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RESEARCH ARTICLE

Implementing the Rule of Law in the European Union: How Long Trapped in Penelope's Spinning Wheel from Article 2 of the TEU?

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Abstract
This contribution analyses the current situation of the implementation of the Rule of Law in the EU focusing on three essential aspects: the role of Article 2 of the TEU as a legal paradigm, the issue of effectiveness of secondary law to strengthen Supranational mechanisms for the defense of the Rule of Law; and the thorny issue of the primacy of EU Law in the current Era of European Integration.

Keywords: EU Law; Rule of Law; primacy of EU Law; constitutional identity; Court of Justice of the EU

I. Introduction

According to PR Wood, the Rule of Law is filling the gap left by fading religions in most of the Western democracies, and it is creating a 'de facto' morality where lawyers are replacing priests.[1] In my view, such a statement is highly questionable. The grounds for the relevance of the Rule of Law in Western democracies are other; first, democracy, without Law, is ephemeral. Second, Law without democracy is autocracy, the foundation of a State with Law but not of a State of Law. The configuration of a multilevel regulatory system in the European Union based on the Rule of Law is a complex process. This contribution analyses the current situation of this process focusing on three essential aspects.

First, the role of Article 2 of the Treaty of the European Union ('TEU'), which should be the main paradigm of the institutional and the legal system of the Union, but which still lacks a precise degree on its constitutional dimension. Second, I will address the issue of the effectiveness of secondary law to strengthen supranational mechanisms for the defense of the Rule of Law. The enforcement of this legislation has not managed to push forward the wide range of changes that have to be implemented by the governments of the concerned Member States. Last, but not least, in the third part I make some reflections on the thorny issue of the preservation of the constitutional identity that some internal jurisdictions are advocating, as opposed to the implementation of the fundamental principles of the European Union.

II. Article 2 of the TEU, a Legal Rubik's Cube Yet to Fit

As established in Article 2 TEU, the Rule of Law constitutes one of the 'supreme or fundamental values' of the Union. The Treaty drafters introduced Article 2 TEU as a new legal paradigm that establishes an axiological evolution comparing with previous provisions of the Treaties,[2] such as Article 2 of the Treaty

[1]PR Wood, *The Fall of the Priests and the Rise of the Lawyers* (Oxford University Press, 2016), pp 3, 17, 263, 265.
[2]See JC Piris, *The Lisbon Treaty* (Cambridge University Press, 2010), p 71.

establishing the European Economic Community. This provision read for full employment, price stability, a sound external balance, and economic growth as mere economic guidelines for achieving the objective of political integration.[3] These '*Leitgedanken*' (guidelines) guided the action of the Institutions and Member States but were not fundamental values or even justiciable values.[4]

The case law of the European Court of Justice ('ECJ') underlines that Article 2 of the TEU, 'contains values which are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States'.[5] According to the Court, the latter must respect this fundamental value to join the Union (Article 49 TEU) but also to keep on belonging to this international organization, as it is a common Union *acquis*.[6] Moreover, the ECJ has stated that the obligation relating to respect for the Rule of Law is a specific expression of the requirements resulting for the Member States from the membership of the European Union pursuant to Article 2 TEU.[7]

LD Spieker has pointed out that, although the values of Article 2 TEU are laid down in the operative part of a legal text and they are necessarily part of EU Law, they can be understood as rules, principles, or even as a new form of legal category that still must be determined.[8] However, the Treaties do not define the concept nor identify the elements comprising the Rule of Law, even though other articles of the TEU implicitly (Article 7(1)–(2)) and explicitly refer thereto (Article 21(1)). This absence of a regulatory definition is also found in other provisions of the Treaties, as for key legal concepts such as public order, public safety, and national security, eg in Article 4(2) TEU, Article 52 and Article 73 of the Treaty of the Functioning of the European Union ('TFEU'), and in relation to the essential security interests of a Member State (Article 346(1) TFEU).

Since these are concepts stemming out of the contemporary constitutional traditions of the nation States, the development of a supranational concept for each of them is a comprehensive and unfinished process, as it is dependent upon the conflict on competences between the institutions of the Union and its Member States. In fact, up to date, no exhaustive definition of this concept has already been provided by means of any secondary legislation of the EU, leaving the case law of the ECJ as the preferred means. This being limited to establishing exclusions from national jurisdiction on a case-by-case basis, but which cannot provide a supranational definition for each.[9]

As regards the concept of the Rule of Law in Article 2 TEU, it bewilders us more that the Treaties do not expressly identify all or some of its components, because unlike other disputed concepts, the Rule of Law is not established as a restriction on the exercise of supranational rights or freedoms, but rather as a guarantee of their exercise. Thus, much must be set regarding key aspects of the Rule of Law as enshrined in Article 2 TEU, such as addressing its legal meaning and its legal effects.

[3]See W Hallstein, 'Zu den Grundlagen und Verfassungsprincipien des Europaischen Gemeinshaften' in *Zur Integration Europas: Festschift C.F. Ophuls* (Karlsruhe, 1965), p 5; H P Ipsen, 'Ziel und Aufgabenbestimmungen. Zielsetzungen' in *Europaisches Gemeinschaftsrecht* (Tubingen, 1972), p 557.

[4]See W Hallstein, 'Grundwerte' in *Die Europaische Gemeinschaft* (Dusseldorf-Wein, 1979), p 71.

[5]See *Commission/Poland*, C-204/21, EU:C:2023:442, para 67; see also *Hungary Supported by Rep of Poland/European Parliament and Council of the EU*, C-156/21, EU:C:2022:97, para 232.

[6]The ECJ has established the principle of no regression that required the Member States to ensure that the preservation of the values enshrined in Article 2 TEU is a condition for the enjoyment of all the rights derived from the application of the Treaties. Therefore, a Member State cannot amend its legislation in such a way as to bring about a reduction in the protection of the value of the Rule of Law. See *Repubblika/Il-Prim Ministru*, C-896/19, EU:C:2021:311, paras 63–65. See also *Euro Box Promotion*, C-357/19, C-379/19, C-547/19, C-811/19, C-840/19, EU:C:2021:1034, para 162.

[7]See C-156/21, note 5 above, para 232.

[8]LD Spieker, 'Breathing Life into the Union's Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis' (2019) 20 *German Law Journal* 1182, p 1200.

