due process for those listed as terrorists, even when security interests and confidential information are at play.

3 ZAIDAN V. TRUMP: NEW FACTS NECESSITATE NEW APPROACHES

3.1 OVERVIEW OF CASE

The novel factual scenario presented in a recent case before the D.C. District Court has ushered in a debate over the US counter-terrorism regime's relationships with due process.[30]

[23] ibid, para 121.
[24] ibid.
[25] ibid, para 120.
[26] ibid, para 123.
[27] ibid.
[28] ibid, para 129.
[29] ibid, para 128.
[30] *Zaidan v. Trump*, 317 F.Supp3d 8 (D.D.C. 2018).

Two journalists—Mr. Kareem and Mr. Zaidan—brought a suit against the President and various heads of US executive branch agencies including the Central Intelligence Agency (CIA), the Department of Defense (DOD), and the Department of Justice (DOJ), among others, alleging that their names are on a list of individuals that the US has labeled as terrorists and can be killed. Because Mr. Kareem is an American citizen and Mr. Zaidan is not, his case offers a different analysis with respect to his constitutional due process rights. The analysis will therefore focus solely on Mr. Kareem.

Mr. Kareem states that he is a journalist for various news organizations including the BBC, CNN and al-Jazeera.[31] He alleges that he has no association with Al-Qaida or the Taliban or any other terrorist organization.[32] However, by virtue of Mr. Kareem's line of work, he has extensively investigated and reported on terrorism on the ground in the Middle East. During a three month period in 2016, Mr. Kareem contends that he was subject to 5 near-miss aerial strikes while he was reporting in Syria.[33] In one event, the strike hit the exact location where Mr. Kareem was set to have an interview; he is still alive because he had climbed a nearby hill to get a viewpoint.[34] In another, a vehicle in which Mr. Kareem was traveling was destroyed by a drone-fired hellfire missile of the type used by the US military; it was only because he was sitting in a nearby vehicle at the time of the strike that he was not killed.[35] The other three incidents are equally as astonishing. As a result of these incidents, Mr. Kareem alleges that he was the intended target of these attacks and he is on the US government's kill list.[36]

The so-called kill list certainly exists.[37] Former President Barack Obama issued a Presidential Policy Guidance in 2013 which outlined guidelines and accountability for inclusion of individuals on the list.[38] Part of this guidance also includes information on how an individual might be put on the list using only metadata.[39] It also includes the necessary preconditions for taking lethal action. Mr. Kareem alleges that the Defendants violated the Administrative Procedure Act by adding his name to the kill list despite the fact that he does not meet the conditions in the Presidential Policy Guidance.[40] Specifically, Mr. Kareem brings forward six counts. Of those, two deal with due process. First, Mr. Kareem argues that his due process has been violated because he was given no notice or opportunity to challenge his inclusion on the kill list. Second, he argues that inclusion on such a list is an illegal seizure and "seeks to deprive him of life without due process of law."[41] The other claims range from a grave breech of common article 3 of the Geneva Conventions constituting a war crime, to an excess of the authority of the Executive pursuant to the Authorization to Use Military Force (AUMF), to a violation of the first amendment by

[31] ibid, 11.
[32] ibid.
[33] ibid.
[34] ibid.
[35] ibid.
[36] ibid.
[37] See generally, Gregory S. McNeal, 'Targeted Killing and Accountability' (2014) 102 Georgetown LJ 681-794.
[38] *Zaidan v. Trump* (n 1).
[39] ibid, 10.
[40] ibid.
[41] ibid, 15.

effect.[42] Importantly, the US takes a broad approach under international humanitarian law with respect to targeted killings, taking the position that "all that is needed to target an individual is sufficiently reliable information that the person is a member of the organized armed group (Taliban, al Qaeda, associated forces)."[43] However, by Mr. Kareem's account – which the government has not responded to – he has no connection to any armed group falling within the purview of the AUMF.

3.2 GOVERNMENT'S FIRST MOTION TO DISMISS: THE CONSTITUTIONAL DUE PROCESS ASPECTS ARE JUSTICIABLE

The US government filed a 12(b)(6) motion to dismiss, arguing that Syria is a war zone where forces from multiple countries are fighting.[44] Thus, the government argues that Mr. Kareem has done nothing other than show that he is a journalist reporting from a dangerous place. The D.C. District Court found that the evidence Mr. Kareem brought forward made it more than "a sheer possibility" that he was on the kill list.[45] In other words, while he could have been targeted by Syria for reporting on anti-Assad work, he could just as plausibly have been targeted by the US. Next, the Court did not accept the government's sovereign immunity defense because the government "fail(ed) to demonstrate at this point that the challenged action took place in the field in time of war."[46] Finally, the Court rejected the government's political question doctrine claim and distinguished the case from *al-Aulaqi I* and *II* – in which a US citizen was targeted and killed as a member of Al-Qaeda with no trial–in three important ways. First, whereas al-Aulaqi was very far from the forum which would have heard his case, Mr. Kareem has come before the forum himself; much of the relevant information is in fact in the United States.[47] Second, in *al-Aulaqi II*, the case was dropped because the judge (the same one hearing Mr. Zaidan's case) refused to extend the *Bivens* liability theory into new territory.[48] Here, Mr. Zaidan's case is not based on a *Bivens* theory of liability. Finally, unlike al-Aulaki's case, there has been no allegation or information of Mr. Zaidan being involved in terrorist activity.

3.3 DUE PROCESS: LOFTY RHETORIC OR MUSCULAR JUDICIAL REVIEW?

The D.C. District Court's treatment of the due process issues seemed robust in the first ruling on the motion to dismiss. Citing *Comm. of U.S. Citizens Living in Nicaragua*, the Court points out the fact that due process rights are justiciable even if they implicate foreign policy decisions.[49] The Court emphasized the grave nature of the liberty interest here, Mr. Kareem's life, in its discussion of both government accountability as well as securing individual

---

[42] ibid.
[43] Gregory McNeal, *How to Make A Kill-List,* Lawfare, February 25, 2013, https://www.lawfareblog.com/how-make-kill-list.
[44] *Zaidan v. Trump* (n 1).
[45] ibid.
[46] ibid. This case could bring to the fore one of the biggest questions surrounding the anti-terrorism conflicts: what is the exact nature of the conflict?
[47] ibid, 28.
[48] ibid, 25. In *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), SCOTUS ruled that, under federal law, individuals can sue federal officials for Fourth Amendment violations and obtain damages.
[49] ibid, 29.

liberties. The Court proclaimed, "Due Process is not merely an old and dusty procedural obligation required by Robert's Rules. Instead, it is a living, breathing concept that protects U.S. persons from overreaching government action even, perhaps, on an occasion of war."[50] These are strong words coming from the bench, regardless of one's take on prior anti-terrorism due process court cases in the United States.

At the same time, the Court's extensive citation of *Hamdi*[51] is somewhat troubling. *Hamdi* was used in conjunction with *Mathews v. Eldridge*[52] extensively in the DOJ's Memo on the government's authority to use lethal force against al-Aulaki, also a US citizen.[53] Thus, the D.C. District Court cited a wide array of cases that have come before the US Supreme Court and the D.C. Circuit dealing with due process and terrorism. The key question then, having cited various precedent, is what now exactly is the US judiciary's stance? Is it, as Italian legal scholar Federico Fabbrini has argued, back to strong institutional balancing after *Boumedienne*,[54] or was the US judiciary's due process stance in the counter-terrorism realm always deferential and vague as argued by US legal scholar Jules Lobels?[55] Moreover, have the most recent cases like *Doe v. Mathis*[56] changed the standard to be applied to the unique facts in *Zaidan*, where a US citizen has allegedly been placed on a kill list in the context of simply fulfilling his work duties? In the ruling on the first motion to dismiss, the Court seems to be reaching for whatever it can grasp hold of as its due process alarm bells ring. In saying, "now that he has made it to a U.S. court…his constitutional rights as a citizen must be recognized…constitutional questions are the bread and butter of the federal judiciary"[57], the D.C. District court seems to be standing up to the Executive branch in the tripartite balance that makes up the US federal government.

3.4 SECOND RULING ON THE MOTION TO DISMISS—MILITARY AND STATE SECRETS PRIVILEGE

On January 30th, 2019, the government filed a motion to dismiss claiming the state secrets privilege.[58] The government claims that because the case "directly implicate(s) classified national security information pertaining to military and intelligence activities… it is apparent that litigating any aspect of this case requires the disclosure of highly sensitive national security information concerning alleged military and intelligence actions overseas."[59] The government argues that four types of evidence would come out from such a case: whether

[50] ibid, 28.
[51] *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).
[52] *Mathews v. Eldridge*, 424 U.S. 319 (1976).
[53] Office of Legal Counsel, Memorandum for the Attorney General Re: Applicability of Federal Criminal Laws and the Constitution to the Contemplated Lethal Operation Against Shayk Anwar al-Aulaki, (online, July 16, 2010), https://www.justice.gov/sites/default/files/olc/pages/attachments/2015/04/02/2010-07-16_-_olc_aaga_barron_-_al-aulaqi.pdf
[54] See, Federico Fabbrini, *Fundamental Rights in Europe: Challenges and Transformations in Comparative Perspective* 51, 75 (Oxford University Press 2014).
[55] See, Jules Lobel, 'The rhetoric and reality of judicial review of counter-terrorism actions: the United States Experience,' in *Critical Debates On Counter-Terrorist Judicial Review* (Fergal F. Davis & Fiona de Londras, 2014) see also, David Jenkins, 'When Good Cases Go Bad: the unintended consequences of rights friendly judgments,' in *Critical Debates On Counter-Terrorist Judicial Review* (Fergal F. Davis & Fiona de Londras, 2014).
[56] *Doe v. Mattis*, 889 F. 3d 745 (2018).
[57] *Zaidan v. Trump* (n 1), 29.
[58] ibid, 1:17 WL 852542, Defendant's Memo in Support of Motion to Dismiss, Document 24-1 (2019).
[59] ibid.

the US lethally targets people outside the US, the DOD's use of lethal targeting in ongoing operations in Syria, whether Mr. Kareem has been designated for the use of lethal force, and whether the government has information about Mr. Kareem.[60] On September 24th, 2019, the D.C. District Court upheld the motion to dismiss, citing the "utmost deference" standard courts apply when evaluating a claim of government claim of state secrets.[61] The case has been appealed and will be heard before the D.C. Circuit Court of Appeals in the coming months.[62]

The state secrets privilege "performs a function of constitutional significance" by allowing the Executive "to protect information whose secrecy is necessary to its military and foreign-affairs responsibilities."[63] In 2005, several scholars conducted a study and claimed that there had never been a case "where courts have forced the government to disclose agency-held classified information in any case in which the privilege has been asserted."[64] However, "like antiterrorist agencies, courts need information if they are to do their job properly."[65] The *Zaidan* case provides a factual scenario worthy of breaking that streak. On appeal, the D.C. Circuit Court should uphold Mr. Kareem's due process rights, thereby establishing a new precedent – distinguished from prior terrorism due process cases – which reigns in the state secrets doctrine and reasserts a more 'muscular role'[66] of the judiciary in assuring US citizens' due process rights in the 'war on terror'. Taking stock of the *Kadi II* case in Europe would provide guidance to the D.C. Circuit on how to do this while balancing the need for confidentiality in the security realm.

