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## The Interaction Between the Rule of Law, Fundamental Rights, and the Supremacy of EU Law

- **ABSTRACT:** *The rule of law constitutes the cornerstone of the European legal order and, consequently, the primary pillar of its constitutionality. Paired with the principle of the supremacy of EU law, affirmed by the Court of Justice of the European Communities in some of its earliest and most significant decisions, it facilitated the development of the European Union both in the legal-constitutional and political senses. The introduction of fundamental rights as a core value completed the legal-constitutional framework, enabling individual rights and freedoms to flourish. As these principles and values are based on moral grounds, cultural and historical forces, and traditions that led to their conceptualisation, the debate on their implementation, reinforcement, crisis, or even backsliding has always been active. The subject of this paper is the key internal and external aspects that influence the way the rule of law, fundamental rights, and the supremacy of EU law are understood, emphasising that their internal and external components are equally important for their universal implementation as legal and political concepts.*
- **KEYWORDS:** rule of law, fundamental rights, supremacy of EU law, EU values, EU principles of law, constitutionality

### 1. Introductory remarks

European values, with the rule of law permeating them as a meta-value, form the constitutional basis of the European legal order, together with the protection of fundamental rights. These two legal concepts stem from the constitutional traditions and constitutional orders of Member States and have been gradually introduced into the EU legal system. The principle of the supremacy of EU law

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is a legal principle created in the early beginnings of the European integration process and developed by the European Court of Justice (now the Court of Justice of the EU) as one of the key pillars of the supranational legal order. The development of these principles and values has served as a point of leverage for European constitutional evolution. They are indeed inevitably intertwined, which can be observed by examining the judicial dialogue between the national courts on the one side and the Court of Justice on the other. This ongoing dialogue was initiated at the inception of the European Communities, shaping the development of the relationship between the two legal orders: the national law of each Member State and the European legal order. Furthermore, any political or judicial decision in the EU arena that builds upon the interconnections between the rule of law, fundamental rights, and the supremacy of EU law strengthens the narrative that nurtures the legitimisation of the European legal identity and its founding elements. Therefore, the European political and legal identity has been founded through the creation of closer and tighter political and legal relationships among Member States. This has been achieved within the framework of the treaties, the Charter of Fundamental Rights of the European Union, and specifically as a result of the case-law of the Court of Justice of the EU (CJEU). The relationship founded on a political slogan of an “Ever-closer Union”<sup>1</sup> included creating common European values and principles as well as balancing national and supranational interests when it comes to the application of the supremacy principle. This has not always been an easy mission, especially due to all the challenges associated with the demanding task of deepening all aspects of European integration, whether as an internal development or as part of European external policy, with enlargement being the mechanism behind EU growth. This process comprises several driving forces. First, without territorial expansion, the EU could not have developed in the way it did, or at all, whereas introducing new legal orders and integrating them into the existing system was not without its burden.

The premise is that the values of all Member States are essentially the same or are common and universally accepted. Accession negotiation is meant to allow the aspiring member to prove this hypothesis; however, the meaning attributed to those values and political forces at the time of accession make this *prima facie* clear and simple approach rather complex in practice.<sup>2</sup> The role of the CJEU is essential in ensuring that these various interpretations of the content of EU values and/or fundamental rights are aligned with each other and understood in the same way when it comes to the implementation of EU law. However, as these values also have aspects that fall outside the scope of law, it can sometimes be a challenging role.<sup>3</sup> For this reason, the Court of Justice is often regarded as slow to respond

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1 European Council, 2017.

2 Claes, 2019, p. XI.

3 Vlajković, 2020, p. 242.

to development trends in a due manner, to the point that it hampers further EU integration. However, to secure proper functioning of the legal order, the CJEU needs to ensure the application of its decisions and prevent any adverse effects that may stem from the fact that the level of common understanding of EU values or the level of protection of fundamental rights is not as aligned as it needs to be.

With each enlargement, additional elements must be considered in the perception of EU values and principles. European nation-states, with their histories and traditions, although essentially similar and intertwined, have differences that need to be acknowledged. While the transfer of competencies to the EU may initially seem clear and practical due to several internal political and other factors, many states may never be able to accept the supremacy of EU law in its fullest capacity; therefore, a margin of discretion is inevitable. During these ever-changing times, it has become increasingly difficult to maintain an integrative process and ensure that the margin of discretion does not put the entire principle into question. Legal uncertainty, inconsistency, and the inability to have legitimate expectations are among the greatest threats to the stability of the EU constitutional order. Even though the rule of law, fundamental rights, and the concept of EU law supremacy are considered legal values and principles and the driving forces of the EU legal order,<sup>4</sup> they are not solely legal terms. They are primarily concepts related to accepted values, perceptions of right and wrong, beliefs, teachings, and understanding. Hence, political, and societal developments will undoubtedly have an impact on the way they are perceived.

Initially, the architecture of the EU legal order in relation to the rule of law, fundamental rights, and the supremacy of EU law was designed in a way that indicates the existence of a hierarchy, yet only at first glance. The core value is most certainly the rule of law, but to make this value a viable legal concept, it needs to be based on a legal order that is considered just.<sup>5</sup> This is the point at which fundamental rights become indispensable in recognising individual freedoms as a guarantee to properly understand the concept of the rule of law. Ideally, the supremacy of EU law in all fields would most certainly solve many problems related to the interpretation and understanding of the rule of law throughout the EU. The differences in culture, language, and traditions between Member States, however, are not just nuances; they are a formative part of national identities and should not be neglected.<sup>6</sup>

In this study, we aim to analyse the origins of these fundamental legal concepts and grasp their importance in the constitutionalisation of the EU legal order. By focusing on their role in the European integration process, we highlight the growing significance of the obligation of Member States and the EU to respect

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4 Von Bogdandy, 2010, p. 54.

5 Raulus, 2016, pp. 25–37.

6 Von Bogdandy, 2010, pp. 54–56.

both fundamental rights and the rule of law. Consequently, they are also ensured by primary legal sources in the EU and are thus covered by the principle of supremacy. Second, these principles have a prominent place in every EU internal and external policy, especially the enlargement policy in relation to conditionality criteria. This has a significant influence on furthering European integration, which is another area worth exploring to better understand the three concepts and their co-dependency. Finally, we emphasise that the rule of law, fundamental rights, and supremacy of EU law complement and counterbalance each other in the EU's constitutional order. We will highlight the latter to find new paths in resolving the ever-lasting dilemma of the 'deepening or widening the Union'<sup>7</sup> and to question whether the concept of the European identity is attainable in every sense.

