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RESEARCH ARTICLE

Restoring Dialogical Rule of Law in the European Union: Janus in the Mirror

Dimitry V. Kochenov*

CEU Democracy Institute and CEU Rule of Law Clinic, Budapest; CEU Department of Legal Studies, Vienna; Mercator Fellow, Forschungskolleg Humanwissenschaften, Bad Homburg (Fall 2023).
Email: KochenovD@ceu.edu

Abstract

The primacy of EU law as framed by the Court of Justice pre-empts substantive arguments of principle that originate in other legal orders. This was accepted and acceptable to the extent that the values EU law contained were at least normatively equivalent to values originated from the other legal orders. In this contribution it is argued that this is no longer the case and that the misuse of the Rule of Law rhetoric justifying the primacy of EU law renders the EU less accountable and undermines the dialogical pluralist essence of EU constitutionalism.

Keywords: supranational rule of law; ECJ; coherence; overreach; EU values; constitutional dialogue; division of competences

I. Introduction

One version of the Rule of Law in Europe is a fight to ensure the values of Article 2 of the Treaty on European Union ('TEU') are implemented at the national level. In this contribution, I highlight a different use of the Rule of Law: in this version Rule of Law language is used to *prevent* substantive arguments of principle being made.[1] The Rule of Law, on this count and as used by the Court, emerges as a trump card making impossible the vital dialogue on which the Rule of Law depends. Using the Rule of Law in this second sense undermines the basic coherence of the EU legal system[2] and also the substance of the Rule of Law as this approach opposes vital checks on the arbitrary power of the sovereign[3]—in this case the *Herren der Verträge*. Here the substantive outcome of this turn in EU law amounts to a vacant supranational approach to values. This use of Rule of Law rhetoric renders the EU less accountable and undermines the dialogical pluralist essence

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[1]For a concise earlier attempt to do this, please see 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).

[2]For more on this notion, see N Nic Shuibhne, *The Coherence of EU Free Movement Law* (Oxford, 2013).

[3]On the Rule of Law from this perspective, see eg M Krygier, 'Tempering Power' in M Adams et al (eds), *Bridging Idealism and Realism in Constitutionalism and Rule of Law* (Cambridge University Press, 2016); G Palombella, 'The Rule of Law as an Institutional Ideal' in G Palombella and L Morlino (eds), *Rule of Law and Democracy: Inquiries into Internal and External Issues* (Brill, 2010); M Krygier, 'The Rule of Law: Legality, Teleology, Sociology' in G Palombella and N Walker (eds), *Re-locating the Rule of Law* (Hart Publishing, 2008).

of EU constitutionalism, besides departing from EU law's own established principles, as well as European Convention on Human rights ('ECHR') standards in Rule of Law cases.[4]

This might be illustrated, *inter alia*, by the questions surrounding the structural independence and lawful composition of the European Court of Justice raised by the *Sharpston* cases,[5] the meaning of the 'lawful judge' embraced by the Court, which showcases a very different approach to that taken by the European Court of Human Rights and highest national jurisdictions;[6] the emerging presumption of guilt as a requirement of mutual trust in European Arrest Warrant cases;[7] and a general vacuum of accountability marking whole spheres of EU's engagement. This last point is best illustrated by the turning of the Mediterranean into a mass grave by the efforts of the EU and the Member States in the absence of any accountability for 27.000 deaths and counting;[8] mistreatment of migrants on the EU's Eastern border;[9] the unlawful imprisonment of innocent migrants in the detention centres outside the EU in post-conflict territories with a weak or no commitment to human rights,[10] and the margin of appreciation the Court has afforded to FRONTEX.[11] Now OLAF bemoans the harm caused by EU's own agencies[12] and doctoral dissertations are defended at Yale Law School on 'EU's Crimes against Humanity'.[13] Fading away of the dialogical Rule of Law is the alarm bell of the EU potentially emerging as an actor of injustice—what Gráinne de Búrca warned about long ago[14]—and what all Europeans, lawyers, and others, are bound to oppose as a perversion of the European project.

II. The Crisis of the Rule of Law in the EU: Considering a Fuller Picture

The Rule of Law is a crucial tool used to reinforce EU law's supremacy claim. The deployment of the principle in this capacity is relatively new: EU law is supreme and the Rule of Law, as interpreted by

[4]For an opposing view, see K Lenaerts, 'On Values and Structures: The Rule of Law and the Court of Justice of the European Union' in Södersten and Hercock (eds), note 1 above.

[5]D Kochenov and G Butler, 'Independence of the Court of Justice of the European Union: Unchecked Member State Power after the Sharpston Affair' (2021) 27 *European Law Journal* 262.

[6]B Grabowska-Moroz, 'Annotation of *Getin Noble Bank*' (2023) 60 *CMLRev* 797; D Kochenov and P Bárd, 'Kirchberg Salami Lost in Bosphorus' (2022) 60 *Journal of Common Market Studies* 150.

[7]P Bárd, 'Canaries in a Coal Mine: Rule of Law Deficiencies and Mutual Trust' (2021) 12 *Pravni zapisi* 371; P Bárd and D Kochenov, 'What Article 7 Is *Not*: The European Arrest Warrant and the *de Facto* Presumption of Guilt: Protecting EU Budget Better than Human Rights?' in A Łazowski and V Mitsilegas (eds), *The Arrest Warrant at Twenty* (Hart Publishing, 2024).

[8]S Ganty and D Kochenov, 'How the EU Death Machine Works' (*VerfBlog*, 27 February 2024); D Kochenov and S Ganty, 'The Death Machine: EU Lawlessness Law that Rules' in C Barnard, A Łazowski, and D Sarmiento (eds), Liber Amicorum *Eleanor Sharpston* (Hart Publishing, 2024); D Kochenov and S Ganty, 'EU Lawlessness Law' (Jean Monnet Working Paper, NYU Law School) No 2/2022; O Shatz and J Branco, *Communication to the Office of the Prosecutor of the International Criminal Court Pursuant to Article 15 of the Rome Statute on EU Migration Policies in the Central Mediterranean and Libya (2014–2019)* (2019), https://www.statewatch.org/news/2019/jun/eu-icc-case-EU-Migration-Policies.pdf.

[9]D Kochenov and B Grabowska-Moroz, 'EU's Face in Łukašenka's Mirror' (*VerfBlog*, 26 August 2021); S Ganty, A Jolkina, and D Kochenov, 'EU Lawlessness Law at the EU-Belarusian Border: Torture and Dehumanisation Excused by "Instrumentalisation"' (MOBILE Working Paper, University of Copenhagen, 2023) No 18.