[9]Among the many decisions of the ECJ that have addressed these concepts is, for example, *NW*, C-368/20, C-369/20, EU:C:2022:298, paras 84–86, where it states that the TFEU establishes such concepts in Articles 36, 45, 52, 65, 72, 346, and 347, as exceptions that must be strictly interpreted. See also *Commission/Hungary*, C-808/18, EU:C:2020:1092, paras 214–15. Nevertheless, compare *La Quadrature du Net*, C-511/18, C-512/18, C-520/18, EU:C:2020:791, paras 134–38, with *M.za Obrambo*, C-742/19, EU:C:2021:597, para 40.

Scholars have underlined the dangers to fill the gap of a definition of the Rule of Law through conceptual stretching,[10] as well as the need to focusing on its different legal meaning comparing to other fundamental values that are also enshrined in that provision of the TEU.[11] Given the reluctant position of the ECJ on this matter[12] it does not seem realistic to attend a legal featuring of this notion at issue by the Court in the short term.

Nevertheless, the ECJ has developed a gradual case law regarding the implementation of the Rule of Law in the Member States that provides some elements to consider. According to the Court, the Rule of Law can receive concrete expression through other provisions of the Treaties and the Charter of Fundamental Rights of the EU (the 'Charter'). The Court has focused on the features of the Rule of Law on Article 19 TEU defending the independence and the empowerment of the judiciaries of the Member States,[13] an approach that is not enough to clarify its legal meaning.[14]

On the other hand, the Court has created the legal framework to address violations to Article 2 TEU through these rulings, transforming the Rule of Law into an enforceable standard.[15] The enforceability of this fundamental value of the Union could be implemented through infringement procedures,[16] although it does not seem that Article 2 TEU fulfills the essential criteria for direct effect.[17]

The European Commission has addressed the issue on a step-by-step basis after the case C-64/16, *ASJP*, using the infringement procedure to ensuring respect for the values of the European Union successfully.[18] Moreover, in a paramount decision adopted recently by the European Commission, she has started a legal action against Hungary that expressly mentions Article 2 TEU as self-standing ground, so this is the first time that a Member State is sued before the court for a potential breach of fundamental EU values laid down in this provision.[19]

[10]See A Magen, 'Cracks in the Foundations: Understanding the Great Rule of Law Debate in the EU' (2016) 54(5) *JMCS* 1050, p 1051. See also R Vitz, 'The Perils of Defending the Rule of Law through Dialogue' (2019) 15(1) *European Constitutional Law Review* 1, pp 15–16.

[11]Such as human dignity, democracy, or human rights. See J Waldron, 'The Rule of Law and the Role of Courts' (2021) 10 (1) *Global Constitutionalism* 91.

[12]For instance, see C-204/21, note 5 above, para 67; C-156/21, note 5 above, para 232; *Rep of Poland/European Parliament and Council of the EU*, C-157/21, EU:C:2022:98, para 192.

[13]See M Bonelli and M Claes, 'Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary' (2018) 14(3) *European Constitutional Law Review* 622, pp 642–43. In different cases, the ECJ grounds the judgments on the second paragraph of Article 19(1) TEU despite the fact that most of the complaints alleged a violation of Articles 2 and 7 TEU. See, for instance, *Commission/Rep of Poland*, C-791/19, EU:C:2021:596; *Commission/Rep of Poland*, C-192/18, EU:C:2019:924; *Commission/Rep of Poland*, C-619/18, EU:C:2019:615; *PPU, LM (Celmer)*, C-2016/18, EU:C:2018:856; *AB and Others*, C-824/18, EU:C:2021:153; *M Lowicz*, C-558/18, C-563/18, EU:C:2020:234; *VZ*, C-487/19, EU:C:2021:798. A critical analysis in C Rizcallah and V Davio, 'L'article 19 du Traité sur l'Union européenne: Sesame de l'Union de droit' (2020) 122 *Rev. Trim. des droits de l'Home* 155.

[14]See, for instance, K L Scheppele, D V Kochenov, and B Grabownska-Moroz, 'EU Values Are Law After All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union' (2020) 39 *Yearbook of European Law* 3, pp 8–9.

[15]S Prechal, 'Effective Judicial Protection: Some Recent Developments – Moving to the Essence' (2020) 13(2) *Review of European Administrative Law* 189. See also L Pech and S Platon, 'Judicial Independence under Threat: The Court of Justice to the Rescue in the *ASJP* Case' (2018) 55 *CML Rev* 1836.

[16]See Ch Hillion, 'Overseeing the Rule of Law in the EU: Legal Mandate and Means' in C Closa and D Kochenov (eds) *Reinforcing Rule of Law Oversight in the European Union* (Cambridge, 2016), p 61. As Commissioner V Reding has stated before, 'we could go further by creating a new specific procedure to enforce the Rule of Law principle … by means of an infringement procedure'. 'The EU and the Rule of Law – What Next?' (4 September 2013) ec.europa.eu/commission/press corner speech 13_677. See also A Bogdandy, 'Principles and Challenges of a European Doctrine of Systemic Deficiencies' (MPIL Research Papers Series), No 2019-14, p 23.

[17]See Spieker, note 8 above, pp 1200–01.

[18]See M Bonelli, 'Infringement Actions 2.0: How to Protect EU Values before the Court of Justice' (2022) 18 *European Constitutional Law Review* 30, pp 35–45. See also T Boekestein, 'Making Do with What We Have: On the Interpretation and Enforcement of the EU's Founding Values' (2022) 23(4) *German Law Journal* 431, pp 450–51.

[19]See Point (2) of the Action brought on 19 December 2022 – European Commission/Hungary (Case C-769/22), OJ C54/16 of 13 February 2023.

While it is true that the Commission's legal action does not include among the grounds for the claim any expressed reference to violations of the Rule of Law, and that it also mentions the infringement of several provisions of the Treaties, the judgement of the Court should address essential issues at stake. For instance, a definition of the values enshrined in Article 2 TEU and its applicability as a free-standing provision. Although a positive decision of the Court on these issues could open a pandora box on the implementation of Article 4 (2) TEU,[20] for the sake of legal certainty and the strengthening of democracy and the Rule of Law, the Court will do no wrong broadening the legal scope of Article 2 TEU.

III. The Limited Effectiveness of the Implementation of Secondary Law

The European Union is filling the above-mentioned legal gaps through a toolkit of secondary legislation and a bunch of institutional initiatives. The most ambitious attempt to establish a supranational definition of the Rule of Law, legally binding, has been the adoption of Regulation 2020/2092.

