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Abstract

Dialogue between different jurisdictional levels within complex constitutional systems is constantly on-going. Within the EU, this dialogue is an indispensable condition for the functioning of the Rule of Law, described as the tension between *gubernaculum* (the body of positive law) and *jurisdictio* (the principles of law beyond the sovereign's reach). Unlike other constitutional systems where the dialogue between the legislature and the judiciary plays the crucial role, the interaction between national courts and the Court of Justice of the EU is the only way through which the EU can be precluded from becoming a self-defining, tyrannical, constitutional order. As national courts seek to protect their constitutional values, they supply an important source of *jurisdictio.* Although the EU system offers a wider understanding of dialogical frameworks, it is under threat of dissolution. Where the Court of Justice feigns to cherish this inter-judicial dialogue, in reality it relies on its own supremacy to construct the EU.

Keywords

Rule of Law, judicial dialogue, EU federalism, supremacy, constitutionalism

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Introduction

Any rule of law-based system, we argue, 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 of course the dialogue between the courts and the legislator, which has been deemed indispensable for the survival and flourishing of democracy.[1] We make two claims taking it from there, before addressing the state of such dialogue in the EU. Firstly, it is not only democracy, but also the rule of law, which is guaranteed by the limitations of power through such means. Regarded in this vein the rule of law is not pure legality, but an effective tension between the two types of law not allowing the sovereign, while acting in line with competence limitations to overstep the boundary of the key principles of law, thereby undermining the rule of law.[2] Secondly, we submit that the parties entering a meaningful dialogue with rule of law implications can vary depending on the core institutional features of the legal system in question. Not all legal systems allow for a dialogical control of values and norms, thus preserving the rule of law, through an engagement between the courts and the legislator. We use the European Union (EU) as an example of such a system, demonstrating that in order for the dialogical rule of law in the EU to flourish it is indispensable to establish the dialogue between the judiciaries at the different levels of the law. We then proceed to test how such dialogue evolved in the EU legal context, concluding that EU Rule of Law is undermined in the face of the breakdown of a meaningful conversation between the courts at the different levels of the law.

Locating the dialogue: structure of the argument

Within the world of jurisprudence, the classical representation on inter-institutional conversation has mostly been that of the dialogue between the legislature and the judiciary.[3] It is the game of 'Mother-may-I' where legislative action is tested through judicial review against a higher norm. Like the children's game, the legislature will enact a measure, to which the judiciary will either respond negatively, or hand down further instructions on how to accomplish the wishes of the legislator within 'the rules'. Although judicial review is now an accepted part of numerous legal systems, the depth of the scrutiny and the openness of the system varies widely to concur with cultural and legal traditions. Scholars argue that the truest sense of 'dialogue' is observed in the Canadian legal tradition, especially regarding the Canadian Charter of Rights and Freedoms.[4] As Hogg and Bushel explain, clauses in the Charter of Rights make it possible for the legislative branch to react more easily to a struck down act.[5] The result is a more equitable relationship between the two branches of government, preserving a balance between (majoritarian) democracy and the safeguarding of higher norms.[6]

Emphasis within the dialogue between the institutions of government has been on the age-old debate on the role of the judiciary and the threat it poses to the rule of democracy.[7] There is a natural conflict

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[1] M Kumm, 'The Idea of Socratic Contestation and the Right to Justification' (2010) 4 L. & Ethics Hum. Rts. 142.

[2] G Palombella, 'Beyond Legality – Before Democracy' in C Closa and D Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (CUP 2016) (and the works cited therein).

[3] J Waldron, 'Some Models of Dialogue between Judges and Legislators' (2004) 23 Supreme Court LRev. 7.

[4] PW Hogg and AA Bushell, 'The Charter Dialogue between Courts and Legislatures.' (1997) 35 Osgoode Hall LJ 75.

[5] Notably, section 33 of the Charter, which allows for a relatively easy intercession in the original act, disapplying specific provisions which have been deemed non-compliant by the courts.

[6] For a critique, see LB Tremblay, 'The Legitimacy of Judicial Review' (2005) 3 I-CON 617.

[7] J Waldron, 'The Core of the Case against Judicial Review' (2005) 115 Yale LJ 1346.

that exists in all legal systems where societal power is vested in parliaments through popular vote, yet the product of this power can, no matter the representative force behind it, be undone through 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.[8] In the 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. Yet although born from thoughts of democracy, we contend that such dialogues in fact find their *locus* in the control of law by *law* on different levels. This entails that this dialogue is not limited to the classical court/legislator scenario.