4 APPLICATION OF KADI II'S DUE PROCESS ANALYSIS IN THE D.C. DISTRICT COURT

4.1 WHY IS *KADI II* PERTINENT TO THE *ZAIDAN* CASE?

The ECJ's treatment of due process in *Kadi II* is pertinent to Mr. Kareem's case for four reasons. First, there has been no case like that of Mr. Kareem yet in the United States; while Kadi's case was different in some respects, a European perspective on asset freezing is illuminating on the due process questions related to terrorist lists. Second, because there is no adequate precedent in the US, there is a danger of addressing the issue using attempts to balance the process due with factual scenarios inapplicable here. For example, *Hamdi* was mentioned some six times in the DOJ's Office of Legal Counsel memo on the legality of using lethal force against a US citizen despite the fact that that case dealt with detention in Guantanamo and entailed a different liberty interest as well as a different territorial analysis.[67] While the alleged inclusion of Mr. Zaidan on the kill list presents a different liberty interest

[60] ibid 3.
[61] Zaidan *v.* Trump, Civil Action No. 2017-0581 (D.D.C. 2019)
[62] Notice of Appeal [1817468] 'seeking review of a decision by the U.S. District Court in' 1:17-cv-00581-RMC, docketed. 19-5328 on November 25, 2019.
[63] *El- Masri v. United States*, 479 F.3d 296, 303 (4th Cir. 2007).
[64] Roger Douglass, *Law, Liberty and the Pursuit of Terrorism* 102 (University of Michigan Press 2014).
[65] ibid 102.
[66] The term 'judicial muscularity' is not author's own. See, Fiona de Londras, 'Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms' (2010) 30 Oxf. J. Leg. Stud. 19, 47.
[67] See n 52.

to Mr. Kadi's property deprivation, the fact remains that they were both subject to deprivations, resulting from their alleged inclusion on a list, by government entities. The due process analysis with respect to that listing is therefore analogous. Third, the state secrets doctrine has come under intense legal fire post 9/11.[68] In Europe, the conversation that occurred from 2005-2013 surrounding the series of Kadi cases is particularly didactic in the US context because of its more recent application of the balancing of security and fundamental rights. Whereas the applicable standard in the US still dates back to 1953,[69] the 'Kadi saga' took place post 9/11. Finally, the ECJ's treatment of due process rights in the context of terrorism blacklists was stronger than that seen in US District Courts,[70] an approach which is in fact more apt in Mr. Kareem's case given the more grave liberty interest – Mr. Kareem's life – at stake.

4.2 WHAT PROCESS IS DUE?

As outlined in section four above, *Kadi II* presented a three-pronged analysis of due process: the baseline right of access and reasons, an evidentiary burden shift and finally a judicial balancing of liberty and security. However, it is important to note that Mr. Kareem's starting point is slightly different than that of Mr. Kadi. While Mr. Kadi had *for sure* been subject to a deprivation, *ie* his placement on the asset freeze list, Mr. Kareem has alleged a deprivation based on his own provided evidence. Nonetheless, according to the European Court of Justice, due process has already kicked in. In *Kadi II*, the Court required disclosure so that an individual can be *in a position* to defend their rights and to decide whether there is reason to bring an action at all. The procedural requirement of due process can be seen with two lenses: the right to obtain information and the right to impart information.[71] In other words, there is a notice requirement and a hearing requirement.[72] In Mr. Kareem's case, he has forced the first requirement by utilizing the second requirement. By coming to the Court and utilizing his right to be heard, he has put the issue of his right to notice to the test.

Article 41 of the EU Charter of Fundamental Rights elucidates what the right to good administration entails. In that article, "the right of every person to have access to their file" is framed as a baseline right, which can be tempered when there is a need for "respecting the legitimate interests of confidentiality."[73] Thus, access to information comes first and confidentiality comes second. The US does not have a similar article; however, the principle case concerning access to information that allegedly includes state secrets is *Reynolds*[74] – in which the widows of three civilians sued the federal government after a military plane,

---

[68] See eg D.A. Jeremy Telman, 'Our Very Privileged Executive: Why the Judiciary Can (and Should) Fix the State Secrets Privilege' (2007) 80 Temp. L Rev. 499; George (n 73); Lyons (n 75).
[69] *United States v. Reynolds*, 345 U.S. 1 (1953).
[70] See Cantwell (n 4).
[71] See, Jens Hillebrand Pohl, 'The Right To Be Heard In European Union Law And The International Minimum Standard —Due Process, Transparency And The Rule Of Law,' CERiM Online Paper Series (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3192858.
[72] ibid.
[73] Charter of Fundamental Rights of the European Union, (2000/C 364/01), accessed from, http://www.europarl.europa.eu/charter/pdf/text_en.pdf.
[74] 345 U.S. 1 (1953), outlining "a common law evidentiary procedure that permits the government to withhold evidence from discovery in civil cases if its revelation would threaten the nation's security." Beth George, 'An Administrative Law Approach to Reforming the State Secrets Privilege' (2009) 84 NYU L. Rev. 1692, 1724.

supposedly carrying secret electronic equipment, crashed.[75] The *Reynolds* case in fact found an equilibrium between access and confidentiality not vastly unlike that protected by Article 41 of the EU Charter. "The standards of Reynolds…achieve a balance that allows claims to be adjudicated, and not be dismissed at the outset, while still protecting state secrets."[76] However, as cogently illustrated by US scholar Carrie Newton Lyons, since the *Reynolds* decision, lower courts have deviated from the *Reynolds* standard. Circuit courts have started using an "utmost deference" standard towards the government's invocation of the privilege, which was in fact never mentioned in *Reynolds.*[77] Moreover, a 4th Circuit decision branched off further from the Supreme Court's *Reynold's* decision by holding that some "secrets are so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of the privileged matter"[78]; therefore the case must be *entirely* thrown out. On the contrary, *Reynolds* allowed the case to go forward, but without the excluded information. These two standards are exactly what the D.C. District Court used to dismiss Mr. Kareem's case. Thus, the D.C. District Court's second ruling, granting the motion to dismiss on state secrets grounds, is not only a departure from the applicable US Supreme Court jurisprudence in *Reynolds,* but also stands in stark contrast to the more rights-friendly approach to good administration outlined in Article 41 and clarified in Kadi, which frames access to information as a minimum floor to be balanced against the necessity for certain information to remain confidential.

The second prong of *Kadi II's* due process discussion related to the evidentiary burden. *Kadi II* held that once an individual subject to a deprivation has challenged their listing, the burden then shifts to the entity which has placed them on the list to bring forward evidence establishing the reasons relied upon in the listing. Importantly, the burden shift in Mr. Kareem's case has already happened because Mr. Kareem has brought the challenge. While he may or may not be listed on the kill list, he has already been subject to a deprivation in needing to bring his claim – thereby spending resources and time to protect his alleged listing in addition to feasibly halting his reporting work – to put himself in a position to defend his rights. In other words, by showing up before a Court in the US, Mr. Kareem is pressing the government to either arrest him if it believes he is involved in criminal terrorist activity and undergo the full judicial process involved therein, or, contest the challenge with arguments that there was either no deprivation involved (*ie* he is not on the kill list) or that the deprivation was justified.

In the D.C. District Court's ruling, however, the Court primarily focused on *Mr. Kareem's* arguments for why the State Secret's doctrine should not apply. Essentially, the Court applied the wrong burden standard under the *Kadi II* framework. The burden must be on the party with access to the information to prove that the reasons relied upon are justified; none of the arguments the government mentioned would pass muster. First, access to the information would not allow Mr. Kareem to "evade attack or capture."[79] He has already shown up before the Court willingly. If the government has information relating to his

---

[75] ibid.
[76] Carrie Newton Lyons, 'The State Secrets Privilege: Expanding Its Scope Through Government Misuse' (2007) 11 Lewis & Clark L. Rev. 99.
[77] ibid 109; *Halkin v. Helms,* 598 F.2d 1, 9 (D.C. Cir. 1978)
[78] ibid 110; *Fitzgerald v. Penthouse Int'l*, Ltd., 776 F.2d 1236, 1240 (4th Cir. 1985).
[79] (n 61) 6.

alleged terrorist involvement, they can arrest him and press criminal charges. Second, it is well-known that the kill list already exists.[80] Therefore, disclosure of whether Mr. Kareem is on the list will not, on its own, harm national security efforts. Finally, the Presidential Policy Guidance from 2013 already publicly stated how individuals would be targeted for lethal and non-lethal force.[81] Thus, the government's final argument does not hold water because such information is known; even if it would harm national security, the case could still move forward while keeping that information confidential. As *Reynolds* held, "the decision to rule out the documents is the decision of the judge, and it is the judge who controls the trial – not the Executive."[82] Crucially, not only is the D.C. District Court's analysis against the more rights-protective burden-shifting standard outlined in *Kadi II*, it also shoots wide of the mark set by *Reynolds* in which the Supreme Court clarified that once a showing of strong necessity is made, the Court must balance that showing with the appropriateness of the government's invocation of the privilege. Satisfying these two requirements outlined in *Kadi II* – the notice and hearing requirement and the burden shift away from the party which brought the claim – would go a long way towards vindicating Mr. Kareem's baseline due process rights. The Court's remaining task is a balancing act between information that must remain confidential to preserve national security and the need to uphold constitutional guarantees of due process.

4.3 THE BALANCING ACT: STATE SECRETS AND PRESERVING CONFIDENTIAL SECURITY MATTERS

The balancing approach adopted by the ECJ in *Kadi II* is similar to the approach normatively postulated by US Supreme Court Justice Breyer.[83] It demonstrates that the need to protect state secrets, which are central to national security, and the need to protect constitutional guarantees of the rule of law are not mutually exclusive. Moreover, because "the federal judiciary is *supreme* in the exposition of the law of the Constitution"[84], courts do not need to defer entirely in the state secrets realm to the other branches of government. Similarly, as stated by Koen Lenaerts in the EU, "considerations relating to international peace and security may not, as such, render decisions imposing restrictive measures upon named persons and entities immune from judicial review. Those considerations are not "political questions" outside the scope of such review."[85] Rather, EU Courts must perform their function of guarantors of the rule of law as outlined in Article 19 TEU.[86] A balancing act, particularly in a case like Mr. Kareem's, is achievable. *Kadi II* provides a due process model which is effective in the context of a US citizen alleging placement on the kill list because the judgement delineates *how* courts can achieve the balance between security and due process rights. This analysis will assert that the D.C. Circuit Court, on appeal, should adopt an

[80] (n 36).
[81] (n 1).
[82] (n 73) 103.
[83] Stephen Breyer, 'Making Our Democracy Work: The Yale Lectures' 120 Yale LJ 1999 (2011), arguing "The courts should not simply abdicate authority to the President, but neither can they remain oblivious to the fact that the Constitution grants to the President and to Congress, not to the courts, the power and the duty to protect the nation's security. Here I believe the courts should require *accountability while pragmatically balancing* the important competing constitutional interests at stake."
[84] *Cooper v. Aaron,* 358 U.S. 1, 18 (1958); ibid.
[85] (n 3) 715.
[86] ibid.

approach akin to *Kadi II* for *Zaidan v. Trump* and therefore establish that approach as a precedent for balancing due process and national security interests in future situations.

In *Kadi II*, recognizing that overriding considerations might bar the release of certain information or evidence, the judgment affirmed that it is still the Court's duty to guarantee respect for procedural rights. In this vein, the task of the ECJ is to utilize 'techniques of accommodation' regarding both the nature and sources of information sought.[87] Courts have a number of resources at their disposal to ensure confidentiality. While the United States system of discovery is unique in the world for both its breadth and control by the parties[88], this does not mean that judges cannot play a more active role under the Federal Rules of Civil Procedure to protect confidentiality in the courtroom. For example, US Courts can name special masters over discovery in complex cases[89] or use counsel with security-clearances.[90] In short, courts have options at their disposal to preserve confidentiality in exceptional circumstances.