According to Article 2(a) of Regulation (EU, Euratom) 2020/2092,[21] the Rule of Law includes the principles of legality (a transparent, democratic, pluralistic, and accountable law-making process); legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection (access to an independent judicial power that protects fundamental rights); separation of powers, and non-discrimination and equality before the law. This provision is based on existing supranational regulatory precedent[22] and other 'soft law' decisions of European international organizations that attempted to identify the essential elements of the concept at hand.[23]

They are also inspired by the doctrinal consensus according to which the Rule of Law is composed of three interconnected and complementary elements: the principle of legality (lawful authority); the objective value of the Law; and the independence of the judiciary.[24] The latter is the key principle because it is the tool for the effective implementation of the Rule of Law.[25] As this is a rule of secondary law directly binding on all addressees, the definition acquires a dimension of justiciability that Article 2 TEU lacks.[26] This is confirmed by the judgment of the ECJ in Cases C-156/21, *Hungary v Parliament and Council*, and C-157/21, *Poland v Parliament and Council*.[27]

In this paramount decision, the Court rejected the applicants' argument alleging violation of the principle of legal certainty because the Regulation does not define the concept of 'Rule of Law' or the principles that it is based on. The Court states that those principles have been widely developed in its case law, arising out of the common values recognized and applied equally by the Member States within their legal systems, and which stems from a concept of 'Rule of Law' that the Member States share together and to which they adhere as a common value to their constitutional traditions. Consequently, Member States can on an individual and precise basis determine the requirements for the implementation of each principle.[28]

[20]See S Okunrobo, 'Case C-769/22: A Further Step in the Protection of the Fundamental Rights within the European Union?' (*European Law Blog*, Blogpost 23, 17 May 2023).

[21]Regulation (EU, Euratom) 2020/2092 of the European Parliament of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L433I, 22 December 2020, p 1.

[22]See COM(2019) 3452 final, *EC Decision laying down the guidelines for determining financial corrections to be made to expenditure financed by the Union for non-compliance with the applicable rules on public procurement*.

[23]See the Guidelines of the Venice Commission on the elements of the Rule of Law, Rule of Law Checklist, Venice, 11–12 March 2016, CDL-AD (2016) 007.

[24]See TH Bingham, 'The Rule of Law, The Sixth Sir David Williams Lecture' (Cambridge 2006), pp 18, 23, 26 https://www.cpl.law.cam.uk/sir-david-williams-lectures/rt-hon-lord-bingham-cornhill-kg-rule-law.

[25]JH Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980), pp 7–9, 31–39.

[26]See, nonetheless, Point 35 of the Opinion of AG Tanchev in *AB and Others*, C-284/18, EU:C:2020:1053, who states that the lack of a comprehensive definition in secondary law deprives it of direct justiciability.

[27]Judgment of the ECJ of 16 February 2022, EU:C:2022:97

[28]EU:C:2022:97, paras 127–28, 136–46, 159–62.

However, it should be noted that Article 2 of Regulation 2020/2092 establishes a definition of the 'Rule of Law' in a sanctioning legal instrument, which creates a regime of 'conditionality' for the protection of the European Union budget.[29] Thus, two questions relating to its justiciability must be addressed: (1) under what circumstances could those violations of the Rule of Law be prosecuted?; and (2) is this Regulation complementary to the sanctioning procedure provided for in Article 7 TEU?

Regarding the first question, it must be underlined that pursuant to Article 3 of the Regulation, 'endangering' judicial independence, allowing arbitrary decisions by public authorities or limiting the effectiveness of justice by various means may be considered breaches of the principles of the Rule of Law. Since this is not an exhaustive list of scenarios and these are also stated generically, many others could be considered,[30] although as provided for in Article 4.2 of the Regulation, only those breaches that affect or may seriously affect the Union budget in a sufficiently direct way will be prosecuted. This specification is highly relevant because it increases the burden of proof for the claimant.

As far as the second question is concerned, Article 7 TEU provides for a preventive procedure in the event of a clear risk of a serious violation, or for a sanction procedure in the event of a serious and persistent violation by a Member State of the values of Article 2 TEU. Although the Rule of Law is not expressly mentioned, there is no doubt that both mechanisms established by Article 7 TEU are directly or indirectly intended to protect the Rule of Law.[31]

However, to date, this provision has been applied only on a very exceptional basis and has had no relevant legal consequences so far for the warned Member States. Thus, for example, with regards to the application of the preventive mechanism of Article 7(1) TEU, reference can only be made to the European Commission's proposal relating to the interference of the Polish Government in the independent functioning of the judiciary,[32] and to the European Parliament's proposal relating to the various threats to the Rule of Law in Hungary (lack of independence of the judiciary, corruption, administrative opacity, violation of rights of political participation and fundamental rights, and fraud in various electoral processes).[33]

Neither of these proposals succeeded due to the Council's institutional neglect. Nevertheless, the ECJ has stated that in addition to the procedure laid down in Article 7 TEU, numerous provisions of the Treaties grant the EU institutions the power to examine the existence of breaches of the values contained in Article 2 TEU that have been committed in a Member State.[34] Although the sanctioning mechanism provided for in Regulation 2020/2092 is still in progress,[35] there are serious hesitations about the availability to cope with the many threats of institutional or structural nature that endanger the implementation of the Rule of Law in the concerned Member States of the European Union.

A certain amount of skepticism stems from the narrow tailoring on Rule of Law conditionality that has been stated on the ruling of the Court on case C-156/21, according to which it will be difficult to attach Rule of Law conditionality to funds where breaches do not implicate sound

[29]N Blauberger and V van Hullen, 'Conditionality of EU Funds: An Instrument to Enforce EU Fundamental Values?' (2020) 43 *Journal of European Integration* 7.

[30]See, for instance, COM (2023) 800 final, *EC 2023 Rule of Law Report*, p 2, that sets out four key pillars: justice systems (focusing on their independence, quality, and efficiency); anti-corruption frameworks; media freedom and pluralism; and institutional issues related to checks and balances.

[31]See *Hungary and Poland, European Parliament*, C-650/18, EU:C:2021:426.

[32]See COM(2017) 835 final, *Reasoned Proposal in accordance with Article 7(1) of the Treaty on European Union regarding the Rule of Law in Poland*.