## 2. The evolution of the EU values and principles: internal aspects

### ■ 2.1. The European evolution of fundamental principles

The European Union is rooted in common civilizational traits originating from a shared heritage, traditions, and common cultural, philosophical, and religious roots.<sup>8</sup> Throughout the centuries, Europe has been stricken by conflicts motivated by similar reasons, burdening Europe and its nations. Therefore, the shared experiences and common European history generated a balanced approach to the values that later developed into the *conditio sine qua non* of European integration. Consequently, and precisely for these reasons, the European continent has always been perceived as a unique territory with predispositions to grow into unity built on commonality. Victor Hugo presented the idea of the "United States of Europe" at the Peace Congress in 1849 as early as the nineteenth century.<sup>9</sup> A century later, Robert Schuman, together with other fathers of European integration, proclaimed the Declaration on the first European Community to be built with joint effort and common interests, as well as the shared goals of the six founding Member States. The Schuman formula is based on the idea that the European Community is built upon *de facto* solidarity and concrete achievements.<sup>10</sup>

Without this political ideology conceived by some of the greatest minds of Europe, the European Union today would not have been able to surpass the European Communities and their original goals, and would not exist in this form.<sup>11</sup> However, with the evolution of European construction, it has become obvious that

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7 Rehn, 2008.

8 Rakić and Vlajković, 2022, pp. 235–239.

9 Košutić, Rakić and Milisavljević, 2021, pp. 10–73.

10 Schuman declaration, May 1950.

11 The same goes for the *de facto* solidarity that evolved into a founding principle of the European Union envisaged in the primary law of the EU. See Arts. 2, 3, 21, 24 etc. of the Treaty on the European Union (Lisbon Treaty), Official Journal of the European Union C 326/13. 26.10.2012.

the said concrete achievements, at first focused solely on economic progress, were reoriented towards creating a strong legal and political ground for the *naissance* of the new Union.<sup>12</sup> This goal of creating “something bigger” was obvious after the first decade of the European Communities with *Van Gen den Loos*<sup>13</sup> and *Costa vs E.N.E.L.*<sup>14</sup> decisions. In the latter, the Court established, or rather pioneered, a principle that would be one of the core principles enabling the efficient functioning of the European Communities and, subsequently, the European Union: the principle of primacy or supremacy of EU law. This principle already portrayed the great ambition of the European construction, which would continue to rely on its supranational character features for decades onwards.

The principle of supremacy of EU law went on to be reaffirmed by the ECJ, with a tendency to be understood in an absolute manner, meaning prevailing over Member States’ constitutional principles and values. The ECJ confirmed its stance in 1970 in the *Internationale* decision when it first encountered a constitutional limit depicted in the protection of a Member State’s fundamental rights.<sup>15</sup> The ECJ clearly stated that

The validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure.<sup>16</sup>

Even though this judicial opinion would be re-examined thoroughly by the constitutional doctrines of the national courts in the following years,<sup>17</sup> we underline that for the first time the highest European judicial authority confirmed that respect for fundamental rights, inspired by the constitutional traditions common to Member States, formed an integral part of the general principles of the Community legal system.<sup>18</sup> This decision is often perceived as the ‘inception of the ECJ human rights jurisprudence’.<sup>19</sup> Nevertheless, fundamental rights remained both

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12 See more Rakić and Vlajković, 2022, pp. 227–281.

13 Judgment of the Court of 5 February 1963. – NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration. – Reference for a preliminary ruling: Tariefcommissie – Pays-Bas. – Case 26-62. European Court reports 196300001.

14 Judgment of the Court of 15 July 1964. C-6/1964 *Flaminio Costa v E.N.E.L.*, ECLI:EU:C:1964:66. Reference for a preliminary ruling: Giudice conciliatore di Milano – Italy. Case 6-64. Reports of Cases 196401195.

15 *Frontini et Pozzani*, Case n 183/73, 27 Dicembre 1973, Giur. Cost. I 2401.

16 *Ibid.*, para. 3, p. 1134.

17 The leading examples in the history of the European integration would be *Solange I* and *II* doctrines created by the Bundesverfassungsgericht in 1987, or the *contralimiti* (counter-limits) doctrine created by the Italian Constitutional Court in 1973.

18 *Ibid.*, para. 4, p. 1134.

19 Davies, 2017, pp. 157–177.

a national constitutional limit to the absolute supremacy of *droit Communautaire* and an integral part *in statu nascendi*. Moreover, the first *Solange* judgment, delivered by the German Constitutional Court (*Bundesverfassungsgericht – BVerfG*), proved that there is indeed a national standard for the protection of fundamental rights that differs from that proclaimed in the ECJ's *Internationale*.<sup>20</sup> Although this judicial stance could be characterised as protectionist, considering that it was brought simultaneously as other complementary constitutional doctrines such as *contra-limiti*,<sup>21</sup> it actually had a positive impact on the further development of respect for fundamental rights by the European Communities. In its subsequent judgment, *Nold*,<sup>22</sup> the ECJ confirmed its position that fundamental rights 'form an integral part of the general principles of law,' affirming its own obligation to draw inspiration from common constitutional traditions of Member States.<sup>23</sup> This was politically supported by the Declaration on European Identity,<sup>24</sup> which clearly established the dynamics of European project development.

However, this did not prove that Member States' understanding of what constitutes EU values and principles is balanced or absolutely the same. Nevertheless, it was more than sufficient for *BverfG* to observe the fundamental rights doctrine in light of the supremacy principle in the second *Solange* decision.<sup>25</sup> The former position of the *BverfG* differentiated national fundamental rights protection from the European Union, confirming that the EU respect for fundamental rights was at an efficient level equivalent to the standard of the German Basic Law (*Grundgesetz*). As long as the EU provided equivalent (or higher) protection, the *BverfG* did not have to resume its jurisdiction or apply *Solange I* standards. This was the pioneering example of an efficient judicial dialogue as well as balancing diverse interests, where the issue of relativisation of the absolute supremacy principle was put aside to estimate and provide adequate protection of fundamental rights, both in Member States and in the Communities.

20 37 BVerfGE 271. English translation [1974] 2 CMLR 540 – *Internationale Handelsgesellschaft v. Einfuhr und Vorratsstelle für Getreide und Futtermittel*.

21 *Contra-limiti* doctrine was coined by the Italian Constitutional Court. It introduced the right to review, or "counter-limit" the EU measures applied in Member States, in this case Italy, when there is a possibility that it could affect fundamental rights and principles protected by the Constitution. See *L'arrêt n 183/73 du 27 déc. 1973, Frontini et Pozzani, Case n° 183/73, Giur. Cost. I 2401; Fragd Judgment of Apr. 21, 1989, Corte cost., Italy, 34 Giur. Cost. 11001.*

22 Judgment of the Court of 14 May 1974. Case 4-73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*, ECLI:EU:C:1974:51 *European Court Reports* 1974-00491.