Kadi II ruled that in the event that confidential information cannot be released, the Court can still rule on the case. The Court must simply base their decision only on the material which it has before it.[91] A similar standard could be used in the US. In the event that all but a very small portion of the information remains confidential as state secrets, the US judiciary can still make a ruling based on the information which is deemed not a threat to national security. This allows the judiciary to uphold the due process clause in the fifth and fourteenth amendments while not releasing information fundamental to security. Such an approach necessarily makes the government think carefully about what information is vital to state security and what information the Court needs to undertake a balancing analysis. A piecemeal approach of granting, for example, injunctive relief in individual cases where too little information is available would clarify where the evidentiary line is without harming national security. In Mr. Kareem's case, in the absence of any information from the government, the court could have enjoined the government from including Mr. Kareem on the kill list in the negative until the government puts Mr. Kareem *in a position* to defend his rights. Importantly, this would still be an incredibly narrow ruling that would not give rise to heaps of new litigation. Where an American citizen has presented plausible facts on which an alleged attempted capital deprivation has taken place on numerous occasions, a court has a role to play in ensuring that the executive has not unnecessarily deprived the individual of their constitutional rights.

Under *Kadi's* due process standard, the D.C. District Court could have also disregarded reasons for Mr. Kareem's inclusion on the kill list if they were not well-founded. This raises the evidentiary requirement and means that Mr. Kareem's placement on the kill list, if he even is on the kill list, must be bolstered by reasons that are justifiable. This prevents the government from depriving citizens of rights by making claims without any information to back up such assertions. *Kadi II's* balance between security and due process means that when the government fails to disclose information behind a reason for the listing, the accused's

---

87 (n 12).
88 Howard M. Erichson, 'Court Ordered Confidentiality in Discovery Symposium: Secrecy in Litigation' (2006) 81 Chi.-Kent L. Rev. 357.
89 ibid 365.
90 Douglass (n 61).
91 *Commission v Kadi,* (n 2) para 123.

corresponding *right to respond* to allegations made against him can be considered by the court in assessing the reason for the listing. Therefore, Mr. Kareem's due process rights are not fully met once he has access to whether he is included on the list and the reasons for such inclusion. Courts can still exercise review by basing their decision on information available, by deciding whether the reasons are well-founded, and by making extrapolations from the government's failure to disclose information about the probative value of the evidence. In that respect, the *Kadi II* case provides a model in which courts, even if they must preclude information to respect security interests, can still uphold the rights of defense and respect for the adversarial process.

Such a balancing act, while difficult, is a necessary part of the judiciary's role. As the D.C. Circuit has stated, "the Executive's power to conduct foreign relations free from the unwarranted supervision of the Judiciary cannot give the Executive *carte blanche* to trample the most fundamental liberty and property rights of this country's citizenry."[92] Courts are the best suited to balance competing fundamental interests. The European Court of Justice has balanced competing fundamental rights with fundamental freedoms in a number of cases.[93] In those cases, the Court balanced the rights to allow them to exist alongside each other, sometimes in competition, but never to the other's complete dearth. It is time that courts in the US began to follow suit and contribute to an effective 'war on terror' that does not continually put due process on the stand.

5 CONCLUSION

Counter-terrorism measures and state security do not fundamentally need to change the way the law operates. In the United States, constitutionally protected due process rights have tended to yield to the Executive's Article II powers. The degree to which US Courts have unquestioningly accepted state secrets claims in the security realm lends credence to this trend. However, in Europe, the debate which occurred between 2005 and 2013 under the four versions of the Kadi case led to a different conclusion. Balancing due process rights with recognized security interests in the context of terrorist lists can be achieved without compromising the integrity of either security or fundamental rights. In the US, the fact that Mr. Kareem is a US citizen and allegedly has no connection to any terrorist organization presents a rare factual scenario under which the US courts should look towards the *Kadi II* model for guidance on how to balance due process concerns with the protection of security. Under this model, the D.C. District Court should have upheld the baseline administrative due process element of access to whether Mr. Kareem was on the kill list and, if so, the reasons behind his listing. As Mr. Kareem has brought the case challenging his listing, the burden to provide evidence confirming or denying the alleged deprivation shifts to the government. Finally, the D.C. Circuit Court should apply a balancing analysis similar to that in *Kadi II*, thereby establishing a narrow but important precedent for future terrorism cases under which US citizens can vindicate their due process rights while balancing important national security interests.

---

[92] *Ramirez de Arellano v. Weinberger,* 745 F.2d 1500 (1984).

[93] See *eg* Sacha Garben, 'The constitutional (im)balance between "the market" and "the social" in the European Union' (2017) 23 Eur. Const. L. Rev. 61.

LIST OF REFERENCES

Beth George, 'An Administrative Law Approach to Reforming the State Secrets Privilege' (2009) 84 NYU L. Rev. 1692, 1724
<https://www.nyulawreview.org/wp-content/uploads/2018/08/NYULawReview-84-6-George.pdf>

Carrie Newton Lyons, 'The State Secrets Privilege: Expanding Its Scope Through Government Misuse (2007). 11 Lewis & Clark L. Rev. 99
<http://law.lclark.edu/org/lclr/ >

D.A. Jeremy Telman, 'Our Very Privileged Executive: Why the Judiciary Can (and Should) Fix the State Secrets Privilege' (2007) 80 Temp. L Rev. 499
<http://scholar.valpo.edu/law_fac_pubs/5>

David Jenkins, 'When Good Cases Go Bad: the unintended consequences of rights friendly judgments', *in Critical Debates On Counter-Terrorist Judicial Review* (Fergal F. Davis & Fiona de Londras, 2014)
DOI: https://doi.org/10.1017/cbo9781107282124.005

Douglass Cantwell, 'A Tale of Two Kadi's Kadi II, Kadi v. Geithner & U.S. Counterterrorism Finance Efforts' (2015) 53 Colombia J. Transnat'l L 654, 700
<http://jtl.columbia.edu/wp-content/uploads/sites/4/2015/06/Cantwell-Note_53-CJTL-652.pdf>

Federico Fabbrini, *Fundamental Rights in Europe: Challenges and Transformations in Comparative Perspective* 51, 75 (Oxford University Press 2014)
<http://hdl.handle.net/1814/22701>

Fiona de Londras, 'Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms' (2010) 30 Oxf. J. Leg. Stud. 19, 47
DOI: https://doi.org/10.1093/ojls/gqp031

Gregory McNeal, *How to Make A Kill-List,* Lawfare, February 25, 2013
<https://www.lawfareblog.com/how-make-kill-list>

Gregory S. McNeal, 'Targeted Killing and Accountability' (2014) 102 *Geo.* L. J. 681-794
DOI: http://dx.doi.org/10.2139/ssrn.1819583

Howard M. Erichson, Court Ordered Confidentiality in Discovery Symposium: Secrecy in Litigation,' 81 Chi.-Kent L. Rev. 357 (2006)
<http://ir.lawnet.fordham.edu/faculty_scholarship/371>

Jens Hillebrand Pohl, 'The Right To Be Heard In European Union Law And The International Minimum Standard —Due Process, Transparency And The Rule Of Law' (2018) CERiM Online Paper Series
DOI: http://dx.doi.org/10.2139/ssrn.3192858

Joris Larik, '*If The Legal Orders Don't Fit, You Must Acquit': Kadi II And The Supremacy Of The Un Charter,* EUROPEAN LAW BLOG (September 2013)
<https://europeanlawblog.eu/2013/09/13/if-the-legal-orders-dont-fit-you-must-acquit-kadi-ii-and-the-supremacy-of-the-un-charter/>

Jules Lobel, 'The rhetoric and reality of judicial review of counter-terrorism actions: the United States Experience', *in Critical Debates On Counter-Terrorist Judicial Review* (Fergal F. Davis & Fiona de Londras, 2014)
DOI: https://doi.org/10.1017/cbo9781107282124.006

Juliane Kokott & Christoph Sobotta, 'The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?' (2012) 23 Eur. J. Int. Law 1015, 1025
DOI: https://doi.org/10.5040/9781474201599.ch-011

Koen Lenaerts, 'The Kadi Saga and the Rule of Law within the EU' (2014) 67 SMU L. Rev. 707.
<https://scholar.smu.edu/smulr/vol67/iss4/4>

Office of Legal Counsel, Memorandum for the Attorney General Re: Applicability of Federal Criminal Laws and the Constitution to the Contemplated Lethal Operation Against Shayk Anwar al-Aulaki, (online, July 16, 2010),
<https://www.justice.gov/sites/default/files/olc/pages/attachments/2015/04/02/2010-07-16_-_olc_aaga_barron_-_al-aulaqi.pdf>

Sacha Garben, 'The constitutional (im)balance between "the market" and "the social" in the European Union', 23 Eur. Const. L. Rev. 61 (2017)
DOI: https://doi.org/10.1017/s1574019616000407

Stephen Breyer, 'Making Our Democracy Work: The Yale Lectures' (2011) 120 Yale LJ 1999
<https://www.jstor.org/stable/41149585?seq=1>

Roger Douglass, *Law, Liberty and the Pursuit of Terrorism* 102 (University of Michigan Press 2014).
DOI: https://doi.org/10.1353/book.36854

SEGRO AND ITS AFTERMATH: BETWEEN ECONOMIC FREEDOMS, PROPERTY RIGHTS AND THE 'ESSENCE OF THE RULE OF LAW'

XAVIER GROUSSOT*, NIELS KIRST†, PATRICK LEISURE‡

The Court of Justice of the European Union's (CJEU, Court) SEGRO judgment is more than just a recent addition to the debate on the so-called rule of law crisis in the European Union. As this case note shows, SEGRO touches on the most fundamental aspects of the European Union and its relation to the Member States. From an economic perspective, the Court in SEGRO's treatment of property rights and the ability of economic actors to rely on their lawfully concluded contracts forms the undercurrent of economic investment in the Union. From a functional perspective, the case is perhaps indicative of a wider change in the role of the Court with respect to national courts' margin of discretion. From a normative perspective, SEGRO gives rise to an important discussion on the difference between fundamental rights and economic freedoms in the EU since the entering into force of the Lisbon Treaty in 2009, as well as 'constitutional homogeneity' in the EU after Hungary's legislative reforms. Finally, from an evolutionary perspective, SEGRO marks another iteration in perhaps a wider shift in the trajectory of the Court with respect to questions that menace the integrity of the functioning of the European Union. This case note first examines the background (I) and facts of the case (II). Then it analyses the Opinion of the Advocate General (III) and the findings of the Court (IV). It concludes with a discussion based not only on an analysis of the SEGRO case (V), but also going beyond the case by analysing the most recent jurisprudential developments concerning Hungary and the issue of the (non-respect) of the Rule of Law in the European Union(VI).

> The Rule of Law is one star in a constellation of ideals that dominate our political morality: the others are democracy, human rights, and economic freedom. We want societies to be democratic; we want them to respect human rights; we want them to organize their economies around free markets and private property to the extent that this can be done without seriously compromising social justice, and we want them to be governed in accordance with the Rule of Law.[1]

* Professor, Faculty of Law, Lund University.
† Niels Kirst, PhD researcher at Dublin City University, LL.M. Université Paris II Panthéon-Assas (2019). Contact at niels.kirst@mail.dcu.ie.
‡ LL.M. University Paris II Panthéon-Assas (2019), J.D. BU School of Law (2019). Contact at pleisure@bu.edu.
[1] Jeremy Waldron, 'The Rule of Law and the Importance of Procedure', Public Law and Legal Theory Research Paper Series, Working paper 10-73 (2010) NYU School of Law, 1.

