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Supranational Thinking out of the Box. "To Ensure that the Law is Observed": Anchoring the Value Turn and Supranational. Legality in the Case Law of the Court of Justice

Keywords: rule of law, values, the law, courtroom, Art. 19TEU, Art. 2TEU, consensus
Słowa kluczowe: praworządność, wartości, prawo, sala sądowa, art. 19 TEU, art. 2 TEU, konsensus

Abstract

In recent years, the European Union ("EU") has faced unprecedented challenges in the rule of law. Besides apparent dangers, it has also offered the Union, its institutions and member states important space for new openings, self-rediscovery, and revisiting certain integration paradigms. This analysis argues that the "rule of law/value crisis" in the EU has created the same space for the Court of Justice to take on the paradigmatic jurisprudential shift from the market to the union of law and values. It posits that the European discourse must revisit the theory of supranational adjudication and offer a new reading

of the Court's mandate and function within the evolving supranational governance and design. In this process, reference to Art. 19 TEU and its connection to Art. 2 TEU have a special explicatory and axiological significance.

Streszczenie

Nieszablonowe myślenie ponadnarodowe. „Zapewnić przestrzeganie prawa". Zakotwiczenie orzeczniczego zwrotu w kierunku wartości i ponadnarodowego legalizmu w orzecznictwie Trybunału Sprawiedliwości Unii Europejskiej

W ostatnich latach Unia Europejska stanęła w obliczu bezprecedensowych wyzwań w obszarze praworządności. Oprócz oczywistych zagrożeń, stworzyło to również Unii, jej instytucjom i państwom członkowskim ważną przestrzeń do nowego otwarcia, samopoznania i rewizji niektórych paradygmatów integracji. Niniejsza analiza dowodzi, że „kryzys praworządności/wartości" w UE stworzył dokładnie taką przestrzeń dla Trybunału Sprawiedliwości do paradygmatycznej zmiany orzeczniczej od rynku do unii prawa i wartości. Analiza ta dowodzi, że dyskurs europejski musi zrewidować teorię ponadnarodowego orzekania i zaproponować nowe odczytanie mandatu i funkcji Trybunału w ramach ewoluującego ponadnarodowego projektu. W tym procesie odwołanie do „prawa" w art. 19 TUE i jego powiązanie z art. 2 TUE ma szczególne znaczenie eksplikacyjne i aksjologiczne.

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Successful constitutional courts turn constitutions into constitutional law, that is they convert a text enacted at a given historical moment into a continuous, collective stream of case law.

Martin Shapiro, *The European Court of Justice*[1]

I. Setting the scene

In recent years, the European Union ("EU") has faced unprecedented challenges in the rule of law[2]. One of the main focal points of these problems is Poland, where the government's actions have undermined the basic princi-

[1] [in:] *The evolution of EU law,* eds., P. Craig, G. de Burca, Oxford 1999, p. 326.

[2] Several in-depth studies on the subject have appeared in the literature. Only by way of an example see D.R. Kelemen, K.L. Scheppele, *Defending Democracy in the EU Member States beyond art. 7 TEU* [in:] *The EU in populist times. Crises and Prospects*, ed. F. Bignami, Cambridge

ples of liberal democracy[3]. Besides the obvious dangers, it has also offered the Union, its institutions and member states important space for new openings, self-rediscovery, and revisiting certain integration paradigms[4].

This analysis argues that the "rule of law/value crisis" in the EU has created exactly such a space for the Court of Justice (the Court)[5]. Since 2017, the Court has laid the foundations for a jurisprudential paradigm shift to defend the integrity of the EU legal system[6]. As the Court has been searching for the optimal positioning and has been calibrating its judicial doctrines in today's less-than-perfect Union, we, in turn, have faced the challenge of making sense of the paradigmatic jurisprudential shift(s) that ultimately affect the heart and soul of an "ever-closer union among the peoples of Europe" and challenge the Member States' continuing fidelity to it[7]. Treaty objectives and design explicitly drew on the implicit understanding of the law of integration and the legal order to be put in place. The implicitness deferred the discussion of the core and content. All parties assumed that the rule of law was essential to the original consensus that would never be questioned. The rule of law crisis exposes the volatility of the implicit understanding(s). The journey within the

2019; P. Blokker, *The democracy and rule of law crises in the European Union and its Member States*, https://reconnect-europe.eu/wp-content/uploads/2021/04/D14.1.pdf (23.01.2024).