23 *Ibid.*, para. 13, p. 507.

24 Declaration on European Identity. Document on The European Identity published by the Nine Foreign Ministers on 14 December 1973, in Copenhagen, *Bulletin of the European Communities*. December 1973, No 12. Luxembourg: Office for official publications of the European Communities, pp. 118–122.

25 German Federal Constitutional Court, judgment of 22 October 1986, 2 BvR 197/83.

Moreover, on the same wave of progressive orientation towards fundamental rights and principles, the Court took a step forward in this direction with its decision in *Les Verts v Parliament* in 1986. In this judgment the Court referred for the first time to the ‘Community based on the rule of law.’<sup>26</sup> Besides, the Court did not miss the chance to make a liaison between respect for the rule of law on the one hand and the supremacy of the Community law on the other.<sup>27</sup> The low-intensity constitutionalism<sup>28</sup> that was dominant until the founding of the Union was reshaped as a consequence of national constitutional pressures, intergovernmental developments, and constitutional interpretation by the European Court of Justice.<sup>29</sup> The reliance on the fundamental principles and rights in the progressive process of constitutionalisation of the European legal order was closely followed by the consequent case-law of the Court of Justice, as well as substantive normative changes introduced by the Treaty on the European Union.<sup>30</sup> In its Opinion 1/91, the ECJ announced that the Treaty was to be considered ‘a Constitutional charter of the Community based on the rule of law.’<sup>31</sup> According to in-depth doctrinal analysis provided by Joseph Weiler on the transformation of Europe,<sup>32</sup> the Court of Justice had to include the protection of fundamental rights to counterbalance the ‘democracy deficit in the Community decision making.’<sup>33</sup>

## ■ 2.2. *The role of the values and principles in creating contemporary European Constitutional Order*

Reconceptualising Communities into a *sui generis* entity, such as the European Union, was a complex process that encompassed the legal and political (re) building of a firm constitutional basis for further functioning.<sup>34</sup> The Treaties of Maastricht and Amsterdam introduced new structural elements understood as affirmations of fundamental rights and principles as foundations of the European project.<sup>35</sup> Safeguarding principles and fundamental rights were set as the primary

26 Case C/294/83, *Parti écologiste ‘Les Verts’ v. European Parliament*, ECR 1986-01339, para. 23.

27 *Ibid.*, para 23: ‘...inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty.’

28 Maduro, 2004, p. 3.

29 Lukić Radović, 2020, p. 4.

30 Treaty on European Union, OJ C 191, 29.7.1992, p. 1–112.

31 Opinion 1/91, European Court Reports 1991 I-06079, para 1.

32 Weiler, 1991, pp. 2403–2484.

33 Lukić Radović, 2020, p. 4.

34 Vlajković, 2022, p. 490.

35 Art. F (2), Treaty on European Union (92/C 191 /01), Official Journal of the European Communities No C 191 / 1, 29 July 1992: ‘The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms...and as they result from the constitutional traditions common to the Member States, as general principles of Community law’; Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, as signed in Amsterdam on 2 October 1997, amended Art. F (1) in the

goals of the EU's external and foreign policies.<sup>36</sup> This normative confirmation of the EU's legal system core elements manifested in two directions: the EU was undergoing a parallel process of politicization and constitutionalisation, and fundamental principles and rights permeated both the internal and external actions of the EU, thus strongly characterising its identity. It came "hand in hand" with the declaration of the Charter of Fundamental Rights in 2000, at the dawn of the greatest enlargement of the Union. Although the Charter is equivalent in effect to the founding Treaties, this document marked "another brick in the wall" of the EU constitutionality.<sup>37</sup> The Lisbon Treaty's unsuccessful predecessor – a Constitution for Europe – had already indicated a very prominent role of common values (once known as principles), highlighting that the Union was founded on values common to Member States. By consecrating a significant role to common constitutional traditions and national values of Member States, the Constitution for Europe intended to counter-balance another normative novelty. Namely, the principle of supremacy of EU law was envisaged in Article I-6, stating that: 'the Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States'. This was the first and only time in the history of European integration that the principle of supremacy was introduced into primary legislation. However, the attitudes of Member States' constitutional courts proved that it was in vain. Most constitutional bodies held that EU law could not have supremacy over national constitutional values and principles or Constitutions *per se*.<sup>38</sup> Thus, in the Constitution for Europe, fundamental values and rights are envisioned as elements of stronger constitutional cohesion but simultaneously as a reason for imposing national constitutional limits to the principle of primacy. This was still perceived as the continuation of the "defensive constitutionalism" approach adopted by national constitutional courts or, as Miguel Poiares Maduro described it,<sup>39</sup> the re-examination of 'how constitutional can the European Union be.'<sup>40</sup>

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following way: 'The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles that are common to the Member States.'

36 See for example Art. J(1) Treaty on European Union.

37 Lukić Radović, 2020, p. 3.

38 Besides aforementioned German and Italian doctrines, the French Constitutional Council was very vocal on the hierarchy of norms, stressing, in its Decision 2004-505 DC of 19 November 2004, that the Treaty establishing a Constitution for Europe would not affect the position of the national constitution as the highest norm in the domestic legal order. Three years prior, the State Council, in the case *Syndicat national de l'industrie pharmaceutique*, brought a Decision on 3 December 2001, where it stated that it gave precedence to all norms of the French Constitution over EU law. The Polish Constitutional Tribunal followed, and in its Decision K 18/04 underlined that 'the Constitution enjoys precedence of binding force and precedence of application within the territory of the Republic of Poland.' The same was with the Constitutional Court of Lithuania. See De Witte, 2011, p. 396.