[10]I Urbina, 'The Secretive Prisons that Keep Migrants out of Europe' (*New Yorker*, 28 Nov 2021); T Spijkerboer, 'Bifurcation of People, Bifurcation of Law: Externalization of Migration Policy before the EU Court of Justice' (2017) 31 *J Refugee Stud* 232.

[11]*NF v European Council*, T-192/16, EU:T:2017:128; *WS and Others v FRONTEX*, T-600/21, EU:T:2023:492. Cf G Davies, 'The General Court Finds Frontex Not Liable for Helping with Illegal Pushbacks: It Was Just Following Orders' (*European Law Blog* 36/2023).

[12]OLAF, *OLAF Final Report on FRONTEX, Case No OC/2021/0451/A1*, https://fragdenstaat.de/dokumente/233972-olaf-final-report-on-frontex.

[13]O Shatz, *EU Crimes against Humanity and the Failed Success of Human Rights* (SJD Dissertation, Yale Law School, 2023).

[14]G de Búrca, 'Conclusion' in D Kochenov, A Williams, and G de Búrca (eds), *Europe's Justice Deficit* (Hart Publishing, 2015).

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the European Court of Justice ('ECJ'), requires setting aside substantive objections once a claim to supremacy has been voiced.[15] EU law is made effective though the operation of supremacy, direct effect, and autonomy.[16] Operating together, they can set aside both national constitutional and international human rights[17] as well as broader international law constraints.[18] EU law originally made the claim by an appeal to the normative value of its content. Indeed, could one imagine today's EU without the positive outcomes of the *Solange* saga(s) or the pro-active stance of the *Corte costituzionale* infusing supranational supremacy narratives with vital substantive constitutional guarantees?

The worrisome recent development is to claim primacy—and its consequences—without a critical examination of the normative content of EU law. This 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,[19] in addition to the question of how the Rule of Law concept can operate to counteract the breakdown of liberal-democratic constitutionalism and national-level defiance.[20]

While the meaning and specific use of the Rule of Law are both crucially important issues, they are quite different from the use of the concept to set aside substantive concerns that are not reflected in the EU law that claims primacy. My claim is that procedural non-reviewability as a perceived element of the Rule of Law is contrary both to the letter and spirit of EU constitutionalism.[21] This is because on such a reading EU law acts to shield the sovereign from scrutiny and criticism by offering the protection of his actions under the Rule of Law, but without an examination of the substantive content of its actions, thus effectively placing the Union outside the law once a supremacy claim has been voiced.

The move towards reduced accountability of the EU's collective sovereign can arguably be seen in the removal of AG Sharpston from office in breach of the security of tenure guarantees established in the ECJ's case law.[22] This was the result of what seems to be a self-declaration by the Court that it is not, in fact, independent from the Member States, since it cannot review 'common accord' by the Masters of the Treaties even when this 'common accord' goes against the wording of the Treaties,

[15]Kochenov, note 1 above; J Lindeboom, 'Why EU Law Claims Supremacy' (2018) 38 *Oxford Journal of Legal Studies* 328.

[16]Procedural principles cannot possibly replace the lack of substantive attention to the core values encompassed by Article 2 TEU, including the Rule of Law. This would only reinforce the justice deficit in the Union. Kochenov, de Búrca, and Williams (eds), note 14 above. Cf P Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky?' (2015) 38 *Fordham International Law Journal* 955; D Kochenov, 'Citizenship without Respect' (Jean Monnet Working Paper, 2010) No 08/10.

[17]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. Cf D Kochenov 'EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?' (2015) 34 *Yearbook of European Law* 74.

[18]On the *Kadi* saga, see G de Búrca, 'The European Court of Justice and the International Legal Order after *Kadi*' (2010) 51 *Harvard International Law Journal*. See also, of course, *Commission and Others v Kadi*, C-584/10 P, ECLI:EU:C:2013:518.

[19]L Pech, 'The Rule of Law as a Well-Established and Well-Defined Principle of EU Law' (2022) 14 *Hague Journal on the Rule of Law* 107; L Pech, 'The Rule of Law as a Constitutional Principle of the European Union' (Jean Monnet Working Paper Series, 2009) No 04/09 (and the literature cited therein). Cf B Grabowska-Moroz, 'The Systemic Implications of the Supranational Legal Order for the Practice of the Rule of Law' (2022) 14 *Hague Journal on the Rule of Law* 331.

[20]This is what M Wyrzykowski, 'Experiencing the Unimaginable: the Collapse of the Rule of Law in Poland' (2019) 11 *The Hague Journal on the Rule of Law* 417, refers to as 'the unimaginable'. See further, L Pech and KL Scheppele, 'Illiberalism within: Rule of Law Backsliding in the EU' (2017) 19 *Cambridge Yearbook of European Legal Studies* 3; A Jakab and D Kochenov (eds), *The Enforcement of EU Law and Values* (Oxford, 2017); C Closa and D Kochenov (eds), *Reinforcing the Rule of Law Oversight in the European Union* (Cambridge, 2016). Cf W Sadurski, *Poland's Constitutional Breakdown* (Oxford, 2021); B Bakó, *Challenges to EU Values in Hungary* (Routledge, 2022).

[21]Eg *Council v Sharpston*, C-423/20 P(R), EU:C:2020:700, Order of the Vice-President of the Court, para 26 (10 September 2020); *Council and Representatives of the Governments of the Member States v Sharpston*, C-424/20 P(R), EU:C:2020:705, Order of the Vice-President of the Court, para 26 (10 September 2020). Cf Kochenov and Butler, note 5 above.

[22]Kochenov and Butler, note 5 above. Cf M Poiares Maduro, 'General Report' in A Kornezov (ed), *Mutual Trust, Mutual Recognition and the Rule of Law: The XXX FIDE Congress in Sofia*, Vol 1 (Sofia, 2023), p 23.

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which supposedly bind them[23] and arguably tinted the lawfulness of ECJ's composition for a year until of the expiration of the original tenure of AG Sharpston.[24]

It might also be evidenced in *Getin Noble Bank* and its progeny,[25] where the ECJ accepted a preliminary reference from a Polish individual sitting as a judge when the European Court of Human Rights and the Polish Supreme Court have already established that that person has not been appointed in accordance with ECHR and national constitutional law, thus putting EU values in question and potentially adding legitimacy to the national-level attacks against the independence of the judiciary. A further example might be the EU-Turkey deal, which *de facto* suspends 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'.[26] While the internal Rule of Law situation in the Union is not ideal, the external boundaries of the Union are a further example of the lack of normative value within the new conception of the Rule of Law focusing on procedural supremacy, while setting aside substantive values the EU is based on.[27] The appropriation of the rhetorical appeals to the law deprive the Rule of Law of any meaning and erase any accountability. 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,[28] the clear danger of the ongoing Rule of Law developments in the Union failing to fulfil the objective of compliance with the values of Article 2 TEU emerges as probably the most acute problem of European constitutionalism.