1 BACKGROUND TO THE CASE

On the 25th of April 2011, the New Fundamental Law of Hungary was passed, not long after the conservative-national Fidesz party led by Victor Orban won the general election in April 2010.[2] These events formed the 'trigger' for what some deem the "Hungarian problem".[3] The lead-up to this point, however, not even a decade ago, is complex, multifaceted and historical in nature. Some point to the fact that Hungary's accession to the European Union created problematic expectations for an improved standard of life that were not met.[4] Hungary has stagnated economically and its historically traditional values played a role in the rise of the new government.[5] While a full discussion of the text of the New Hungarian Fundamental Law is beyond our scope here, suffice to say that according to some scholars "neither democracy nor the rule of law emerges intact [...]."[6] The text makes a distinction between Hungarians living on Hungarian soil or Hungarians living abroad and other nationalities living in Hungary, puts in place the so-called "cardinal laws" via which the government has quickly entrenched new provisions in various sectors, and finally directs some duties towards the national community rather than towards other individuals.[7]

The European Union has been grasping for a way to intervene in this new political and legal order without risking backlash; some question whether the EU is structurally capable to deal with such a situation.[8] In light of the above, the Commission has taken action. Through soft law, the Commission issued a Communication on a New EU Framework to Strengthen the Rule of Law in 2014.[9] The Commission also has the 'nuclear' option at its disposal, via Article 7 TEU. However, the triggering of Article 7 in September 2018 by the European Parliament is unlikely to yield a substantive outcome. Part of the reason for this is that Hungary is not a 'lone wolf' with regard to state behaviour that could be seen as threatening traditional notions related to the rule of law.[10] Remarkably, the Vice-President of the Commission even called a meeting of the Network of the Presidents of the Supreme Judicial Courts of the EU in order to deal with problems related to the independence of the judiciary in Hungary.[11]

SEGRO is also not the first CJEU case touching on the rule of law in Hungary. On April 25, 2012, the Commission brought infringement proceedings against Hungary for lowering the retirement ages of judges, prosecutors and notaries to 62.[12] The Court found that the scheme gave rise to a difference in treatment which was incompatible with Council

---

[2] Editorial comments, 'Hungary's new constitutional order and European unity' (2012) 49 CML R, 871-883.
[3] ibid.
[4] ibid.
[5] ibid.
[6] ibid.
[7] ibid.
[8] Andreas Hofmann, 'Resistance against the Court of Justice of the European Union' (2018) Intl J of L in Context 258.
[9] Commission, Communication, "A New EU Framework to Strengthen the Rule of Law" (2014).
[10] Poland and even France have come under fire in the rule of law context. See, for example, Tomasz Tadeusz Koncewicz, 'The Capture of the Polish Constitutional Tribunal and Beyond: Of institution(s), Fidelities and the Rule of Law in Flux' (2018) 43 Review of Central and East European Law; for the French example, see Amnesty International, *A Right Not A Threat – Disproportionate Restrictions on Demonstrations under the State of Emergency in France* (2017).
[11] See (n 2).
[12] Case C-286/12, *Commission v. Hungary* EU:C:2012:687.

Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, noting Hungary's failure to provide evidence establishing that more lenient provisions could *not* have achieved the same objective.[13] Similarly, in a judgment rendered in February 2017, again, infringement proceedings brought by the Commission, the Court ruled that by making nationality a condition necessary to access the notarial profession, Hungary had not performed its Article 49 TFEU freedom of establishment obligations.[14] Finally, on July 19, 2018, the Commission sent a letter of formal notice to the Court of its decision to refer Hungary to the Court for infringement proceedings relating to Hungary's non-compliance with asylum law.[15]

2 THE FACTS OF SEGRO

SEGRO is a land development company, seated in the United Kingdom, with investors who are not Hungarian nationals.[16] SEGRO acquired 'usufruct' rights — rights to fruitfully use land, (in contrast to full ownership rights) — over land in Hungary in the early 2000s.[17] The district property registry deleted those rights on the basis that they were rights acquired against laws passed in 2013 (law on transitional measures and law on property registry).[18] Specifically, the 2013 laws mandated that usufruct rights had to be obtained by people who had a 'close family relationship' with Hungarians.[19] SEGRO brought an action in the Administrative and Labour Court contending that those 2013 laws infringed Hungarian law as well as EU law. The Administrative and Labour Court referred the issue to the Constitutional Court of Hungary which dismissed the request but declared that the 2013 laws were unconstitutional in that they did not offer compensation for the deprivation of validly acquired land-use rights.[20] However, the Hungarian government did not change the laws subsequent to the Constitutional Court's ruling. It instead claimed that the rules of civil law were enough to ensure compensation.[21] The Administrative and Labour Court then referred the matter to the Court of Justice in Luxembourg for a preliminary ruling.

The referring court took the view that the 2013 laws restricted freedoms of movement—of establishment and of capital—of EU nationals who are not Hungarians because they ran the risk of causing an untimely dispossession of valid contractual rights.[22] In that regard, the Hungarian legislature did not sufficiently establish the necessity nor the proportionality of the 2013 laws. The 2013 laws' indiscriminate cancelation of contractual land-use rights, given that the laws reduced 20 year usufruct rights to only a few months, was not justified.[23] However, the Constitutional Court upheld the objective of the 2013 laws that

[13] ibid paras 71-73.
[14] Case C-392/15, *Commission v. Hungary* EU:C:2017:73.
[15] European Commission Press Release, Migration and Asylum: Commission takes further steps in infringement procedures against Hungary, 19 July 2019, accessed from, http://europa.eu/rapid/press-release_IP-18-4522_en.htm
[16] Joined Cases C-52/16 and C-113/16 *SEGRO and Horváth v. Vas Megyei Kormányhivatal* EU:C:2018:157, [15].
[17] ibid, para 16.
[18] ibid, para 17.
[19] ibid, para 8.
[20] ibid, paras 20-21.
[21] ibid, para 22.
[22] ibid, para 23.
[23] ibid, para 26.

productive land can only be owned by the natural persons who work it—which is guaranteed under the New Fundamental Law—in rejecting the request.[24] More generally, the stated objectives of the laws were to prevent speculation of land, depopulation of the rural countryside, practices which attempted to circumvent national law and to penalize infringements concerning exchange controls.[25]

The questions referred to the Court of Justice raised a multitude of issues. First, the 2013 laws constituted a deprivation of legally created contractual rights. By linking the requirement of a close family relationship with the usufruct rights, the Administrative and Labour Court wanted a definitive answer as to the compliance with EU law of this national requirement.[26] Next, the referring court asked whether the national legislation was lawful in light of the fundamental freedoms. Moreover, the referring court had doubts as to whether the Charter of Fundamental Rights (hereinafter 'the Charter') might come into conflict with these national provisions[27]; specifically, the right to a fair trial and the right to property. Finally, while the laws impacted both Hungarian nationals and nationals of other Member States, there was also an element of discrimination due to the fact that, in the majority of cases, the close family relationships would privilege Hungarian nationals resulting in indirect discrimination.[28] The way the Court answered these questions sheds light on complex dimensions of EU law.

3 ADVOCATE GENERAL SAUGMANDSGAARD ØE'S OPINION

The Advocate General (hereinafter AG) Saugmandsgaard Øe came to five major conclusions in his Opinion.[29] First, he found that the request for a preliminary ruling was admissible. Second, the AG established that the freedom of capital should apply to the case of usufruct land rights. Third, the AG delved into whether there was a breach of the free movement of capital despite Article 345 of the Treaty on the Functioning of the European Union (hereinafter TFEU). Fourth, the AG raised the difficult question of whether or not the laws were justified. Finally, the Opinion laid out an intriguing argument for why the Court should not respond to the question of whether there is a violation of Article 17 and Article 47 of the EU Charter of Fundamental Rights.

The AG concluded that the Court would have jurisdiction regardless of if the usufruct rights were created before May 1, 2004, the date on which Hungary entered the European Union, since the case concerns administrative decisions which took place after May 1, 2004. [30] Moreover, any national court may refer questions of EU law for preliminary rulings. Contrary to the Hungarian government's argument that the Constitutional Court of Hungary's judgment is binding on the referring court, "[...] national courts have the widest discretion in referring questions to the Court […] and that discretion and that obligation are an inherent part of the system of cooperation between the national courts and the Court of

[24] ibid.
[25] ibid paras 24-25.
[26] ibid, para 29.
[27] ibid.
[28] ibid, para 33.
[29] See *SEGRO* (n 16); Opinion of Advocate General Saugmandsgaard Øe in *SEGRO* EU:C:2018:157.
[30] ibid, para 47.

Justice established by Article 267 TFEU [...]."[31] Thus, the Constitutional Court's stance did not bar the request's admissibility.

The AG found a restriction of the free movement of capital despite Article 345 TFEU's *principle of neutrality* towards the rules of ownership being left to the Member States.[32] Article 345 TFEU does not exclude national measures relating to the acquisition of agricultural land from the purview of the fundamental rules of the EU's legal system – particularly the fundamental freedoms and the rules on non-discrimination.[33] To the AG, the national measures constituted indirect discrimination according to the source of the capital due to the fact that Hungarian nationals can more easily satisfy the conditions laid out in the Hungarian law as compared with citizens of other Member States. The standard to use in this determination is whether the proportion of other Member State nationals affected is greater than the proportion of Hungarian nationals.[34] Finally, this finding of indirect discrimination cannot be influenced by whether the holder of such rights can obtain financial compensation from the other party to the contract.[35]

According to the AG, none of the Hungarian government's three arguments to justify the restriction of the free movement of capital could pass muster. First, the extinction of the usufruct rights by the Hungarian legislation was disproportionate to the objective of penalizing infringements of the national legislation on exchange control because the Hungarian laws are neither narrowly tailored nor necessary to achieve its stated goals.[36] Second, although the prevention of abusive practices is a legitimate reason to curtail one of the four freedoms, the laws assumed a general occurrence of abusive practices, which was not necessarily the case and, even so, could not be used to justify such a restriction. Third, the AG disagreed with Hungary that the justifications based on the public interest were linked to the use of agricultural land because, again, the measures were neither appropriate nor necessary to achieve such objectives.[37] Finally, the AG asked the Court to clarify whether discriminatory measures can ever be justified by public interest objectives; he believed they could not.[38]

On the applicability of the Charter to the case, the AG found that the Court should refrain from answering that question where the measures at issue "do not implement provisions of EU secondary law"[39] but do infringe on the economic freedoms. In this respect, the AG saw two different situations concerning the use of a justification by a Member State to restrict the free movement provisions: (i) the *Schmidberger* situation[40], where a fundamental right serves as a justification for the restriction and, (ii) the *ERT* situation[41],

---

[31] ibid, para 45.
[32] ibid, para 66.
[33] ibid.
[34] ibid, para 80.
[35] ibid, para 84.
[36] ibid, paras 90-118.
[37] ibid, para 114.
[38] ibid, para 118.
[39] ibid, para 122.
[40] Case C-260/89, Schmidberger EU:C:2003:333. In this case, the Government of Austria, in order to justify a restriction of the free movement of goods resulting from a demonstration which had entailed the closure of a major transit route, had relied on the protection of the demonstrators' rights to freedom of expression and freedom of assembly (see paragraphs 17 and 69 et seq. of that judgment).
[41] Case C-260/89, ERT EU:C:1991:254. In this case, ERT, a Greek radio and TV company had a concentration of exclusive rights to broadcast its own programmes and the exclusive right to receive and

where the breach of a fundamental right nullifies the justification for the restriction.[42] The AG found that *SEGRO* falls within the latter case.[43] Nonetheless, it was not necessary to interpret the Charter to reject Hungary's justifications. Moreover, taking the opposite view—that infringing the Charter could be examined independently of any violation of the economic freedoms—would lead to a scenario where all national legislation affecting cross-border situations might be challenged in light of the Charter.[44] This would run counter to Articles 6(1) Treaty on European Union (hereinafter TEU) and Article 51(2) of the Charter in that it might increase the powers of the Union as laid out in the Treaties.[45]

4 FINDINGS OF THE COURT

4.1 PRELIMINARY QUESTIONS: JURISDICTION, DIRECT EFFECT, AND NATIONAL COURTS HIERARCHY

The Court rejected Hungary's jurisdictional arguments stating that Hungary's 2004 (after the usufruct rights were acquired) accession to the EU has no bearing on the Court of Justice's ability to examine the facts in relation to laws from 2013.[46] Because Articles 49 and 63 TFEU are directly applicable, they can render national law inconsistent with them inapplicable. Recognizing that the referring court and the Constitutional Court of Hungary clearly disagree over the substance of the case, the Court agreed with the AGs Opinion and disregarded the fact that the lower court was side-stepping the Constitutional Court's dismissal of the case. Courts, at any level of the national hierarchy in the EU, have wide discretion to utilize the preliminary reference procedure laid out in Article 267 TFEU.[47]

4.2 SUBSTANCE: AN OVER-RELIANCE ON ECONOMIC FREEDOMS OR CAUTION WITH FUNDAMENTAL RIGHTS?

The Court first dealt with the issue of which freedom was applicable to the situation at hand—the freedom of establishment or the free movement of capital. While it was *prima facie* possible to examine it under either, the Court ultimately examined the question under the free movement of capital.[48] Looking at the purpose of the national legislation, the Court held that, in light of prior case law connecting capital and land-use as well as the fact that non-Hungarian EU citizens were deprived of an acquired contractual land right in Hungary due to a change in national law, the situation ought to be examined under the free movement of capital.[49]

---

retransmit programmes from other Member States (see paragraphs 21 to 23 of that judgment). The Court held that Member States can rely on derogations provided for in the Treaty on grounds of public policy, public security and public health only insofar as the national rules at issue are compatible with the fundamental rights, in particular freedom of expression (see paragraphs 43 to 45 of that judgment).