39 Maduro, 2004, pp. 14–15.

40 *Ibid.*

The role of fundamental rights and values was reiterated in the Treaty of Lisbon without substantial changes from the previous Constitution. The narrative remained the same except for the contestable primacy provision. The European Union is founded and functions 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’ which are common to all Member States. These values are mentioned in the 10 Articles of the Lisbon Treaty, leading to further constitutionalisation and Europeanisation.<sup>41</sup> Together with the Charter on Fundamental Rights, the Treaty of Lisbon proved that ‘the only normatively acceptable construct is to conceive a polity as a Community of values...’ where ‘the commitment to human rights becomes the most ready currency.’<sup>42</sup>

Regarding the Charter, the issue of intertwining fundamental rights protection with the question of primacy emerged with the introduction of its Article 53. This article regulates the level of protection of fundamental rights but may pose a threat to the proper application of the supremacy principle. Although the issue of supremacy was skilfully avoided during the drafting of the Charter, this article carries a strong political message. It essentially means that Member States’ demands were met by clarifying that the national constitutions and the protection of fundamental rights guaranteed by them will in no way be replaced or pre-empted by the Charter. With a simple textual analysis of this article, we may conclude that it does not normatively change the level that has already been established in the legal framework of the EU but provides a ‘simple politically valuable safeguard,’<sup>43</sup> which would reduce the fear that the Charter could be the basis for an additional restriction of rights that were previously guaranteed by other national or international instruments. The fear of the potential abuse of Article 53 was to a certain extent justified. On the part of the EU, the reasons can be found in the tendencies already affirmed of national constitutional courts limiting the application of community law by respecting the basic rights guaranteed by the Constitution, and therefore, by their own constitutional control and assessment. However, the Member States, supported by the argumentation of the protection of their own constitutional *specificum*, could also avoid turning to standard judicial dialogue precisely in fear of the possible outcomes of Charter interpretation by the same CJEU. This is due to the Court’s proven tendency to prioritise the level of protection provided by the Union to the detriment of the national one, thereby neglecting the existence of exclusive national fundamental rights and values, as well as constitutional traditions.

Evidently, the Court of Justice played a significant role in constitutionalising the European Union legal order and legitimising the European project, taking into

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41 Arts. 2, 3, 7, 8, 13, 14, 21, 32, 42 and 29 of the Lisbon Treaty. Vljaković, 2022, p. 488.

42 Weiler, 1991, cited in Lukić Radović, 2020, p. 5.

43 Liisberg, 2001, p. 38.

consideration all its fundamental elements from the rule of law to fundamental rights. Judicial activity on the European side has not been neglected, especially in the post-Lisbon era. To be more precise, since the 2000s, its jurisdiction in the said matter has been ‘deepening and broadening in a linear fashion.’<sup>44</sup> A prominent example is given in its *Kadi I* judgment.<sup>45</sup> As the president of the CJEU, Koen Lenaerts stated while analysing the concluding remarks of the Courts’ decision, the common values on which the EU is founded are also ‘the backbone of a Union based on democracy, justice and law.’ They secure the autonomy to the Union’s legal order, and their respect should always take precedence over other international legal actions. In this case, the UN Security Council sanctions are implemented through EU legislative measures.

### **3. The role of the rule of law and fundamental rights in the enlargement process: external aspects**

The EU has managed to transform into the organization that it is today in greatest part due to the fact that over the course of its existence it has been dedicated to territorial expansion. This has not always been as smooth as it may appear, considering that this expansion is quite significant, achieved in a relatively short period of time, and aims to create a unique, extremely close-knit union of nation-states. Considering that every Member State must agree to each enlargement, this process has always been driven or hampered by a myriad of factors ranging from those that are political to those related to the technicalities of the process.

The EU and its Member States undoubtedly learned from each enlargement experience and eventually managed to produce a set of criteria that must be met for prospective members to accede to the EU. These criteria, now colloquially known as the Copenhagen criteria,<sup>46</sup> after the 1993 European Council where they were first established, and further reinforced by the 1995 Madrid European Council, present a broad set of rules to which a prospective member needs to adhere to meet the requirements stipulated in Article 6 and Article 49 TFEU.<sup>47</sup> The first criterion clearly indicates that EU membership is based on a value system established on strict adherence to the rule of law, democracy, and fundamental rights, whereas the third criterion sets grounds to ensure the application of the

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44 Lukić Radović, 2020, p. 5.

45 Judgment of the Court (Grand Chamber) of 3 September 2008, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, Joined cases C-402/05 P and C-415/05 P, ECR 2008 I-06351, EU: C:2008:461.

46 Copenhagen European Council, Presidency Conclusions [1993] SN 180/1/93 REV 1.

47 The values that require adherence are stipulated in Art. 2 TEU as follows: respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights, including the rights of persons belonging to minorities.

supremacy of EU law; that is, it is supposed to be a clear indication of preparedness to assume the rights and obligations pursuant to EU membership and fit into what makes the body of EU law. Although these criteria are mutually accepted and at first glance may seem undisputable, in every case when actual countries were examined against them, it appeared that different states and cultures may attribute different meanings to them; this has inevitably led to a number of obstacles, misunderstandings, stalling of accession negotiations, frustration, and negative sentiments towards the EU and its members. Turkey's lengthy accession negotiation and pre-accession phase clearly demonstrates how, over the course of the years, if reforms adopted by the candidate country are not reciprocated with accession advancement, backsliding is inevitable. The case of the Western Balkans is an even more salient example for this statement, where all states are continuously treated identically despite their differences, which discourages them from continuing their rule of law reforms and contributes to the overall negative sentiment towards the EU and the importance of adhering to its values and principles. With the recently granted candidate status to Ukraine and the confirmation of the European perspective to Georgia and Moldova, which was clearly not based on their respective reforms in relation to the rule of law and other EU values, the external aspect of the rule of law has become even more vague and even trivialised; thus, it now appears as a policy measure that is easily bent to pragmatic political ends. In addition, as political criteria often develop into some form of political conditionality that is often criticised for its inconsistency and even regarded as counterproductive in the process of attaining the set goals,<sup>48</sup> it is often impossible to advocate for strict adherence to EU values and expect them to be understood and applied universally throughout the Union and within its partner states. Furthermore, if the premise is that all European states share the same European values that are reflected in the EU legal order and constitutional setup that subsequently allows for them to eventually join the EU, why is it necessary for these states to prove that they indeed adhere to these values, and why do they have to be conditioned into reforming their statehood in a way that will be indicative of the presence of these values? This approach demonstrates that all actors involved in the process are aware that these values at times appear a mere proclamation rather than an issue of substance. Taking into account the fact that the political accession criteria are simultaneously actual legal values and principles and the very basis of the legal aspects of accession with their concrete understandings and implications, the need for a uniform approach to adherence to the rule of law and fundamental rights criteria, while simultaneously acknowledging the fact that there are many inconsistencies in their implementation, has become self-evident. For EU values to be effective throughout the Union, the way they are perceived in the countries that fall under the scope of the enlargement policy is equally

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48 Smith, 1998, p. 254.

important. Only with genuine adherence to these principles and values and their consistent implementation can we truly ensure the proper functioning of the EU constitutional order and EU law.