[33]See the European Parliament Resolution of 12 September 2018 regarding the situation in Hungary, doc 2017/2131 (INL).

[34]EU:C:2022:97, para 159.

[35]See, for instance, case T-115/23R, Order of the President of the General Court of 1 June 2023, D Egytem/Council, OJ C252/51 (17 July 2023).

budgetary management.[36] There are also some institutional mechanisms for the protection of the Rule of Law, such as the development of standards linking it to the procedure for monitoring the economy and budgetary environment of the Member States (the European semester[37]), or the framework to address systemic threats to the Rule of Law in any Member State.[38]

However, the existing disagreements between the institutions of the European Union regarding the implementation of the Regulation 2020/2092 is outlining a real danger of transforming the preservation of the Rule of Law into a tradeoff for the European money.[39] The unprecedented decision of the four major European associations of judges to file an action before the General Court of the EU on 28 August 2022, challenging the Council's decision to green light Poland's Recovery and Resilience Plan, calls into question the role of the European Commission and the Council within the above-mentioned framework.[40]

Regarding the violations of the Rule of Law in Hungary and Poland, the situation resembles the game of cat and mouse, where it is not yet clear how the European institutions could catch these two recalcitrant States, although it seems plausible that with the smell of cheese on the European Union budget, they end up falling into the trap. On the one hand, Poland is being subjected to three different types of sanctions that pose a high economic and financial cost to this country: a daily fine imposed by the ECJ for controversial judicial reforms in October 2021;[41] blocking access to the EU's post-pandemic recovery fund;[42] and delaying or suspending cohesion payments.[43] On the other hand, Hungary, which has been labelled by the European Parliament as 'no longer a democracy',[44] is pushing forward some legislative changes that could unlock over EUR 13.2 billion from the cohesion funds[45] and is implementing

[36]M Wigler, 'Can the European Union Effectively Protect the Rule of Law in its Member States? Evaluating Enforcement Tools in the Context of Poland and Hungary' (European Union Law Working Papers) No 78, pp 25–26.

[37]See COM (2019) 343 final, and EP Resolution of 7 October 2020, 2020/2072 (INI), p9_TA (2020) 0251.

[38]COM (2014) 158 final, *A new EU framework to strengthen the Rule of Law*. A critic on the functioning of this mechanism in R Vassileva, 'Threats to the Rule of Law: The Pitfalls of the Cooperation and Verification Mechanism' (2020) 26(2) *European Public Law* 767.

[39]See L Fromont and A V Waeyenberge, 'Trading Rule of Law for Recovery? The New EU Strategy in the Post-Covid Era' (2022) 27 *ECJ* 132, pp 146–47.

[40]See T Shipley, 'European Judges v. Council: The European Judiciary Stands Up for the Rule of Law' (*EU Law Live*, 30 August 2022), pp 1–5.

[41]The Order of the Vice-President of the Court of 27 October 2021 in *European Commission et al/Republic of Poland*, C-204/21R, EU:C:2021:878, imposed a daily fine of EUR 1,000,000 because Poland ignored rulings on the judicial system from the EC, at paras 60–64. If paid in full, the total amount paid by Poland could reach more than EUR 500 million. Nevertheless, in November 2022 Poland submitted a motion to suspend the daily fine on the grounds of legal reforms that replaced the controversial Disciplinary Chamber by an independent Chamber of Professional Responsibility. The Order of the Vice-President of the Court of 21 April 2023, EU:C:2023:334, stated that although Poland has implemented some changes on the judicial system they are not yet in line with the standards of the Rule of Law of the EU. But the Order cut the fee in half of EUR 500,000 per day, at paras 109–13. The decision of the ECJ on the main case C-204/21 adopted on 5 June 2023, declared that the Republic of Poland has failed to fulfill its obligations under the second subparagraph of Article 19(1) TEU, note 5 above, para 386.

[42]The EU should release EUR 36 billion in loans and grants from this fund, but the European Commission agreed a roadmap with Poland according to which this country must adopt a Bill that has to meet milestones regarding judicial disciplinary matters before unlocking the money. The Polish Parliament passed the new Law in February 2023 but a presidential referral for review by the Constitutional Court in March 2023 dragged the enactment of this Bill on for months. The Constitutional Court should adopt a decision on 7 September 2023. See A Szczerbiak, 'Why Does the Polish President's Judicial Reform Law Constitutional Referral Matter So Much?' (*Notes from Poland*, 13 March 2023).

[43]The European Commission is blocking the payments to Poland from cohesion funds on the same grounds. As the amount that should be given to this country worth up to EUR 76.5 billion, the financial impact is larger than the EU blockade of the EU's post-pandemic recovery fund.

[44]See Point Y of the Resolution of the European Parliament of 15 September 2022 on the existence of a clear risk of a serios breach by Hungary of the values on which the Union is founded, 2018/0902R (NLE)-Doc A9-0217/2022.

[45]The Hungarian Parliament passed Bill T/3131 on 3 May 2023 that aims to strengthen the independence of the judiciary by ensuring the autonomy of the National Judicial Council, as well as reforming the Supreme Court and the Constitutional Court to allow their members to refer cases to the ECJ for preliminary rulings. According to the information delivered by the

different tools to fight against corruption to get EUR 5.8 billion in EU grants and EUR 6.6 billion in EU loans under the post-pandemic recovery fund.[46]

While waiting to verify the real effectiveness of these tools, the risk of populist entrenchment persists in the concerned Member States.[47] The Conference on the Future of Europe addressed this problem in its final Report, which expressly states that the European Union must adopt measures that 'effectively apply[] and evaluat[e] the scope of the Conditionality Regulation and other Rule of Law instruments and consider[] extensions to new areas regardless of their relevance for the European Union budget. Any necessary legal avenues, including Treaty changes, should be considered to punish breaches of the Rule of Law'.[48] Nevertheless, the Member States have decided to take some time before tackling this issue.[49]

IV. The Court to the Rescue, or How to Preserve the Rule of Law Respecting National Identities

As remarked above, the ECJ's commitment to protecting the Rule of Law has already triggered some rejections in different constitutional courts of the Member States who claimed their exclusive jurisdiction over this matter as an essential element of their national identity.[50]

There is however a broad doctrinal debate about the convenience of this judicial activism. For instance, some scholars argued that a supranational court cannot provide solutions that must be tackled within domestic and European political processes.[51] A similar line of thought could be drawn from the Opinion of Advocate General Bobek in *Associata et al* when he warns that the Court is entering on shifting land because political problems cannot be solved just through legal remedies.[52] It is indeed a thorny issue.[53]

According to other arguments, the ECJ cannot become a rule maker that fills normative gaps because, in addition to damaging its institutional independence by having to advocate a legal paradigm that is not based on a consensus among the Member States, the Court should slow down or even prevent a political decision on the matter.[54]

It seems that this time is different than during the early decades of the European integration process because the jurisdictional conflict is not about preserving the primacy of the EU's legal order facing to dissent of constitutional courts that defend their national traditions founded on the democratic principle and the fundamental rights. The underlying social political element in the current context of the European integration makes the legal solution much more complex.