III. Ephemeral Values of the Union and the Role of the Rule of Law

The starting point underpinning modern constitutionalism elevating the Rule of Law to its 'institutional ideal' is that a Rule of Law-based system controls the applicable law through dialogical legal considerations.[29] On this reading, dialogue is the essential starting point of the Rule of Law. The most popular example of constitutional dialogue today is the dialogue between the courts and the legislature, which has been deemed indispensable for the survival and flourishing of democracy.[30] The framing of this dialogue at the heart of the Rule of Law is a distinctive feature of EU law.[31] Indeed, it goes to the core of the EU's self-image and the account of it in the eyes of others, unquestionably informing the values plane of EU law as much as the rest of the *acquis*.[32] 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'.[33]

[23] *Council v Sharpston*, C-423/20 P(R), note 21 above, para 29; *Council and Representatives of the Governments of the Member States v Sharpston*, note 21 above, para 29.

[24] Cf Kochenov and Butler, note 5 above. For more on the potential role of the Article 255 committee in rejecting the vetting of candidates when the existence of the vacancy is not a given, see J Laffranque, 'Europe Is Looking for a Super-Judge' (2023) 32 *Juridica International* 131, pp 149–50.

[25] *Getin Noble Bank*, C-132/20, ECLI:EU:C:2022:235, annotated by Grabowska-Moroz, note 6 above; cf D Kochenov and P Bárd, note 6 above.

[26] Cf, on similar suspensions in other fields, 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* 185.

[27] Ganty and Kochenov, note 8 above; Kochenov and Ganty, 'The Death Machine' note 8 above; Kochenov and Ganty, 'EU Lawlessness Law' note 8 above.

[28] Eeckhout, note 16 above; B de Witte and Š Imamović, 'Opinion 2/13 on Accession to the ECHR: Defending the EU Legal Order Against a Foreign Human Rights Court' (2015) 40(5) *ELRev* 683.

[29] Palombella, note 3 above.

[30] M Kumm, 'The Idea of Socratic Contestation and the Right to Justification' (2010) 4 *Law and Ethics of Human Rights* 142.

[31] This being said, it is not my intention here to advocate any *sui generis* nature of the Union, which has been persuasively disproved by Robert Schütze: R Schütze, *From Dual to Cooperative Federalism* (Oxford, 2009).

[32] Cf KL Scheppele, D Kochenov, and B Grabowska-Moroz, 'EU Values Are Law, After All' (2021) 38 *Yearbook of European Law* 3.

[33] Opinion 2/13, note 17 above, para 168. See also *EUPM in Bosnia and Herzegovina*, C-455/14 P, EU:C:2016:569, para 41.

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The values of Article 2 TEU emerge on such a reading as the very '*untouchable core*' of the EU legal order.[34] Membership of the Union is open only to democratic states adhering to the Rule of Law and human rights protection.[35] While the Union's ability to enforce this claim also after accession has not booked many successes,[36] the case law has been developing swiftly,[37] even if the Commission has been looking the other way.[38] What is crucial for our purposes is that it is only recently that the question of the *EU's own* compliance with this 'untouchable core' came under much-needed scrutiny.

The EU's compliance with its values 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 necessarily caring about the considerations of justice lying outside of the pursuit of its tasks.[39] This resulted, in Michael Wilkinson's words, in a system of 'Authoritarian liberalism'.[40] Yet, gradually EU values turned from an image-related luxury item that, *sensu stricto*, barely made up part of the *acquis* (the Copenhagen criteria were not binding law *per se*, showcasing *acquis*' limitations)[41] into an indispensable ornament, adorning the legal-political edifice of the EU.[42] This does not mean, however, that the Union is in the position to defend the values it proclaims to be built upon,[43] or, indeed, that it can export these values abroad effectively.[44] And studying EU history reveals a richer and a more multi-faceted story of values and aspirations, some of these now out of sight.[45]

[34]Eg N Lavranos, 'Revisiting Article 307 EC: The Untouchable Core of Fundamental European Constitutional Law Values and Principles' in F Fontanelli, G Martinico, and P Carrozza (eds), *Shaping Rule of Law through Dialogue: International and Supranational Experiences* (Groningen, 2009). Cf LD Spieker, *EU Values before the Court of Justice* (Oxford, 2023); J Wouters, 'Revisiting Art. 2 TEU' (2020) 5 *European Papers* 255.

[35]See eg European Council Declaration on European Identity, 7th General Report EC 1973, Annex 2, Ch II; Joint Declaration by the EP, the Council and the Commission on the respect of fundamental rights, OJ 1977, C103/1; EP Declaration on fundamental rights and freedoms, OJ 1989, C120/51; Inter-institutional declaration on democracy, transparency and subsidiarity OJ 1993, C329/133; P Soldatos and G Vandersanden, 'L'admission dans la CEE: Essai d'interprétation juridique' (1968) *Cahiers de droit européen* 674. Cf V Perju, 'On Uses and Misuses of Human Rights in European Constitutionalism' in D Veleky and GL Neuman (eds), *Human Rights, Democracy, and Legitimacy in a World of Disorder* (Cambridge, 2018).

[36]Pech and Scheppele, note 20 above; Sadurski, note 20 above; Bakó, note 20 above.

[37]For a detailed step-by-step analysis of the relevant case-law, see L Pech and D Kochenov, 'Respect for the Rule of Law in the Case-Law of the Court of Justice' (SIEPS Report) No 2021/3. Cf 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*' (2021) 46 *European Law Review* 692.

[38]RD Kelemen and T Pavone, 'Where Have the Guardians Gone? Law Enforcement and the Politics of Supranational Forbearance in the European Union' (2023) 74 *World Politics*.

[39]A Williams, 'Taking Values Seriously: Towards a Philosophy of EU Law' (2009) 29 *OJLS* 549; C O'Brien, *Unity in Adversity* (Hart Publishing, 2017); Kochenov, de Búrca, and Williams (eds), note 14 above.

[40]MA Wilknson, *Authoritarian Liberalism and the Transformation of Modern Europe* (Oxford, 2021).

[41]D Kochenov, 'The *Acquis* and Its Principles: The Enforcement of "Law" versus the Enforcement of "Values" in the European Union' in Jakab and Kochenov (eds), note 20 above.

[42]Cf Wouters, note 34 above.

[43]Pech and Scheppele, note 20 above.

[44]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). 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' (2022) 14 *Hague Journal on the Rule of Law* 221.