[42] SEGRO Opinion (n 29), paras 128-133.

[43] ibid.

[44] ibid.

[45] ibid, para 138.

[46] *SEGRO* (n 16).

[47] ibid, para 45.

[48] ibid, para 58.

[49] ibid, paras 50-60.

The Court found outright that the national legislation here would be a restriction on the free movement of capital.[50] Compensation for the extinguishment of the rights would not affect this finding.[51] The mere fact that the national restrictions would likely discourage non-residents from making investments in the Member State was enough to be caught by Article 63.[52] However, with respect to the question of discrimination, the Court was less concrete. Tying the land-use rights to 'close family ties', the national legislation was not considered to be directly discriminatory because the criteria was deemed to be possibly independent of national origin.[53] Nonetheless, the Court ruled that the 2013 laws likely constitute indirect discrimination in that they disadvantage nationals of states other than Hungary, despite the statistics submitted which showed that merely 5% of the usufruct holders were nationals of states other than Hungary.[54] However, ultimately, such a finding would be for the national court to determine.[55]

The remaining part of the Court's judgment in *SEGRO* assessed whether the national legislation was objectively justified and whether the means used were proportional in light of its objectives.[56] The justifications given were deemed to be consistent with common agricultural policy goals in Article 39 TFEU. Therefore, the Court had to analyse their proportionality. Placing the burden of proof on Hungary, the Court found that the legislation was not appropriate because it had no direct connection with its objective.[57] The Court relied on practical arguments, such as the fact that family ties do not guarantee that the usufruct holder will farm the land (and vice versa), in addition to the lack of a foreseeable connection between the measure and preventing land fragmentation, rural migration and working the land you own.[58] Moreover, the Court examined Hungarian Civil law and found that the burden on victims would be lengthy and expensive, and compensation was far from-assured.[59] This combined with the fact that it could have been achieved by less restrictive measures meant the national legislation went beyond what was necessary.[60]

The Court then turned to the stated objective of preventing the infringement of exchange control legislation. Again, the Court stated that Hungary's legislation requiring a close family relationship was, from the available evidence, unrelated to exchange control legislation.[61] The Court spun the prior statistics submitted by the Hungarian government by arguing that the fact that 95% of all those affected by the law are Hungarian constituted proof to that effect.[62] Finally, as pointed out by the Advocate General, a myriad of other more tailored and less restrictive legislative possibilities exist to achieve such goals.

The Court finished its thorough examination by considering the justification put forward by the Hungarian government of preventing practices designed to circumvent

---

[50] ibid, para 66.
[51] Ibid, para 62.
[52] ibid.
[53] ibid, para 67.
[54] ibid, paras 71-72.
[55] ibid, para 79.
[56] Ibid, paras 81-126.
[57] ibid, para 85.
[58] ibid.
[59] ibid, para 91.
[60] ibid, para 94.
[61] ibid, para 105.
[62] ibid, para 104.

national law.[63] Rejecting the Hungarian government's claim, the Court found that a narrowly tailored analysis which permits the flexibility that a case-by-case analysis provides is necessary in this context to comply with the proportionality requirement.[64] It then emphasized that the presumption of general abusive practices of owning land goes too far when there are, again, many other less restrictive options available.[65] Finally, the Court recalled that it is "settled case-law that grounds of a purely economic nature cannot constitute overriding reasons in the public interest justifying a restriction of a fundamental freedom guaranteed by the Treaty."[66] Having found an unjustified breach of the free movement of capital, the Court sidestepped addressing the questions related to Articles 17 and 47 of the Charter, finding those questions unnecessary "to resolve the disputes in the main proceedings."[67]

5 ANALYSIS OF THE CASE: ECONOMIC, FUNCTIONAL AND NORMATIVE PERSPECTIVES

5.1 ECONOMIC PERSPECTIVE: PROPERTY RIGHTS — AN EVOLUTIONARY AND COMPARATIVE VIEW

"What could be clearer and more necessary for the ordering of society than rules that say 'this is mine' and 'that is yours'?"[68] Humans tend to think about property rights as a given thing; the possession of property is somehow inherent to the human mind.[69] "The manifest necessity for property rules together with their seemingly common sense nature makes it natural to think of property law as consisting of rules that are stable and fixed for all time."[70] This makes the human mind think that property rules, as they are today, have been there forever and will be fixed for all time. Of course, as history makes clear, property rules are not fixed and they can change in a rapid manner; often in connection with social upheavals.

The *SEGRO* and *Commission v Hungary*[71] cases bring about an important discussion concerning the economic context behind the economic freedoms and fundamental rights as they relate to land use in the European Union. While the *SEGRO* case involves a deprivation of usufruct rights, the violation of the free movement of capital concerns the ability of European investors to acquire land-use rights in other Member States and reasonably rely on the fact that those rights will not be arbitrarily taken away with no process or compensation. There is a clear connection between property rights and economic activity, including, foreseeability, the ability to rely on lawfully concluded contracts, and the legislature's desire to encourage investment by Europeans within the EU as it relates to the smooth and efficient

[63] ibid, paras 108-126.
[64] ibid, para 117.
[65] ibid, para 122.
[66] ibid, para 123.
[67] ibid, para 128.
[68] Ronald A. Cass and Keith N. Hylton, Laws of Creation: Property Rights in the World of Ideas (Harvard University Press, 2013), 13.
[69] See generally, Jeremy A. Blumenthal, 'To Be Human': A Psychological Perspective on Property Law' (2009) Tulane LR, 83.
[70] ibid.
[71] Case C-235/17, *Commission v. Hungary* EU:C:2019:432. The follow-up case to SEGRO, in which the Commission brought infringement proceedings against Hungary based on the violation of the free movement of capital found in SEGRO and alleging a violation of the EU Charter.

functioning of the internal market. A brief look at several philosophic and economic theories of property rights informs the tension over property law in the EU that underpins the *SEGRO* judgement and how EU economic freedoms interact with Article 17's right to property in the post-Lisbon Treaty legal landscape.

Adam Smith, the founder of modern economics, saw property rights as developing through four stages: hunter-gatherer, pastoral, agricultural and commercial societies.[72] Smith argued that property rights would become more complex depending on the stage of evolution of the commercial society.[73] On the other hand, John Locke developed a property rule which was based on labour.[74] His basic argument was that something belongs to someone if that person puts labour into it and thereby refines it.[75] "Locke chose to make a 'good for all times' argument because he wanted to contest Thomas Hobbes's view that property rights were in all instances dependent on the whim of the government."[76] Locke, shaped by the political developments in the seventeen hundreds, observed that governmental authority might arbitrarily deprive citizens of their property. Accordingly, "Locke saw government as sufficiently prone to invasions of interest in property – and with those invasions, impositions on related forms of liberty – that he sought a theory that would make property prior to, not dependent on, government."[77] In contrast, the utilitarian theory, brought forward by Locke's coeval Jeremy Bentham, focuses on property in connection to investment and benefit *ie* the more rivalrous a good is, the stronger the property rights for that good should be.[78] For utilitarians, only the one who invested to refine or to produce a certain good should be entitled to the property rights associated with that good. Society is thus encouraged to produce and refine more goods, since the individual will be encouraged to invest in certain goods in order to gain property rights over those goods. Finally, Kantian theorists claim that property rights respect and augment the autonomy of the individual by allowing him or her to realize and extend their desires and plans through property.[79] From that perspective, property plays a part in the natural autonomy of the individual, which is a fundamental value of society.

Some scholars see a tension in the EU with respect to the history of property under the different European treaties.[80] The commitment under the Treaty of Lisbon to implement the economic freedoms may, given time and within the wider European integration project, demand a rethinking or Europeanization of the current property structures, which are today still left to the Member States.[81] In this sense, the philosophical and social goals that took root in Europeans' minds well before the idea of the EU came to fruition may manifest themselves in the EU in the form of economic rights protected by the four freedoms.

---

[72] (n 69), 15. The subsequently explained property theories are seen through the eyes of Ronald Cass and Keith Hylton in their monograph 'Laws of Creation: Property Rights in the World of Ideas'.
[73] ibid.
[74] ibid, para 17.
[75] ibid.
[76] ibid, para 18.
[77] ibid.
[78] ibid, para 19 et seq.
[79] ibid, para 26.
[80] See eg Daniela Caruso, 'Private Law and Public Stakes in European Integration: The Case of Property' (2004) 10 Eur LJ, 751; (n 83), 65.
[81] See Gerwyn Griffiths, 'The Bastion Falls? The European Union and the Law of Property' (2003) 8 Conveyancing & Prop LJ, 39; (n 83).

However, the brief overview of the philosophical underpinnings surrounding property rights in Europe illustrates the difficulty of one single approach to property rights under Article 17 of the Charter. Interpreting Article 17 will necessarily make the Court of Justice choose to value certain theoretical underpinnings of property rights in Europe over others. In the United States, this judicial 'valuation' took place nearly 100 years ago.

In the US Declaration of Independence, the right to life, liberty, and the pursuit of happiness originally included property rather than happiness.[82] It was not until the Bill of Rights was passed 15 years later that the 'takings clause' in the 5th Amendment was recognized.[83] In the 18th and 19th centuries however, regulatory 'takings', whereby people's use of land was affected by government regulations, were not recognized. It was not until later—after the growth of cities and change brought about by the industrial revolution—that the US Supreme Court recognized regulatory 'takings' by the government as potential deprivations under the 5th Amendment in the famous *Pennsylvania Coal* case.[84] In Europe, the French revolutionaries were influenced, as were their American counterparts, by the philosophies of rights put forward by Locke and Rousseau which affected the legal protections ultimately adopted.[85] Indeed, the 17th of the rights listed in the Declaration of the Rights of Man and Citizen of 1789, the right to property, contained many of the same elements as the US Bill of Rights' 5th Amendment.[86] Moreover, the proposed but ultimately rejected European Constitution's Article II-77 may look familiar. This is because it is the exact same as Article 17 of the Charter.[87] A transition in European property rights is ripe to occur under the Lisbon Treaty. A case similar to the US's *Pennsylvania Coal* could push the Court of Justice towards a stronger recognition of the fundamental right to property in the EU, thereby enmeshing Lockian and Kantian property theories in the jurisprudence of the Court of Justice. *Commission v Hungary*[88] could be the first step in that direction.