A number of advanced democratic legal systems provide useful counterpoint to the Canadian-style dialogue, where immunity to the legislature/courts dialogue is observable for reasons which are more of a structural, systemic nature, rather than those related purely to legal and democratic culture. The EU is one of such systems.[9] In fact, leaving aside the obvious tensions surrounding its auto-characterization as a democracy,[10] the fundamental differences in institutional design between, say Canada and the EU would be the most relevant explanation. One should look, in particular, at the prominent role that the ECJ 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 the national legislative activity in the areas where the supranational EU legislator is not necessarily empowered to act. This policing of substance through the procedures designed to limit the competences of particular levels of the law to act in a world where the supranational legislator actually *cannot* be competent to decide, while the ECJ is perceived to be, precisely, doing its job, is what makes the classical approach to constitutional dialogue adopted in the literature not infrequently unusable at the supranational level.

We thus fully side with Marc Dawson, who has shown, 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'.[11] As a result, the 'Canada-style' constitutional dialogue in its traditional understanding, when verbatim applied to the EU, could be quite beyond the point. This does not mean, however, that the EU does not know dialogical constitutionalism, quite to the contrary. The crucial distinguishing feature of the dialogue as practised 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 opponent of the supranational Court in checking EU law than any legislature would be. In fact, since supremacy forecloses dialogue with national legislatures while the European legislator is not competent to enter any dialogue when negative integration is at stake, no dialogue between the legislature and the courts is possible at all in a very large area of possible constitutional conflicts. The same does not hold true for the dialogue between the courts at different levels, potentially bringing

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[8] This can be easily demonstrated by the developments regarding judicial review in countries such as France (on to this day), Weimar Germany or the resistance that exists against judicial review in the US. Some examples can be found here: G Jasper, *Der Schutz der Republik; Studien zur staatlichen Sicherung der Demokratie in der Weimarer Republik, 1922-1930.* (JCB Mohr 1963); M Stolleis, 'Judicial Review, Administrative Review, and Constitutional Review in the Weimar Republic' (2003) 16 Ratio Juris 266; JE Beardsley, 'The Constitutional Council and Constitutional Liberties in France' (1972) 20 AJCL 431; A Stone Sweet, 'Politics of Constitutional Review in France and Europe' (2007) 5 ICON 69; J Waldron, 'Judicial Review and Judicial Supremacy' (NYU School of Law 2014) Public Law Research Paper No. 14-57.

[9] See also the tradition in the Netherlands, G Van der Schyff, 'Constitutional Review by the Judiciary in the Netherlands' (2010) 11 German LJ 275.

[10] 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* (CUP, 2017); but see G Davies, 'Social Legitimacy and Purposive Power: The End, the Means and the Consent of the People', in D Kochenov, G de Búrca and A Williams (eds), *Europe's Justice Deficit?* (Hart 2015).

[11] M Dawson, 'Constitutional Dialogue between Courts and Legislatures in the European Union' (2013) 19 EPL 369, 371.

about the same results as the Canadian dialogical practices praised in the literature. This seemingly lies behind the elevation of the *Bundesverfassungsgericht* (BverfG) to the level of a credible conversation partner of the ECJ, as well as Czech, Polish[12] and other national constitutional courts and tribunals' claim to fame.

Needless to say, the altered *locus* of dialogue in the EU does not and cannot alter the key function of it: both the EU dialogue between the judiciaries and the classical instances of constitutional dialogue can ultimately be viewed as amounting to supplying examples of the dialogical Rule of Law, we argue, where 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 duo to the court/courts scenario, the essential rationale as well as the functional outcomes of the dialogue remains the same. Both are clearly instances of constitutional dialogue. Both scenarios aim to ensure the adherence of the Rule of Law in the constitutional system in question.

This paper's aims are thus twofold. First we present the dialogical Rule of Law, which we propose as the core idea behind both types of constitutional dialogue. Having outlined its importance and inspired by Gianluigi Palombella's work on the subject, we move on to find the proofs of the existence of the dialogical Rule of Law in the EU, drawing on a number of examples of the possible tensions between the different types of the law. Having found none in practice, but not excluding the emergence of the dialogical Rule of Law in the EU in theory, we then move to the inter-courts dialogue *sensu stricto*, to give an overview of some recent developments in this area, which is absolutely vital in EU law in the absence of the conditions for the legislature/courts dialogue 'Canada-style'. Our conclusion is discomforting – EU law is *not* based on the Rule of Law, at least not in the useful dialogical sense opposed to the circular reading of 'law is made in accordance with the law thus there is rule of law'. The 'Mother-may-I' game is not over, however, and we are less pessimistic than what our discussion should probably call for. The EU is a constantly developing system and flagging the no Rule of Law malaise is not a death sentence but a helpful diagnosis, as we see it. This is not to befog the main finding: a breakdown in dialogue means the annihilation of the Rule of Law in the given system of law.

Dialogical Rule of Law in the EU

The Rule of Law is a classic example of an essentially contested concept:[13] the broad academic doctrine is well known[14] and the debate is constantly ongoing.[15] The last available definition in the EU,[16] inspired by the Venice Commission's guidelines[17] could provide a solid illustration of the

[12] That is at least before its destruction in the Law and Justice (PiS)-orchestrated attack on the national constitution: TT Koncewicz, 'Of Institutions, Democracy, Constitutional Self-Defence and the Rule of Law' (2016) 53 CMLRev 1753.