[45]On colonialism, nuclear proliferation, and flirting with big business, see P Hansen and S Jonsson, *Eurafrica: The Untold Story of European Integration and Colonialism* (Bloomsbury, 2014); G Mallard, *Fallout: Nuclear Diplomacy in the Age of Global Fracture* (Chicago, 2014); JD Veraldi and MR Hassall, 'The Politics of the Constitutionalisation of Corporate Power in Europe' in M Tushnet and D Kochenov (eds), *Research Handbook on the Politics of Constitutional Law* (Edward Elgar, 2023).

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While most law faculties in Europe teach EU law as constitutional law, the constitutional nature of the Union, although assumed,[46] is regularly questioned.[47] The reasons for such questioning are evident on the surface. The Rule of Law and other values, although mentioned in the Treaties, are *not* the EU's founding idea, or, paraphrasing Joseph Weiler, are not in the EU's 'DNA',[48] notwithstanding the constant rhetorical adherence.[49] In the division of powers between the EU and its Member States, democracy and the Rule of Law are seemingly left entirely to the Member States and the EU can do little when the basic foundations of constitutionalism are disturbed in one or more Member States.[50] The Union is not in the position to defend the values it proclaims to be built upon.[51] This is the case both in relation to national level- *and* supranational-level disregard of the values. One observes it, as Elena Basheska demonstrated, even in the context of EU enlargements, where EU leverage and power is at its utmost and the desire to promote change is clearly articulated.[52] This is a serious design flaw, which was probably difficult to anticipate at the outset. Once again: the issue emerges as a result of the Union incrementally digesting a greater number of competences lying beyond the pursuit of its tasks in the absence of democracy, Rule of Law and other values in the DNA of its legal system as per Weiler's plain diagnosis.[53] It is thus unsurprising in this context that gradually EU values became indispensable to the justification for the uncritical expansion of primacy arguments where Rule of Law is deployed to trump any constitutional conversation about the values' substance.

Indeed, the re-articulation of the Union from an ordinary treaty organization into a self-proclaimed constitutional system was not accompanied by a sufficient upgrade of the role played by the core values that it is said to be built upon. Though the promotion of its values, including the Rule of Law, is an obligation lying with the Union in accordance with the Treaties.[54] The EU has arguably not been founded on the values that Article 2 TEU preaches, as the integration project went through a significant evolution throughout its history.[55] A vivid daily reminder of this is that the Union as a space of rights under its law only exists for Europeans[56]—an *apartheid européen* in Étienne Balibar's apt phrase, upgraded by Hans Kundnani to 'Eurowhiteness'.[57] The Rule of Law as a principle of EU law has thus produced a Janus effect: besides consolidating EU's claims to

[46]On the crucial importance of this presumption, see JHH Weiler and UR Haltern, 'The Autonomy of the Community Legal Order: Through the Looking Glass' (1996) 37 *Harvard International Law Journal* 411, p 422. Indeed, 'who cares what it "really" is'. Ibid.

[47]For the most compelling account, see PL Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation State* (Oxford, 2010).

[48]JHH Weiler, 'The Schuman Declaration as a Manifesto of Political Messianism' in J Dickson and P Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford, 2012).

[49]See further A Williams, *The Ethos of Europe: Values, Laws and Justice in the EU* (Cambridge, 2009).

[50]D Kochenov, 'The EU and the Rule of Law: Naïveté or a Grand Design?' in M Adams, E Hirsch Ballin, and A Meuwese (eds), *Constitutionalism and the Rule of Law: Bridging Idealism and Realism* (Cambridge, 2017).

[51]Pech and Scheppele, note 20 above.

[52]Basheska, note 44 above; D Kochenov, *EU Enlargement and the Failure of Conditionality* (Kluwer Law International, 2008).

[53]Williams, note 39 above; O'Brien, note 39 above; Kochenov, de Búrca, and Williams (eds), note 14 above.

[54]Art 3(5) TEU. See also Pech, note 44 above.

[55]Next to JHH Weiler's brilliant scholarship, the crucial argument in this vein has been made, most powerfully, by Andrew Williams. Williams, note 39 above. For the argument of how crucial the latest enlargements of the EU were for the codification and articulation of Art 2 TEU values, see W Sadurski, *Constitutionalism and the Enlargement of Europe* (Oxford, 2012). Cf M Klamert and D Kochenov, 'Article 2 TEU' in M Kellerbauer, M Klamert, and J Tomkin (eds), *The Treaties and the Charter of Fundamental Rights: A Commentary*, 2nd ed (Oxford, 2024).

[56]Kochenov and Ganty, note 8 above; D Kochenov and M van den Brink, 'Pretending There Is No Union: Non-derivative *Quasi*-Citizenship Rights of Third-Country Nationals in the EU' in D Thym and M Zoetewij Turhan (eds), *Degrees of Free Movement and Citizenship* (Brill-Nijhoff, 2015), p 66.

[57]É Balibar, *Nous, citoyens d'Europe ?: Les frontières, l'État, le peuple* (La Découverte, 2001), p 192. Cf H Kundnani, *Eurowhiteness: Culture, Empire, and Race in the European Project* (Hurst, 2023).

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legitimacy as a project of integration through law,[58] it has at the same time occluded the further clarification of the values' substance in the EU legal system: a different approach to values is certainly possible and urgently needed.

IV. 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.[59] 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 courts and legislature can ultimately be viewed as amounting to illustrations of the dialogical Rule of Law where a modern legal system is only viewed as based on the Rule of Law if its law is, once again, controlled by law.[60] 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.

Indeed, a number of legal systems provide useful counterpoints to 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 their legal and political culture. The EU is one such system.[61] Leaving aside the obvious tensions surrounding EU's self-characterization as a democracy,[62] let us not forget Joseph Weiler's crucially important baseline: the EU is not your classical democratic government, whatever it has to say about itself, since the citizens cannot 'throw the scoundrels out' in the way a government could be voted out at national level.[63] 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 shaping of 'negative' as opposed to 'positive' integration, 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.[64]

[58]Pech, note 19 above (and the literature cited therein). Cf. Lord Mackenzie-Stuart, *The European Communities and the Rule of Law* (Stevens, 1977); ML Fernández Esteban, *The Rule of Law in the European Constitution* (Dordrecht, 1999); U Everling, 'The European Union as a Federal Association of States and Citizens' in A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (Oxford, 2011), p 734; M Zuleeg, 'The Advantages of the European Constitution' in von Bogdandy and Bast (eds), note 58, p 763.

[59]Eg, J Waldron, 'The Core of the Case against Judicial Review' (2005) 115 *Yale Law Journal* 1346.

[60]Eg Palombella, note 3 above.

[61]JHH Weiler, 'The Political and Legal Culture of European Integration: An Exploratory Essay' (2011) 9 *International Journal of Constitutional Law* 678.