5.2 FUNCTIONAL PERSPECTIVE: THE FUNCTION OF THE COURT AND THE PRELIMINARY REFERENCE PROCEDURE—A RULE OF LAW PERSPECTIVE

If we think about the Member States as a group of Labradors all on leashes held by the Court, Hungary in the *SEGRO* case would be on a very tight leash indeed. The margin of discretion allowed to the Hungarian courts is slim with respect to their potential domestic analysis. The Court seems to go through all possible justifications that the national court might put forward to possibly come out the other way on the issue. The evidentiary requirement indicated by the Court provides a prime example. Despite stating several times that they have

---

[82] Harvey M. Jacobs, 'The Future of the Regulatory Takings Issue in the United States and Europe: Divergence or Convergence?', The Urban Lawyer, Vol. 40, No. 1 (Winter 2008) 51-72.
[83] US Const. amend. V.
[84] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).
[85] Jacobs (n 83), 58.
[86] ibid. It states: "Property being an inviolable and sacred right, no one may be deprived of it except when public necessity, certified by law, obviously requires it, and on the condition of a just compensation in advance."
[87] ibid. It states: "Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law insofar as is necessary for the general interest."
[88] (n 16).

little facts with which to make a full judgment, the Court then takes what little evidence they have and uses it to rule that the 2013 laws' justifications are neither connected to their objectives nor proportionate. The Court utilizes the statistics that 95% of those affected by the 2013 law were Hungarian to find that, since the measure primarily affects Hungarian nationals, it could not have been related to exchange controls.[89] At the same time, the Court claims that despite the fact that merely 5% of the affected parties were non-Hungarian, the law was still likely indirectly discriminatory in that it disadvantaged non-Hungarians.[90] The tight leash is indicative of the fact that the Court is wary of Hungarian courts spinning the reasoning against the desired protection of the free movement of capital. Because of the Court's extensive response, it would be difficult for the national courts to subsequently not reach the same result as the Court on remand. By giving such extensive 'guidance', the Court is leaving the issue to the national court while doing its best to ensure the outcome.

The *SEGRO* judgment indicates that if a Member State is trying to justify national laws that infringe one of the four freedoms and raises questions in regard to the rule of law, the Court is going to need a high standard of proof that speaks to the law's non-discriminatory and tailored nature in relation to the objectives pursued. Moreover, the burden of proof therein falls on the Member State that passed the laws. In another sense, the Court may be teeing up further potential avenues for legal action, either in Hungary or elsewhere, where economic freedoms and rule of law issues intersect. By giving such a detailed proportionality analysis, *SEGRO* indicates that the Court sought to avoid discord in the national hierarchy.[91] Since "Member States can be held financially liable for the costs incurred by citizens and companies on account of a failure to correctly implement or apply EU law",[92] perhaps the Court is setting up a possible state liability claim in the event that the Constitutional Court of Hungary decides to stick to its original interpretation.

One scholar notes, "(a)s in all international legal orders, the implementation of EU law essentially relies on the willingness of its subjects to comply […] a necessary condition for this system to work is that national courts actually follow the CJEU's interpretations."[93] The *SEGRO* case is indicative of the Court trying to walk the fine line between issuing a strong judgment while also attempting to ensure compliance. While non-compliance with infringement proceedings brought by the Commission can carry sanctions, the preliminary reference procedure technically has no enforcement mechanism.[94] Given that in addition to SEGRO and Mr. Horvath there are over 5000 other potential non-Hungarian plaintiffs in this case who might pursue damages against the Hungarian state for having deleted their

---

[89] *SEGRO* (n 16); by using evidentiary data to analyze the effect of the Hungarian legislation, the Court uses a socio-legal methodology similarly seen by the United States Supreme Court in the subsequent case law on school segregation to *Brown v. Board of Education of Topeka, 347 U.S. 483 (1954),* see relevant chapters in Bruce Ackerman, *We the People, Volume 3: The Civil Rights Revolution*.

[90] ibid.

[91] For an interesting case on the matter, see, Cour de cassation (18 nov. 2016) n°15-21.438, illustrating interesting example where French Courts disagreed over application of EU law principle and clarity of contours of the Court's prior case law, thus invoking potential state liability.

[92] Hofmann, (n 8).

[93] ibid.

[94] See, Sim Haket, 'The Danish Supreme Court's Ajos judgment (Dansk Industri): Rejecting a Consistent Interpretation and Challenging the Effect of a General Principle of EU Law in the Danish Legal Order', Rev. of Europ. Admin. L. (2017) 135-151.

usufruct rights in violation of EU law, the Hungarian courts certainly have an incentive to follow the Constitutional Court's reasoning rather than that of the Court of Justice.

5.3 NORMATIVE PERSPECTIVE: ECONOMIC FREEDOMS VERSUS FUNDAMENTAL RIGHTS IN THE CONTEXT OF PROPERTY

There are substantive differences between the fundamental rights and fundamental freedoms; the 'delicate balance' between these protections is a vital question in EU law.[95] Economic freedoms are recognized in the Treaty while fundamental rights are primarily based on the common constitutional traditions of the Member States and, after Lisbon, on the incorporation of the Charter articles into the Treaty by Article 6 TEU.

Finding this 'delicate balance' is no easy task for the Court. While economic freedoms confer rights on the individual with respect to the internal market, fundamental rights are rights with no prerequisites. They concern every individual and are applicable universally regardless of the economic status of the person concerned. Indeed, economic freedoms only apply in cross-border economic situations. Nonetheless, the four economic freedoms have become used as a means to protect the rights of individuals with regard to the free movement of persons and services since workers are protected when they work or provide services abroad. Thus, while initially the economic freedoms were thought to protect the coherence of the internal market,[96] in certain situations they also serve to protect social and individual rights. Today, many of the economic freedoms clearly overlap with the fundamental rights.[97] Nonetheless, the way they interact with each other and their relative weight when brought in one claim together remains an open question.

The Court in *SEGRO* limited its analysis to the economic freedoms, preferring not to delve into the realm of fundamental rights because they had already found a violation of EU law. While the Court has been tasked with balancing fundamental rights and economic freedoms in a number of landmark cases, *Commission v Hungary*, the follow-up case to *SEGRO,* represents the first time where the Commission has asked the Court to rule on a failure to comply with the Charter.[98] The Court must thus answer the normative and legal question it refrained from broaching in *SEGRO*, *ie* can and should the Court delve into the realm of failure of Member States to comply with the Charter?

In his Opinion in *Commission v Hungary*,[99] Advocate General Saugmandsgaard Øe treads a careful line in finding that the Court is not competent to pronounce on Article 17 of the Charter, that such an analysis would be superfluous and finally that the 2013 laws are incompatible with the right to property enshrined in Article 17 of the Charter.[100] The AG

---

[95] See Vassilios Skouris, 'Fundamental Rights and Fundamental Freedoms: The challenge of Striking a Delicate Balance', EUROPEAN REVIEW OF BUSINESS LAW (2006).

[96] On a side note, the Fundamental Freedoms not only protect the internal market, together with EU's competition law provisions and the economic rights enshrined in the Charter they could be thought of as the Constitution of the Internal Market. See eg. Christian Joerges, 'The European Economic Constitution and Its Transformation Through the Financial Crisis' (February 4, 2015), ZenTra Working Paper in Transnational Studies No. 47/2015.

[97] For example, one could imagine how Article 14 of the Charter's freedom to found educational establishments might interact in diverse ways with several of the economic freedoms.

[98] (n. 29) 64.

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

[100] AG Saugmandsgaard Øe makes these arguments in the alternative.

aptly characterizes what is at stake, saying, "at issue is the extent to which the *Court of Justice*, as the highest court, has the jurisdiction to take the place of national constitutional courts and the European Court of Human Rights in monitoring the legislation and actions of the Member States in the light of fundamental rights."[101] Under Article 51 of the Charter, the provisions therein are applicable only when "Union law is being implemented".[102] The Commission thus forced the issue on the Court to make a choice 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.

The logical connection that the Court made in *Associação Sindical dos Juízes Portugueses*[103] —where the Court based its competence on a combination of Article 19 TEU and Article 47 of the Charter — is a similar leap to what the Commission is asking the Court to base its competence on in *Commission v. Hungary*. A robust argument exists that this is an important normative leap to make in terms of ensuring the *effet utile* of the fundamental rights in the Charter, which the Court is tasked with ensuring. Although the rights enshrined in the economic freedoms overlap and intertwine in many ways with those of the fundamental rights, they are in fact *different* sources and forms of legal protection. The Court has effectuated a balancing exercise between the economic freedoms and rights before, delimiting the scope of the freedoms versus the rights in a coherent manner. Limiting the ability to vindicate obstructed EU rights which would have resulted from following the Advocate General's reasoning would have meant that the Court had failed to fulfil its role under the *Hauer* case law.[104] Further, SEGRO resolves the textual conundrum with respect to the field of application of Article 51 of the Charter, when EU law is being implemented —an affirmative violation could be considered a failure to implement. Article 51's positive field of application, nonetheless, supports the inapplicability of independently brought Charter claims. The Court in *Commission v. Hungary*[105] puts this conundrum with respect to Article 51's scope of application to rest. The rationale of the Court — following the *AGET Iraklis* judgment — is that since Hungary is actively invoking 65(1)b TFEU, which is a limitation on the free movement of capital and gives Member States the possibility to effectively target illegal capital movements, Article 17 of the Charter applies.[106] This finding is not to be understood as a general affirmation that the Charter applies to all situations in which a Member State is justifying a national measure. However, as soon as a Member State tries to justify a restriction on the four freedoms by invoking EU law provisions, the Charter becomes applicable. This could give rise to creative litigation strategies of avoiding the 'implementation of EU law' by simply neglecting to justify restrictions and thereby not invoking EU law. Yet, the Court seems to anticipate such litigation strategies in cases similar to the factual scenario presented by SEGRO by implying that a Member State necessarily invokes EU law when it passes legislation regulating land-use in the public interest.[107]

---

[101] ibid, para 68.
[102] Charter of Fundamental Rights of the European Union, (2000/C 364/01), accessed from, http://www.europarl.europa.eu/charter/pdf/text_en.pdf.
[103] Case C-64/16, *Associação Sindical dos Juízes Portugueses* EU:C:2018:117.
[104] Case C-44/79, *Liselotte Hauer v. Land Rheinland Pfalz* EU:C:1979:290.
[105] (n 72).
[106] ibid, paras 62-66.
[107] ibid, para 89.

From a value-based perspective, the AG notes in *Commission v Hungary* that rule of law issues are equally as important as the division of competences between the EU and the Member States, and that Union citizens can have their fundamental rights vindicated at the ECtHR (after having exhausted national remedies). While practically speaking such lines of reasoning may carry some weight, from a legal perspective neither argument is persuasive. The equality with which the AG sees the rule of law issues and division of competences issues speaks rather to the normative need of the Court to rule in this area of law. Moreover, simply because a remedy is possible in another forum does not mean that a claim should not be accepted. Given the setup in the Treaties, it is hardly possible to forum shop at the Court. The Court has an important duty to shut the door on frivolous, redundant and legally unjustified Charter-based claims while staying true to its duty to ensure fundamental rights for Union citizens given the new status of the Charter under the Lisbon Treaty.