The EU initially came into existence as an economic union of like-minded nations. From that point on, it expanded in ways that could not have been foreseen as a possibility in that initial setting. Economic co-operation requires a uniform legal approach. Legal approximation paved the way for certain constitutional issues, and further economic and political development of the Union depended on enlargement. With each new territorial expansion, the importance of common values and principles for the maintenance of the established order became more palpable but, simultaneously, more fragile. Enlargement most certainly makes the Union ever stronger; however, it introduces a period of integration of a new state in which the entire Union is exposed to significant vulnerabilities. In the process of enlargement, the European Union secured the implementation of its law even outside its territory. There have been many instances of territorial expansion in the application of EU Law. First, the core of accession negotiations is based on the approximation of laws – that is, on the development of the ability to assume membership obligations.<sup>49</sup> States under the enlargement policy have been in the process of harmonising their laws for decades. This mechanism allowed for EU law to enter the national legal systems of several neighbouring countries, creating *de facto* territorial expansion. These practices also exist in Eastern Partnership countries.<sup>50</sup> This obligation was established through association agreements.<sup>51</sup> This obligation of prospective members has been introduced by the same treaties that insist on the promotion of fundamental rights as the connective tissue leading to further integration. Another example of this territorial expansion of EU law outside the EU in certain policy areas that are dependent on network infrastructure to function properly is the Energy Community Treaty,<sup>52</sup> which defines the extension of the EU *acquis* under Title II in the fields of energy, environment, competition, and renewables, and a possibility for extension to other areas, and a clear timeline, guidelines, and country-specific approach to the approximation of laws reinforced by the implementation and dispute resolution mechanism. We can

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49 Vljaković and Tasev, 2021, p. 91.

50 Paivi and Petrov, 2009, pp. 655–671.

51 The EU concluded association agreements with its partners under the European neighbourhood policy where accession is a possibility. For the Western Balkan region this instrument is adapted and known as the stabilisation and association process. The said agreements, both the association agreements in Eastern Partnership countries and the Stabilisation and Association Agreements in the Western Balkans, establish the obligation of the harmonisation of laws. The idea is for the state in question to gradually align its legal system to that of the EU so that advanced cooperation can further develop regardless of eventual membership.

52 2006/500/EC: Council Decision of 29 May 2006 on the conclusion by the European Community of the Energy Community Treaty OJ L 335M, 13.12.2008, pp. 374–382 (MT), OJ L 198, 20.7.2006, p. 15–1.

conclude that EU law, or at least its fragments, is *de facto* applicable and valid in many countries outside EU territory, primarily other countries on European soil, which can certainly underpin its further development and stronger integration within the EU. However, the values of the EU legal system cannot be transposed through purely technical and legislative undertakings. Likewise, with the *de facto* territorial expansion of the validity of EU law, they also need to be uniformly understood and implemented outside the jurisdiction of the EU with the intention of securing the proper functioning of the EU legal order and its external tendencies. This is where conditionality comes into the picture as one of the most obvious mechanisms for enforcing the implementation of sophisticated and intricate concepts such as the rule of law.<sup>53</sup> This quintessential legal and political value, as observed by scholars, is often misconstrued by practitioners, that is, those in charge of securing the rule of law reform in a specific country.<sup>54</sup> The practitioners are focused on being able to transplant institutional set-ups and procedures deemed “best practice” to nations ‘that lack the historical processes that gave rise to the rule of law in the modern West.’<sup>55</sup> This inevitably leads to the rule of law being understood as a mere institutional or procedural measure to be undertaken to attain a certain goal, be it financial aid or incentives, or political advancement in EU accession negotiations. This constant struggle between the rule of law as a value and the rule of law as an indication of political commitment leads to its trivialisation and many difficulties related to its implementation and understanding.

With the undisputed correlations of the rule of law, fundamental rights, and democracy, the remaining EU constitutional order values follow the same footsteps. So closely linked together, yet with many unanswered questions of their own, they often pose major points of disagreement and misunderstanding. Although in terms of enlargement all these difficulties may be, to a much lesser extent than in their global outreach, fundamental rights as perceived on

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53 De Ridder and Kochenov explained that the conditionality criteria consist of democratic conditionality and *acquis* conditionality. However, they underlined that the application of conditionality criteria, especially related to political criteria, that is built upon democracy, rule of law and fundamental rights, lack(ed) ‘any clarity as to what was actually expected of the candidates willing to accede.’ This resulted in the absence of clear and concise demands when it comes to standards that the countries would have to comply with. Crucial issues that needed to be tackled by the EU when applying conditionality criteria are serious assessments and clear standards. See De Ridder and Kochenov, 2011, pp. 597–598.

54 Magen, 2009, p. 58. Kochenov also draws attention to the fact that it is ‘possible to observe that the Copenhagen related documents give priority to the assessment of the rule of law, without concentrating on the analysis of the democratic process in the candidate countries in necessary detail.’ Therefore, the mere assumption ‘that the famous accession criteria and the political criteria in particular, as formulated at Copenhagen’ are clear and precise enough is not enough ‘in order to serve as a real measurement tool for the progress made by the candidate countries towards accession.’ See Kochenov, 2004, pp. 12–23.

55 Magen, 2009, p. 59.

European soil, despite numerous similar historic factors that shaped European culture, are not without challenges. Simply put, although the major setbacks regarding fundamental rights may be of a lesser scope, sometimes pertaining mostly to the rights of a certain group, the notion that human rights as such are not accepted as normative standards everywhere in the same manner, nor are they supported on universally accepted moral grounds,<sup>56</sup> is present even in the case of EU enlargement. Taking into consideration numerous examples of countries being in breach of fundamental rights as stipulated by the EU Charter and the tendency of EU institutions to turn a blind eye to these issues due to certain collective or individual political aspirations or interests, this fragment of the first Copenhagen criterion is yet another indication of how the external perception of EU values can be as important as the internal.

While EU membership may appear as the end of the road from the perspective of a state involved in accession negotiations, it is essentially the beginning of a new journey. All these misunderstandings and policies based on the conditionality approach will continue to exist, even on the other side of the border. This spillover effect is the root cause of challenges related to the implementation of the rule of law as a value and legal concept within the EU. Adding the supremacy of the EU law principle to this equation, with a growing stronger sentiment of national identity, it is clear that the EU values and principles and the Union's tendency to grow in every way are intertwined. That said, the fact remains that the rule of law and fundamental rights are at the very core of the enlargement policy, not only for their legal and political aspects but also for their moral grounds and value-based systems, and consistent adherence to the first Copenhagen criteria is essential for both their external and internal components. The rule of law and fundamental rights will always remain something to strive for and will never be presumed as inherent to a certain state or culture, and any contrary conviction can lead to falling into a dangerous trap, both for the perseverance of the EU constitutional and legal order and the prosperity of individual rights and liberties.