[13] For a brilliant outline of the history of contestation, see, J Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?' (2002) 21 Law and Philosophy 137.

[14] For a multi-disciplinary overview, see e.g., G Hadfield and B Weingast, 'Microfoundations of the Rule of Law' (2014) 17 Annual Review of Political Science. 21; L Pech, 'The Rule of Law as a Constitutional Principle of the European Union.' (NYU School of Law 2009) No. 04/09 (and the literature cited therein).

[15] For the recent key contributions, see, W Schröder, *Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation* (Hart 2016); L Morlino and G Palombella (eds), *Rule of Law and Democracy: Inquiries Into Internal and External Issues* (Brill 2010); G Palombella and N Walker (eds), *Relocating the Rule of Law* (Hart 2009).

[16] Commission, 'A New EU Framework to Strengthen the Rule of Law' COM (2014) 158.

[17] 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).

current state of the definitional debate as internalised by the EU institutions. 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 them definitely boasting its own sound claim to existence as a notion independent from the Rule of Law.[18] And it is not mere legality, which is adherence to the law on the books, read the whims of the sovereign.

One theoretical approach to the meaning of the Rule of Law in the panoply of definitions emerges as particularly attractive, however. 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.[19] This idea, traceable back to mediaeval England,[20] is usually described with recourse to two key notions, to reflect the fundamental duality of the law's fabric, indispensable for the operation of the Rule of Law as a principle of law:[21] *jurisdictio* – the law untouchable for the day-to-day rules running the legal system and removed from the ambit of purview of the sovereign – and *gubernaculum*, which is the use of the general rule-making power.[22] Even in this age of popular sovereignty this statement is obviously true, 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.[23] Such rule of law is *dialogical* in essence. It presupposes and constantly relies upon a constant taming of law with law.[24] On this count the Rule of Law implies that the law – *gubernaculum* – should always be controlled by law – *jurisdictio* – lying outwith the sovereign's reach.[25] In this context it is clear that the absolute domination 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; Poland, where the executive ignores the constitution,[26] or pre-constitutional democracies, which equate the law with legislation,[27] the majority of constitutional democracies in the world today recognise 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 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

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[18] One should not forget the wise words of Joseph Raz: 'We have no need to be converted into the rule of law just in order to believe … that good should triumph': J Raz, 'The Rule of Law and Its Virtue', *The Authority of Law: Essays on Law and Morality* (OUP 1979) 211.

[19] Palombella, 'Beyond Legality – Before Democracy' (n 2).

[20] JP Reid, *Rule of Law: The Jurisprudence of Liberty in the Seventeenth and Eighteenth Centuries* (Northern Illinois University Press 2004).

[21] G Palombella, *È Possibile una Legalità Globale?* (Il Mulino 2012).

[22] For a detailed exposé, see Palombella, 'Beyond Legality – Before Democracy' (n 2); See also, G Palombella, 'The Rule of Law and Its Core' in G Palombella and N Walker (eds), *Relocating the Rule of Law* (Hart 2009) 30.

[23] Cf. Kumm (n 1).

[24] According to Palombella '[it] amounts to preventing one dominant source of law and its unconstrained whim, from absorbing all the available normativity', see, 'The Principled, and Winding, Road to *Al-Dulimi*. Interpreting the Interpreters' [2014] QIL 15, 18; D Georgiev, 'Politics or Rule of Law' (1993) 4 EJIL 1, 4.

[25] For an analysis, see, Palombella, *È possibile una legalità globale?* (n 21); Palombella, 'The Rule of Law and Its Core' (n 22); See also, Palombella, 'Beyond Legality – Before Democracy' (n 2).

[26] Koncewicz (n 12).

[27] 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) 238.

core of what the Rule of Law is about, can be policed either by courts, or even by the structure of the constitution itself through removing certain domains from *gubernaculum*'s scope.[28] The ideology of human rights is of huge significance in this context.[29] Furthermore, the existence of international law[30] and, of course, supranational legal orders,[31] contributes to the policing of the said duality.[32] The policing of the *jurisdictio–gubernaculum* divide is thus possible both through the means internal and external to the given legal system.

From Lord Mackenzie Stuart[33] to *Les Verts*, which characterises the Treaties as 'a constitutional charter based on the Rule of Law',[34] what we have been hearing about the Rule of Law in the EU really amounts to compliance with own law.[35] This is an established understanding of legality.[36] Legality is not enough to ensure that the EU behaves like – and is – a true rule of law-based constitutional system. Palombella is right: 'the Rule of Law cannot mean just the self-referentiality of a legal order',[37] which is the reason why contemporary constitutionalism is usually understood as implying, among other things, additional restraints through law:[38] restraints which are, crucially, not simply democratic or political.[39]

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[28] Y Roznai, *Unconstitutional Constitutional Amendments* (OUP 2017).