[3] W. Sadurski, *Poland's Constitutional Breakdown*, Oxford, 2019; G. de Burca, *Poland and Hungary's EU membership: On not confronting authoritarian governments*, "International Journal of Constitutional Law" 2022, no. 20, p. 13.

[4] T.T. Koncewicz, *Revisiting "An Ever Closer Union of Law and Values" Still paddling together?* "Przegląd Konstytucyjny" 2024, no. 1 (*forthcoming)* and *Charting a new path for "an ever-closer union among peoples of Europe". Epilogue or a new Prologue?*, "Przegląd Konstytucyjny" 2024, no. 2 (*forthcoming*). Also reference in note 7 *infra*.

[5] For most recent excellent overview of the Court, its institutional role and mandate consult T. Tridimas, *The Court of Justice of the European Union* [in:] *Oxford Principles of European Union Law*, eds. R. Schutze, T. Tridimas, Oxford 2018; *New Legal Approaches to Studying the Court of Justice Revisiting Law in Context*, eds. J. Scott, C. Kilpatrick, Oxford 2020.

[6] Among many analysis consult M. Bonelli, M. Claes, *Judicial serendipity: How Portuguese judges came to the rescue of the Polish judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical dos Juízes Portugueses*, "European Constitutional Law Review" 2018, no. 14, s. 622.

[7] T.T. Koncewicz, *What does it mean to be a Member State of the Union in 2022 and beyond?* https://reconnect-europe.eu/blog/what-does-it-mean-to-be-a-member-state-of-the-union-in-2022-and-beyond (23.01.2024) and *"The Ever Closer Union among the Peoples of Europe" in Times of War*, https://verfassungsblog.de/the-ever-closer-union-among-the-peoples-of-europe-in-times-of-war (23.01.2024) and reference in note 4 *supra*.

implicit understood as the shared understanding of essentials was present in the past, but as the Community grew, evolved and differentiated, the "shared" became contestable. Seen from that perspective, the rule of law crisis brings to light the misunderstandings and calls into question the avowed shared dimension of the implicit core of the Union. The rule of law crisis has the potential to play both an explicatory and revealing role. It might bring to the surface essential elements of the constitutional bargain and open the discussion on the final contours of what was presumed as fundamental yet implicit in the parties' decision to join the Communities in 1951.

It will be argued that the crisis has elevated implicit constitutional abeyances[8] to the mainstream constitutional discourse. The ambiguity and obscurity that defined constitutional abeyances is now replaced by open and critical bargaining over the explicit and the states' acceptance limits. Tacit understandings are turned into loud misunderstandings and the Court is caught in this critical axiological juncture.

This analysis argues that European discourse must revisit the theory of supranational adjudication and offer a new reading of the Court's mandate and function within the evolving supranational governance and design. Given the centrality of the Court in the supranational design, its prominent role in its constitutionalisation[9], and its leading role in bringing the value of constitutionalism to the centre of the supranational discourse[10], judicial power merits renewed attention. Today, the Court finds itself in a very delicate position:

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[8] M. Foley has argued that a written constitution is not all that it documents and the "written" part of the constitution may be its least important part. He locates a third profoundly fundamental dimension that goes beyond the "written-unwritten" distinction. This dimension rests upon the recognition that in both written and unwritten constitutions there remains an undisclosed component upon which the stability of a constitution's meaning and authority depends. The layer "[…] accommodates those implicit understandings and tacit agreements that could never survive the journey into print without compromising their capacious meanings and ruining their effect as a functional form of genuine and valued ambiguity"; *The Silence of Constitutions. Gap, 'abeyances' and political temperament in the maintenance of government*, London 2011, pp. 7–8.

[9] On role of art. 19: R. Barents, *Remedies and Procedures before the EU Courts*, Wolters Kluwer 2016, pp. 107–125 and T. Tridimas, *op.cit.*, In Polish with further references T.T. Koncewicz, *Filozofia unijnego wymiaru sprawiedliwości*, Warsaw 2021.