[62]A von Bogdandy, 'The Prospect of a European Republic' (2005) 42 *CMLRev* 913; K Lenaerts and JA Gutiérrez-Fons, 'Epilogue on EU Citizenship: Hopes and Fears' in D Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge, 2017); but see G Davies, 'Social Legitimacy and Purposive Power: The End, the Means and the Consent of the People' in Kochenov, de Búrca, and Williams (eds), note 31 above; JHH Weiler, 'The Selling of Europe: The Discourse on the European Citizenship in the 1996 IGC' (Jean Monnet Working Paper, Harvard Law School, 1996) No 03/96. Cf. Š Auer, *European Disunion: Democracy, Sovereignty, and the Politics of Emergency* (Hurst, 2022).

[63]Weiler, note 62 above.

[64]G Davies, 'The Humiliation of the State as a Constitutional Tactic' in F Amtenbrink and PAJ van den Berg (eds), *The Constitutional Integrity of the European Union* (TMC Asser Press, 2010), p 147; D Kochenov, 'EU Citizenship: Some Systemic

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Indeed, the ECJ 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, making dialogue with the legislator much less impactful in the EU's constitutional context. 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'.[65] 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 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 ECJ, 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.[66] Thus, since the European legislature is not competent to enter into any dialogue (without a predetermined outcome based on supremacy of EU law that is) 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 ECJ's point of view, of course, but due to the fact that a lot of negative integration tends 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.

V. An Echternach Procession Away from the EU's Values?

The current perception of the inability of the Court of Justice to include normative values in the claim of primacy undermines the coherence of the law, and underplays the values' constitutional importance: deploying primacy in this manner in the multi-level legal system could breach the core principles of the Rule of Law and human rights protection,[67] resulting in a movement akin to an 'Echternach procession': three steps forward: the Court building precious case law—and two steps back: the court deploying primacy in a way capable of undermining EU law's recent achievements. What remains the key characteristic of the EU legal order is that, although adherence to the Rule of Law has always been praised as an essential feature of the European Union's constitutionalism, it is marked by the absence of a power to uphold the Rule of Law at the national level.[68] The same applies to the supranational level, as numerous examples clearly demonstrate.

A. The Supranational Transformation

The competence lacuna in the field of the Rule of Law had to be filled sooner or later, allowing the EU to graduate into a legal system that actually has theoretical means, at least in law, to stand by its principles, and the case law of the last several years could be interpreted as starting precisely this kind of transformation.[69] 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

Constitutional Implications' in N Cambien, D Kochenov, and E Muir (eds), *European Citizenship under Stress: Social Justice, Brexit, and Other Challenges* (Brill-Nijhoff, 2020), p 11.

[65]M Dawson, 'Constitutional Dialogue between Courts and Legislatures in the European Union' (2013) 19 *European Public Law* 369, p 371.

[66]Schütze, note 31 above.

[67]Grabowska-Moroz, note 19 above.

[68]Sadurski, note 20 above; Bakó, note 20 above; Pech and Scheppele, note 20 above. Cf C Closa, D Kochenov, and JHH Weiler, 'Reinforcing the Rule of Law Oversight in the European Union' (EUI RSCAS, 2014), Research Paper 2014/25.

[69]Pech and Kochenov, note 37 above.

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supranational problems, which are not confined to the effectiveness of EU's intervention and point at systemic deficiencies at the supranational level. Let us trace the three steps forward made by the Court and offer a reality check of their effectiveness to appraise the recent developments.

The first step concerned the competence of the Court to intervene. One of the pillars of EU law is a presumption of compliance with the Rule of Law. This is now backed by *competence* to intervene when that presumption is not satisfied.[70] This is part of an 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.[71]

As the second step, the Court of Justice has articulated the core *substantive* elements of the supranational Rule of Law,[72] in a manner that focuses predominantly on judicial independence.[73]

As a third step, the Court has moved to ensure that its newly found substance of the Rule of Law, which cuts through the legal orders, emerges as effectively enforceable. 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 *national courts* of the Member States, with the help of EU law, to do the same.[74]

B. Reality Check: National Level

The promised reality check reveals a worrisome picture. The results of these important developments have been mixed to say the least. One does not observe any improvements—not even a slowdown in non-conformity with the Rule of Law in Hungary and Poland, which could be attributable to the recent ECJ-driven upgrade of EU law. At the national level the general question that arises, irrespective of how much authority and good will the Court of Justice commands, is how much courts can actually do in the face of a rising tide of populism?[75] Populism is not the exception in the world today—it is the rule.[76] 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.[77] It thus appears that 'autocratic legalism' is here to stay and the EU needs effective tools to combat it,[78] including, at the supranational level.[79] The Union can seemingly do very little on the ground notwithstanding the supranational Rule of Law rethink, including the newly acquired EU competences.[80] What the EU needs is a set of legal-political tools to prevent non-conformity in any of

[70]*Associação Sindical dos Juízes Portugueses v Tribunal de Contas*, C-64/16, EU:C:2018:117. L Pech and S Platon, 'Judicial Independence under Threat: The Court of Justice to the Rescue in the *ASJP* Case' (2018) 55 *Common Market Law Review* 1827.

[71]D Kosař, J Baroš, and P Dufek, 'The Twin Challenges to Separation of Powers in Central Europe: Technocratic Governance and Populism' (2019) 15 *EUConst* 427, p 461.

[72]L Pech, note 19 above; Pech and Kochenov, note 37 above.

[73]K Lenaerts, 'New Horizons for the Rule of Law within the EU' (2020) 21 *German LJ* 29.

[74]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.

[75]D Adamski, 'The Social Contract of Democratic Backsliding in the "New EU" Countries' (2019) 56 *CMLRev* 623. Cf A Sajó, 'The Rule of Law as Legal Despotism: Concerned Remarks on the Use of "Rule of Law" in Illiberal Democracies' (2019) 11 *The Hague Journal on the Rule of Law* 371; M Blauberger and RD Kelemen, 'Can Courts Rescue National Democracy? Judicial Safeguards against Democratic Backsliding in the EU' (2017) 24(3) *European Journal of Public Policy* 321; P Blokker, 'EU Democratic Oversight and Domestic Deviation from the Rule of Law' in Closa and Kochenov (eds), note 20 above.

[76]M Krygier et al (eds), *Anti-constitutional Populism* (Cambridge, 2022).

[77]N Lacey, 'Populism and the Rule of Law' (2019) 15 *Ann Rev Law Soc Sci* 79.

[78]KL Scheppele, 'Autocratic Legalism' (2018) 85 *University of Chicago Law Review* 545.

[79]Kochenov and Ganty, 'EU Lawlessness Law' note 8 above.

[80]It is 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 Scheppele and John Morijn to the SIEPS anthology: Södersten and Hercock (eds), note 1 above.