[29] G Frankenberg, 'Human Rights and the Belief in a Just World' (2014) 12 I-CON 35.

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

[31] 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* (OUP 2012).

[32] Palombella, È possibile una legalità globale? (n 21) ch 2.

[33] Lord Mackenzie-Stuart, *The European Communities and the Rule of Law* (Stevens and Sons1977).

[34] Case 294/83 *Partie Ecologiste 'Les Verts'* v. *Parliament* EU:C:1986:166 [1986] ECR 1339, 23. See also Opinion 1/91 *EEA Agreement* EU:C:1991:490 [1991] ECR 6097.

[35] M Fernández Esteban, *The Rule of Law in the European Constitution* (Kluwer Law International 1999); also, 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* (2nd edn, Beck/Hart 2011) 701; M Zuleeg, 'The Advantages of the European Constitution' in A Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (2nd edn, Beck/Hart 2011) 772–779; EU Institutions' own accounts of what is means by the Rule of Law beyond the tautology of 'being bound by law' present a most diverse account, which found an expression in EU's external action: L Pech, 'Promoting the Rule of Law Abroad' in F Amtenbrink and D Kochenov (eds), *The European Union's Shaping of the International Legal Order* (2013) 108.

[36] E.g. the contributions in LFM Besselink, F Pennings and S Prechal (ads.), *The Eclipse of the Legality Principle in the European Union* (Kluwer Law International 2011).

[37] Palombella, 'Beyond Legality – Before Democracy' (n 2); 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* (Eleven 2006) 129; See also, BZ Tamanaha, *Law as a Means to an End* (CUP 2006).

[38] 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 EMH Hirsch Ballin (eds), *Constitutionalism and the Rule of Law* (CUP 2017).

[39] The virtually complete depoliticisation of the law has been one of the key criticisms of the EU legal order: J Přibáň, 'The Evolving Idea of Political Justice in the EU' in D Kochenov, G de Búrca and A Williams (eds), *Europe's Justice Deficit?* (Hart 2015) 193; and in the same volume, MA Wilkinson, 'Politicising Europe's Justice Deficit: Some Preliminaries' at 111.

EU law's scrutiny from above: international law

At the international level, the EU seems to be the only legal system in Europe which fiercely objects to any outside scrutiny,[40] pushing the glorification of own autopoetic nature almost to the extreme. Outside scrutiny 'from below', has remained only a (albeit productive) threat[41] and the ECJ has expressly prohibited – now twice[42] – 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 defence of its *gubernaculum* – its *acquis* – from the 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'.[43] 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-others' deficiencies in the arena of values, particularly the Rule of Law. Officially, this is about ruling within the EU's own sphere of competences, yet the Court's reliance on the argument of 'autonomy' makes it clear that what we are dealing with is a recurrent claim to power, unchecked externally.[44] This is precisely the reason to be suspicious and to want *more* rather than less Socratic contestation.

Even where the Union clearly *is* a member of a Human Rights regime, the Court continues to interpret the binding principles in such a way as to allow for their effects to be limited. This is to a large extent possible by the manner in which the Court has shaped the way in which international law finds its way into the European legal order. International agreements become an immediate part of the Union's legal order.[45] The effect thereof is that the interpretation of these agreements falls under the jurisdiction of the ECJ.[46] Although it then becomes an issue on whether the competences within the field of operation of the agreement fall within the exclusive or the shared competences of the Union,[47] the result will mostly be the same,[48] the Court will act as the interpreter and adjudicator of any treaty regime the Union becomes a member of.[49] This has the remarkable effect that, given the reliance of the Court on

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[40] One could no doubt pose a question, whether the CoE system is a legitimate candidate to become the second. I thank Michael Ioannidis for this point.

[41] BVerfGE 37, 271 (*Solange I*). For an analysis of the whole story see, FC Mayer, 'Multilevel Constitutional Jurisdiction' in A Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (2nd edn, Beck/Hart 2011) 410–420; JHH Weiler and NJS Lockhart, '"Taking Rights Seriously" Seriously' (1995) 32 CMLRev (parts I and II).

[42] Opinion 2/94 (*ECHR Accession I*) EU:C:1996:140 [1996] ECR I-1759; Opinion 2/13 (*ECHR Accession II*) EU:C:2014:2454.

[43] Opinion 2/13 (*ECHR Accession II*) EU:C:2014:2454, para. 192 (emphasis added). Cf. P Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky' (2015) 38 Fordham Int'l LJ 955; D Kochenov, 'EU Law without the Rule of Law' (2015) 34 YEL 74.

[44] Eeckhout made a most persuasive argument that 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, as rightly put by Eeckhout 'for the CJEU […] 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: Eeckhout (n 43).

[45] Case C-344/04 *IATA and ELFAA* EU:C:2006:10 [2006] ECR I-403 para. 36.

[46] By way of Article 19(1) TEU.

[47] P Eeckhout, *EU External Relations Law* (2nd edn, OUP 2011) ch 7.

