DIALOGICAL RULE OF LAW IN THE HANDS OF THE COURT OF JUSTICE: ANALYSIS AND CRITIQUE

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ABSTRACT

The Court of Justice deploys the Rule of Law to pre-empt necessary dialogue and to disqualify substantive arguments of principle originating in other legal orders. The Rule of Law thus emerges as a trump card making the vital dialogue on which EU law directly depends impossible. Such deployment of the Rule of Law ruins the basic coherence of the EU legal system, as the Court does not measure itself by the same standards that it applies to the national courts, while embracing a multitude of conflicting approaches to the Rule of Law and judicial independence, steeply departing from EU law's own established principles, as well as ECHR standards in Rule of Law cases. Such use of the principle is both dangerous and directly opposed to the very essence of European constitutionalism. It is an attack on the substance of the Rule of Law, as it opposes vital checks on the arbitrary power of the sovereign – in this case the Herren der Verträge. The abusive misuse of Rule of Law rhetoric to render the EU less accountable and undermine the dialogical pluralist essence of EU constitutionalism is what I term ‘supremacy Rule of Law’.

KEYWORDS Supranational Rule of Law, ECJ, Coherence, Overreach, EU Values, Constitutional Dialogue, Division of Competences
INTRODUCTION

In this contribution, which embraces a dialogical understanding of the Rule of Law, I focus on the ‘other’ side of the Rule of Law coin in Europe, as opposed to the story of the fight for the values of Article 2 TEU at the national level: the deployment of the principle of the Rule of Law by the Court of Justice of the European Union (ECJ) to pre-empt necessary dialogue and to disqualify substantive arguments of principle originating in other legal orders. The Rule of Law, on this count and as used by the Court, emerges as a trump card making the vital dialogue on which the Rule of Law directly depends impossible. Such deployment of the Rule of Law ruins the basic coherence of the EU legal system, as the Court does not measure itself by the same standards that it applies to the national courts, while embracing a multitude of conflicting approaches to the Rule of Law and judicial independence, steeply departing from EU law’s own established principles, as well as ECHR standards in Rule of Law cases. Such use of the principle is both dangerous and directly opposed to the very essence of European constitutionalism, I argue. It is an attack on the procedural side of EU law, as it undermines coherence, as well as on the substance of the Rule of Law, as this approach opposes vital checks on the arbitrary power of the sovereign – in this case the Herren der Verträge. This is all particularly dangerous given the huge question marks concerning the ECJ’s own structural independence. Also, the ECJ’s lawful composition is not a given – at least for a year following the abuse of power by the Member States to appoint a Greek usurper as an ‘Advocate General’ in September 2020 in the absence of a vacancy. Lastly, the gradual divergence between ECJ and ECtHR case-law on the meaning of a ‘lawful judge’, making judicial dialogue impossible on many occasions, is a product of the frivolous and over-entitled vision of the Rule of Law espoused by the EU’s supranational judiciary. The abusive misuse of the Rule of Law rhetoric to render the EU less accountable and undermine the dialogical pluralist essence of EU constitutionalism is what I term ‘supremacy Rule of Law’.
THE CRISIS OF THE RULE OF LAW IN THE EU: CONSIDERING A FULLER PICTURE

The Rule of Law is a crucial tool in the hands of the ECJ to reinforce EU law’s supremacy claim. The deployment of the principle in this capacity is relatively new and has been very effective: EU law is supreme and the Rule of Law, as interpreted by the ECJ, requires setting aside substantive objections once a claim to supremacy has been voiced. This fundamental functional aspect of the Rule of Law in the EU provides a basis for the effective instrumentalization of the principle in the context of delegitimizing normative claims not originating in the realm of the EU’s supranational legal order. In fact, it emerges with growing clarity that the ECJ is in the process of gradually turning supremacy of EU law into one of the key reasons behind the Rule of Law, thereby dealing a dramatic blow to the essential meaning of what the Rule of Law stands for.¹

This particular development has been somewhat overlooked in legal scholarship, with colleagues focusing mostly on the distillation of the precise meaning of the Rule of Law in Europe,² as well as the effective deployment of the principle to counteract what Professor Wyrzykowski called ‘the unimaginable’:³ the breakdown of liberal-democratic constitutionalism coupled with national-level defiance in some Member States, in particular Poland and Hungary.⁴ Both are crucially important issues. They are quite different, however, from using the principle of the Rule of Law to set aside fundamental substantive human rights and constitutionality concerns, when these are in the way of the EU’s

¹ D. Kochenov, ‘EU Rule of Law Today: Limiting, Excusing, or Abusing Power?’, in A. Södersten and E. Hercock (eds), The Rule of Law in the EU: Crisis and Solutions (SIEPS Report 2023:1op), April 2023.
unconditional supremacy claims. Worse still, it is even more different from the abuse of power, collectively, by the Herren der Verträge in a constitutional system, where their decisions might apparently be unchallengeable in courts, even if these are outright unlawful: procedural non-reviewability as a perceived element of the Rule of Law here trumps the substance of as well as the spirit of EU constitutionalism.\(^5\) In all these contexts the Rule of Law emerges as a tool of over-simplifying complex substantive constitutional dilemmas – this is not always in the interests of the preservation of a high level of protection of fundamental rights and the respect of crucial constitutional principles in Europe: instead, it is a form of ‘evil law’, shielding the sovereign from scrutiny and criticism,\(^6\) if not opening the gates of lawlessness in the shadow of the Rule of Law’s protection.\(^7\)

The framing of the EU’s Rule of Law as an unconditional good, by focusing on the clear purpose of reinforcing EU law’s supremacy and allowing the Court of Justice to question the criticism of its vision of the law coming from any quarters, is a crucially important chapter of the Rule of Law story in the EU, which is worth focusing on. Indeed, the role played by the Rule of Law in the context of the preservation and reinforcement of the supremacy of EU law has not so far been fully theorized and understood: this is the lacuna this paper aims to start bridging. The focus is on the instrumental side of the Rule of Law story – enabling and reinforcing the supremacy claim of EU law (and also bringing it to new sub-fields).

It would be difficult to disagree with Justin Lindeboom that the EU, in order to remain effective, has to claim supremacy and fend off eventual counter-claims


originating from other legal orders operating in Europe.\(^8\) Yet, the technique of explaining away the counterclaims matters a great deal for the preservation, precisely, of the Rule of Law. Should this be done via a press-release?\(^9\) What about through self-glorifying exceptionalism?\(^10\) Or would otherwise pretending to be in control be sufficient?\(^11\) This paper moves on to the issue of how the claim is operationalized, zooming in on the deployment of the Rule of Law as one of the key tools ensuring that the supremacy claim is compelling. The obverse of the story is clear: the strategy of deploying the Rule of Law in such a way has paid off and the Court is triumphant (the absolute lack of change on the ground in Poland and Hungary is not of relevance from this perspective\(^12\)). EU law is acquiring a new substantive understanding of the Rule of Law via the articulation of EU law’s binding standards on the independence of the judiciary and the principle of the

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\(^11\) This usually happens through making sure that questionable actions of the sovereign are found to fall outside the scope of EU law. Three recent examples in EU law could be cited, among many others:


\(^12\) Cosmetic changes at the national level, akin to what Poland has implemented in an attempt to unblock EU funds does not alter the general context of the on-going attacks against the Rule of Law in the country.
irremovability of judges. This being said, ‘autocratic legalism’ and ‘ruling by cheating’ still flourish on the ground in several Member States, thus undermining the reality of the EU’s values claims in Article 2 TEU. The literature usually looks elsewhere, presenting the Rule of Law arguments in the context of fighting backsliding as effective, constantly striving to change the situation, and leading to new important developments. It is not the results, on this account, that matter; it is the road towards possible future improvements that counts.

A different reading of the same developments is equally possible: the difficult process of returning Hungary and Poland to the Rule of Law track has not yet started in earnest. Moreover, dangers lurk in using the Rule of Law rhetoric to silence normative claims coming from other legal orders in Europe that potentially could be able to play a positive role in the context of a dialogical Rule of Law in the EU. The reasons behind seeing the dangers are simple: the Court of Justice


18 In fact, why not regard it as one of the necessary elements of the EU’s pluralist nature? Cf. M. Avbelj and G. Davies (eds), Research Handbook on Legal Pluralism and EU Law (Edward Elgar, 2018).
could be using the Rule of Law rhetoric precisely to undermine the Rule of Law in the Union, thereby hurting its own legitimacy and fueling the populists. The emergence of double standards here is so outright obvious and so deeply regrettable that the core message of EU law, which presents the Union as a values project, could end up at risk of being undermined.

One could see worrying signs, in one example, in the story of the Court’s collusion with the Member States in illegally removing Advocate General Sharpston from office in breach of binding principles of EU law. This came down to a self-declaration by the omni-powerful Court that it is not, in fact, independent from the Member States. A non-independent body cannot be a guardian of the Rule of Law, basic accountability, or legality, for that matter. Getin Noble Bank, where the ECJ accepted a preliminary reference from a known usurper posing as a Polish judge in the name of ‘judicial’ (sic) dialogue, could be another example of the same tendency. Or take the EU-Turkey deal suspending crucial EU law rights of asylum seekers. This de facto suspension of crucial elements of EU law was deemed itself ‘outside the scope of EU law’. There are other cases in point. It appears that erasing accountability is among the key aspects of the on-going

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20 Cf. Kochenov and Butler, op cit.