[10] L.S. Rossi, *La valeur juridique des valeurs. L'article 2 TUE: relations avec d'autres dispositions de droit primaire de l'UE et remèdes juridictionnels*, "Revue trimestrielle de droit européen" 2020, no. 3, p. 639.

it not only defines the supranational legality and defends it but is also defined by the feedback it gets from its most direct interlocutors: member states, the national courts, and individuals[11]. Faced with the unprecedented and persistent backlash against its own authority, the Court has faced an unenviable conundrum: trapped between what is now clearly a counter-factual assertion ("common values"), on the one hand, and the pragmatic judicial path and mandate that binds the Court to the "community based on the rule law" mast against all odds, on the other. As the Court has searched for the optimal positioning and has calibrated its judicial doctrines in today's less-than-perfect Union, we face a conceptual challenge of making sense of the paradigmatic jurisprudential shift from the market to the values. This shift is seen as paradigmatic because it will ultimately affect the heart and soul of an "ever-closer union among the peoples of Europe" and test the Member States' continuing fidelity to it[12]. In this spirit, this analysis argues that the case law built around the the "law of integration" (Art. 19 TEU) and the "common values" (Art. 2 TEU)[13] must anchor the Court's present and future trajectory within the Union not simply of "the law" but also "of the values".

II. Why article 19 TEU?

Article 19 (1) TEU (formerly Art. 220 EC and Art. 164 EEC) mandates the Court to ensure that in the interpretation and application of the Treaty, "the law" (*le droit/il diritto/el derecho/het recht/das Recht/prawo*) is observed[14].

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[11] R.D. Kelemen, *The Court of Justice of the European Union in the Twenty-First Century*, "Law and Contemporary Problems" 2016, no. 79, p. 117.

[12] T.T. Koncewicz, *What does it mean to be a Member State of the Union in 2022 and beyond?* at https://reconnect-europe.eu/blog/what-does-it-mean-to-be-a-member-state-of-the-union-in-2022-and-beyond (23.01.2024) and *"The Ever Closer Union among the Peoples of Europe" in Times of War*, https://verfassungsblog.de/the-ever-closer-union-among-the-peoples-of-europe-in-times-of-war (23.01.2024).

[13] F. Schorkopf, *Value Constitutionalism in the European Union*, "German Law Journal" 2020, no. 21, p. 956.

[14] A.-M. Donner, *La justice, factor d'unite et d'egalite du droit*, "Journal des Tribunaux" 1962, no. 11, p. 649 and P. Pescatore, *Rôle et chance du droit et des juges dans la construction de l'Europe*, "Revue internationale de droit comparé" 1974, no. 26, p. 5.

From the Court's perspective, the reference to "the law" has always played a fundamental role in developing the law of integration. The institutional trajectory of the Court clearly shows that Art. 19 TEU has always played a systemic ordaining function. First, it has moved the governance from power-oriented to rule-oriented politics. Second, it has stood for "the supranational legality". Third, it has both empowered and delimited the Court. Fourth, it has expressed the fundamental idea of judicial protection which has allowed the Court to interpret the jurisdictional clauses in a manner that is coherent and constructive. Fifth, it has defined normative space within which the Court exercises its judicial power. Sixth, it has underscored that the courts of the Union – both national and EU – are courts of law and that the Union is governed by law. And yet, despite all this accumulated wisdom, the importance and reformative potential of "the law" seems to be continuously overshadowed by the effective judicial protection limb of Art. 19 TEU. The reformative potential of "the law" has not been appreciated by the doctrine with the attention it deserves. The novelty of this paper resides thus in rediscovering the importance and centrality of "the law" in Art. 19 TEU when read in conjunction with Art. 2 TEU. The connection is crucial yet remains underdeveloped. The supranational legality built on, and around, Art. 2 and Art. 19 TEU, becomes a key concept that not only defines the supranational design and governance, but makes for the most distinctive feature of the supranational overlapping consensus[15].