[48] S Gáspár-Szilágyi, 'EU Member State Enforcement of "Mixed" Agreements and Access to Justice' (2013) 40 LIEI 163.

[49] 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 ELRev. 213.

the autonomy and inviolability of the Union's primary law, the Court will enforce, indeed sometimes going as far as to have a far reaching effect on the autonomy of the Member State's legal systems,[50] norms and rules with which it itself does not comply. Indeed, when confronted by the fact that this scenario seems to be in violation with the Rule of Law, the Union's argumentation turns circular. 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.[51] 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 Convention of Human Rights, such scrutiny would in effect make it possible for an outside force to interpret EU law. This of course, will not stand. Therefore, pronouncements like the recent decision by the Aarhus Convention Compliance Committee,[52] will produce no effect whatsoever in the EU legal order.[53]

The EU, acting chiefly through its Court, seems to be immune to irony: it *does* consider itself better than the Member States' constitutional systems,[54] which apparently need the subjection to international scrutiny through numerous treaty bodies as well as, probably most importantly, the European Court of Human Rights *on top* of their machinery of internal legal constraints to police their respective *jurisdictio–gubernaculum* divide, constraints which the EU seemingly *does not* have.[55] Although the EU has its internal procedures to ensure that legality be observed, what is missing is precisely what Palombella characterises as 'a limitation of *law*(-production), through law'.[56]

EU's scrutiny from below: national constitutional orders

The core autopoetic argument for immunity from outside scrutiny from above is that the EU adheres to a rich catalogue of values and thus 'knows better'. This argument is flawed, however, since it is based on an assumption of compliance, which the EU cannot possibly police, as it is largely outside of its sphere of competences. The constitutional values and traditions have always been a part of the values

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[50] The clearest example is the approach of the Court to the environmental rights regime of the Aarhus Convention. Although the Court's own case law regarding standing rights for public interest litigants is extremely restrictive, it has forced Member States to comply with the standard set out in the Convention, as it is now an integral part of EU law. See, amongst many, J Reichel, 'Judicial Control in a Globalised Legal Order – A One Way Track?' (2010) 3 REALaw 69; and H Roer-Eide and M Eliantonio, 'Meaning of Regulatory Act Explained' (2013) 14 German LJ 1851.

[51] Although, as proposed by Pech, this can be in part be explained by the traditionally formalistic interpretation of the rule of law by the Union and Court. Pech (n 14).

[52] Aarhus Convention Compliance Committee, 'Findings And Recommendations Of The Compliance Committee With Regard To Communication ACCC/C/2008/32' (UN-ECE 2017).

[53] See A Tancredi, 'Enforcing WTO Law' in A Jakab and D Kochenov (eds.), *The Enforcement of EU Law and Values* (OUP 2017).

[54] See Joseph Weiler's enlightening criticism of the seemingly somewhat smooth presentation of the latest case law: J.H.H. Weiler, 'Epilogue: Judging Europe's Judges – Apology and Critique', in M. Adams et al. (eds.), *Judging Europe's Judges* (Hart 2013) 235. See also Koen Lenaerts' contribution in the same work, explaining the work of the Court.

[55] Here we need to distinguish between the constraints related 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 weak – 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), *EU Citizenship and Federalism: The Role of Rights* (CUP 2017); On the problematic outcomes of such modesty when not informed by any thought of going beyond the protection of the acquis, see D Kochenov, 'Citizenship Without Respect' (NYU School of Law 2010) 08/2010.

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

of the European Union either by way of general principles, which the ECJ finds when it is in need of a remedy, or through explicit mention in the Treaties.[57] General principles are a product wholly created by the Court.[58] Already in 1969 did it find that the Community had incorporated fundamental human rights,[59] even though the only reference to human rights was the non-discrimination clause on grounds of gender.[60] Subsequently, the Court found fundamental rights to be a part of the general principles of Community law as they were "inspired" by the constitutional traditions of the Member States.[61] The full extent of general principles in EU law is therefore always vague, and one would assume in a state of flux, as the constitutional traditions of the Member States may vary, just as the membership of the Union does.[62]

The manner in which the Court finds these general principles is of interest, as it implies that there is a dialogue at work between legal orders. This is however not the case. Although the Court sees ECHR as a source of inspiration,[63] perhaps even a constitutionalisation of these principles,[64] it equally proceeds to find and distil them on its own merit. However, the Court has rarely studied the systems of law in the Member States to ascertain whether certain rights were common in all legal systems.[65] It is therefore doubtful whether general principles are in effect part of a shared legal order, or stop-gap measures used by the Court to fill in certain *lacunae*.[66] This is exemplified by the dialogue that constitutional courts have attempted to bring to the ECJ through preliminary references. Where they find a contestation between national constitutional values and the values of the European Union, they have virtually always – especially of late – found the Court to be insensitive to their requests. Although in earlier days the Court might have been willing to accommodate certain constitutional features,[67] the following discussion on the nature of the judicial dialogue and its break down will illustrate how the reliance of the Court on the uniformity of the EU's legal order has led to the *de facto* removal of the Member State's constitutional values as a source of *jurisdictio*. If anything, in a reversal of the original place of the constitutions on the Member States, general principles now have the contrary effect, where constitutional pluralism is erased. The irony is apparently lost, as a Member State is precluded from deviation from the norm it is apparently itself a part. Furthermore, as has become clear from some of the earliest cases in which the Court of Justice has interacted with the

[57] See for instance Arts 67 and 82 TFEU on the operation of the Area of Freedom, Security and Justice. The political nature of the policy area has warranted an explicit mention of the "[…] traditions of the Member States."