European Commission in the short term will unfreeze almost the total amount of the 13.2 billion euros from the cohesion funds for Hungary. See P Tamma, 'EU Readies Payout to Hungary to Avoid Ukraine Aid Blockade' (*Politico.eu*, 3 October 2023).

[46]See Points 3 and 4 of the Communication of the Council of the European Union CM 5860/22, Brussels, 15 December 2022.

[47]See N Vinour and C Hirsch, 'Lawless Europe: How EU States Defy the Law and Get Away with It' (*Politico.eu*, 6 July 2022), pp 1–7.

[48]See Point 4 of the 25th Proposal: Rule of Law, Democratic Values and European Identity of the Report on the Final Outcome of the Conference on the Future of Europe, Brussels, May 2022, p 68. See also Points 10 and 11 of the Annex II of this Report, p 128.

[49]See Points 27–29 of the European Council Conclusions 23 and 24 June 2022, EUCO 24/22 Co EUR 21 CONCL. 5.

[50]See, for instance, C-204/21, note 5 above, paras 60–61.

[51]See D Adamski, 'The Social Contract of Democratic Backsliding In The New EU Countries' (2019) 56(3) *CML Rev* 623, p 659. See also Bonelli, note 18 above, p 57.

[52]C-83/16, C-127/19, C-195/19, Opinion delivered on 23 September 2020 EU:C:2020:746, Points 222–23.

[53]Editorial, 'Sovereign within the Union? The Police Constitutional Tribunal and the Struggle for European Values' (2021) *European Papers* 1117.

[54]See M Blauberger and R D Kelemen, 'Can Courts Rescue National Democracy? Judicial Safeguards Against Democratic Backsliding in the EU' (2017) 24(3) *Journal of European Public Policy* 321.

It is worth remembering the most outstanding features of the jurisdictional confrontation because some remarkable dissidences remained still open. In the initial years of the integration process, long before even the execution of the Maastricht Treaty, the ECJ established the principles of primacy and direct effect as laid out in the *Costa v ENEL*[55] and *Van Gend en Loos*[56] judgments, as these created *ex novo* subjective rights and established obligations for their protection by the public authorities of the Member States.[57]

Indeed, the law of the then European Communities was unquestionably a self-contained set of rules, principles, and institutions capable of sorting out the problems set up in the economic integration plan[58] with a 'constitutional logic of its own',[59] in which the afore-mentioned principles of primacy and direct effect had only a functional value.[60]

In that legislative context, it was almost dreamlike to assimilate the terms 'Community of Law' and 'Rule of Law'. The weakness of the connection between these two concepts, that some scholars have inferred in light of the *Costa* and *Van Gend en Loos* judgments, and subsequently of the *'Los Verdes'*[61] judgment, expressed only a legal trend, but not the existence of a legal system fully comparable to the Rule of Law.[62] This amongst other reasons, as Community law at that point in the process of European integration did not have a specific duty to safeguard Human Rights.

The rebellion of the Constitutional Courts against the application of the principle of primacy[63] demonstrated the existence of a legal dispute that could not be overcome by legal logic.[64] It could be said that the relativization of the principle of primacy during that period of the integration process questioned the very legitimacy of the Community legal order due to its 'pre-democratic' or 'a-democratic' character. So, we can state that in such legal context all supranational decisions were based on what LUHMANN defines as mere 'legitimation by procedure'.[65]

It was precisely this democratic deficit the feature where the German Constitutional Court placed its main emphasis when it reluctantly accepted the adaptation of the Maastricht Treaty to the German constitutional system, drawing up intangible limits on the principle of attributed powers.[66] This line of argument no longer called into question the role of EU Law in view of its commitment to the protection of fundamental rights, but already warned that any extension of the Union's powers could only take form by an express attribution from its Member States.[67]

[55]C-6/64, EU:C:1964:66.

[56]C-26/62, EU:C:1963:1.

[57]See R Lecourt, 'Quel eut été le Droit des Communautés sans les Arrets de 1963 et 1964?' (*L'Europe et le Droit*, 1991), pp 349–50. D Kochenov, A Magen, and L Pech, 'Introduction: The Great Rule of Law Debate in the EU' (2016) 54 *JCMS* 1045.

[58]See R Bernhard, 'European Law' (1983) 6 *Encyclopaedia of Public International law* 179.

[59]G C Rodríguez Iglesias, 'La función del Tribunal de Justicia de las Comunidades Europeas y los rasgos fundamentales del ordenamiento jurídico comunitario' (1993) XXXIII(2) *Foro International* 294.

[60]Lord Mackenzie Stuart, *The European Communities and the Rule of Law* (Stevens, 1977).

[61]C-294/83, EU:C:1986:166, para 23.

[62]L Pech, *The Rule of Law as a constitutional principle of the European Union* (J. Monnet Working Paper, NYU School of Law, 2009) 04/09, p 21.

[63]See the Judgment of the German Constitutional Court of 29 May 1974, *Internationale Handelsgesellschaft* (BVerfGE 37, 279) and the Judgment of 22 October 1986, *Wunsche* (BVerfGE 73, 339). See also the decision of the French State Council in case *Syndicat Gen de Fabric. De Semoules de France*, of 1 March 1968.

[64]The constitutional logic was incompatible with the logic of community law by not yet guaranteeing this legal system the protection of fundamental rights. See L Díez Picazo, '¿Una constitución sin declaración de derechos?' (1991) 32 *Revista Española de Derecho Constitucional* 155.

[65]N Luhmann, *Legitimation durch Vefahren* (Suhrkamp Verlag, 1969), p 113.

[66]Judgment of the German Constitutional Court of 12 October 1993 (BVerfGE), pp 89, 155.