21 For broader context on the development of the legal tools in EU law aiming to remove any accountability in the face of outright abuse by the Member States and the institutions of the Union, see, D Kochenov and S Ganty, ‘EU Lawlessness Law’, Jean Monnet Working Paper No.2/2022 (NYU Law School).


23 Similar suspensions of rights are in fact required by the Court in the European Arrest Warrant cases – the EU-Turkey understanding is not at all an exception: individuals see their fundamental rights – including ECHR rights – sacrificed in the name of the ideal picture of the Union based on mutual trust that the ECJ has taken upon itself to promote: P. Bárd, ‘In courts we trust, or should we? Judicial independence as the precondition for the effectiveness of EU law’, (2022) 27 (1-3) European Law Journal.
misuse of the Rule of Law rhetoric in the European legal space. Keeping in mind that the core idea behind the infamous Opinion 2/13 seems to be to diminish the level of external scrutiny of the EU’s human rights record, the acute danger of the on-going Rule of Law developments in the Union failing to fulfil the objective of the most basic compliance with the values of Article 2 TEU emerges. This is particularly acute in these times: while the internal Rule of Law situation in the Union is already not ideal, the external boundaries of the Union are emerging as deadly lawlessness zones outwith the Rule of Law’s reach *par excellence*. Via the efforts of the EU and its Member States, the Mediterranean has turned into a mass grave of epic proportions. This hints at the emergence of what I have termed, with Sarah Ganty, ‘EU lawlessness law’ – the appropriation of the law to deprive the Rule of Law of any meaning and erase any accountability.

**EPHEMERAL VALUES OF THE UNION IN THE FIGHT FOR THE RULE OF LAW**

One of the starting points for approaching the Rule of Law is the following: any Rule of Law-based system implies the control of the applicable law through dialogical legal considerations, elevating such dialogue – should it play an effective systemic law-limiting function – to a necessary element of the Rule of Law. The most popular example is the dialogue between the courts and the legislature, which has been deemed indispensable for the survival and flourishing of democracy.  

The EU is quite special in a number of crucial respects as far as the framing of this dialogue at the heart of the Rule of Law is concerned. This special character of the

25 Kochenov and Ganty, op. cit. (and the literature cited therein).  
EU is quite different from any particularities observed among states.\textsuperscript{27} Indeed, it goes to the core of the EU’s self-image and the account of it in the eyes of others.\textsuperscript{28} While the majority of law faculties in Europe teach EU law as constitutional law nowadays, the constitutional nature of the Union, although assumed,\textsuperscript{29} is regularly questioned\textsuperscript{30} – something one does not observe in the case of the majority of states. The reasons for the constant questioning of the basics are evident on the surface. Indeed, when one thinks about the EU, democracy or human rights protection would be the last thing to come to mind.\textsuperscript{31} This is because democracy and the Rule of Law are not the EU’s founding ideas, or, paraphrasing Joseph Weiler, they are not in the EU’s ‘DNA’,\textsuperscript{32} notwithstanding the constant rhetorical adherence to both. In the context of the division of powers between the EU and the Member States as interpreted at the moment, democracy and the Rule of Law are seemingly left entirely to the Member States to care about.\textsuperscript{33} The EU can thus do little when the basic foundations of constitutionalism are profoundly disturbed in one or more Member States.

The recent moves to reinforce the supranational legal system by extending the scope of its power\textsuperscript{34} have not proven effective to solve the outstanding problems on the ground. More problematically still, the Union’s own adherence to the values it professes is not beyond doubt.\textsuperscript{35} This is a serious design flaw, which was

\begin{itemize}
\item \textsuperscript{27} This being said, it is not my intention here to advocate any \textit{sui generis} nature of the Union, which has been persuasively disproved by Robert Schütze: R. Schütze, \textit{From Dual to Cooperative Federalism}, Oxford 2009.
\item \textsuperscript{28} Cf. K.L. Scheppele, D.Kochenov and B. Grabowska-Moroz, ‘EU Values Are Law, After All’ \textit{38 Yearbook of European Law} (2021, early view).
\item \textsuperscript{29} On the crucial importance of this presumption, see, J.H.H. Weiler and U.R. Haltern, ‘The autonomy of the Community legal order – Through the looking glass’, \textit{Harvard International Law Journal} 37 (1996), pp. 411–448, at pp. 422. Indeed, ‘who cares what it “really” is’ (at 422, emphasis added).
\item \textsuperscript{30} For the most compelling account, see, P.L. Lindseth, \textit{Power and Legitimacy: Reconciling Europe and the Nation State}, Oxford 2010.
\item \textsuperscript{31} See further, A. Williams, \textit{Human Rights: A Study in Irony}, Oxford 2004.
\item \textsuperscript{34} Pech and Kochenov, \textit{op. cit.}
\item \textsuperscript{35} Kochenov and Ganty, \textit{op. cit.}
\end{itemize}
probably difficult to anticipate from the very beginning: the issue only became problematic as a result of a certain path that the Union followed throughout its history by emerging as a dynamic federal constitutional system that gradually digested more and more competences without caring about the considerations of justice lying outside of the pursuit of its tasks.\textsuperscript{36} Yet, gradually EU values turned from an image-related luxury item that, \textit{sensu stricto}, barely made up part of the \textit{acquis}\textsuperscript{37} into an indispensable element of the legal-political climate in the EU.\textsuperscript{38} This does not mean, however, that the Union is in the position to defend the values it proclaims to be built upon\textsuperscript{39} or, indeed, that it can export these values abroad effectively.\textsuperscript{40}

According to the Court of Justice, ‘[The EU] legal structure is 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’.\textsuperscript{41} The values of Article 2 TEU can thus be said to be at the very ‘untouchable core’ of the EU legal order.\textsuperscript{42} They arguably were implied from the start of the integration process, if we assume that it was


\textsuperscript{38} Cf. Wouters, \textit{op. cit.}, and other literature in note 16.


\textsuperscript{40} L. Pech, ‘Promoting the Rule of Law abroad: On the EU’s limited contribution to the shaping of an international understanding of the Rule of Law’, in D. Kochenov & F. Amtenbrink (eds.), \textit{The European Union’s Shaping of the International Legal Order}, Cambridge 2013, pp. 108–129. This is the case even in the context of EU enlargements, where EU leverage and power is at its utmost: E. Basheska, ‘EU Enlargement in Disregard of the Rule of Law’, 14 \textit{Hague Journal on the Rule of Law}, 2022, 221.

\textsuperscript{41} Opinion 2/13 (\textit{Accession to the European Convention of Human Rights II}) EU:C:2014:2454, para 168. See also Case C-455/14 \textit{P EUPM in Bosnia and Herzegovina} EU:C:2016:569, para 41.

only open to democratic European states adhering to the Rule of Law and human rights protection (an understanding that was reconfirmed by numerous declarations of the EEC institutions and the text of the Preamble of the EEC).\textsuperscript{43}

By and large, the re-articulation of the Union from an ordinary treaty organization into a constitutional system was not accompanied by a sufficient upgrade of the role played by the core values that it is said to be build upon. These do not quite inform the day-to-day functioning of EU law, either internally\textsuperscript{44} or externally\textsuperscript{45} (including in the context of enlargements of the Union\textsuperscript{46}). Let us not forget that the promotion of its values, including the Rule of Law, is an obligation lying with the Union in accordance with the Treaties.\textsuperscript{47} Indeed, unless we take the Commission’s opulent scribbles on values for granted, the EU’s steering of countless issues directly related to the values at hand appears to be more problematic than not. The EU is not about the values that Article 2 TEU preaches, which any student of EU law and politics will readily confirm.\textsuperscript{48}


\textsuperscript{47} Art. 3(5) TEU. See, also, L. Pech, ‘Promoting the Rule of Law abroad: On the EU’s limited contribution to the shaping of an international understanding of the Rule of Law’, in D. Kochenov and F. Amtenbrink (eds.), The European Union’s Shaping of the International Legal Order, Cambridge 2013, pp. 108–129.

\textsuperscript{48} Next to J.H.H. Weiler’s brilliant scholarship, the crucial argument in this vein has been made, most powerfully, by Andrew Williams: A. Williams, ‘Taking values seriously: Towards a philosophy of EU Law’, Oxford Journal of Legal Studies 29 (2009), pp. 549–577.
definition is not about human rights, the Rule of Law, or democracy. EU law functions differently: there is a whole other set of principles which actually matter and are held dear: supremacy, direct effect, and autonomy are the key trio that come to mind. Operating together, they can set aside both national constitutional and international human rights as well as broader international law constraints. Most worryingly, the EU Rule of Law is seemingly evolving in the direction of deploying the principle to justify the questionable actions of the Herren der Verträge instead of holding them accountable. This is done through playing with the scope of the law – which has, in EU law, traditionally been a secluded playground for the Court of Justice to enjoy – instead of any assessment of the substance. Substantive bending of time-tested principles of EU law in the name of aspirational procedural proclamation is also part of the picture, however. The result is devastating: the principle which is partly justified by

49 E.g., Opinion 2/13 (Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms II) ECLI:EU:C:2014:2454, para 170, which states that the fundamental rights in the EU are ‘interpret[ed] […] within the framework of the structure and objectives of the EU’. Even the Rule of Law has been found by the ECJ to draw its importance from the need to ensure the supremacy of EU law in the EU, resulting in criticism: Editorial Comments, ‘EU Law between Common Values and Collective Feelings’ (2018) 55 CMLRev. 1329, at 1334.