[58] Case 8/55 *Fédération Charbonnière de Belgique v High Authority* EU:C:1956:11, [1956] ECR 291.

[59] Case 26/69 *Stauder* EU:C:1969:57 [1969] ECR 419 para 7.

[60] This non-discrimination provision was not a sign of an early enlightened European elite, but rather was an attempt to preclude social dumping by Member States who would utilise cheaper female labour.

[61] Case 11/70 *Internationale Handelsgesellschaft* EU:C:1970:114 [1970] ECR 1125. para 4.

[62] One would surmise that with the coming to pass of 'Brexit', there would be an effect on the constitutional traditions of the Member States and thus on the catalogue of principles such as they exist in the Union.

[63] T Tridimas, *The General Principles of EU Law* (OUP 2006) 6.

[64] As was already stated by the Joint Declaration on Human Rights in 1977; OJ 1977 C 103/1 Council Declaration on Democracy, EC Bulletin 3 1978, 5.

[65] See for instance Case 44/79 *Hauer*, EU:C:1979:290 [1979] ECR I-3727 para 14ff.

[66] Tridimas (n 63) s 1.6.1.

[67] Case 11/70 *Internationale Handelsgesellschaft*, para 40.

newest acceded members,[68] there is a distinct possibility that the constitutional values that originally formed the *jurisdictio* is of a distinct homogeneous Western tradition.[69]

EU law's scrutiny from within: the Union's values

It is true that the EU has Article 2 TEU.[70] However, since the time of the Copenhagen Criteria from which it largely originates,[71] it has never been law in the sense of forming part of the body of the ordinary EU *acquis*.[72] Consequently, given that the *acquis* on values largely does not exist, the EU is powerless to define their content. Consequently, the case law of the ECJ seems to be pointing towards Article 2 TEU not having acquired any self-standing value.[73] Technical explanations for that are readily available: respect of the limited nature of EU's powers. Such explanations no doubt are sold to a careless observer as emanations of adherence to the prevailing understanding of the Rule of Law. Yet, once scrutinised closely, they emerge as dubious: mutual trust based on the presumption of general adherence to the values where only the trust, but not the actual adherence is enforced is highly problematic.[74] The EU turns its own rhetorical weakness into a tool for escaping the Rule of Law checks on its system of formal legality.

From the perspective of approaching the Rule of Law as a balance in the duality of two types of law within the constitutional system – *jurisdictio* and *gubernaculum*, as opposed to conflating the meaning of the EU Rule of Law with legality – the EU emerges as a legal system that cannot boast the Rule of Law. The 'Rule of Law' in Article 2 TEU cannot thus have any meaning beyond a requirement to observe basic legal procedures and, possibly, a set of other well-known elements of legality.[75] In a

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[68] Illustrated for instance in Case C-399/09 *Landtová* EU:C:2011:415, which was later deemed to be an *ultra vires* act of the ECJ by the Czech Supreme Court. A discussion on the early case law of the constitutional courts of the 'new' Member States can be found in, D Kochenov, *EU Enlargement and the Failure of Conditionality* (Kluwer Law International 2008).

[69] A case can be made that the Court has always had difficulties with approximating legal systems, as made clear by the upheaval caused by the *Factortame* cases, the first significant judicial collision between the continental system of the Community and the UK. P Craig, 'Sovereignty of the United Kingdom Parliament after *Factortame*' (1991) 11 YEL 221.

[70] For an analysis embedding Art. 2 TEU in the context of other provisions of EU primary law, see C Hillion, 'Overseeing the Rule of Law in the EU' in C Closa and D Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (CUP 2016).

[71] For a legal-historical presentation, see, Kochenov, *EU Enlargement and the Failure of Conditionality* (n 68) chs 1 & 2.

[72] The key reason for this, of course, is in the competence limitations imposed by *Herren der Verträge* on the Union; yet the cause does not change the result: Art. 2 TEU and its predecessors are no ordinary part of the EU's *gubernaculum*. See, for a discussion, D Kochenov, 'Declaratory Rule of Law: Self-Constitution through Unenforceable Promises' in J Přibáň (ed), *Self-Constitution of European Society* (Routledge 2016).