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its regions.[81] 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 defence of the Rule of Law, the bigger picture still remains quite grim as the populist forces are busy undoing not only judicial independence, but also essentially the idea of legality *as such*.

C. Reality Check: Supranational Level

What about the supranational level of the law? It seems unquestionable, that all of 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 its own case law in the area of understanding of the Rule of Law and judicial independence[82] and rigorously 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 of the Treaty on the Functioning of the European Union, 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 arguably and eagerly pretend otherwise, puzzling some leading observers and making the fight for the Rule of Law and judicial independence alike more difficult for Polish judges.[83] 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 showing less resilience in the face of such interference with its own composition than the highest Polish courts have.[84] It also accepted 'dialogue' with unlawful 'judges', thus representing bodies not established by law[85] as per national[86] and ECHR law.[87] Article 267 TFEU thus end up misused, justifying abuses of the Rule of Law and offering legitimacy to unlawful bodies parading as courts.

The theoretical limitations of the Court's approach to the Rule of Law are potentially even more important than that, as they carry direct implications for the rigorous adherence to the presumption of innocence in the EU.[88] The Court seems unwilling to harken the obvious—that compliance with Article 6 ECHR by the judiciaries of the backsliding Member Sates has been severely undermined.[89] Puzzlingly, in criminal cooperation cases the ECJ still insists that requested courts must check whether or not to cooperate with a requesting court in a captured state,[90] deploying a much-criticized test that is unusable in practice to the detriment of human rights protection, legal certainty, and the Rule of Law.[91] The effect of human rights could thus

[81]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. Leloup et al, note 37 above.

[82]Pech and Kochenov, note 37 above.

[83]Eg *Getin Noble Bank*, note 25 above, annotated by Grabowska-Moroz, note 6 above. Cf P Fillipek, 'Drifting Case-Law on Judicial Independence' (*VerfBlog*, 13 May 2022); Kochenov and Bárd, note 6 above. No leading commentators could predict this move: L Pech and S Platon, 'How *Not* to Deal with Poland's Fake Judges' Requests for a Preliminary Ruling' (*VerfBlog*, 21 July 2021).

[84]Kochenov and Butler, note 5 above.

[85]*Getin Noble Bank*, note 25 above, and its progeny.

[86]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.

[87]*Advance Pharma v Poland*, No 1469/20, Judgment of 3 February 2022, ECLI:CE:ECHR:2022:0203JUD000146920.

[88]Bárd and Kochenov, note 7 above.

[89]Kochenov and Bárd, note 6 above.

[90]Bárd, note 26 above; P Bárd, 'Jeopardizing Judicial Dialogue Is Contrary to EU Law: The AG Opinion in the *IS* case' (*VerfBlog*, 20 April 2021), https://verfassungsblog.de/jeopardizing-judicial-dialogue-is-contrary-to-eu-law.

[91]P Bárd and J Morijn, 'Luxembourg's Unworkable Test to Protect the Rule of Law in the EU (Part I)' (*VerfBlog*, 18 April 2020), https://verfassungsblog.de/luxembourgs-unworkable-test-to-protect-the-rule-of-law-in-the-eu; P Bárd and J Morijn, 'Domestic Courts Pushing for a Workable Test to Protect the Rule of Law in the EU: Decoding the Amsterdam and

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equally be suspended by way of the operation of the EU's Rule of Law, and this has been the worry of the ECJ's interlocutors for a number of years now, as best articulated, *inter alia*, by *Rechtbank Amsterdam*.[92]

The result of the recent developments is thus mostly what they describe: an astonishing 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. The editors of the *Common Market Law Review* might be right in their analysis of the fundamentals underlying *Portuguese Judges*.[93] 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',[94] 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?"'[95] 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.

The disarticulation of the Rule of Law standard, theorized also by Matej Avbelj[96] is a two-vector process, observable at the national and at the supranational levels, with developments, which tend reinforce each other in the atmosphere of the growing competence of the Court and the absence of established means of taming the power of the *Herren der Verträge*. The high point of the farcical drift away from the fundamentals of EU values is 'AG' Rantos, himself not neatly appointed, recommending the Court of Justice to answer preliminary questions from the so called 'Disciplinary Chamber' of the Polish Supreme Court: a body known to have been created in breach of judicial independence and lawful composition standards under both Polish national law *and* ECHR law (not to mention EU law itself).[97] Yet the making and taking of the reference adds credence to politicized attacks on the independence of the judiciary in Poland. In a context where a judge appointed by irregular means, as set out in *Advanced Pharma*[98]—and, as happened in *Getin Noble Bank*—sends questions to the ECJ, any possibility of dialogue is moot *ab initio*: the weaving of the answer received from the ECJ into the fabric of national law 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: 'Defending EU legal order against a foreign Human Rights Court'[99] is the best summary of this idea offered in the literature today and flowing from the understanding of the EU's role vis-à-vis the citizens and the Member States as elucidated by the Court itself in its Opinion 2/13. ECJ's brothers in exceptionalism are well known: only two other legal systems in Europe think of themselves as naturally placed above ECHR guarantees. These are Belarus and the Russian Federation. To sum up, the emphasis on dialogue grew in ECJ's case-law at the expense of adhering to the basic values of Article 2 TEU and preserving the Rule of Law in the Union, as the basic premise of Article 6 ECHR binding all the EU Member States stands undermined by the ECJ's shortsighted self-serving approach.

Karlsruhe Courts' Post-LM Rulings (Part II)' (*VerfBlog*, 19 April 2020), https://verfassungsblog.de/domestic-courts-pushing-for-a-workable-test-to-protect-the-rule-of-law-in-the-eu.

[92]Bárd and Morijn, 'Domestic Courts Pushing for a Workable Test' note 91 above.

[93]Editorial Comments, 'EU Law between Common Values and Collective Feelings' (2018) 55 *CMLRev* 1329, p 1334.

[94]*ASJP*, note 70 above, para 36.

[95]Editorial Comments, note 93 above, p 1334.

[96]M Avbelj, 'The Rule of Law, Comprehensive Doctrines, Overlapping Consensus, and the Future of Europe' (2023) 36 *Ratio Juris* 242.

[97]Opinion of AG Rantos in Case C-718/21 *Krajowa Rada Sądownictwa*.

[98]*Advance Pharma v Poland*, note 87 above, paras 349–50.

[99]De Witte and Imamović, note 28 above.