52 On the Kadi saga, see, G. de Búrca, ‘The European Court of Justice and the international legal order after Kadi’, Harvard International Law Journal 51 (2010). See also, of course, Case C-584/10 P Commission and Others v Kadi ECLI:EU:C:2013:518.


supremacy of EU law, as we have seen, equally plays a role in removing the accountability of the EU’s collective sovereign for – at times – grave violations of EU as well as ECHR and international law: this is hardly the function one could expect the Rule of Law to play. As a consequence, the Union frequently stars as part of the problem, rather than part of the solution. It is not surprising in this context that the EU would deploy the rhetoric of the Rule of Law, unconvincingly, in order to advance its claims of supremacy and missing accountability, thus solidifying the surprising abuse of the principle.

DIALOGICAL RULE OF LAW: A PLURALIST STARTING POINT OF THE VITAL CONCEPT

The emphasis in scholarly discussions on dialogues between the institutions of government has been a feature of the age-old debate on the role of the judiciary and the threat it poses to the rule of democracy.55 There is a natural conflict that exists in all legal systems where democratic authority is vested in parliaments through popular vote, yet the product of this power, no matter the representative force behind it, can be undone by the supremacy vested in (apex) courts. This has been especially the case in ‘revolutionary’ states, where the perceived arbitrariness of a judge mirrors that of the renounced monarch.56 In extreme cases, all the law is replaced either by the ‘revolutionary consciousness’ of the


judge or by the free rein of ‘the will of the people’ and a complete elimination of judicial review and hence dialogue and, along with it, the Rule of Law.

Although this dialogue is born from thoughts of democracy, in most modern situations the dialogue between judicial and democratic authority in fact finds its locus in the control of law by law on different levels. This entails that the dialogue is not limited to the classical court/legislature scenario. Needless to say, the altered locus of dialogue in the EU does not and cannot alter its key function: both the EU dialogue between the judiciaries and the classical instances of constitutional dialogue between domestic court and legislature can ultimately be viewed as amounting to illustrations of the dialogical Rule of Law where, we argue, a modern legal system is only viewed as based on the Rule of Law if its law is, once again, controlled by law. With the shift of the main point of law/law tension from the legislature/courts dynamic to the court/courts dynamic, the essential rationale as well as the functional outcomes of the dialogue remain the same. Both are clearly instances of constitutional dialogue. Both aim to ensure adherence to the Rule of Law in the constitutional system in question.

A number of advanced democratic legal systems provide useful counterpoints to such classical dialogue, where immunity to the legislature/courts dialogue is observable for reasons that are more structural and systemic in nature, rather than relating purely to legal and democratic culture. The EU is one such system.\(^{57}\) In fact, leaving aside the obvious tensions surrounding its self-characterization as a democracy,\(^ {58}\) the fundamental differences in institutional design between, say, Canada and the EU would be the most relevant explanation for the different forms dialogue takes in the European context. One should look, in particular, at the prominent role that the Court of Justice of the European Union plays in the

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shaping of ‘negative’ as opposed to ‘positive’ integration,\textsuperscript{59} which is based on red-lines and limitations on the direction and extent of national legislative activity in the areas where the supranational EU legislature is not necessarily empowered to act. This policing of substance through the procedures designed to limit the competences at particular levels of the law to act in a world where the supranational legislature actually cannot be competent to decide is what makes the classical approach to constitutional dialogue adopted in the literature unusable at the supranational level.\textsuperscript{60}

Mark Dawson has demonstrated, with only minimal reservations, that ‘the present-day EU carries few of the background conditions necessary for a sustainable dialogue between the Court and the legislatures to take hold’.\textsuperscript{61} This does not mean, however, that the EU does not know dialogical constitutionalism, or that it does not attempt to give shape to its Rule of Law through dialogue – quite to the contrary. The crucial distinguishing feature of the dialogue as practiced in the EU is that it happens largely between the judiciaries of the different levels of the law. This is only logical: through their ability to police the sphere of competences claimed by the CJEU, the national courts are a more effective (adversarial) interlocutor of the supranational court in checking EU law than any legislature could be. In fact, the supremacy of EU law forecloses dialogue with national legislatures. Thus, since the European legislature is not competent to enter into any dialogue when negative integration is at stake, there is no dialogue possible for a very wide range of possible constitutional conflicts. This is not because of the benevolence of the European co-legislators vis-à-vis the CJEU’s point of view, of course, but due to the fact that a lot of negative integration tends

\textsuperscript{59} Negative integration is the term of art in EU law used to denote the route of EU law development through supranational Court-orchestrated preclusion of certain laws, rules, or behaviors of the Member States in the fields of their full – sometimes even exclusive – competence in the name of safeguarding the effectiveness of EU law in other fields. The Court of Justice of the EU is the main driver of negative integration, while the legislator is in charge of positive integration. The scope of the latter is infinitely narrower than the scope of the former.

\textsuperscript{60} It should be noted, with a few notable exceptions, that the general feeling has been that the Court is precisely doing the job it is tasked to do. For a path-breaking account of this activism, see H. Rasmussen, \textit{On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking}, Dordrecht 1986.

to happen in the areas outside of the EU’s legislative competence. The same does not hold true for the dialogue between the courts at different levels. This seemingly lies behind the elevation of the German Constitutional Court to the level of a credible conversation partner of the CJEU, as well as the Czech,\textsuperscript{62} Polish,\textsuperscript{63} Danish,\textsuperscript{64} and other national apex courts and tribunals.\textsuperscript{65} Crucially, despite being cherished by the ECJ as the most important mode of offering Kirchberg a say, the desire to preserve judicial dialogue no matter what backfired, seemingly leading not only to the watering down of the meaning of a ‘court or tribunal of a Member State’, but also to the abdication – on the part of the ECJ – to continue making sure that the notion enjoys an EU law definition.\textsuperscript{66} From \textit{Getin Noble Bank} onwards, the ECJ accepts preliminary references from known impostors that are not considered judges not only in the context of their own national law, but also in the context of

\textsuperscript{62} The Czech Constitutional Court made it clear that it saw the ECJ as acting \textit{ultra vires} when it gave its judgment in Case C-399/09 \textit{Marie Landtová v Česká správa socialního zabezpečení} ECLI:EU:C:2011:415.

\textsuperscript{63} That is, at least, before its destruction in the Law and Justice (PiS)-orchestrated attack on the national constitution: T.T. Koncewicz, ‘Of institutions, democracy, constitutional self-defence and the Rule of Law’, \textit{Common Market Law Review} 53 (2016), pp. 1753–1792. See also the Verdict of the Constitutional Tribunal of Poland of May 11th, 2005; \textit{K 18/04}. The current emanation of the Constitutional Tribunal would not be capable of qualifying as a ‘Court’ due to the fragrant violations of appointment rules for its members and its president: A Ploszka, ‘It Never Rains but It Pours’ HJRL 2022 (online first). Among all the legal systems in Europe outside of the outcast states, such as Russia or Belarus, which are not members of the ECHR, only the ECJ would probably treat this body as a Court in the name of a ‘dialogue’ with it, following its disastrously myopic \textit{Getin Noble Bank} case-law.

\textsuperscript{64} In Case no. 15/2014 – \textit{Dansk Industri (DI) acting for Ajos A/S vs. The estate left by A}. The Danish Court refused to see General Principles of EU law as having primacy over Danish law, as these General Principles are unwritten and, in short, could not fulfil the democratic legitimacy needed.

\textsuperscript{65} See also, A. Rosas, ‘The European Court of Justice in context: Forms and patterns of judicial dialogue’, \textit{European Journal of Legal Studies} 1 (2007), pp. 121–136. Importantly, no confusion should be made with the recently expressed position of the so-called Polish ‘Constitutional Tribunal’, since it is not lawfully composed, and thus does not meet, on the face of it, the basic definition of a court or tribunal in the light of ECtHR or Polish constitutional law: D. Kochenov, ‘Mad in Poland’, \textit{EU Law Live}, 22 October 2021 (as well as all the other contributions to the \textit{EU Law Live} symposium on this matter).