Before the *Commission v Hungary* judgment, it was far from clear that the situation presented in *SEGRO* would run afoul of Article 17 of the Charter. A narrow ruling on the Article 17's right to property — utilizing a more lenient proportionality approach than that used in *SEGRO* regarding the standard of proof needed to show narrowly tailored means— would have refrained from favouring the free movement of capital over the right to property or vice versa. The evidentiary requirement to show that Article 17 of the Charter had been violated could, based on a purely textual reading, be higher. Indeed, the wording of Article 17 indicates that it might be a more lax justification analysis than that carried out with respect to the free movement of capital employed in *SEGRO*. Certainly, the public interest of preventing land speculation is at stake and property may be regulated by law if necessary for the general interest. Therefore, dependent on Hungary's evidence and justifications as to the law's objectives necessary for the general interest, it was not a foregone conclusion that the analysis under Article 17 of the Charter would lead to an identical result to the free movement of capital analysis the Court carried out in *SEGRO*. Nonetheless, the Court in *Commission v Hungary* found that Article 17 must be read in conjunction with Article 52(1).[108] The result of this emphasis is that the relevant analysis with respect to finding a violation of the right to property as guaranteed by the charter is virtually the same as the proportionality test employed with respect to the four freedoms.

6 ANALYSIS BEYOND THE CASE: CONTEXTUALIZING THE NORMATIVE PERSPECTIVE AND THE 'ESSENCE OF THE RULE OF LAW' IN THE EU

The previous discussion on the right to property and economic freedoms raises a crucial question: what is the essence of the rule of law after *SEGRO* and *Commission* v *Hungary?* So far, the discussion of *SEGRO* and *Commission* v *Hungary* has focused only on economic freedoms and economic (fundamental) rights.[109] Yet, these two cases put in a broader context also concern the need of stopping the inflation of 'illiberal legislation' and are thus about the need to protect the rule of law in the EU. But *quid* rule of law? This is the one billion Euro question. Are we dealing with the protection of an economic rule of law founded on the

[108] ibid.
[109] See (n 16) and (n 72).

sacrosanct economic freedoms and the right to property? Or is it about the protection of a substantive rule of law through the application of the EU Charter and its Article 17? Or is it both? Could it be something else?

In *SEGRO,* we have already analysed and stressed in the previous section the importance of the economic rule of law through the economic freedoms and the application of Article 17 of the EU Charter. Yet, a question worth asking in the context of this normative discussion is whether the economic rule of law constitutes the essence of the EU rule of law.[110] Looking at *SEGRO* and *Commission v Hungary*, such a conclusion is fully plausible. Similar to the situation in the US, the right to property may be seen as a core aspect of the rule of law. Yet, by looking at the broader and recent jurisprudential context on economic freedoms, the EU Charter and Article 19 TEU, it appears that such a conclusion would not entirely characterize the nature of the rule of law in the EU.

In *Commission v Hungary,* the Court has taken the opportunity to define and enforce a thick and substantive understanding of the rule of law.[111] By doing so, it has aligned with the recent jurisprudence on the rule of law as a substantive concept.[112] After the Opinion of the AG in *Commission v Hungary*, the Court was in fact at a normative cross-roads. It could follow the restrictive Opinion of the AG[113] regarding the scope of the Charter, thus observing its prior jurisprudence according to which the right to property (and other rights) as a matter of general principle of Union law can only be enforced against Member States to the extent that they 'implement Union law'. Or, it could follow a very progressive road by applying the Charter independently and in surplus to the claim based on economic freedoms. *Viva la vida loca*! The CJEU decided not the follow the Opinion of the AG on this matter[114] and correctly framed the matter as a fresh and substantive one by utilizing a systemic approach to Member State duties similar to its methodology relied in *Associação Sindical dos Juízes Portugueses*.[115] Under this methodology, the respect for the right to property is not 'simply' an additional commitment of Member States but a *partie intégrante* of its duties to an EU legal order based on the (substantive) rule of law, *ie* the Charter and, more specifically, article 17 of the Charter.[116] It is therefore possible to contend that when the Union's political institutions are unable to act (in our case in relation to the impasse of the Article 7 procedure against Poland or Hungary), the CJEU is inclined to step in, and the enforcement of substantive rule of law is no exception. The merging of the rule of law and the Court's rights-based enforcement as framed for the first time in *Commission v Hungary* seems almost unavoidable in retrospection. As discussed in the previous section, the logical construction that the Court established for instance in *Associação Sindical dos Juízes* is an analogous jump to what the Commission was requesting the CJEU to base its competence on in *Commission v Hungary*. In light of this

---

[110] ibid.
[111] (n 72) paras 49-66.
[112] See Xavier Groussot and Johan Lindholm, 'General Principles: Taking Rights Seriously and Waving the Rule of Stick in the European Union' in Katja Ziegler et al, *Constructing Legal Orders in Europe: General Principles of EU Law, Edward Elgar, Forthcoming , Lund University Legal Research Paper No. 01/2019*.
[113] See Opinion of AG Saugmandsgaard Øe in Case C-235/17 *Commission* v. *Hungary* (n 82), para 89; see also Opinion of AG Saugmandsgaard Øe in Joined Cases C-52/16 and C-113/16 *SEGRO and Horváth*, (n 29), paras 119-142.
[114] See Case C-235/17 *Commission* v. *Hungary* (n 72), paras 49-66.
[115] (n 104).
[116] Lisa M. Austin, 'Property and the Rule of Law', Legal Theory vol. 20 pp. 79–105 (2014) (on the relationship between the common law of property and the rule of law.

analysis, *Commission v Hungary* exemplifies the rise of the substantive rule of law by allowing the application of Article 17 of the Charter in addition to the provision on free movement of capital, the economic freedom.

Yet, the logic of *Associação Sindical dos Juízes Portugueses* is not only based on a substantive approach, but is also strongly anchored within a procedural understanding of the rule of law. Importantly, the CJEU already made this procedural construction very clear many years ago. For instance, in *Opinion 1/91* the CJEU ruled that the Treaties 'constitutes the constitutional charter of a Community based on the rule of law' and connects this to other, core principles of the EU law order, such as supremacy, direct effect and loyalty.[117] The judgment in *Opinion 1/91* echoes the wording of *Les Verts* where the Court first voiced its claim of a rule-of-law-based Union and associated this to the central role of the Union's judicial system.[118] It is worth keeping in mind that *Les Verts* concerned the application of the rule of law against the Union and it was the rule of law that, according to the Court, entailed that the Union's judicial system must be able to indirectly review the legality of acts by the European parliament through the system of preliminary rulings. The CJEU has persistently upheld that line in later cases, ensuring that the Union judicial systems can review the legality of Union acts.[119] Thus, much of this case law has focused on the realization of the value of the rule of law, as set out in Article 2 TEU, through the 'complete' system of institutions and remedies set out in Article 19 TEU in addition to evolving around the capability of upholding the rule of law in relation to Union measures. Yet, the CJEU has been particularly energetic in recent times in noting that the nature of the Union legal order absolutely requires that the Member States uphold their duty under Article 19(1) TEU to 'ensure effective legal protection in the fields covered by Union law.'[120] This connection was repeated and confirmed in *Associação Sindical dos Juízes Portugueses* and even more recently in *Vindel* and *Commission* v. *Poland*.[121] The message is crystal clear: the procedural Rule of Law must also be respected by the Member States when 'implementing' Union law.

Thus, stemming from the above discussion on the methodology used by the CJEU in its rule of law-case law, the rule of law as shaped by the CJEU appears to be not only substantive but also clearly procedural. There is a constant jurisprudential reliance on the need to ensure an effective judicial review of both the acts of Union and the acts of the Member States falling within the scope of Union law. In that respect, one should also not forget that the CJEU's case law on economic freedoms encrypted the procedural rule of law on economic freedoms a long time ago. It is now important to take a brief look at the procedural rule of law in the jurisprudential matrix of the CJEU, which is closely related to the *SEGRO* case and the free movement of capital.

In the context of the economic freedoms, the procedural rule of law is rooted in the free movement of goods case law on additives in foodstuff from the eighties. In fact, this

---

[117] Opinion 1/91EU:C:1991:490, para 166.
[118] Case 294/83, *Les Verts* [1986] EU:C:1986:166, para 23.
[119] See *eg* Case C-50/00 P *Unión de Pequeños Agricultores* EU:C:2002:462, paras 40-41; and Case C-583/11 P*, Inuit* EU:C:2013:625, para 94.
[120] *Associação Sindical dos Juízes Portugueses* (n 104), para 32 ('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').
[121] Case C-159/18 *Vindel,* EU:C:2019:106, paras 61-67; and Case C-619/19 *Commission v. Poland* EU:C:2019:325.

obligation can be traced back to the CJEU's judgments in the *Muller*[122] and the *German Beer* case.[123] In *Muller*, the Court decided whether the French ban on food additives for cakes was in breach of the free movement of goods. The Court considered that since the prevailing Directive[124] was intended to achieve only partial harmonization as regards these additives, the conditions governing the use of these additives having not yet been determined at the Community level, the power of the Member States to adopt rules related to foodstuffs is not unlimited.[125] Apart from the substantive limits imposed by the Treaty rules on the free movement of goods, AG Marco Darmon pointed out that "the harmonization for which [the directive] provides, even though embryonic, has the [effect that a] Member State must follow [a certain] Community procedure in order to prohibit the use of an additive previously authorized".[126] In other words, the Member State has neither unlimited substantive discretion nor unlimited procedural discretion to ban an additive in foodstuffs. The CJEU, in the *German beer* case, which concerned a ban on additives for beer, built on the *Muller* case[127]. It considered that by virtue of the principle of proportionality, traders must be able to apply, under a procedure which is easily accessible to them and can be concluded within a reasonable time, for the use of specific additives to be authorized by a measure of general application.[128]

Several procedural safeguards in administrative procedures emerged in relation to the justification of measures restricting free movement.[129] In *Greenham Abel,* for instance, the CJEU considered whether the national rules could be justified provided that they fit the requirements of Article 34 TFEU. The first of these requirements, before the analysis of proportionality, is the availability of an accessible and speedy procedure and judicial review in case of rejection.[130] An example beyond the scope of prior authorization is *Laval.*[131] More recently, in *Noria Distribution,*[132] the CJEU clarified its *Greenham Abel* case law on the need to respect the procedural requirements in the context of free movement of goods. In this case, the Court assessed French legislation prohibiting the marketing of food supplements whose content in nutrients exceeds the upper limits set by that legislation without providing for any procedure for the placing on the market of that type of food supplement. The legislation was found to constitute a measure having an effect equivalent to a quantitative restriction for the purposes of Article 34 TFEU that could be justified provided that it complied with the double 'requirements' of Article 36 TFEU as interpreted in paragraph 34 of the *Greenham*

---

122 Case 304/84 *Muller* EU:C:1986:194.
123 Case 178/84 *Germany v. Commission (German Beer Case)* EU:C:1987:126.
124 Council Directive 74/329 of 18 June 1974 on the approximation of the laws of the Member States relating to emulsifiers, stabilizers, thickeners and gelling agents for use in foodstuffs (OJ 1974, L 189, p. 1).
125 *Muller*, (n 124), paras 12-15. In fact, in merely specifying the emulsifiers, stabilizers, thickeners and gelling agents 'for use in foodstuffs', this directive allowed the Member States to lay down their own rules on the use of such agents, particularly as regards the foodstuffs in which they may be used and the conditions for their use. Nevertheless, it is clear from the scheme of the directive and from other rules of Community law that the power of the Member States to adopt such rules is not unlimited, as the existence of harmonizing directives does not exclude the operation of the treaty provision on free movement.
126 Opinion of Advocate General Darmon in *Case 304/84 Muller* EU:C:1986:80.
127 *German Beer Case* (n 125).
128 ibid, para 45.
129 Sacha Prechal, 'Free Movement and Procedural Requirements: Proportionality Reconsidered' (2008) 35 *Legal Issues of Economic Integration*, 201, 208.
130 ibid.
131 Case C-341/05 *Laval* EU:C:2007:809, para 110.
132 Case C-672/15 *Noria Distribution* EU:C:2017:310.