#### **4. Complementary and counterbalancing aspects of the rule of law, fundamental rights, and the supremacy of EU law**

##### **■ 4.1. *The relationship between the rule of law, fundamental rights, and the supremacy of EU law before CJEU***

The CJEU's post-Lisbon case-law has extensively addressed the challenge of balancing the principle of EU supremacy, on the one side, with the ongoing development of the EU constitutional foundations, on the other. This was particularly the

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<sup>56</sup> Martin, 2013, p. 61.

case when it comes to fundamental rights protection. The 2013 *Melloni* judgment<sup>57</sup> underlined how challenging the interpretation of Article 53 of the Charter could be for balancing interests between the national and supranational legal orders. The Court of Justice underlined the importance of the Charter and the minimum standard for the protection of guaranteed fundamental rights. However, the CJEU expressed an inflexible approach that aimed at sending a message to the Member States that the uniform application of EU law, efficacy, and supremacy of EU law are crucial elements for the functioning of the EU legal order. It acted in a way that allowed for the reconfirmation of the importance of the supremacy principle and ensured that Article 53 would not be considered an exception or even a *carte-blanche* to the said principle.<sup>58</sup> The same formulation “(su)primacy, unity and efficacy” was used in the subsequent case before the CJEU that considered a preliminary reference from Sweden regarding the application of EU law and not contravening *ne bis in idem* rule guaranteed by both the Charter and the European Convention on Human Rights.<sup>59</sup> Nevertheless, the arguments from both judgments formed solid ground for the Court’s narrative in Opinion 2/13, contrary to the aspirations stated in Article 6(2) TEU. There are two key paragraphs of this opinion that define the relationship between the EU legal order and others, as well as the European (constitutional) identity. As the Court of Justice highlighted in paragraph 167 of Opinion 2/13,

These essential characteristics of EU law have given rise to a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States with each other, which are now engaged, as is recalled in the second paragraph of Article 1 TEU, in a ‘process of creating an ever closer union among the peoples of Europe...’<sup>60</sup>

The aim was to build a stronger Union underlying the specificity of EU legal order

based on the fundamental premise that each Member State shares with all the other Member States, and recognizes that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU.<sup>61</sup>

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57 Judgment of 26 February 2013, C-399/11 *Stefano Melloni v. Ministerio Fiscal*, ECR, EU: C:2013:107.

58 Lukić Radović, 2020, p. 6.

59 Judgment of 26 February 2013, C-617/10 *Åklagaren v. Hans Åkerberg Fransson*, ECR, ECLI:EU:C:2013:105.

60 Opinion 2/13 of the Court (Full Court) 18 December 2014, ECLI:EU:C:2014:2454, para 167.

61 *Ibid.*, para. 168.

As previously mentioned, the reasoning in the *Kadi* judgments, as well as the opinions delivered on the occasion of accession to the Convention, clearly show the tendency of the Court of Justice of the EU to reaffirm the specificity of the Community legal order based on EU values, which are a catalyst for linking national legal orders into a single European order with its own international identity.<sup>62</sup>

After the *Melloni* and *Akeberg Franson* judgments concerning the determination of an adequate level of protection of fundamental rights, the question of who or whose court had the last word was again at the centre of the judicial dialogue between legal orders. Following the CJEU's initial setback in the first *Taricco* judgment,<sup>63</sup> which only expanded the *Melloni* argumentation, the Italian court was ready to 'hit back' by invoking the *contralimiti* doctrine, which led to a nuancing of the supremacy principle by the Court of Justice in the *Taricco II* judgment, that is, *M.A.S.*, *M.B.*<sup>64</sup> In *Taricco*, the Court highlighted the problem of articulation between the legal order of the Union and the national legal order. Conflicts arose due to the determination of different scopes of the principle of legality in the EU on the one hand and in the Italian legal order on the other. The case also highlights the longstanding issue of balancing the protection of fundamental rights that are protected by the Charter and the protection of rights that are guaranteed by the national Constitution. As Rauchegger rightly noticed in the *Taricco* case, 'the disapplication of the Italian limitation rules in question was compatible with the right enshrined in the Charter, but incompatible with the equivalent Italian constitutional right.'<sup>65</sup> In relation to that, these judgments also contributed to the judicial relativisation of the supremacy principle in favour of the higher level of protection of fundamental rights guaranteed in the national legal and constitutional orders. Many called this judicial solution and the new interconnection between fundamental rights protection and the supremacy principle 'a new chapter in the judicial dialogue.'<sup>66</sup>

In the same period, the Court found itself in a position to determine the applicability of the EU Law of Fundamental Rights to private parties' litigation.<sup>67</sup> The *Samira Achbita*<sup>68</sup> case was important, as the Court discussed the importance of the minimum harmonisation of fundamental rights protection in the EU.<sup>69</sup> Again, the Court turned to balancing interests, giving a wider margin of appreciation to the Member States, which was read as a compromise or concession given to the national

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62 Lukić, 2015, pp. 127–137.

63 Judgment of 8 September 2015, C-105/14 *Ivo Taricco and Others*, ECR, EU: C:2015:555.

64 Judgment of the Court (Grand Chamber) of 5 December 2017 Criminal proceedings against *M.A.S.* and *M.B.*

65 Rauchegger, 2018b, p. 1521.

66 Faraguna, 2017.

67 Marín Aís, 2018, pp. 409–417.

68 Judgment of the Court (Grand Chamber) of 14 March 2017. Case C-157/17 *X v Staatssecretaris van Financiën*, ECLI:EU:C:2017:203.

69 Čučković, 2021, pp. 263–288.

legal systems and another step towards relativisation of the EU supremacy *par rapport* constitutional principles, guarded by constitutional identity protection.<sup>70</sup>

Subsequently, in the case *l'Associação Sindical dos Jutes Portugueses*, the initial premise of the Court's reasoning was the importance of Article 2 as referenced in Opinion 2/13, specifically in Paragraph 168. The Court underlined that Article 19 TEU specifies the values from Article 2, namely, the rule of law, and linked Article 19(1) TEU with the foundations of the European legal order embodied in Article 2 TEU. The Court of Justice emphasised its role, as well as the role of national courts, in protecting the rule of law. Simultaneously, it paved the way for further application of this narrative in similar cases. In 2019, in the case of the European Commission v Republic of Poland, AG Tanchev precisely highlighted the role of Article 19 in giving concrete expression to the rule of law that is both protected as a value but also determined by the protection of fundamental rights guaranteed by the EU legal system on an equal basis as legal principles.<sup>71</sup>

Finally, adequate examples where fundamental rights protection and the principle of supremacy are interconnected are present in CJEU activity in the field of the European Arrest Warrant (EAW) and asylum policy in recent years. Regarding the former, linking the Court's narrative with the Melloni case in every subsequent decision was inevitable. The CJEU's approach to Article 53 of the Charter in the Melloni case clearly underlines the right of Member States to apply a higher standard of protection of fundamental rights as long as they respect the supremacy, unity, and effectiveness of EU law. However, in the so-called Solange III case, the German BVerfG determined that identity review (*identitätskontrolle*) and the Solange doctrine remained the main instruments for the adequate protection of fundamental rights guaranteed in the German Basic Law.<sup>72</sup> This somewhat defiant stance of the Karlsruhe court demonstrated the growing tendency of national courts to protect the constitutional core, despite the settled Melloni approach. It seems that the BVerfG developed a new condition for the application of the principle of EU supremacy,<sup>73</sup> that is, an identity review that guarantees respect for German fundamental rights in every individual case,<sup>74</sup> thus nuancing once again the supremacy of EU law in favour of higher national fundamental rights protection. These and similar decisions are very important *feu rouge* for the CJEU's future approach to value-based decisions.