\textsuperscript{66} As has been set in stone in the case-law since time immemorial – see for details, M. Broberg and N. Fenger, \textit{Broberg and Fenger on the Preliminary References to the European Court of Justice} (Oxford, 2021).
Article 6 ECHR, as Petra Bárd and I have explained elsewhere.\(^\text{67}\) In such a context any reference to the weaving of the answer received from the ECJ into the fabric of national law – wherever such a reference would be coming from – is bound to result in a breach of ECHR law, which binds every court in the European legal space, with the sole exception of the ECJ due to its perfect exceptionalism as elucidated by the Court itself in its Opinion 2/13. In other words, hunger for dialogue has welcomed conversations with impostors at the expense of adhering to the basic values of Article 2 TEU and preserving the Rule of Law in the Union.

**SUPRANATIONAL RULE OF LAW: AN ECHTERNACH PROCESSION AWAY FROM EU’S VALUES?**

In dealing with the Rule of Law backsliding in the EU, the Court of Justice has very much drawn on the dialogical appeal, managing to capitalize on the direct actions by the Commission as much as on the preliminary references from the national courts, including those under attack,\(^\text{68}\) in order to turn the proclamation-based Rule of Law value of Article 2 TEU into an enforceable substantive principle of law, spanning across both the EU and national legal orders. Yet, in doing so, the ECJ equally has made a number of puzzling retrograde steps, undermining the coherence of the law and refusing to be bound by the same core principles which it set upon propagating for the Member States’ courts, resulting in a movement akin to an “Echternach procession”: three steps forward and two steps back. As a result, all the recent significant advances in the case-law, which have revolutionized the role played by the Rule of Law in the context of EU law as well as the accepted understanding of the EU’s competences in this field, have not resulted in pretty much any clearly identifiable improvements on the ground in precisely the Member States that the ECJ was trying to help through its interventions. The growth of EU law in terms of competence, substance,


\(^{68}\) P. Bárd, ‘In courts we trust, or should we? Judicial independence as the precondition for the effectiveness of EU law’, (2021) 27 (1-3) European Law Journal.
procedure, and enforcement has thus not been matched at all by the resolution of the outstanding problems at hand in the backsliding Member States.

In discussing these issues, it is important to fully realize the fact that the Rule of Law and democracy backsliding problems occurring in the EU do not indicate any specificity of the Union: defiance is wide-spread in federations, as R. Daniel Kelemen, *inter alia*, has demonstrated, using the US as an example. The EU is thus not that special.\textsuperscript{69} What was special about the EU is that, although adherence to the Rule of Law has always been praised as an essential feature of its constitutionalism, the Union possessed – so it seemed – no competence to intervene in the cases when backsliding occurred at the national level.\textsuperscript{70} And, of course, there is nothing close to the US National Guard in the European Union to help restore law and order in the recalcitrant Member States.\textsuperscript{71}

The competence lacuna had to be filled sooner or later, allowing the EU to graduate into a true constitutional system that actually stands by its principles,\textsuperscript{72} and the case-law of the last several years could be interpreted as starting precisely this kind of transformation. While the growth of EU competence and substantive law is unquestionable here, looming questions remain regarding the EU’s effectiveness in reaching the goals it set itself in terms of ensuring full compliance with Article 2 TEU at the national and at the supranational level. Attempts to solve national problems through supranational law showcased significant supranational problems. Let us trace the three steps forward and two steps back dynamics at hand to appraise the recent developments.

The Court has managed, first, to turn the presumption of compliance with the Rule of Law, which remained one of the pillars of EU law since the inception of the

\textsuperscript{69} R.D. Kelemen, ‘Europe’s Other Democratic Deficit: National Authoritarianism in Europe’s Democratic Union’ (2017) 52 *Government and Opposition* 211.


integration project, into an enforceable promise backed by the necessary competence to intervene.\(^73\) Having acquired the new competence, as long anticipated by experts,\(^74\) the Court added a new presumption into the mix: that the Member States courts – including in the backsliding Member States – are lawfully composed. This has led to it accepting Baratarian questions from usurpers dressed up as judges,\(^75\) dealing a significant blow to the very idea of a productive dialogue between the ECJ and the national judiciaries of the Member States. This obviously includes vital dialogue in relation to the newly-discovered massive areas of EU competence, such as the extension of the EU’s say into the realm of the structure, organization, and operations of the national judiciaries of the Member States.\(^76\)

Introducing EU law into the picture thus resulted – quite counterintuitively – in giving up the EU law approach to the definition of what a court or tribunal of a Member State entails. The ECJ’s burning desire to engage in a ‘judicial dialogue’ with whomever happened to usurp the robes locally threatened the very idea of dialogue, thereby departing from the national and

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\(^73\) Case C-64/16 Associação Sindical dos Juízes Portugueses v Tribunal de Contas EU:C:2018:117.


ECtHR-inspired understandings and occluding clarity through turning away from the core principles that Article 19 TEU would push the ECJ to respect and defend.\textsuperscript{77}

Moreover, secondly, the Court of Justice has also articulated the core \textit{substantive} elements of the supranational Rule of Law,\textsuperscript{78} which it had the competence to enforce, going beyond the circularity of the definition offered in \textit{Les Verts} and focusing predominantly on judicial independence.\textsuperscript{79} In doing so, the Court managed to deal a blow to the basic coherence of EU law by categorically refusing to apply the same understanding of the Rule of Law and its sub-components to the national and the supranational levels of governance, effectively placing itself outside of the law. The result – following both Opinion 2/13 and the \textit{Sharpston} cases\textsuperscript{80} is a worrying multiplication of the Rule of Law and, more generally, Article 2 TEU values' standards in the European legal space.\textsuperscript{81} Most importantly, some of the standards promoted by the Court in the name of the Rule of Law – including the necessary absence of the judicial review of unlawful actions by the \textit{Herren der Verträge} having straightforward implications for the operation of EU law and the protection of its core principles, rights, and freedoms at the supranational level\textsuperscript{82} – amount to a steep denial of what the Rule of Law would presumably stand for. The principle is seemingly deployed to deny accountability and the uniform application of the law:\textsuperscript{83} this new Rule of Law, let us call it ‘supremacy Rule of Law’,\textsuperscript{84} thus amounts to safeguarding the unchecked power of the sovereign.

\textsuperscript{77} Grabowska-Moroz, ‘Annotation of Getin Noble Bank’, \textit{op cit.}


\textsuperscript{79} K. Lenaerts, ‘New Horizons for the Rule of Law within the EU’ (2020) 21 \textit{German LJ}, 29.


\textsuperscript{81} Kochenov and Bárd, ‘Kirchberg Salami Lost in Bosphorus’, \textit{op cit.}

\textsuperscript{82} Kochenov and Butler, ‘Independence of the Court of Justice of the European Union’, \textit{op cit.}

\textsuperscript{83} See also, on the EU–Turkey deal, T Spijkerboer, ‘Bifurcation of People, Bifurcation of Law’, 31(2) \textit{Journal of Refugee Studies} 2017, 232; B Schotel, ‘The EU-Turkey Statement and the Structure of Legal Accountability’, in E Kassoti and N Idriz (eds), \textit{The Informalisation of the EU’s External Action in the Field of Migration and Asylum} (Springer, 2022)

\textsuperscript{84} Kochenov, ‘EU Rule of Law Today: Limiting, Excusing, or Abusing Power?’, \textit{op cit.}
Supremacy Rule of Law is the misuse of the principle, voiding it of any meaning, which consists in the removal of any judicial (or other) constraints on the exercise of arbitrary power.\textsuperscript{85}

The Court has moved on, thirdly, to ensure that its newly-found substance of the Rule of Law, which cuts through the legal orders, emerges as effectively enforceable and that this enforcement includes ample possibilities for interim relief, including interventions to reverse the structural changes made by the Member States in their systems of the judiciary and, crucially, the empowerment of the \textit{national courts} of the Member States, with the help of EU law, to do the same.\textsuperscript{86} The results of this have been mixed to say the least, as one does not observe any improvements – not even a slow-down in the Rule of Law backsliding – in Hungary and Poland.\textsuperscript{87} In other words, the tools which came with a significant extension of EU competences and a revamping of enforcement techniques in the face of the backsliding danger arising from Poland and Hungary ended up doing one thing: instead of mitigating the negative developments related to the Rule of Law backsliding, they created a new important chunk of EU judge-made law that is important in itself but quite unrelated, when all of its aspects are considered, to solving the issues at hand.

As a consequence, lastly, the Court of Justice has joined the emerging trend observable around the world in which international bodies and courts play an increasing role in the structuring and organization of the judiciaries at the national level.\textsuperscript{88} The Court of Justice did this, as mentioned above, with no regard to the actual ability to make change on the ground in the Member States facing the


\textsuperscript{86} P. Wennerås, ‘Saving a forest and the rule of law: Commission v Poland. Case C-441/17 R, Commission v Poland, Order of the Court (Grand Chamber) of 20 November 2017’ (2019) 56 CMLRev, 541.

\textsuperscript{87} If anything, the contrary could actually be true: P. Bárd and D. Kochenov, ‘War as a Pretext to Wave the Rule of Law Goodbye?’ 27 \textit{European Law Journal} 2021, 39.

problem of Rule of Law backsliding and with no intention to apply coherently the same law to the national and to the supranational levels, thereby promoting a deeply questionable multiplications of core values standards, while, at the same time, departing from the pathway of ECHR law.