III. Revisiting "the law of integration"

Since the foundational *Portuguese Judges* case[16], the case law of the Court has steadily moved towards rediscovering the importance and centrality of "the law" of Art. 19 TEU when read in conjunction with Art. 2 TEU. The Court has read Art. 2 TEU as forming part of EU law *sensu lato* in the same way it has interpreted the term "law". The combination of Art. 2 and 19 TEU has led

[15] For the application of the Rawlsian overlapping consensus to the EU see T.T. Koncewicz, *The Politics of Resentment and First Principles in the European Court of Justice* [in:] *EU Law in Populist Times. Crises and Prospects*, ed. F. Bignami, Cambridge 2019.

[16] M. Bonelli, M. Claes, *op.cit.*

to a novel reading of the substantive commitments of the Member States. In particular, it has clarified the meaning of the EU's commitment to the rule of law by connecting it to the provision of effective judicial protection and the safeguarding of judicial independence as the essence of the fundamental right to a fair trial (Art. 47 of the Charter). The very existence of effective judicial review is of the essence for the rule of law. For effective judicial protection to be ensured, it is essential that judicial independence must be maintained. Article 19 TEU is a constitutional basis for a shared judicial mandate and responsibility. The right to a fair trial and judicial independence functions as a guarantee for the effectiveness of all EU-derived rights and for the safeguard of EU values.

What has been often overlooked is the fact that searching for a way to incorporate the values into EU law, the Court sees Art. 19 TEU in its totality as the fundamental bridge between the values and EU law. This was spelt out quite unequivocally by the Court in C-357/19, *Criminal proceedings against PM and Others*[17]: "[…] compliance by a Member State with the values enshrined in Art. 2 TEU is a condition for the enjoyment of all the rights deriving from the application of the Treaties to that Member State. A Member State cannot, therefore, amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law, a value which is given concrete expression by, inter alia, Art. 19 TEU" (§ 162). Notably, it is not any one given section of Art. 19 TEU that serves as the point of reference, but the totality of Art. 19 TEU. More recently, in C-430/21[18], RS, the Court stressed: "[a]s regards the obligations deriving from Art. 19 TEU, it should be noted that that provision gives concrete expression to the value of the rule of law affirmed in Art. 2 TEU" (§ 39) In this way, "the law" of Art. 19 TEU and the duty to ensure its observance as well as its effective judicial protection flesh out the bare bones of the EU's core values. And finally, in the most recent C-204/21 *Commission v. Poland*[19], the Court asserted its authority in the strongest possible terms by proclaiming that the "review of Member States' compliance with the requirements arising from Art. 2 […] TEU falls fully within the jurisdiction of the Court" (§ 62), and that Art. 2 TEU is not merely a statement of policy

[17] ECLI:EU:C:2021:1034.

[18] ECLI:EU:C:2022:99.

[19] ECLI:EU:C:2023:442.

guidelines or intentions, but rather "contains values which are an integral part of the very identity of the European Union as a common legal order", which are "given concrete expression in principles containing legally binding obligations for the Member States" (§ 67; all emphasis is mine).

Art. 2 TEU and the references thereto should not only be read in the light of this case law (element of continuation and anchoring) and as adding a new legal and political layer to the judicial development of core features of the EU legal order (element of opening)[20]. A core layer of values and principles exists that defines the identity and essence of the Union membership and provides the terms and conditions for belonging to the common legal order. Relying on art. 19 in its totality, the Court chooses a superior principle to resolve the cases and establishes brick-by-brick (or, in K. Lenaert's words, "stone by stone")[21] an internal hierarchy between various Treaty norms and values. Some are technical, and others are fundamentally important. In case of conflict, the most important provision, the principal rule, must be followed. The resulting super-constitutionality becomes a governing mechanism for ordaining the norms and values within the Treaty framework.

From the combined reading of the case law of the Court since 2017 and old precedents of *Simmenthal*[22] (primacy of EU law), *Les Verts*[23] (a community based on the rule of law), Opinion 1/91[24] (the Court's function of ensuring the observance of the law) and *Kadi*[25] (primacy and respect for human rights and fundamental freedoms as a foundation of the Union), "the very foundations of the Union" (fr. *les bases mêmes de la Communautė*; *Simmenthal*, § 18), "the very essence of Union law" (fr. *les exigences inhérentes la nature même du droit communautaire*; *Simmenthal,* § 22) and "the very foundations of the Union legal order" (fr. *fondements mêmes de l'ordre juridique*

[20] On the conceptualization of art. 2 TEU consult T.L. Boekestein, *Making Do with What We have: On the interpretation and Enforcement of the EU's Founding Values,* "German Law Journal" 2022, no. 23, p. 431; T.T. Koncewicz, *Values* [in:] *Oxford Encyclopedia of EU law,* eds. S. Garben, L. Gormley, Oxford 2023.