Conversely, in one of the most recent decisions regarding asylum policy, the CJEU held that 'EU law precludes legislation under which, in the event of a

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70 See Opinion of Advocate General Kokott delivered on 31 May 2016. C-157/15 *G4S Secure Solutions*, ECLI:EU:C:2017:203.

71 Opinion Of Advocate General Tanchev delivered on 20 June 2019, C-192/18 *European Commission v Republic of Poland*, ECLI:EU:C:2019:924, para 95.

72 BVerfG, 15 December 2015, 2 BvR 2735/14 Solange III.

73 Rauegger, 2018a, p. 95.

74 *Ibid.*, p. 113.

mass influx of third-country nationals, an asylum seeker may be detained on the sole ground that he/she is staying illegally,<sup>75</sup> was in the request for a preliminary ruling by the Supreme Administrative Court in Lithuania in 2021. Here, the Court considered the standards of human rights protection guaranteed in the European Convention with special emphasis on the relevant articles of the Charter, stating that their respect, combined with the obligation to respect ‘Article 8(2) and (3) of Directive 2013/33 must be interpreted as precluding legislation of a Member State’.<sup>76</sup> When it comes to proper interpretation of EU secondary legislation and thus adequate application of said legislation, the Court of Justice in the subsequent case considered whether the Dublin III Regulation, read in conjunction with the EU Charter, provided an unaccompanied minor right to appeal, that is, the right to judicial remedy.<sup>77</sup> The Court held that it could and reminded that ‘it should be recalled that, in accordance with the Court’s settled case-law, the rules of EU secondary legislation must be interpreted and applied in compliance with fundamental rights’.<sup>78</sup> This 2022 case represented a good example of the perpetual interconnection of respect for the EU rule of law and fundamental rights by taking into account the provisions of the Charter to properly apply the legislation in Member States. Moreover, it underlined that the EU legal system could function properly only if all elements of its constitutional core were considered in the judicial dialogue between legal orders.

#### ■ 4.2. *Legislative solutions of the EU to ensure respect for the rule of law in light of contemporary challenges*

In recent years, much debate has arisen concerning the effectiveness of the EU’s response to the rule of law crisis,<sup>79</sup> with EU officials and scholars vigorously examining the rule of law backsliding.<sup>80</sup> It should once again be emphasised that the understanding of the rule of law, being a meta-value, is a very complex matter.<sup>81</sup> Dale Mineshima stresses the two dimensions of said complexity within the EU legal order: ‘...the discrepancy between the identification of the rule of law as very important within the Community, and, simultaneously, the lack of a uniform conception for this fundamental principle’.<sup>82</sup>

75 Judgment of the Court (First Chamber) of 30 June 2022 (request for a preliminary ruling from the Lietuvos vyriausioji administracinis teismas – Lithuania), C-72/22 PPU, ECLI:EU:C:2022:505.

76 Ibid., para. 93.

77 Judgment of the Court (Grand Chamber) 1 August 2022. C-19/21 I és S kontra Staatssecretaris van Justitie en Veiligheid, ECLI:EU:C:2022:605.

78 Ibid.

79 Peirone, 2019, pp. 57–98.

80 Kochenov, 2019, pp. 33–50.

81 Vlajković, 2020, pp. 235–257.

82 Mineshima, 2002, pp. 73–87.

In addition, the EU has turned to various mechanisms to cope effectively with issues of respect for the rule of law throughout its territory. Therefore, the responsibility for backsliding is divided among all stakeholders, challenging the European integration project and the foundations of EU constitutionality.

Aside from the political and legal “tools” already in force,<sup>83</sup> in 2018 the European Commission presented its Proposal for a Regulation on the protection of the Union’s budget in cases of generalised deficiencies as regards the rule of law in the Member States,<sup>84</sup> putting once again the institutional focus on the ongoing rule of law backsliding in the EU. According to European officials, the issue was not only whether the rule of law should be protected in the EU legal and political system but also what the most efficient way to do so is. A Europe of values had to be preserved at all costs, and that was the rationale for every tool that was envisaged or even implemented in practice, starting from the activation of Article 7(1) TEU, infringement procedures before the CJEU, and numerous Commissions’ Communications.<sup>85</sup> It seemed that in the time of the “poly-crisis,”<sup>86</sup> it was not possible to find a common answer to the value crises, with special emphasis on the protection of the rule of law that is, according to Commissioner Reding, ‘in many ways a prerequisite for the protection of all other fundamental rights listed in Article 2 TEU and for upholding all rights and obligations deriving from the Treaties.’<sup>87</sup> The first Rule of Law Report, published in September 2020, highlighted that the ‘first reflection is on the rule of law culture and on the level of trust in the checks and balances in Member States.’<sup>88</sup> The EU Commission went on to publish the Report in the following three years, trying to underline the gaps in the protection of the rule of law in specific Member States and identify challenges to further develop the substantive understanding of the rule of law as a leading value in the EU legal system.<sup>89</sup>

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83 Such as the EU Commission’s Framework to Strengthen the Rule of Law or the 2018 Commission’s Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union’s budget in case of generalised deficiencies as regards the rule of law in the Member States or finally the Rule of Law Report: The rule of law situation in the European Union, issued by the Commission in 2020.

84 Proposal for a Regulation of the European Parliament and of the COUNCIL on the protection of the Union’s budget in case of generalised deficiencies as regards the rule of law in the Member States, COM/2018/324 final – 2018/0136 (COD).

85 One of them being Communication from the Commission (COM) 2014/0158 to the European Parliament and the Council a new EU Framework to strengthen the Rule of Law, 2014 and later on 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.

86 Jean Claude Juncker, 2016, cited in Lukić Radović, Vlajković, 2021, p. 58.

87 Reding, 2013.

88 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2020 Rule of Law Report The rule of law situation in the European Union, Brussels, 30.9.2020, COM (2020) 580 final, pp. 6–7.