All these changes could lead to a significant upgrade of the role played by the Rule of Law also at the supranational level. One would expect the Court to take into account the recent significant advances in the area of understanding of the Rule of Law and apply them to the well-tested areas of EU law, such as the guarantees of independence of the bodies to meet the standards of ‘court or tribunal’ in the context of Article 267 TFEU, as well as welcoming direct actions by the Commission against the Member States whose courts fail to take a meaningful part in the dialogue with the Court of Justice. In practice, as we have seen, the ECJ would eagerly pretend otherwise, puzzling observers.89 Not only are the results at the national level missing, the ECJ has also deemed crucial substantive aspects of Article 19 TEU inapplicable to the supranational judiciary, thus welcoming arbitrary and unlawful Member State interference with its own composition and showing less resilience in the face of such abuse than the highest Polish courts have.90 It also welcomed ‘dialogue’ with kangaroo bodies not established by law91 as per national92 and ECHR law.93 The result is an overwhelming growth of the EU’s – or, more precisely, the ECJ’s – power which is unrelated to solving the problems on the ground and is accompanied by a steep multiplication of substantive values standards at hand, ultimately erecting a significant obstacle in the way of taming arbitrary exercises of power at the supranational level. All this amounts to the deployment of Rule of Law rhetoric to enlarge the EU's own power and deprive the ‘Rule of Law’ of any meaning. What we started off comparing with a procession at Echternach, could thus also be presented as following a different, Leninist, walking pattern: ‘one step forward and two steps back’. Further research will enlighten us more, but at the point of writing it is difficult to say – taking into

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90 Kochenov and Butler, 'Independence of the Court of Justice of the European Union', op cit.
92 Resolution of the formation of the combined Civil Chamber, Criminal Chamber, and Labour Law and Social Security Chamber, Case BSA I-4110-1/20, para. 55.
93 ECtHR, Advance Pharma v. Poland, no. 1469/20, judgement of 3 February 2022, ECLI:CE:ECHR:2022:0203JUD000146920
account the lack of progress at the national level coupled with the devastating effects of the ECJ’s self-centered ‘supremacy Rule of Law’ approach on the essence of the EU’s Rule of Law\(^94\) – whether the recent developments discussed in the literature in excruciating detail are a sign of progress or a worrying sign of the weakening of the Rule of Law at the supranational level too, alongside Hungary and Poland. Let us have a closer look at why this could indeed be so.

**WHAT ABOUT THE LARGER CONTEXT OF DEPLOYING RULE OF LAW ARGUMENTS IN THE UNION?**

The first trouble with all the developments described above is that the Court of Justice has resoundingly failed to apply to itself the same standards that it has been preaching. In the *Sharpston* cases it clearly did not feel bound by the imperatives of irremovability and security of tenure of its own members. Worse still, by refusing to question outright violations of primary law by the Member States, President Lenaerts’ Court has dismissed any possibility of the application of the newly-found principles to itself at all – in a thoughtless gesture of haphazard nonchalance, it has dismissed any claims of its own *structural independence* from the direct unlawful arbitrary interference by the Masters of the Treaties.\(^95\) Yet, by its own standards, a non-structurally independent body is, unquestionably, *not a court*. It will take the Union time to get back on track after such a blow in a system of ‘integration through law’. The Court tells us that anyone, from the Spanish tax tribunals in *Banco Santander SA*\(^96\) to the German prosecutors\(^97\) have an independence problem, which *de facto* disqualifies them from any participation in the intricate dance of the dialogical Rule of Law, if they are not *structurally* independent. Yet, continues the same Court, basic Rule of Law principles applicable to the national judiciaries are *not* expected to bind the Court of Justice itself: the naked Emperor is above the law, undermining its workings and appeal by suggesting that, at the supranational level, the impeccably lawful composition of the Court is not required.

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\(^{94}\) Kochenov, ‘EU Rule of Law Today’, *op cit*.

\(^{95}\) See, for a detailed step-by-step analysis, Kochenov and Butler, *op cit*.

\(^{96}\) Case C-274/14 *Banco de Santander SA*, EU:C:2019:802.

\(^{97}\) Joined Cases C-508/18 OG (Public Prosecutor’s office of Lübeck) and C-82/19 PPU PI (Public Prosecutor’s office of Zwickau) and Case C-509/18 PF (Prosecutor General of Lithuania).
The Commission concurs. When prompted, Vice-President Jourová clarified that she is ‘aware’ of the problem of the potentially unlawful composition of the ECJ in violation of the principles that the Court has been preaching and the requirements of Primary Law. Nevertheless, whatever happens, ‘the Court has to be regarded as the highest authority, when it comes to EU law’. The logic is the same as what PiS expresses in Poland in relation to the kangaroo courts that are void of independence and staffed with eager usurpers in violation of Article 6 ECHR, as per the ECtHR. Getin Noble Bank, tapping into that national-level reality, makes the situation more interesting: the ECJ is now the only court in the European legal space that is seeking dialogue with unlawfully appointed usurpers that have been shunned by the ECtHR and the lawful national bodies, thereby symbolically siding – just as in the Sharpston cases, only now at the national level – with the arbitrary political power acting against judicial independence and the Rule of Law.

Our problems do not stop here. In fact, a whole new set of issues arises even once one sets aside the Court’s supranational assault on the meaning of the core elements of the principle of the Rule of Law, which it has only recently formulated for the national courts. The general question that arises irrespective of how much independence the Court of Justice actually does command – along the lines of Dariusz Adamski’s thinking – is how much can the courts actually do in the face of a rising tide of populism? And this is, probably counterintuitively to some, where the EU, rather than the backsliding Member States, seems to be emerging

98 A question from D. Kochenov to V. Jourová at CEU Democracy Institute discussion ‘The Future of Democracy in EU Member States’ (published on YouTube on March 1, 2021) https://www.youtube.com/watch?v=Qj6xGSe24dcandfbcld=IwAR1t5IrHy_hxmfoOg78Ndctv7cNLuHykcf8V0vDK8qCRCqNeX-4XEf4NvdA at 43:37.
as a winner from the Rule of Law crisis. Indeed, the Rule of Law transformations – positive and negative, as briefly outlined above – constitute a very significant turn in the whole history of EU law. They will have lasting consequences. The EU is definitely better off and more powerful as a result – even if it is not more ‘value based’, as long as all the innovations do not result in any changes on the ground and, what is potentially more dangerous, promote a cacophony of Rule of Law ‘standards’ that undermine the coherence of EU law and remove the ECJ itself from the purview of some of the values of Article 2 TEU. This is particularly so when the supranational ‘supremacy Rule of Law’ emerges as a principle that aims to untie the hands of the sovereign in opposition to taming arbitrary power.

Considering all the countless difficulties with the most recent case-law, it is the Court of Justice – and probably no one else – that emerges as a particularly strong winner from the whole Rule of Law upgrade debacle; this is particularly so given the inability of other EU institutions to act in a more or less consequential, effective, and coherent manner.100 The Court, even if it is not lawfully composed itself, is ‘the last soldier standing’,101 offering a new vision of constitutionalism to the Union which is, ironically, an unmistakably attractive one: from the world of proclamations, the core values of the Union are moving into the realm of the law, turning the Union into a true constitutional system – until it is tested in the likes of the Sharpston or Getin Noble Bank cases, that is.

The same cannot be said, unfortunately, about the Member States experiencing the democratic and Rule of Law decline. Indeed, the Union can seemingly do very little on the ground notwithstanding the supranational Rule of Law rethink, including the newly-acquired massive EU competences.102 This has nothing to do with any particular set of Member States in question. ‘Is something “wrong” with

102 It remains to be seen how effective the path leading to the cutting of the funds to the backsliding Member States will be in restoring compliance with values on the ground. Cf., inter alia, the contribution by Kim Lane Scheppel and John Morijn to the SIEPS anthology: Södersten and Hercock (eds) op cit.
Central and Eastern Europe?\textsuperscript{103} while obviously relevant in the context of Hungary and Poland, is not the most important question to consider. What the EU needs is a set of legal-political tools to prevent backsliding in any of its regions – presenting this necessity as region-specific is not sufficient.\textsuperscript{104} This is particularly so given the awful Brexit populism and numerous other worrying signs coming from all kinds of directions. Populism is not the exception in the world today – it is the rule.\textsuperscript{105} In this context, the assaults on the Rule of Law are bound to intensify, since populism and the attacks on the Rule of Law are frequently connected, as Nicola Lacey teaches us.\textsuperscript{106} It thus appears that ‘autocratic legalism’ is here to stay and the EU needs effective tools to combat it wherever and whenever backsliding occurs.\textsuperscript{107}

As the law stands today, once again it is undeniable that the EU has received its Rule of Law upgrade, which is very welcome, but the consequences of this upgrade in practice on the ground in the backsliding jurisdictions could be very limited for now. Dariusz Adamski is absolutely right: courts ‘cannot preclude a social contract of democratic backsliding when a society concludes that an illiberal system is superior to its previously tried liberal alternatives’.\textsuperscript{108} And this, precisely, seems to be the case in at least two EU Member States at the moment.\textsuperscript{109}