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VI. Rule of Law Rhetoric and Domination: 'Supremacy Rule of Law'

Once the values of Article 2 TEU are not observed by Member States, and if the institutions of the Union do not apply them in practice to the supranational level, 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:[100] mutual recognition becomes an untenable fiction, to which the Member States are nevertheless bound by EU law to adhere,[101] while primacy of EU law, from a values-enhancing tool, on numerous occasions seemingly evolves into the opposite of what Article 2 TEU values imply.[102] This is the core effect of what the autonomy of EU law stands for, as confirmed by the Court in the infamous Opinion 2/13,[103] adding additional complexity to the legal-political make-up of the integration project. Outlining the mechanics of operation of the Rule of Law will help us understand what is at play here.

A. Definitional Aspects

One of the most oft-cited definitions of the Rule of Law in the EU,[104] the one inspired by the Venice Commission's guidelines,[105] could provide a solid illustration of the current state of the definitional debate as internalized by the EU institutions.[106] 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.[107] This idea reflects the fundamental duality of the law's fabric that is indispensable for the operation of the Rule of Law as a principle of law:[108] *jurisdictio*—the law that is untouchable for the day-to-day rules running the legal system and is removed from the ambit of the sovereign—and *gubernaculum*, which is the use of the general rule-making power.[109]

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.[110] The concept of the Rule of Law emerges as *dialogical* in essence. It presupposes and constantly relies upon an on-going taming of law with law.[111] 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. This *jurisdiction-gubernaculum* distinction 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

[100]Spieker, note 34 above.

[101]Bárd and Kochenov, note 13 above.

[102]Ibid. The argument in what follows draws on and further nuances and contextualises Kochenov, note 17 above.

[103]This point has been forcefully restated in the ECJ's Opinion 2/13, note 17 above. See eg para 192.

[104]COM 2014 158, Communication from the Commission to the European Parliament and the Council, A New EU Framework to Strengthen the Rule of Law. Cf D Kochenov and L Pech, 'Better Late Than Never: On the European Commission's Rule of Law Framework and Its First Activation' (2016) 54 *Journal of Common Market Studies* 1062.

[105]Venice Commission Document CDL-AD(2016)007-e, 'Rule of Law Checklist', adopted in 106th Plenary Session, Venice, 11–12 March 2016, as well as in the earlier version thereof: Venice Commission Document CDL-AD(2011)003rev-e, 'Report on the Rule of Law', adopted in 86th Plenary Session, Venice, 25–26 March 2011.

[106]K Lenaerts, 'The Rule of Law and the Constitutional Identity of the European Union' (*Evropejski praven pregled*, 5 March 2023); Pech, note 19 above.

[107]Palombella, note 3 above.

[108]G Palombella, *È Possibile una Legalità Globale?* (Bologna, 2012).

[109]For a detailed exposé, see ibid. See also G Palombella, 'The Rule of Law and Its Core' in G Palombella and N Walker (eds), *Relocating the Rule of Law* (Oxford, 2009).

[110]Eg Kumm, note 30 above.

[111]According to Palombella: '[it] amounts to preventing one dominant source of law and its unconstrained whim, from absorbing all the available normativity'. See G Palombella, 'The Principled, and Winding, Road to *Al-Dulimi*: Interpreting the Interpreters' (2014) *Questions of International Law* 15, p 18; D Georgiev, 'Politics or Rule of Law' (1993) 4 *European Journal of International Law* 1, p 4.

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scope.[112] The ideology of human rights is of huge significance in this context.[113] Furthermore, the existence of international law[114] and, of course, supranational legal orders,[115] contributes to the policing of the duality.[116] 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. Palombella is right: 'the Rule of Law cannot mean just the self-referentiality of a legal order',[117] which is the reason why contemporary constitutionalism is usually understood as implying, among other things, additional restraints through law[118]—restraints that are, crucially, not simply democratic or political.[119] Rule of Law is significantly weakened once the distinction between *gubernaculum* and *jurisdictio* is undermined.

B. Rule of Law and Supremacy

The consequences of the current operationalisation of the supremacy of EU law for the Rule of Law are drastic: 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. To agree with Sharpston and 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'.[120]

The defence of its *gubernaculum*—which in EU legal parlance is called the *acquis* representing the entirety of EU law, including the interpretations thereof by the ECJ—from internal or external contestation is clearly elevated to one of its chief priorities. Just listen to the Full Court: '[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'.[121] Where the Rule of Law is *not* enforced in the Member States of the EU via the supranational legal order, the Member States's courts themselves are not free to consider each other's deficiencies in the arena of values, particularly the Rule of Law and human rights, let alone scrutinize the adherence to the values on the institutions and organs belonging to the supranational level. Through this reasoning, the Court has effectively brought all checks on the Rule of Law under its own control. This is precisely the reason to be suspicious and to want *more* rather than less Socratic contestation.[122]

C. Rule of Law and Human Rights

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,[123] binding principles of

[112]Y Roznai, *Unconstitutional Constitutional Amendments* (Oxford, 2017).

[113]G Frankenberg, 'Human Rights and the Belief in a Just World' (2014) 12 *International Journal of Constitutional Law* 35.

[114]R Dworkin, 'A New Philosophy of International Law' (2013) 41 *Philosophy and Public Affairs* 2.

[115]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 Sadurski, note 55 above.

[116]Palombella, note 108 above, Ch 2.

[117]Ibid. 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), *Abuse: The Dark Side of Fundamental Rights* (Utrecht, 2006). Cf BZ Tamanaha, *Law as a Means to an End* (Cambridge, 2006).

[118]For a clear discussion of the relationship between constitutionalism and the Rule of Law, see Krygier, note 3 above.

[119]Cf Tushnet and Kochenov (eds), note 68 above.

[120]E Sharpston and D Sarmiento, 'European Citizenship and Its New Union: Time to Move on?' in Kochenov (ed), note 62 above.

[121]Opinion 2/13, note 17 above, para 192 (emphasis added). Cf Eeckhout, note 16 above; Kochenov, note 17 above.

[122]See Kumm, note 30 above, p 164.

[123]*Internationale Handelsgesellschaft*, 11/70, ECR I-1125, para 4; *Nold v Commission*, 4/73, ECR I-491, para 13, later expanded when the Court found that the ECHR has 'special significance' in *ERT*, C-260/89, ECR I-2925.

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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.[124] The effect thereof is that the interpretation of these agreements falls under the jurisdiction of the ECJ.[125] Although the issue then becomes whether the competences within the field of operation of the agreement fall within the exclusive or the shared competences of the Union,[126] the result will mostly be the same:[127] the Court will act as the interpreter and adjudicator of any treaty regime of which the Union becomes a member.[128] Equally, it would do its best to neutralize any alternatives as its case law against bilateral investment treaties demonstrated, notwithstanding the fact that this has significantly imperilled the Rule of Law in the backsliding Member States, leaving no avenues for the protection of rights previously covered by such treaties, as numerous cases of politically-motivated expropriations in Hungary demonstrate.[129]

Indeed, when confronted by the fact that this seems to violate the Rule of Law, the Union's argumentation becomes circular.[130] The counterclaim 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 effect make it possible for an outside force to interpret EU law.[131] This, of course, will not be allowed to stand. Therefore, pronouncements like the decision by the Aarhus Convention Compliance Committee,[132] let alone the decisions of the bilateral investment treaty tribunals, will produce no effect whatsoever in the EU legal order, even if this state of affairs is a strong blow to the Rule of Law.[133]

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 *sui generis* autonomy to preclude any substantive discussion informed by the values, thus

[124]*IATA and ELFAA*, C-344/04, ECR I-403), para 36.