[21] K. Lenaerts, *How the ECJ Thinks: A Study on Judicial Legitimacy,* "Fordham International Law Journal" 2013, no. 36, p. 1369.

[22] Case 106/77, *Simmenthal,* ECLI:EU:C:1978:49.

[23] Case 294/83, *Les Verts,* ECLI:EU:C:1986:166.

[24] *Opinion 1/91,* ECLI:EU:C:1991:490.

[25] Joined cases C-402/05 P and C-415/05 P, *Kadi,* ECLI:EU:C:2008:461.

communautaire; *Kadi*, § 304) comprise today: a) the primacy of the EU law that undergirds the autonomy of the law of integration; b) institutional balance established by the Treaties; c) the judicial review and the Court's function of the guardian of Union legality under Art. 19 TEU; d) the protection of fundamental rights; e) liberty; f) democracy; g) rule of law. These elements make up the constitutional fabric of the EU legal order to which all Member States have committed. Articles 2 and 19 TEU anchor the concept of the "very foundations of the common legal order" by giving it a sense of axiological identity of its own. It is truly a paradigmatic shift that affects the very core of the Union, its design and legality. The noun "foundations" used by the Court and the verb "founded on" used in Art. 2 TEU with the overarching duty to ensure the observance of the law of integration in Art. 19 TEU make a perfect match.

IV. The Court and "the union of law and values". *Quo vadis?*

The Court is bound by Art. 19 TEU. Unless it wants to be guilty of committing *per non est*, it must always adhere to the basic values in Art. 2 TEU and translate them judicially and judiciously into enforceable doctrines. This is where the challenge of converting a legal text (constitution) into a principled and non-opportunistic case law comes to the fore and poses the biggest challenge to the Court: one of constitutional imagination and self-understanding. The Court has always been recognised as a powerful political player that can cast its judicial shadow on all the actors in the governance structure. Niamh N. Shuibhne spoke of the "responsibilities of constitutional courts". She has argued that a constitutional court has a responsibility to protect and to further the objectives and values enshrined in the constitution to ensure that the rights and protections promised by the constitution are realised. The existential jurisprudence anchored in Art. 2 and Art. 19 TEU must be seen as an exercise in constitutional balancing that will be shaped by the context (the Court's institutional and political awareness in reading the political consensus), consequences (judicial diplomacy), mandate (adherence to the basic values and defending the legality of the supranational legal order as expressed in Art. 19 TEU and finally the interaction as the mandate keeps reinforcing and informing the interpretation of

the competences. Such balancing will ultimately determine the Court's success (or failure). A blind court decoupled from political reality will harm its legitimacy, as politics increasingly oppose its rulings. The law constrains but must also be constrained at the same time. The courtroom has its promises as well as operates within important limits.

The Union must be anchored in at least some recognition of commonality and constitutional essentials and the responsibility for the common good. However, for that to happen, Art. 19 TEU must be put front and centre and must be linked to Art. 2 TEU. In 2024 and beyond, the rule of law must be understood as a fundamental principle with a clear non-negotiable minimum that is binding on all the parties to the original consensus. The rule of law must be read as the principle that has implicitly underpinned the original Treaties in 1951 and 1957, and that continues to do so explicitly more than 70 years afterwards[26]. Without the commitment to the rule of law and the continuing confidence that parties to the consensus will guarantee the independence of their courts, parties would have never been able to come together and defer to each other in the first place.

Therefore, the Court's value turn anchored in Art. 2 TEU[27] must go hand in hand with making "the law" of Art. 19 TEU the front and center of the discourse on the supranational design and governance. Crucially, Art. 2 TEU clearly forms part of the EU law *sensu largo* in the same way that the Court has interpreted the term "law" in Art. 19 TEU. Putting Art. 19 TEU on the same conceptual level as Art. 2 TEU helps us understand the paradigmatic shift that the supranational governance and design have undergone.