\footnotesize{\textsuperscript{103} J. Dawson and S. Hanley, ‘What’s Wrong with East-Central Europe? The Fading Mirage of the “Liberal Consensus”’ (2016) 27 Journal of Democracy 21. \\
\textsuperscript{104} The same should certainly apply to the temporal aspects of the growth of the Union: different rules cannot apply to the countries that joined with different waves of enlargements, requiring a broader reading of the recent Repubblika case-law: M. Leloup et al., ‘Non-Regression: Opening the Door to Solving the “Copenhagen Dilemma”? All Eyes on Case C-896/19 Repubblika v Il-Prim Ministru’, 46 European Law Review 2021, 692. \\
\textsuperscript{105} M. Krygier et al. (eds), Anti-Constitutional Populism (Cambridge 2022). \\
While it is undeniable that the supranational judiciary can on some occasions be much more effective than the political institutions in bringing about tangible results in terms of the defense of the Rule of Law, the bigger picture still remains quite grim as the populist forces busy undoing not only judicial independence, but also essentially the idea of legality as such enjoy popularity and will not go away on the back of the Court's Rule of Law case-law, however far-reaching. This towering problem has been outlined with particular clarity by David Kosař, Jiří Baroš, and Pavel Dufek:

‘While the European Court of Justice surely plays an important role, especially in the current developments in Poland, the failure of the Pan-European template shows that a top-down approach to the separation of powers does not work in Central Europe and that any long-term solution must have the broad support of the people’ (footnotes omitted).110

The supranational transformation of the Rule of Law as part of the EU law applicable to the national level judiciaries in the EU has been far-reaching, swift, and all-encompassing. Yet, at its core, there is a belief in the centrality and importance of EU law to all the Member States. Justin Lindeboom has justified this belief very consistently by demonstrating its soundness especially when viewed from Brussels or Kirchberg: any real legal system claims supremacy and is self-referential regarding its own importance. With the latest case-law from the Danish, Czech, and, crucially, German highest courts, the limited, if not myopic, nature of this picture is clear: not all the ‘participants in the dialogue’ believe that the ECJ is, indeed, the court to lead the pack. In the absence of such a belief, self-referentialism can become dangerous and, indeed, end up denying the very essence of the Rule of Law, which has dialogue lying at its heart.111 To make

matters worse, the ECJ is busy humiliating itself through ‘dialoguing’ with usurpers and playing with an idea of putting itself outside the law, as explained above. But the self-content rot spreading from Kirchberg, on the assumption that a reference to ‘supremacy’ will push the national courts to gloss over any kind of non-sequitur, touches the very essence of the meaning of what the Rule of Law does or does not stand for.

Loïc Azoulai, writing on behalf of the editors of the Common Market Law Review, might be right in his analysis of the fundamentals underlying Portuguese Judges. If the Court states that ‘the very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law’, does this not smell of a circular and unhelpful approach to the Rule of Law, and indeed the denial of the meaning of the concept? ‘How can the mundane objective of “compliance with EU law” be constitutive of “the essence of the rule of law”?’. While this could be presented as agnostic to the essence of the Rule of Law as a dialogical concept, it unquestionably contradicts the core function of the Rule of Law, which consists in tempering power. Consequently, ‘supremacy Rule of Law’, as crafted by the ECJ in the name of untamed power of the Union and the Herren der Verträge, seems to be the wrong answer to the challenges at hand, which is incapable of benefitting the Rule of Law in Europe. What we have at hand at the moment is a Rule of Law proclamation that is not applicable in essence to all participants in the articulation of the dialogical Rule of Law, thus hinting at the fact that the principle has been brought in with some other ends in mind rather than serving the law sensu stricto.

113 ASJP, para. 36.
Indeed, one of the most oft-cited definitions of the Rule of Law in the EU,116 the one inspired by the Venice Commission’s guidelines,117 could provide a solid illustration of the current state of the definitional debate as internalized by the EU institutions.118 Whether one agrees with the Venice Commission’s approach or not, it seems to be beyond any doubt what the Rule of Law is not. It is not democracy, the protection of human rights or similar wonderful things, each of which boasts its own sound claim to existence as a notion independent from the Rule of Law,119 and it is also not mere legality, which is adherence to the law on the books, let alone supremacy of EU law.

In the panoply of definitions one theoretical approach to the meaning of the Rule of Law emerges as particularly attractive. Once the Rule of Law and legality are distinguished, the basic meaning of the Rule of Law comes down to the idea of the subordination of the law to another kind of law, which is not up to the sovereign to change at will.120 This idea, traceable back to medieval England,121 is usually described with recourse to two key notions in order to reflect the fundamental duality of the law’s fabric that is indispensable for the operation of the Rule of Law as a principle of law:122 jurisdic- 


119 One should not forget the wise words of Joseph Raz: ‘We have no need to be converted to the Rule of Law just in order... to believe ... that good should triumph’: J. Raz, The Authority of Law: Essays on Law and Morality, Oxford 1979, at p. 211.


the sovereign – and *gubernaculum*, which is the use of the general rule-making power.\(^{123}\) Even in this age of popular sovereignty, this duality continues to hold, since democracy should not be capable of annihilating the law. Indeed, this is one of the key points made by the defenders of judicial review.\(^{124}\) The concept of the Rule of Law emerges as *dialogical* in essence. It presupposes and constantly relies upon a constant taming of law with law.\(^{125}\) On this account, the Rule of Law implies that the law – *gubernaculum* – should always be controlled by law – *jurisdictio* – lying outwith the sovereign’s reach.\(^{126}\) In this context, it is clear that the prevalence of either *gubernaculum* or *jurisdictio* necessarily destroys the core of the Rule of Law, which is the tension between the two.

Unlike despotic or totalitarian regimes, where the ruler is free to do anything he pleases, or problematic states, such as Hungary, where the constitution is a political tool, or Poland, where the executive ignores the constitution,\(^{127}\) or pre-constitutional democracies, which equate the law with legislation,\(^{128}\) the majority of constitutional democracies in the world today recognize the distinction between *jurisdictio* and *gubernaculum*, thus achieving an approximation of the dialogical Rule of Law in terms of maintaining and fostering the constant tension between these two facets of the law. Authority should itself be bound by clear

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126 For an analysis, see, G. Palombella, *È possibile una legalità globale?*, Bologna 2012.


128 In a pre-constitutional state, the *Rechtsstaat* shapes a reality, in the words of Gianfranco Poggi, where ‘there is a relation of near-identity between the state and its law’. G. Poggi, *The Development of the Modern State*, Stanford 1978, at p. 238.
legal norms which are outside of its control. Indeed, this is the key feature of post-war constitutionalism. The *jurisdictio*-*gubernaculum* distinction, lying at the core of what the Rule of Law is about, can be policed by courts either through traditional means of judicial review or through dialogue with the legislature, or even by the structure of the constitution itself through the removal of certain domains from *gubernaculum*’s scope.\(^{129}\) The ideology of human rights is of huge significance in this context.\(^{130}\) Furthermore, the existence of international law\(^{131}\) and, of course, supranational legal orders,\(^{132}\) contributes to the policing of the duality.\(^{133}\) In each of these instances, the municipal law in force is policed by an array of different legal rules that lie outside of the control of the sovereign’s legal order. In their myriad forms, written and unwritten, supranational or intergovernmental, these examples create a legal tension that limits and polices the possibility of the sovereign in his own legal order. The policing of the *jurisdictio*-*gubernaculum* divide is thus possible both through the means that are internal and external to the given legal system.

From Lord Mackenzie Stuart\(^ {134}\) to *Les Verts*, which characterizes the EU Treaties as ‘a constitutional charter based on the Rule of Law’,\(^ {135}\) what we have been hearing about the Rule of Law in the EU really amounts to compliance with EU’s own law.\(^ {136}\)

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\(^{132}\) For an argument that numerous Central and Eastern European States were actually motivated by the desire for external legal checks on their laws – a *jurisdictio* – when joining the CoE, see, W. Sadurski, *Constitutionalism and the Enlargement of Europe*, Oxford 2012.

\(^{133}\) G. Palombella, *È possibile una legalità globale?*, Bologna 2012, at ch. 2.