89 European Commission, 2023.

Besides the country-specific analysis, which is undoubtedly an added value to the rule of law toolbox, the issue of the effectiveness of this Mechanism has come into question with the following reports. First, aside from shedding light on the issues and challenges and encouraging and enabling inter-institutional dialogue, it does not answer the question of enabling dialogue with States that chose not to respect the rule of law checklist provided by the said Mechanism. In addition, considering that this kind of reporting is very similar to pre-accession reporting with respect to the criteria and negotiating chapters, it does not offer a new element for the prevention system that would in some way reverse the ongoing breach. This Mechanism was reinforced by the rule-of-law conditionality mechanism proposed in 2018 and adopted during the COVID-19 pandemic in 2020. Following three weeks of blockade in Brussels, and continuous negotiations that lasted four days, final “blessing” was given to the NGEU. The central part of the conflict was precisely the implementation of the NGEU’s centrepiece, the Rule of Law Conditionality Regulation (the Regulation).<sup>90</sup> France and the Presiding Member State, Germany, supported the rule of law conditionality envisaged by the said Regulation, with Macron describing it as ‘not a perfect mechanism, but a mechanism that is able to change something fundamental.’<sup>91</sup> The Regulation was, however, contested before the CJEU on several grounds,<sup>92</sup> among which the most prominent was the argument that there was no appropriate legal basis in the TEU and TFEU for the said regulation and that the EU had breached the principle of legal certainty, having exceeded its powers.<sup>93</sup> However, this joint action for annulment was not successful, as the Court dismissed it, relying heavily in its argumentation on the rule of law and fundamental rights that are at the core of EU existence.

the Court points out that compliance by the Member States with the common values on which the European Union is founded – which have been identified and are shared by the Member States and define the very identity of the European Union as a legal order common to those States – such as the rule of law and solidarity, justifies the mutual trust between those States’.<sup>94</sup>

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90 Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget [2020] OJ L 433 I/1.

91 Gehrke, 2020.

92 Judgments in Cases C-156/21 *Hungary v Parliament and Council*, ECLI:EU:C:2022:97 and C-157/21 *Poland v Parliament and Council*, ECLI:EU:C:2022:98.

93 Court of Justice of the European Union, 2022.

94 Case C-156/21 *Hungary v European Parliament and Council of the European Union* Judgment of the Court (Full Court), 16 February 2022 – Résumé.

However, this motivated the EU Commission to clarify several elements connecting the conditionality mechanism with the rule of law in consultation with the EU Parliament and Member States, setting guidelines for its application.<sup>95</sup> It remained to be seen whether every instrument envisaged to protect the fundamentals could effectively supplement the workload of the CJEU, upgrading the rule of law and fundamental rights protection, and not turning new legislative solutions into a political battlefield for ‘who will have the last word’, that is, into a confrontation over supremacy issues.<sup>96</sup>

## 5. Conclusion

The concepts of EU values and fundamental rights continue to intrigue scholars and practitioners. With the territorial expansion of the Union, the founding EU principles and values are put to the test through exposure to two divergent tendencies.

Primarily, there is a tendency of new Member States to introduce different outlooks on the essence of EU values, which inevitably leads to a series of difficult questions that need to be addressed in a consistent manner. Considering the struggles the EU faces to align its legal order with the national legal orders of Member States while preserving the supremacy principle, these additional interpretations make constitutional processes more complex and require adamant consistency. Second, the territorial expansion of the Union allows for its values and principles to become the norm across a larger territory, which evidently contributes to their universal quality. Therefore, to be comprehensively observed, the rule of law and fundamental rights need to be studied from the point of view of both Member States and the states developing close ties with the EU itself. It should not be disregarded that the goals and values of Member States are not only the contributing factors in the creation of the values and norms of the Union but are in fact shaped by them.<sup>97</sup> Each Member State has added substance to the meaning and implementation of EU values as much as it has contributed to the difficulties of their presumed universality. In light of the effects of this enlargement, even other states and their views of these concepts will have a significant impact on how they evolve. This outside perspective is where the Union needs to express firm consistency to avoid being called upon for not obeying its own rules. It is often quite difficult to fulfil this requirement, considering that EU values are

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95 Communication from the Commission Guidelines on the application of the Regulation (EU, EURATOM) 2020/2092 on a general regime of conditionality for the protection of the Union budget, Brussels, 2.3.2022 C(2022) 1382 final.

96 About the challenges posed by the introduction of the conditionality mechanism, see more in: Lukić Radović, Vlajković, 2021.

97 Schimmelfennig, 2005, p. 173.

not merely legal concepts but also largely political. It should not be neglected that strict adherence to the rule of law and respect for fundamental rights play key roles in fostering enlargement and further integration.

The other equally important point of view for observing the rule of law and fundamental rights and their relationship with the supremacy principle is the insider's perspective, that is, the perspective of the driving forces of integrative processes within the Union. What we indicated in this paper through the presentation of the most relevant practice of the CJEU is that, although all stakeholders within the EU are presumed to be under the auspices of the same value system, there are many issues that need to be tackled in each individual case to secure further development of the EU constitutional setup and allow for the national identities of all Member States to be preserved. The role of the CJEU in these processes is certainly the most prominent, albeit a very challenging one. The CJEU needs to recognise the moment when the climate within the Union is right for stronger integration, while taking the risk of taking a step that may steer the whole process in a completely different direction. Conversely, the CJEU is expected to be progressive and work in the best interests of the Union, which is not always understood as the best interests of all its members. Political processes that occur at any given point in time, both European and global, have often made this task even more difficult. The balancing role of the CJEU is important in determining the national margin of appreciation in cases where the national standard of fundamental rights protection collides with the EU's longstanding stance on the supremacy of EU law. This calls for effective judicial dialogue, in which the nuancing of legal and political approaches is a delicate game entrusted to the CJEU.

We can conclude that the EU is now at a point where an understanding of the rule of law and fundamental rights has been put in the spotlight for further progress in EU integration. With growing political tensions and voices against externalising integration and continuing enlargement policies in favour of deepening internal integration, there is very little leeway for further unity in advancing the constitutionalisation of the EU order. Considering the contemporary challenges and ongoing crises, the re-examination of certain aspects of the value-based EU legal order seems unavoidable. However, the EU values and principles, including the protection of fundamental rights, are legal and political concepts, ideals, and goals to be constantly pursued. They have survived numerous challenges because of their ability to adapt and be transformed and reinterpreted while simultaneously remaining pillars of just and democratic legal orders. Overall, whether they serve as a counterbalance to the principle of supremacy of EU law or an essential element of EU identity, and thus a complement to supremacy, they are and should form the basis of the EU legal order, including the application of both EU internal and external integration policies. Without them, the constitutionalisation of the EU resembles a "ship without a rudder".

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