[73] Look, for instance, at the recent cases involving Hungary: the EU fights against the anti-constitutional movement in the Member State by attempting to tackle deep-rooted Art. 2 TEU problems using ordinary *acquis* elements, abundantly failing as a result. Never mind that it wins its cases: Hungary, having lost for petty *acquis* grounds, is nowhere nearer an improvement in its adherence to Art. 2 TEU values. Cf. KL Scheppele, 'Enforcing the Basic Principles of EU Law through Systematic Infringement Actions' in C Closa and D Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016).

[74] Indeed, as Halberstam has also rightly suggested, it is impossible to enforce the demand of trust when the substance of values is not enforced in any way in the Member States: D Halberstam, 'It's the Autonomy, Stupid: A Modest Defence of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward' (2015) 16 German LJ 105.

[75] Raz (n 18); R Fallon, '"The Rule of Law" as a Concept in Constitutional Discourse' (1997) 97 Columbia LR 1.

system with rhetorical adherence to legality through considerations of autonomy – which largely pre-empts reality checks – and without the Rule of Law, generating injustice is not viewed as a problem,[76] and the legitimacy of the law as such thereby naturally remains undermined, while outstanding issues are interpreted away either as non-existent or falling to some other legal order – either national[77] or ECtHR[78] – to resolve. The 'autonomous legal order'[79] confidently emerges as a formally coherent system directly bound by nothing beyond the day-to-day rules of its own creation and operation. The Treaty text is its limit,[80] with no greater aspiration in sight beyond being shielded from outside influence. Weiler's take on its nature, which dates back to the nineties, is thus still profoundly correct today – it is a market standing alone without a mantle of ideals[81] – all the recent values-inspired commotion notwithstanding. Checks on the *substance* of the law which aim to ensure that the law is limited by Law do not exist, thus impairing the Rule of Law as an institutional ideal.

This, however, does not mean that the EU's values are completely devoid of *jurisdictio.* The EU cannot boast of any *jurisdictio* besides perhaps the principles of the Internal Market. Indeed, if *jurisdictio* is taken to mean the DNA of the polity placed out of reach for the sovereign, then the EU has only one candidate to occupy this place: the internal market is what it is to promote and guarantee. However, how much of a Rule of Law are we talking about – in the modern constitutional sense – if the internal market rules are granted the role of a *jurisdictio* in an autopoetic system, which is also a self-proclaimed constitutional order? The engagement of EU law, the dispensation of its protections and the rights it grants, are usually connected to internal market thinking. The internal market as the founding value is protected with true ferocity. The EU has been very effective in mobilising the discourse of knowledge and expertise,[82] or of bright unchallengeable goals,[83] to discredit claims of political (and also legal) contestation of its law[84] – the emergence of *jurisdictio* from within is as difficult as sourcing it from the (blocked) external scrutiny.

Even if we assume for a moment that a constitutional system can evolve around the internal market serving as a crucial element of its essential Rule of Law core,[85] the question remains open whether the internal market has actually ever played such a role in the EU. The answer, most likely, will be 'no'. Not because it would obviously be an affront (given the generally accepted sets of values in any European society) to measure rights and protections against the ultimate rationale of the market, and cross-border trade (what the EU has been not infrequently accused on doing[86]), but because the internal market rules are by definition an insufficient set to measure dignity, rights and equality

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[76] A Williams and D Kochenov, 'Europe's Justice Deficit Introduced' in D Kochenov, G de Búrca and A Williams (eds), *Europe's Justice Deficit?* (Hart 2015) 1 and, in the same volume, S Douglas-Scott, 'Justice, Injustice and the Rule of Law in the EU', 51.

[77] E.g. C-135/08 *Rottmann* EU:C:2010:104 [2010] ECR I-1449.

[78] E.g. C-434/09 *McCarthy* EU:C:2011:277 [2011] ECR I-3375; C-256/11 *Dereci* EU:C:2011:734 [2011] ECR I-11315.

[79] Case 6/64 *Costa v ENEL* EU:C:1964:66 [1964] ECR 585 (special English edition).

[80] AT Williams, 'Taking Values Seriously: Towards a Philosophy of EU Law' (2009) 29 OJLS 549.

[81] JHH Weiler, 'Bread and Circus: The State of the European Union' (1998) 4 CJEL 223, at 231.

[82] M Bartl, 'The Way We Do Europe: Subsidiarity and the Substantive Democratic Deficit' (2015) 21 ELJ 23; On the instrumental deployment of the justice discourse in the EU to justify any outcome, see, S Roy, 'Justice as Europe's Signifier' in D Kochenov, G de Búrca and A Williams (eds), *Europe's Justice Deficit?* (Hart 2015).

[83] Davies, (n 10)

[84] AJ Menéndez, 'Whose Justice? Which Europe?' in D Kochenov, G de Búrca and A Williams (eds.) *Europe's Justice Deficit?* (Hart 2015) 137.

[85] For very well-reasoned doubts about this, see, N Nic Shuibhne, *The Resilience of EU Market Citizenship* (2010) 47 CMLRev. 1597.