This is an established understanding of legality.\footnote{E.g. the contributions in L.F.M. Besselink, F. Pennings and S. Prechal (eds.), \textit{The Eclipse of the Legality Principle in the European Union} (Alphen aan den Rijn 2011).} Legality is not enough to ensure that the EU behaves like – and is – a true Rule of Law-based constitutional system. Gianluigi Palombella is right: ‘the Rule of Law cannot mean just the self-referentiality of a legal order’,\footnote{G. Palombella, ‘Beyond legality–before democracy: Rule of Law caveats in the EU two-level system’ in C. Closa and D. Kochenov (eds.), \textit{Reinforcing Rule of Law Oversight in the European Union}, Cambridge 2016, pp. 36–58; Compare with Krygier: ‘To try to capture this elusive phenomenon by focusing on characteristics of laws and legal institutions is, I believe, to start in the wrong place and move in the wrong direction’, M. Krygier, ‘The Rule of Law. An abuser’s guide’ in A. Sajó (ed.), \textit{Abuse: The Dark Side of Fundamental Rights}, Utrecht 2006, pp. 129–157. Cf. B.Z. Tamanaha, \textit{Law as a Means to an End}, Cambridge 2006.} which is the reason why contemporary constitutionalism is usually understood as implying, among other things, additional restraints through law\footnote{For a clear discussion of the relationship between constitutionalism and the Rule of Law, see, M. Krygier, ‘Tempering power: Realist-idealism, constitutionalism, and the Rule of Law’ in M. Adams, A. Meuwese and E.M.H Hirsch Ballin (eds.), \textit{Constitutionalism and the Rule of Law}, Cambridge 2017, pp. 34–59.} – restraints which are, crucially, not simply democratic or political.\footnote{Cf. M. Tushnet and D. Kochenov (eds), \textit{Research Handbook on the Politics of Constitutional Law} (Edward Elgar, 2023).} Thus the Rule of Law evaporates when the traditional policing of \textit{jurisdiction – gubernaculum} within the EU fails as a result of not actually being restrained by limits beyond its own self-referential legality. The ECJ’s deployment of the principle of the Rule of Law over the last years clearly points in this direction.\footnote{I borrow from my 2015 \textit{Yearbook of European Law} article on ‘EU Law without the Rule of Law’ here – the trend was abundantly clear already then and has become more acute over time.}

**RULE OF LAW RHETORIC AND DOMINATION: ‘SUPREMACY RULE OF LAW’**

Once the values of Article 2 EU are not observed, the essential presumptions behind the core of the Union no longer hold, which undermines the very essence
of the Union’s self-image and the rationale underlying the integration exercise.\textsuperscript{142} Mutual recognition becomes an untenable fiction, to which the Member States are nevertheless bound by EU law to adhere. This is the core of what the autonomy of EU law stands for, as confirmed by the Court in the infamous Opinion 2/13.\textsuperscript{143} Autonomy considerations in the context of EU law are usually prone to prevail over human rights and other values – including the Rule of Law – that are cherished in the national constitutional systems of the Member States. Indeed, it would probably not be incorrect to argue that this would be the shortest possible summary of Opinion 2/13, which, in turn, summarized EU law as it stands.

The consequences for the Rule of Law are drastic: all the principles invoked by the ECJ to justify giving EU law the upper hand in Opinion 2/13 are procedural, while the problems which the reliance on the ECHR is there to solve are substantive. Curing the substantive deficiencies of the EU legal order with remedies confined to autonomy and direct effect is a logical flaw plaguing the EU legal system – it is a condition that puzzles most renowned commentators.\textsuperscript{144} One cannot quarrel about the roses when the forests are burning. To agree with Eleanor Sharpston and Daniel Sarmiento, ‘in the balance between individual rights and primacy, the Court in Opinion 2/13 has fairly clearly sided with the latter. The losers under Opinion 2/13 are not the member states of the signatory States of the Council of Europe, but the individual citizens of the European Union’.\textsuperscript{145} This is so, one must add, not only because of the potential reduction in the level of human rights protection. Rather, it is due to the fact that the EU, as Opinion 2/13 made clear, boasts an overwhelming potential to undermine the Rule of Law at the national level and this potential impact is not an empty threat.\textsuperscript{146}

\textsuperscript{142} Spieker, EU Values before the Court of Justice, op cit.
\textsuperscript{143} This point has been forcefully restated in the ECJ’s Opinion 2/13 – Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECLI:EU:C:2014:2454). See, e.g., para. 192.
The EU seems to be the only legal system in Europe which fiercely objects to any outside scrutiny, pushing the glorification of its own autopoetic nature almost to the extreme. It is beyond scrutiny ‘from below’, which has remained only a threat (albeit a productive one)\textsuperscript{147} and the ECJ has expressly prohibited – now twice\textsuperscript{148} – outside scrutiny ‘from above’, all in the name of ‘autonomy’. In essence, in the EU’s particular case, autonomy means that the EU tends to tolerate no constraints on its ability to rule. The defense of its gubernaculum – which in EU legal parlance is called the acquis representing the entirety of EU law, including the interpretations thereof by the CJEU – from internal or external contestation is clearly elevated to one of its chief priorities. Just listen to the Grand Chamber: ‘[W]hen implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that [...] they may not check whether that other Member State has actually, [...], observed the fundamental rights guaranteed by the EU’.\textsuperscript{149} Where the Rule of Law is not enforced in the Member States of the EU via the supranational legal order, the Member States themselves are not free to consider each other’s deficiencies in the arena of values, particularly the Rule of Law, let alone scrutinize each other’s adherence to the values at the supranational level. This seems to concern the division of the EU’s competences, yet the Court’s reliance on the argument of ‘autonomy’ makes it clear that we are dealing with a recurrent claim to externally


unchecked power. Through this reasoning, the Court has effectively brought all checks on the Rule of Law under its own control through the expanding scope of ‘implemented EU law’, thereby barring any contestations by other courts who may find the standard in their brethren states doubtful. This is precisely the reason to be suspicious and to want more rather than less Socratic contestation.

Even where the Union clearly sees itself as subjected to an international human rights regime, as is evident in the Court’s recurrent emphasis on the importance of the ECHR, binding principles of international law continue to be interpreted in such a way as to limit their effects. This is, to a large extent, made possible by the manner in which the Court has shaped the way that international law finds its way into the European legal order. International agreements become an immediate part of the Union’s legal order. The effect thereof is that the interpretation of these agreements falls under the jurisdiction of the CJEU. Although the issue then becomes whether the competences within the field of operation of the agreement fall within the exclusive or the shared competences

150 Piet Eeckhout made a most persuasive argument that the federal division of competences cannot possibly play any role here, since, no matter which level of government is responsible, the fundamental values, as expressed in the ECHR, have to be respected ‘for the ECJ [...] to assume that responsibility and division of competences are one and the same, is not an example of proper judicial reasoning, to say the least’. It is thus clear that the ECJ simply deploys ‘autonomy’ as a flimsy pretext to ensure that its own jurisdiction is unchecked: P. Eeckhout, ‘Opinion 2/13 on EU accession to the ECHR and judicial dialogue – autonomy or autarky?’, Fordham International Law Journal 38 (2015), pp. 955–992.


152 Case 11/70 – Internationale Handelsgesellschaft (ECR I-1125), para 4, and Case 4/73 – Nold v Commission (ECR I-491), para. 13, later expanded when the Court found that the ECHR has “special significance” in Case C-260/89 – ERT (ECR I-2925).

153 Case C-344/04 – IATA and ELFAA (ECR I-403), para. 36.

of the Union, the result will mostly be the same: the Court will act as the interpreter and adjudicator of any treaty regime of which the Union becomes a member. Equally, it will do its best to neutralize any alternatives, as its attacks against bilateral investment treaties demonstrated, even in the cases where the Rule of Law has been directly weakened as a result.

All this has the remarkable effect that, given the reliance of the Court on the autonomy and inviolability of the Union’s primary law, the Court will enforce – indeed sometimes going as far as to restrict the autonomy of the Member State’s legal systems – norms and rules with which it itself does not comply and which go against the essential constitutional foundations of the Member States’ and ECHR legal systems. The EU often fails to practice what its apex court preaches. Indeed, when confronted by the fact that this seems to violate the Rule of Law, the Union’s argumentation becomes circular. The counter-claim is made that the Union cannot be in violation of the Rule of Law, as it has laid down in the Treaty that it adheres to the Rule of Law. Furthermore, as the international agreement has become an integral part of the Union’s legal order, any outside scrutiny of this statement through compliance mechanisms or tribunals will not produce an effect. As the Court has made it eminently clear in its Opinions on accession to the European Convention of Human Rights, such scrutiny would in


157 This is the case even where there is an enforcement mechanism in place, N. Lavranos, ‘Concurrence of Jurisdiction between the ECJ and other international courts and tribunals’, European Environmental Law Review 14 (2005), pp. 213–225.


160 Kochenov and Butler, op cit.
effect make it possible for an outside force to interpret EU law.\textsuperscript{161} This, of course, will not be allowed to stand. Therefore, pronouncements like the decision by the Aarhus Convention Compliance Committee,\textsuperscript{162} let alone the decisions of the BIT tribunals, will produce no effect whatsoever in the EU legal order.\textsuperscript{163}

The EU, through its Court, seems to be immune to irony: it \textit{does} consider itself better than the Member States’ constitutional systems,\textsuperscript{164} which apparently need subjection to international scrutiny through numerous treaty bodies as well as, probably most importantly, the European Court of Human Rights \textit{on top} of their obligatory internal legal constraints to police their respective \textit{jurisdiction-gubernaculum} divide. Yet when confronted with the lack of these constraints within the EU, and therefore when reminded of the necessity of international scrutiny, the Court makes use of its own authority to claim \textit{sui generis} autonomy to preclude any discussion.\textsuperscript{165} Although the EU has its internal procedures to

\textsuperscript{161} As Lindeboom eloquently puts it: ‘However, the Opinion offers no prospect of compromise, dialogue or inter-systemic balance, and no reflection upon the moral virtues of accession. It maintains that any harm to the supremacy of EU law and the functioning of mutual trust violates the Treaties, notwithstanding any significant benefit for fundamental rights protection in the EU’: J. Lindeboom, ‘Why EU law claims supremacy’, \textit{Oxford Journal of Legal Studies} 38 (2018), pp. 328–356.