With the totality[28] of Art. 19 TEU, important dots of the analysis presented here are connected. One can clearly see the various trajectories, promises, and, yes, also risks, involved in the existential jurisprudence developed by the

[26] On the implicit embeddedness of the rule of law in the legal order of the Community from its inception consult A. Magen, L. Pech, *The rule of law and the European Union* [in:] *Handbook on the Rule of Law*, eds. Ch. May, A. Winchester, Cheltenham, Northampton 2018, pp. 237–238. See also the research results presented within the RECONNECT project at www.reconnect.eu (23.01.2024).

[27] F. Schorkopf, *Value Constitutionalism in the European Union*, "German Law Journal" 2020, no. 21 p. 956.

[28] Interestingly the argument from the totality of art. 19 as a powerful argumentative method has been emphasized in 1995 by former Judge F. Schockweiler: *La Cour de justice des*

Court. The trajectory "Back then" was built on the First Principles[29] as constitutional abeyances[30], which were assumed but not spelt out explicitly. The "Now trajectory" moves us from explicit understandings to explicit expressions of what was once explicit. Possible "trajectory tomorrow" will enforce the rule of law as an essential precondition for all parties' deferral to one another and to the Union they had created. Rule of law – separation of powers – judicial independence is now emerging from the shadows of constitutional abeyances and start operating as procedural benchmarks of the European constitutionality.

This is exactly the kind of discourse that is very much needed in face of the internal shifts and changing paradigms of the supranational governance. Article 19 (1) TEU determines and circumscribes the rules of the game and then is relied on to enforce them against the foul players. Separation of powers, rule of law and judicial independence are becoming the essential rules of the game that is being played out on the integration field with the shadow cast by the Court on all the players. The first Court of the 1960s and 1970s always spoke of the law's authority that binds together the union of "states, institutions, and individuals"[31] and the Court of today reverts to and builds on this judicial tradition.

The Court has not only been rediscovering old precedents, but, first and foremost, building on the spirit of what Judge Kakouris has called in 1994 the "mission of the Court"[32]. The respect for and trust in the rule of law are existential components of the original consensus on which all other parties' commitments are built[33]. The fragile European consensus will start to crumble the moment these principles start to crumble. It is the voice we should expect moving forward. While indeed the uneasy question "how far" always

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Communautés européennes dépasse-t-elle les limites de ses attributions?, "Journal des Tribunaux de Droit Européen" 1995, no. 4 p. 73, where he writes "du droit *dans sa totalité*" (my emphasis).

[29] D. Edward, *An Appeal to First Principles* (on file with the Author).

[30] M. Foley, *op.cit.*, See also the explanation in the *Setting the scene* part of present analysis.

[31] *Editorial. Union Membership in Times of Crisis*, "Common Market Law Review" 2014, no. 51, p. 1.

[32] C.N. Kakouris, *La Mission de la Cour de Justice des Communautés Européennes et l'ethos du Juge*, "Revue des Affaires Européennes" 1994, no. 4, p. 35.

[33] For an excellent analysis of the power of the law in the European integration consult F. Jacobs, *The Sovereignty of Law. The European way*, Cambridge 2009.

remains, the Court's trajectory has been set[34]. It must be so, because after all the Court is a court of law, and the Union is a "community of law". With this, the totality of the "law" of Art. 19 TEU is back, and so are many conceptual challenges to frame, anchor and understand the momentous jurisprudential shift happening on Kirchberg. However, as ground-breaking as this jurisprudential shift is, it must always be analysed, appreciated and understood through the prism of a broader political and institutional context, which the Court must consider when charting its own trajectory in the "law and values of integration"[35]. It is so because as much as the law of integration constraints, it must also be constrained. Embracing this interactive duality of the law of integration would lead us to a true "supranational thinking out of the box"!

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[34] K. Lenaerts, *op.cit.*, p. 1303.

[35] For this broader contextual and axiological perspective T.T. Koncewicz, *The politics of integration in retrospect and the supranational mega-politics of governance and design in prospect. A roadmap,* "European Law Journal" 2024, no. 32 (*forthcoming*).

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