[67]Indeed, Article 5(2) TEU, after the conclusion of the Lisbon Treaty, implicitly reflects that position of the German Constitutional Court by establishing that 'every competence not attributed to the Union in the treaties belongs to Member States'. In addition, the first paragraph of Declaration Number 18 annexes the Lisbon Treaty reiterates that 'the powers that the treaties have not attributed to the Union will be of the Member States'.

Article 4.2 TEU, establishing the principle of respect for their national identities, was also introduced into the constitutional foundations of the EU by the Maastricht Treaty and developed more concisely by the Treaty of Lisbon, a regulatory paradox when compared to Article 2 TEU.[68] Specifically, this provision distinguishes between the respect for 'fundamental political and constitutional structures' and the 'essential State functions', identifying two complementary levels that refer, in the first case, to the organization of democratic life, and, in the second case, to the very survival of the State. This difference is relevant for the purposes of weighing the extent to which the EU may hinder the implementation of the principle of respect for the national identity of a Member State.[69]

In fact, the Treaties establish several provisions empowering Member States to disregard EU law in situations that threaten their essential safety interests or their own survival (Articles 42.7 TEU, 78.3 TFEU, 222 TFEU, 347 TFEU), a circumstance that is not provided for in relation to respect for their political-constitutional structures, with the exception of the 'emergency brake' mechanism of Articles 82.3, 86.1, and 87.3 TFEU or, even as stated in Articles 6 and 7 of the Protocol on the application of the principles of subsidiarity and proportionality.

Since the Treaties promote a process of political, legal, and economic integration, Article 4.2 does not establish a reservation of sovereignty, nor does it guarantee the non-interference of the EU in the internal affairs of the Member States. This is confirmed by many judgments of the ECJ.[70]

The strengthening of the democratic principle as a source of legitimacy for the Union's decisions as stated in the Treaty of Lisbon[71] has not prevented a resurgence in the resistance of some Constitutional Courts against the implementation of the principle of primacy. Such is the case in Romania,[72] Poland,[73] and France.[74] All these decisions have in common a rejection of the expansion of the Union's powers through praetorian activism, especially with regards to special sensitive areas for national sovereignty.[75]

Among the relevant decisions of the ECJ, the *Euro Box Promotion* case can be highlighted,[76] as well as the *Poland/Parliament and Council* case,[77] and the *RS* case, where the Court stated '*inter alia* that following the entry into force of the Treaty of Lisbon she has consistently confirmed the earlier case-law on the principle of the primacy of EU Law'. Therefore, a Constitutional Court of a Member

[68]A von Bogdandy and S Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' (2011) 48 *CML Rev* 1417.

[69]Th Konstadinides, 'Dealing with Parallel Universes: Antinomies of Sovereignty and the Protection of National Identity on European Judicial Discourse' (2015) 34(1) *YEL* 127.

[70]See cases *Anton Las*, C-202/11, EU:C:2013:239, paras 26–33, and *Bogendorff von Wolffersdorff*, C-438/14, EU:C:2016:401, paras 64–67, 83–84. See also C-204/21, note 5 above, paras 72–82.

[71]Especially the establishment of different tools of submission of the legal order of the Union to fundamental rights, provided for in Article 6 TEU, the modification of the preventive procedure in the face of a clear risk of violation by a Member State of the EU values, provided for in Article 7(1) TEU, and, to the inclusion of the new Title II of the TEU relating to democratic principles.

[72]See Romania Curtea Constitutionala, Comunicat de Presa, Bucarest, 23 December 2021. An analysis by B Selejan-Gutan: 'Who's Afraid of the "Big Bad Court"?'(*Verfassungsblog*, 10 January 2022).

[73]See Assessment of the conformity to the Polish Constitution of selected provisions of the Treaty on European Union, Ref No K 3/21, Judgment of 7 October 2021 (a ruling adopted by a majority vote). An analysis by J Jaraczewski: 'Gazing into the Abyss. The K 3/21 Decision of the Polish Constitutional Tribunal' (*Verfassungsblog*, 12 October 2021).

[74]See the Decision of the French State Council, Assemblée of 2 April 2021, No 393099, which considers that the definition of national security is only the competence of the French Republic. This decision that establishes the national sovereignty exception converges with the judgment of the German Constitutional Court of 30 June 2009 on the Lisbon Treaty Ratification Act, which identified the areas of competence reserved for the German State, BVerfG 2, 5, 1010, 1022, 1259/08 and 182/09, para 249.

[75]See J Scholter, *The Abuse of Constitutional Identity in the European Union* (Oxford University Press, 2023).

[76]C-357/19, C-379/19, C-547/19, C-811/19, C-840/19, note 6 above, para 250.

[77]C-157/21, note 12 above, para 284.

State cannot disapply the Rule of Law, on the ground that that Rule undermines the national identity of the concerned Member State.[78]

Nevertheless, when it comes to specifying the extent of the Union interference to ensure Rule of Law standards in the functioning of a Member State's powers, its legislative and judicial powers, the Member States concerned do not accept this by peaceful means.[79] In short, in some constitutional arenas, it is understood as a means of interference by the Union, which challenges the Court when it exercises its duties as guarantor of the application of EU law, as well as at the level of the Member States.[80] In fact, some scholars qualified the exercise of supranational judicial powers as a tool to impose 'the tyranny of values'.[81]

However, a detailed analysis of the decisions of the ECJ on this issue reveals the institutional caution with which it acts. Thus, for example, the ECJ repeatedly justifies its jurisdiction by differentiating between the competence of the Member States to determine the organization of their internal powers (namely the administration of justice), and its own jurisdiction, which is limited to ensuring that Member States exercise their powers in compliance with the obligations arising under Union law.[82]

This legitimate interference in the field of the powers of the State might occur independently of the ground that gave rise to the breach of obligations, whether it is an abuse of power that affects judicial independence,[83] or that affects the right to a judge as established by law,[84] or the formulas for selecting judges and the composition of the courts of justice,[85] or disciplinary proceedings.[86]

The caution with which the ECJ acts in justifying its judicial review should be highlighted, since it only assesses, on a case-by-case basis, the adequacy of the conduct of the Member States with respect to Union law. But it has not taken advantage of this context to replace the legislative power by trying to establish a minimum threshold for respect of the Rule of Law, with the sole exception, perhaps, of establishing the principle of no-regression, mentioned above, according to which Member States cannot lower their standards after having become a Member of the EU.[87]

Thus, there is a threat of becoming endemic of the plot line followed by the dissent constitutional courts that reject the expansion of the Union's powers through pretorian activism.[88]

Beyond the inadequacy of supranational legal remedies to solve political problems, to which Advocate General Bobek refers,[89] there is a dichotomy between the values enshrined in the Constitutional traditions of some Member States and the implementation of Article 2 TEU.