\textsuperscript{162} 
Aarhus Convention Compliance Committee, \textit{Findings and Recommendations of the Compliance Committee with Regard to Communication ACCC/C/2008/32 (UN-ECE 2017)}. The Convention aims to create procedural safeguards through which environmental rights can be better invoked and protected. Especially regarding access to the court for public interest litigants, this would mean that the ECJ would need to allow an outside force to affect the autonomous legal order. This, of course, does not stand in the eyes of the Court.


\textsuperscript{165} It is indispensable to distinguish between the constraints relating to the policing of the competences border – a federal animal – and the Rule of Law constraints within the EU’s sphere of competences. While the former might be said to be present – albeit weakly – the latter is less pronounced still. On the ECJ’s self-censorship in policing the federal competences border, see e.g., N. Nic Shuibhne, ‘EU citizenship as federal citizenship’ in D. Kochenov (ed.), \textit{EU Citizenship and Federalism: The Role of Rights}, Cambridge 2017, pp. 147–176. On the problematic outcomes of such modesty when not informed by any thought of going beyond the protection of the \textit{acquis}, see D. Kochenov, ‘Citizenship without respect’, \textit{Jean Monnet Working Paper} No. 08/10 (2010).
ensure that legality is observed, what is missing is precisely what Palombella characterizes as ‘a limitation of law(-production), through law’.\textsuperscript{166}

The examination of the tension between \textit{jurisdictio} and \textit{gubernaculum} as evidenced in interactions between different constitutional actors can help demonstrate the state of the Rule of Law in any given legal order. Understanding the Rule of Law as the dynamic limitation of law by higher law allows for analysis of the adherence to that essentially contested concept, regardless of the precise list of terms that fall within it. The EU emerges as an example of a legal system in which the Rule of Law, defined in such a way, is under constant attack. Even though there are clear sources from which it could derive \textit{jurisdictio} (international law, the constitutional values of its members, and its own constitutional principles), the Union places primacy in the value of its \textit{gubernaculum} – the body of substantive EU law, which we call the \textit{acquis}, in combination with three deeply anti-dialogical principles: supremacy, autonomy, and direct effect, which threaten the substance of the core values and principles guiding the law in any liberal democracy.

Once again, the difficulty of applying the principle of the Rule of Law consistently across the levels of the multi-layered legal systems has been mentioned in the literature.\textsuperscript{167} Yet, what one observes in the EU is quite extreme by all standards since the ECJ is above and beyond the law, as far as respect for and upholding the Rule of Law elements that are supposedly applicable both to \textit{itself} and to the EU as a \textit{system of law} in the context of the interactions with other legal orders and legal systems. There is apparently a towering necessity to apply the strict Rule of Law standards flowing from the latest case-law equally to the courts at the Member State level \textit{and} the supranational courts, including the Court of Justice itself. The cases of AG Sharpston mentioned above demonstrate with clarity that there is a significant gap emerging here, to say nothing about the basic


understanding of the meaning of the supranational Rule of Law as such post-Opinion 2/13, or the substance of ‘court or tribunal established by law’ following the Getin Noble Bank debacle, which extinguished both the requirement of lawful appointment and the independent EU law approach to the national bodies that are able to engage in a dialogue under Article 267 TFEU. The growing array of double standards that come hand-in-hand with ‘supremacy Rule of Law’ is a big problem.

The EU cannot be a locus of two types of Rule of Law applying side by side, as this would undermine the legitimacy of the whole exercise of defending the Rule of Law throughout the EU at all levels. We thus need to hope that Opinion 2/13, which is entirely blind to substantive rule of law considerations, as well as the Sharpston cases making Rule of Law inapplicable at the supranational level, and the Getin Noble Bank case law solidifying numerous double standards in the field of the Rule of Law in Europe, are forgotten or overruled. This hope is not likely to materialize any time soon, however, as the Court, ironically, uses frequent references to Opinion 2/13, which was precisely a blow to the EU’s Rule of Law, in justification of its own interventions in defense of the Rule of Law and judicial dialogue. This incoherent practice is hardly sustainable and undermines the important work that the Court is doing in the Rule of Law field.

In fact, the theoretical deficiency of the Court’s approach is potentially even more important than that. The Court is unwilling to declare the obvious – that some captured states have captured courts with all judges being affected, thus destroying compliance with Article 6 ECHR. Puzzlingly, in criminal cooperation cases the CJEU still insists that requested courts must check whether or not to cooperate with a requesting court in a captured state, deploying a much-


\[\text{169 D. Kochenov, ‘EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?’ (2015) 34 YEL, 74.}\]

\[\text{170 D Kochenov and P Bárd, ‘Kirchberg Salami Lost in Bosphorus’, 60 JCMS 2022, 150.}\]

criticized test that is unusable in practice to the detriment of human rights protection, legal certainty, and the Rule of Law.\footnote{172} Worse still, by starting to accept preliminary references from the judges who are tainted by questionable appointments,\footnote{173} the CJEU adopts an interpretation that is radically different from the ECtHR’s reading of what constitutes a ‘court or tribunal’ under Article 6 ECHR.\footnote{174} It also markedly departs from its own case-law, from the relatively recent \textit{Banco de Santander SA}, to the more foundational ones, which are best analyzed by Broberg and Fenger in their seminal work.\footnote{175} The Court of Justice develops a double standard of judicial independence in Europe through shying away from calling a spade a spade and thus failing to call out the fake judges, thus undermining rather than reinforcing the state of the Rule of Law and, most notably, judicial independence, in the European legal space.\footnote{176} The tragedy of looming illegality at Kirchberg itself, with disregard for primary law in the name of unchecked Member States’ power, only exacerbates this story: national level Rule

\footnote{175} M. Broberg and N. Fenger, \textit{Broberg and Fenger on the Preliminary References to the European Court of Justice} (Oxford, 2021).
of Law problems are not unique, after all.\textsuperscript{177} It goes without saying that the unfortunate collision path with Strasbourg which the Court of Justice has chosen only risks negative implications for the future of the Union as a Rule of Law-based democracy honoring human rights, unless the dialogue between Kirchberg and Strasbourg and the EU accession to the ECtHR were to bear fruit.\textsuperscript{178} The sacrifice of conceptual clarity and the lowering of the level of judicial independence and human rights protection, which came with the new Kirchberg approach, does not bring any changes for the better on the ground in the backsliding Member States.

**CONCLUSION**

There is great potential for the necessary tension that is at the heart of the Rule of Law to arise from the judicial dialogue between the Court of Justice of the EU and the courts of the Member States. However, the potential for such a dialogical Rule of Law is imperiled by the ECJ’s imposition of strict adherence not to the Rule of Law, but to principles of EU law that it has itself created in order to pre-empt any substantive value-based arguments that challenge the autopoetic orthodoxy, let alone any application of the same standards to itself. This is highly problematic as it requires domestic constitutional courts – who see it as their task to protect inherent constitutional values and rights – to set aside these values in favor of vague euro-speak, such as coherence and supremacy. They are required also to pretend that the meaning of a lawfully appointed tribunal established by law changes depending on the level of the law in question – this is what the ECJ implied when speaking of itself in the *Sharpston* cases and by eagerly conversing with the outcast Polish usurpers in *Getin Noble Bank*. It also ruins basic consistency, as recent case-law resulted in far-reaching departures from key Article 6 ECHR standards as articulated by the ECtHR and also fails to apply the same Rule of Law

standards to the supranational court which that very Court expects all the EU Member States’ courts to uphold and comply with. However, if the ECJ would allow actual dialogue instead of the current monologue, the conditions to flourish in the EU could be created, turning the EU into a much richer constitutional system for the Rule of Law. A less strict adherence to its own supremacy would not only create a greater willingness for constitutional courts to engage with the ECJ, but this significant step towards achieving constitutional pluralism through dialogue would lead to greater oversight of the Rule of Law in the Union’s legal order, fostered by the greater support and engagement of the legal orders of the Member States. The balance and tension between *jurisdictio* and *gubernaculum* would be restored.

The ECJ is faced with a choice between committing itself to dialogue while upholding the principles and standards that it has *itself* formulated for the judiciaries in the EU, or instead opting for only two possible scenarios at the end of the *status quo*. Either the constitutional courts, and later lower courts, will start to ignore the ravings of the Court in Luxembourg in the name of the fundamental and indispensable constitutional essentials of the domestic legal systems that they are obliged to protect, or there will be a slow but steady decline in the enforceability of what the Court takes to be the Rule of Law as the values of the Union lead to an increase in the kind of political stalemates currently occurring in Poland and Hungary. Lastly, the growing cleavage between the Rule of Law standards proclaimed by the ECJ and their open violation by that very Court could discredit the European judiciary, and with it the European project. This would be quite a bitter end for a short-term gain power game: the Court would be selling a dream for nothing.

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