[125]By way of Article 19(1) TEU. Cf Spieker, note 34 above; Pech and Kochenov, note 37 above; TT Koncewicz, 'The Supranational Rule of Law as First Principle of the European Public Space: On the Journey in Ever Closer Union Among the Peoples of Europe in Flux' (2020) 5 *Palestra* 168; C Rizcallah and V Davio, 'L'article 19 du Traité sur l'Union européenne: sesame de l'Union de droit' (2020) 122 *Quarterly Review of Human Rights* 156; Pech and Platon, note 70 above, p 1836; M Bonelli and M Claes, 'Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary' (2018) 14 *European Constitutional Law Review* 622.

[126]P Eeckhout, *EU External Relations Law* (Oxford, 2011), Ch 7.

[127]S Gáspár-Szilágyi, 'EU Member State Enforcement of "Mixed" Agreements and Access to Justice' (2013) 40 *Legal Issues of European Integration* 163.

[128]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' (2005) 14 *European Environmental Law Review* 213.

[129]W Sadowski 'Protection of the Rule of Law in the European Union through Investment Treaty Arbitration' (2018) 55 *CMLRev* 1025; D Kochenov and N Lavranos, '*Achmea* Versus the Rule of Law: CJEU's Dogmatic Dismissal of Investors' Rights in Backsliding Member States' (2022) 14 *The Hague Journal of the Rule of Law* 195.

[130]Kochenov and Butler, note 5 above.

[131]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'. Lindeboom, note 15 above.

[132]Aarhus Convention Compliance Committee, 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.

[133]See A Tancredi, 'Enforcing WTO Law' in Jakab and Kochenov (eds), note 20 above.

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turning Rule of Law into a circular supremacy argument.[134] This has led to a black hole of accountability at the supranational level, where the role of democracy is obviously diminished and the vacuum created by the resignation of the legal institutions from their role of the guardians of the Rule of Law cannot be easily filled. A direct outcome of this is the apparent misuse of such vacuum of legality and accountability crafted by the circularity of the Rule of Law arguments in the interests of the Masters of the Treaties wishing, for one reason or another, to sidestep own law and ECHR guarantees. The murderous policy deployed in the Mediterranean for which the Member States claim not to be responsible is an acute reminder of the new, previously unforeseen role, the EU can be made to play as a shield against accountability and the law, thus facilitating mass human rights violations.[135] Although the EU has its internal procedures to ensure that legality is observed, what is missing is precisely what Palombella characterizes as 'a limitation of *law*(-production), through law'.[136] Let us call it 'Rule of Law'. This deficiency allows the deployment of EU law to enable otherwise unlawful developments, what the author, writing elsewhere with Sarah Ganty, characterised as 'EU lawlessness law'.[137]

D. Rule of Law and EU Constitutional Actors

The examination of the tension between *jurisdictio* and *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 *jurisdictio* (international law, the constitutional values of its members, and its own constitutional principles), the Union places primacy in the value of its *gubernaculum*—the body of substantive EU law, which we call the *acquis*, in combination with three principles: supremacy, autonomy, and direct effect.

The particular difficulty of applying the principle of the Rule of Law consistently across the levels of the multi-layered legal systems has been analysed in the literature.[138] Yet, there is 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 *and* the supranational courts, including the Court of Justice itself as well as make sure that the Rule of Law rhetoric, when deployed at the supranational level, does not produce human rights blind spots, or move apparent injustices outside the scrutiny of the law for the sole reason of putting the Union and its Court above urgent legitimate criticism. This is what Eeckhout also underlined in the context of his Opinion 2/13 analysis:[139] supremacy claims in EU legal system should be subjected to the same level of human rights-based scrutiny and values-informed analysis as any other claim voiced in the European legal space: any confusion

[134]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 eg N Nic Shuibhne, 'EU Citizenship as Federal Citizenship' in Kochenov (ed), note 62 above. On the problematic outcomes of such modesty when not informed by any thought of going beyond the protection of the *acquis*, see Kochenov, note 16 above.

[135]Elena Basheska and Dimitry Kochenov, 'Migration and Citizenship in Europe – Does "Illiberalism" Matter? Eurowhiteness Solidarity from the EU and Hungary to the UK', COMPAS Working Paper (University of Oxford) No. 24–167 (2024).

[136]G Palombella, 'Law's Ideals and Law's Global Connections: Some Concluding Notes' (2014) 123 *Rivista di Filosofia del Diritto* 123, p 124.

[137]Kochenov and Ganty, 'EU Lawlessness Law', note 8 above.

[138]Grabowska-Moroz, note 19 above; G Palombella, 'Beyond Legality – before Democracy: Rule of Law Caveats in the EU Two-Level System' in C Closa and D Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge, 2016).

[139]Eeckhout, note 16 above.

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between supremacy and the Rule of Law should be excluded outright to guarantee the compliance of both levels of the EU's complex legal system with the values of Article 2 TEU.[140]

We thus need to hope that Opinion 2/13, which is entirely blind to substantive Rule of Law considerations,[141] is explicitly overruled, marking the dawn of values-aware approaches to supremacy reinforcing, rather than undermining EU constitutionalism. Regrettably, the Court, uses frequent references to Opinion 2/13, in justification both of its own welcome interventions in defence of the Rule of Law and judicial dialogue, as well as its use of the supremacy argument, undermining the Rule of Law and making the Janus face of EU Rule of Law ever apparent. This self-contradictory practice undermines the important work that the Court is doing in the Rule of Law field.[142]

VII. 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 imperilled by the ECJ's imposition of strict adherence to principles of EU law that pre-empt any substantive value-based arguments that challenge the autopoetic orthodoxy, revealing the Janus-faced nature of the Rule of Law in the European Union. If the ECJ would allow actual dialogue instead of the current monologue, the conditions for the Rule of Law to flourish in the EU could be created, turning the EU into a much richer constitutional system. Abolishing the current substitution of the Rule of Law with would not only create a much-needed openness for constitutional courts to engage productively 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.

[140]Palombella, note 138 above.
[141]Kochenov, note 17 above.
[142]Kochenov and Ganty, 'EU Lawlessness Law' note 8 above.

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