As the former Polish Prime Minister Morawiecki has pointed out: 'what are the European Values? Our basic identity is national identity. Poland experiences discrimination due to the

[78]C-430/21, EU:C:2022:99, paras 50, 67–70. See also *FX et al*, C-858/19, C-926/19, C-929/19, Order of the Court (Sixth Chamber) of 7 November 2022, EU:C:2022:878, paras 127–39; C-204/21, note 5 above, paras 62–63.

[79]J Muller, 'Should the EU Protect Democracy and the Rule of Law Inside Member States?' (2015) 21(2) *ELJ* 141.

[80]See R Uitz, '*Commission/Poland (C-204/21 R)*: Pulverizing the Primacy of EU Law' (*Brexit Institute News*, 1 November 2021).

[81]A von Bogdandy, 'Towards a Tyranny of Values?: Principles on Defending Checks and Balances in EU Member States' in A von Bogdandy et al (eds), *Defending Checks and Balances in EU Member States: Taking Stock of Europe's Actions* (BzaoRV, 2021). See also B Selejan-Gutan, '*When Activism Takes the Wrong Turn*' in M Belov (ed), *Courts and Judicial Activism under Crisis Conditions* (Routledge, 2021), pp 138–40.

[82]See *Associatia et al*, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19, C-397/19, EU:C:2021:393, paras 110–12; see also *AB*, C-824/18, EU:C:2021:153, paras 68–69.

[83]C-204/21 R, Order of the Vice President of the ECJ of 27 October 2021, EU:C:2021:878, paras 54–57. See also COM (2022) 234, *The 2022 EU Justice Scoreboard*, paras 3.3.2, 3.3.3. See K Lenaerts, 'New Horizons for the Rule of Law within the EU' (2020) 21 *German Law Journal* 29, pp 33–34.

[84]*Simpson and HG*, C-542/18 RX II, C-543/18 RX II, EU:C:2020:232, paras 55–57.

[85]*DNA*, C-379/19, Opinion of Advocate General Bobek, of 4 March 2021, EU:C:2021:174, Point 96. See also *Min Public/FQ et al*, C-811/19, C-840/19, Opinion of GA Bobek, of 4 March 2021, EU:C:2021:175, Points 134–36.

[86]See *R I/Inspectia Judiciaria, NL*, C-817/21, EU:C:2023:391, paras 35–38, 44, 48–51.

[87]See C-896/19, note 6 above, paras 63–65.

[88]See C-204/21, note 5 above, para 46.

[89]See note 52 above.

involvement of European institutions in internal disputes of a Member State under the slogan of 'defending the Rule of Law' … in a deeper sense, the dispute today is between the sovereignty of a State and the sovereignty of institutions … between the democratic power of the people at a grass-root level and the top-down imposition of power by a narrow elite'.[90]

This ideological controversy has been underlined on numerous occasions both from the Head of State of Poland and from the Polish Government.[91] Although it is possible to identify an intellectual link between the skeptical approach to the matter in question of scholars like R Legutko and the political behavior of the ruling party in Poland,[92] there is a strong socio-political resilience in some European countries that disagree with vital topics for the protection of the EU Rule of Law.[93]

There is also an unfinished legal process at the European level that conceals discretionary powers of the Member States to design the differential features of internal legal orders on the ground of its national identity. Although the ECJ has underlined that whilst the Member States of the European Union have separates national identities, they adhere to a concept of Rule of Law that they share,[94] there is no uniform European standard on the matter.[95] In such circumstances, must be avoided slides between the notions of democracy, human rights, or fundamental freedoms through the notion of the Rule of Law.[96]

On the other hand, different analysis of the current situation of Western democracies, including those of the Member States of the European Union, are advocating for relativizing the conceptual orthodoxy from which compliance with legitimacy standards is evaluated. Specially as far as liberal democracies are concerned. As we know, following a well-defined pattern,[97] those governments of

[90]M Morawiecki: 'Europe at a Historical Turnaround' (Speech delivered at the University of Heidelberg, 20 March 2023), Point 3.

[91]President Kaczynski has accused the Commission of trying to undermine Rule of Law in Poland. J Cienski, 'Poland Warns It Will Turn Cannons on the EU in Rule of Law Dispute' (*Politico.eu*, 8 August 2022). Moreover, Prime Minister Morawiecki stated, answering comments by European Commission President Von der Leyen, that the EU has the tools to deal with a Member State if things get wrong, that what the EU is trying to implement is not the Rule of Law, it is a dictate and the lack of the Rule of Law. J Hayden, 'Poland Calls von der Leyen's "the Tools" Comment "Scandalous"' (*Politico.eu*, 24 September 2022).

[92]See R Legutko, *The Demon in Democracy: Totalitarian Temptations in Free Societies* (Encounter Books, 2016). According to this thought, there are similar features between communists' totalitarianism and liberal democracy, given that for the latter it is about imposing a new pattern of intolerance, 'the progressives' intolerance', to transform civil society and standardize the dynamics of the public institutions of Western States. The Israeli Government's institutional reform proposal, which is threatening the Rule of Law is grounded on these standards. See A England and J Shotter, 'The Angry Divide in Israel over the Rule of Law and Religion' (*Financial Times*, 28 February 2023). On 24 July 2023, the Knéset adopted an amendment to the Basic Law: The Judiciary, Amendment No. 5 – Reasonableness standard to add to section 15 of the said law (5748/1984), that reads as follows: 'In spite of what is stated in this basic law, those holding judicial power by law, including the Supreme Court sitting as the High Court of Justice shall not hear [a case] nor issue an order against the government, the Prime Minister or a government Minister, on the reasonableness of their decisions (any decision)'.