Abel case.[133] In that light, the CJEU considered that, despite the existence of a procedure as to the placing on the national market of certain food supplements, the procedure is inapplicable to food supplements whose content in nutrients exceeds the maximum doses set by that legislation and which are lawfully manufactured or marketed in another Member State.[134] Therefore, the French legislation was not compatible with EU law since it did not provide a procedure in the circumstances of the case.[135] The importance of the procedural rule of law has now made its way into all the free movement provisions. In this regard, one need not look further than the recent and spectacular *TopFit & Biffi* case delivered in June 2019 by the CJEU in the context of free movement of persons and citizenship.[136]

It appears clear from this short overview that the procedural rule of law is strongly present in the economic freedoms and free movement case law of the CJEU. The same phenomenon appears true if one looks at the most recent case law of the CJEU with regard to the interpretation of the EU Charter, such as *Egenberger* or *Cresco.*[137] In those two Grand Chamber cases, the CJEU tied the application of substantive provisions of the Charter (*in casu* Article 21 of the Charter) to the respect of the principle of effective judicial protection under Article 47 of the EU Charter). This is, in our view, no coincidence. It is the result of a judicial will to reinforce the procedural rule of law by relying on the Charter. The reinforcement is therefore both procedural and substantive as it is founded on the substantive provisions of the EU Charter in the procedural context.[138] Arnull offers a critical analysis of the current state of the procedural law of the Union and queries how it might develop in the future, using the conventional narrative sparingly to elucidate changing patterns in the case law.[139] The author shows that the default position is shifting from national procedural autonomy (effectiveness) to the duty to ensure effective judicial protection of Union law rights. In other words, the default position is becoming increasingly substantive and Charter-based. According to Sacha Prechal, effective judicial protection is a fundamental right, which demands a higher intensity of scrutiny compared to the principle of effectiveness often relied in the CJEU case law (*Rewe*-effectiveness).[140] The author suggests redefining the relationship between '*Rewe*-effectiveness' and effective judicial protection by contrasting the two principles in four sets.[141] First, the principle of effectiveness appears to be a less demanding standard of judicial review. Second, the general test of effectiveness (practical impossibility'-, or the 'excessiveness' tests) is formulated in a negative manner that brings, in turn, a negative obligation – whereas effective judicial protection implies both a negative and positive obligation.[142] Third, the principle of effectiveness is described as operating at the

133 ibid, para 21.
134 ibid, para 25.
135 ibid, para 28.
136 Case C-22/18 *TopFit and Biffi* EU:C:2019:497, para 65.
137 See Case C-404/16 *Egenberger* EU:C:2018:257; and Case C-193/17 *Cresco Investigation* [2019] EU:C:2019:43.
138 This development is in line with cases, such as *Unibet, DEB, Alassini,* which see the court employing Article 47 of the Charter and effective judicial protection in the context of national procedural autonomy. See cases: C-279/09 *DEB* EU:C:2010:811; Case C-432/05 *Unibet* EU:C:2007:163; Joined Cases C-317/08 to C-320/08 *Alassini* EU:C:2010:146.
139 Anthony Arnull, 'Remedies before National Courts' in Robert Schütze and Takis Tridimas, *Oxford Principles of EU law*, (OUP, 2018), 1011.
140 Sacha Prechal, 'Redefining the Relationship between 'Rewe-effectiveness and Effective Judicial Protection' (2011) 4 , Rev. of Europ. Admin. Law 31, 39-44.
141 ibid.
142 ibid.

Member State – not individual – level. Lastly, Prechal explains that justifications applied with regard to the two principles do indeed differ.[143]

Commission v Hungary should also be understood as epitomizing the importance of the procedural rule of law as it is our view that the substantive rule of law and the procedural rule of law often work in tandem. This point is exemplified by paragraph 102 of the judgement in *Commission v Hungary* where the CJEU ruled that:

> Article 65(1)(b) TFEU states that the provisions of Article 63 TFEU are to be without prejudice to the right of Member States to take all requisite measures to prevent infringements of national law and regulations, to lay down procedures for the declaration of capital movements for the purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security. In accordance with Article 65(3) TFEU, such measures or procedures are not, however, to constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63 TFEU.[144]

This paragraph shows once again the close link between the application of the economic freedoms and the procedural rule of law. In a similar vein, this procedural logic permeates the recent CJEU case law on the independence of judges in the European Arrest Warrant (EAW) context. As noted by Gutman, the Court in *LM*:[145]

> [R]eiterated that the very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law, and that maintaining the independence of national courts and tribunals is essential for ensuring effective judicial protection, as confirmed by the second paragraph of Article 47 of the Charter, as well as the proper functioning of the preliminary ruling procedure and the European arrest warrant mechanism.[146]

The procedural rule of law may thus be seen as the 'essence' of the rule of law. In that sense, it is worth noting that the CJEU in *Torubarov* in July 2019 went as far as to state that the requirements of effectiveness and effective judicial protection as enshrined in Article 47 of the Charter constitutes the 'very essence of EU law'.[147] This case is of utmost importance for the rule of law debate and also concerns new Hungarian legislation on administrative procedure which is said to establish certain procedures and remedies whose purpose is to enable the administrative courts to require administrative bodies to comply with their judgments except where its application deprives individuals of an effective remedy in practice.[148] The CJEU ruled that the national court must set aside any provision of a national

---

[143] ibid.
[144] See *Commission* v. *Hungary* (n 72).
[145] Case C-216/18 PPU *Minister for Justice and Equality* EU:C:2018:979, paras 51-58.
[146] Kathleen Gutman, 'The Essence of the Fundamental Right to an Effective Remedy and to a Fair Trial in the Case-Law of the Court of Justice of the European Union: The Best Is Yet to Come?' German Law Journal (2019), 20, 884-903, 900.
[147] Case C-156/17 *Torubarov* EU:C:2019:626, para 73. See also for the same wording Joined Cases C-188/10 and C-189/10 *Melki* EU:C:2010:363, para 44. See for a similar approach (but different wording) to effectiveness; Case C-573/17, *Popławski* EU:C:2019:530, paras 52-62.
[148] ibid, *Torubarov*, paras 71-72.

legal system and any legislative, administrative or judicial practice that might impair the effectiveness of EU law by withholding, from the national court with jurisdiction to apply that law, the power to do everything necessary at the moment of its application that might prevent EU rules having direct effect.[149] So far, the CJEU explicitly considers that the essence of the EU rule of law is procedural.[150] In light of the previous discussion, this is a very far-reaching conclusion given the importance of the economic rule of law and substantive rule of law both within the EU and at a more theoretical level.[151] *La fin justifie-elle les moyens* or is this evolution a deeper marker of the very nature of the rule of law in the EU as a procedural rule of law.

[149] ibid, paras 73-74.

[150] See also in that respect, two pending cases considering Hungarian legislation that may refer to the importance to respect procedural requirements. First, Case C-66/18 *Commission v Hungary,* the Commission claims that the legislation, by requiring foreign higher education institutions to offer higher education in their country of origin, is in breach of inter alia Articles 49 TFEU and 56 TFEU as well as from Article XVII of the GATS and its obligations under Article 13, 14 and 16 of the EU Charter. Second, Case C-78/18 *Commission v Hungary*, the Commission claims that the national legislation imposing obligations of registration, declaration and transparency on certain categories of civil organizations, and also making it possible for penalties to be imposed on organizations that do not fulfil such obligations, has failed to fulfil its obligations under Article 63 TFEU and Articles 7, 8 and 12 of the EU.

[151] See Jeremy Waldron (n 1), at p.1 and at p. 20. Waldron underlines that the procedural aspect of the rule of law is often hidden by the doctrine and given less importance than the other facets of the rule of law. According to him, legal philosophers tend to emphasize formal elements of the rule of law. Whereas he thinks a fallacy of modern positivism is its exclusive emphasis on the command-and-control aspect of law, or the norm-and-guidance aspect of law, without any reference to the culture of argument that a legal system frames, sponsors and institutionalizes.

LIST OF REFERENCES

Andreas Hofmann, 'Resistance against the Court of Justice of the European Union', Int. Journal of Law in Context (2018)
DOI: https://doi.org/10.1017/s174455231800006x

Anthony Arnull, 'Remedies before National Courts' in Robert Schütze and Takis Tridimas, Oxford Principles of EU law, (OUP, 2018), 1011

Bruce Ackerman, We the People, Volume 3: The Civil Rights Revolution
DOI: https://doi.org/10.4159/harvard.9780674416499.xx

Christian Joerges, 'The European Economic Constitution and Its Transformation Through the Financial Crisis' (February 4, 2015), ZenTra Working Paper in Transnational Studies No. 47/2015
DOI: http://dx.doi.org/10.2139/ssrn.2560245

Gerwyn Griffiths, 'The Bastion Falls? The European Union and the Law of Property', 8 Conveyancing & Prop. L. J. 39, 1997

Harvey M. Jacobs, 'The Future of the Regulatory Takings Issue in the United States and Europe: Divergence or Convergence?', The Urban Lawyer, Vol. 40, No. 1 (Winter 2008) https://www.jstor.org/stable/23800824

Jeremy Waldron, 'The Rule of Law and the Importance of Procedure', Public Law and Legal Theory Research Paper Series, Working paper 10-73, NUY School of Law, 2010
DOI: https://doi.org/10.2139/ssrn.1688491

Kathleen Gutman, 'The Essence of the Fundamental Right to an Effective Remedy and to a Fair Trial in the Case-Law of the Court of Justice of the European Union: The Best Is Yet to Come?' German Law Journal (2019), 20, 884–903, 900
DOI: https://doi.org/10.1017/glj.2019.67

Kriszta Kovács, Gábor Attila Tóth, Editorial comments, Hungary's new constitutional order and European unity, 49 (2012) Common Market Law Review
DOI: https://doi.org/10.1017/s1574019611200038

Lisa M. Austin, 'Property and the Rule of Law', Legal Theory vol. 20 pp. 79–105 (2014)
DOI: https://doi.org/10.1017/s1352325214000056

Ronald A. Cass and Keith N. Hylton, Laws of Creation: Property Rights in the World of Ideas (Harvard University Press, 2013)

DOI: https://doi.org/10.4159/harvard.9780674067646

Sacha Prechal, 'Free Movement and Procedural Requirements: Proportionality Reconsidered' (2008) 35 Legal Issues of Economic Integration, 201, 208. ISSN: 1566-6573

Sacha Prechal, 'Redefining the Relationship between 'Rewe-effectiveness and Effective Judicial Protection' (2011) 4 , Rev. of Europ. Admin. Law 31
DOI: https://doi.org/10.7590/real_2011_02_03

Sim Haket, 'The Danish Supreme Court's Ajos judgment (Dansk Industri): Rejecting a Consistent Interpretation and Challenging the Effect of a General Principle of EU Law in the Danish Legal Order', Rev. of Europ. Admin. Law (2017)
DOI: https://doi.org/10.7590/187479817x14945955772000

Tomasz Tadeusz Koncewicz, 'The Capture of the Polish Constitutional Tribunal and Beyond: Of institution(s), Fidelities and the Rule of Law in Flux' (2018) 43 Review of Central and East European Law
DOI: https://doi.org/10.1163/15730352-04302002

Vassilios Skouris, 'Fundamental Rights and Fundamental Freedoms: The challenge of Striking a Delicate Balance', European Business Law Review (2006), Volume 17, Issue 2 https://heinonline.org › hol-cgi-bin › get_pdf › eblr0017

Xavier Groussot and Johan Lindholm, 'General Principles: Taking Rights Seriously and Waving the Rule of Stick in the European Union' in Katja Ziegler et al, Constructing Legal Orders in Europe: General Principles of EU Law, Edward Elgar, Forthcoming, Lund University Legal Research Paper No. 01/2019
DOI: https://doi.org/10.2139/ssrn.3361668