[93]The results of the public survey conducted by the W Martens Centre for European Studies show wide rejections in front of EU decision making and policies in subjects like the extension of the scope of protection of human rights to other fields that are strongly stick to the national identities of the Member States. See FO Reho and A Blamska, 'Standing in Unity, Respecting Diversity: A Survey into Citizens Perspectives of the Future of Europe' (Wilfried Martens Centre for European Studies, 25 May 2022), pp 52–57 (The Future of EU Values – Rule of Law Standards). Moreover, another research study has underlined that EU policymakers should be more alert to geopolitical implications of values differences between Eastern and Western Europe. See M Lampert, P Papadongonas, and F O Reho, 'Middle Class Concerns and European Challenges: A Data-Driven Study from a Centre-Right Perspective' (Wilfred Martens Centre for European Studies, 15 September 2023), p 10.

[94]See C-204/21, note 5 above, para 73.

[95]See Council of Europe, 'State of Democracy, Human Rights and the Rule of Law, 2023 Rule of Law Report – Stakeholder Contribution. An invitation to Recommit to the Values and Standards of the Council of Europe', p 20.

[96]According to J Waldron, a non-democratic legal system based on the denials of human rights may conform to the requirements for the Rule of Law better than liberal Western democracies. Waldron, note 11 above, pp 103–05.

[97]See S Guriev and D Treisman, *Spin Dictators: The Changing Face of Tyranny in the 21st Century* (Princeton University Press, 2023), pp 3–4, 19–20.

Member States of the European Union that have attempted to move towards the so-called illiberal democracy, have been pointed out for fostering a dangerous process of democratic backsliding.[98]

This term means changes that move the polity in the direction of hybrid or authoritarian regime. In short, the executive power drives a gradual process of democratic regression where political competition is eclipsed by competition on identity or values, embracing populist appeals to safeguard the interest of the nation from elites (including foreigners and the European Union institutions).[99]

Faced with the threat of a chronification of these processes, the ECJ has consecrated the principle of non-regression, creating a new paradigm for the protection of the Rule of Law.[100] Nonetheless, the backsliding paradigm is being questioned because it lacks the intellectual tools to discuss underlying conditions to the political arena of the concerned Member States. As L Cianetti and S Hanley have pointed out, the focus on a lineal path between democracy and autocracy is a conceptual straight jacket: '(there) is a risk treating deep social, economic and cultural underlying conditions to thinly as enabling factors for democratic disloyal leaders to play the illiberal playbook'.[101]

These factors must be taken into consideration in the current context of European integration, because, according to H Kundnami, the influence of civic elements of a European identity was greatest until the beginning of the Euro-crisis (2010) and the refugee crisis (2015), but, since then, the civic regionalism has given way to ethnic/cultural elements.[102] Thus, we should think about 'careening' instead of backsliding, focusing on those factors that make democracy a zigzagging but reversible path.[103]

V. Final Remarks

In Plato's *Republic,* democracy is compared to a constitutional bazaar because the citizens have the freedom to choose the form of government of their political community. Whether it is just for the citizens at the national level, or for the European Union institutions at a supranational level to define the essential elements of the Rule of Law it must be settled between the stakeholders through political tools on a consensual basis.

What should be ruled out in advance is to trust on the imposition of supranational fines, sanctions, or budget conditionality rules as the preferred means of solving political conflicts with deep socio-cultural roots.[104] As General Murat warned Napoleon to curb his expansionist desires, 'Sire, bayonets are useful for many things except sitting on them'. All the above said, retaliation measures could even worsen the conflict with the governments of the Member States concerned.[105]

There is a chance however for the Court to address the issue in the context of the adoption of the decision in the above-mentioned case C-769/22. Although it is true that the Commission's legal action does not include among the grounds for the claim an express reference to the Rule of Law, the Court could clarify the issues regarding the legal dimension of Article 2 TEU.

[98]See S Hanley and M Vachudova, 'Understanding the Illiberal Turn: Democratic Backsliding in the Czech Republic' (2019) 34(3) *East European Politics* 276; see also L Pech and KC Scheppele, 'Illiberalism within: Rule of Law Backsliding in the EU' (2017) 19 *CYBELS* 3.

[99]See S Hanley and M Vachudova, above at pp 278–9.

[100]See note 6 above.

[101]See L Canetti, J Dawson, and S Hanley, *Rethinking 'Democratic Backsliding' in Central and Eastern Europe* (Abingdon, 2020).

[102]H Kundnami, *Eurowhiteness Culture, Empire and Race in the European Project* (Hurst, 2023).

[103]See L Cianetti and S Hanley, note 101 above, pp 76–77. See also D Stater, 'Democratic Careening' (2013) 65(4) *World Politics* 729.

[104]See M A Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (Oxford University Press, 2021). See also M A Wilkinson, 'Authoritarian Liberalism in the European Constitutional Imagination: Second Time as Farce?' (2015) 21(3) *European Law Journal* 313, p 327.

[105]See P Blokker, 'Populist Counter-Constitutionalism, Conservatism and Legal Fundamentalism' (2019) 15(3) *European Constitutional Law Review* 519, pp 541–43.

The decision could be grounded on the institutional dynamics of the Court. On the one hand, the implementation of the principle of proportionality as a tool for the protection of liberal democracy.[106] According to Judge Sinisa Rodin, the Court must protect the liberal democratic constitutional project because the European Union is not a neutral project in the constitutional sense: 'the ideological construct of the European Union is incompatible with ideological construct that seeks to abolish liberal democracy and its counter-majoritarian guarantees … the very fundamental principles are being weaponized against the European Union'. Judge Rodin underlines that the protection of national identity could result in subversion of the entire system, involving disrespect for the Rule of Law.[107]

On the other hand, it must be borne in mind that the Court has used the teleological interpretation of the Treaties to clarify key legal issues for the European integration.[108] Therefore, the Court could use the meta-teleological method of interpretation to say the law in line with the solid ground case law addressing essential issues for the survival of the European integration process and the preservation of the fundamental values of the Union.[109]

[106]See, for instance, *Asoc Forumul*, C-216/21, EU:C:2023:628, paras 57–67.

[107]S Rodin, 'Proportionality as a General Principle of Law and as a Tool of Judicial Review at the CJEU' (Lectio Magistralis at the Carlos III University, 29 September 2023), pp 25–29.

[108]See A Albors Llorens, 'The European Court of Justice, More than a Teleological Court' (1999) 2 *CYBELS* 373.

[109]See K Leanerts and J A Gutiérrez-Fons, *Los métodos de interpretación del Tribunal de Justicia de la Unión Europea* (Marcial Pons, 2023), pp 21–27, 67–81.

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