[86] E.g. A Williams, *EU Human Rights Policies: A Study in Irony* (OUP 2004).

against, as the ultimate rationale, in the hard cases. They are what they are: part of the *gubernaculum*, playing a role in guaranteeing EU legality, but falling short at the same time of establishing a viable *jurisdictio–gubernaculum* border.

The role of the national courts in the shaping of the Union's Rule of Law

The autopoetic reality of EU law is only infused with Rule of Law understood as a tension between the two types of law through the possibility of the national courts' resistance to the ECJ's reading of the rule of law as a requirement of unchecked supranational rule. As mentioned above, the legislatures cannot play any similar role in the EU legal system due to the nature of the division of powers between the EU and the Member States and the prominent role played by negative integration. It is thus necessary to look at the relationship between the national courts and the ECJ in some more detail to assess the state of the Rule of Law in Europe: a diagnosis affecting, importantly, both the EU and the national levels of the law. This judicial dialogue is not unlike a worn Roman coin, with on the obverse a beautiful portrait of the maiden Europa, the official story from every textbook; on the reverse, the vacant actual value. The dialogue story is as much a story of breakdown as it is a story of the actual policing of the *jurisdictio-gubernaculum* divide.

The obverse

Whether perceived from the role of a Supreme Court, whose judgment affect all belying courts,[87] or as an equal partner amongst the other apex courts of Europe engaging in dialogue with peers,[88] the element that ties this relationship together is the role of national judges as Union judges. The working relationship has been defined by the Court as national courts and ECJ working together whilst "[...] both keeping within their respective jurisdiction, with the aim of ensuring that Community law is applied in a unified manner to make direct and complementary contributions to the working out of a decision.".[89]

Lower courts in national legal order are said in the textbook to be co-opted in making use of the judicial dialogue, as it empowers them *vis-a-vis* their hierarchical superior brethren, as the standard story goes.[90] Given the status of ECJ ruling even on preliminary references, this endows these lower courts with power on par with that of their apex courts.[91] The flip-side of this relationship is that the Court is almost totally dependent on the references. Although the ECJ has often been described as activist or centralist in nature,[92] the only possibility it has to act is through the large discretion offered to lower national courts. Indeed, this dependency is increased by the fact that there is almost no direct relationship between individual applicants and the Court, and the fact that the reference procedure is

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87 KJ Alter, *Establishing the Supremacy of European Law* (OUP 2001).

88 Lady Justice Arden, 'Peaceful or Problematic? The Relationship between National Supreme Courts and Supranational Courts in Europe' (2010) 29 YEL 3.

89 Case 16/65 *Schwarze* EU:C:1965:117 [1965] ECR I-1081 p. 886

90 D Edward, 'National Courts – the Powerhouse of Community Law' (2004) 5 CYELS.

91 The effect of the preliminary reference procedure in both empowering lower courts and in creating the European legal order has been of interest to many commentators, see for instance: CO Lenz, 'The Role and Mechanism of the Preliminary Ruling Procedure' (1994) 18 Fordham Int'l LJ 388; P Allott, 'Preliminary Rulings – Another Infant Disease' (2000) 25 ELRev 538; SA Nyikos, 'The Preliminary Reference Process National Court Implementation, Changing Opportunity Structures and Litigant Desistment' (2003) 4 *European Union Politics* 397; T Tridimas, 'Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure' (2003) 40 CMLRev 9.

92 Of which Rasmussen is probably the most well-known. H Rasmussen, 'On Law and Policy in the European Court of Justice' (Nijhoff 1986); But see the measured response of Tridimas in: 'The Court of Justice and Judicial Activism' (1996) 21 ELRev 199.

not a remedy which those applicants can invoke before national courts.[93] The addition of the *Köbler* case law can therefore only be seen as a logical way through which the Court tries to reinforce this relationship, as any disturbances in the working of the inter-court dialogue can have a diffusing effect on the coherence of Union law. By treating courts as an emanation of the unitary state, and having them therefore fall under the *Francovich* non-contractual liability regime,[94] the Court is assuring itself of consistency of the *acquis*, without *lacunae*.[95]

The Court thus not only fosters, but depends on the inter-court dialogue for the formation and maintenance of the European legal order. Until recently it could not afford to sour the relationship that it has built up in 50 years of references, as the dialogue is not only the most significant way in which the Court can give effect to European law, and enforce the rights derived thereof. When the system works, the functioning of the Rule of Law is secured, as European norms are fitted into the legal orders of the Member States with respect for the constitutional traditions and arrangements in those states. This is perhaps most famously emphasized in the *Solange I* & *II* interaction between the German *Verwaltungsgericht* and the Court, as accorded by the *BVerfG*. In these cases, a possible clash occurred between the concept of fundamental rights as protected by the German constitutional order, and that of the European legal order. The German Administrative court referred a case to the ECJ, on whether it was possible to have European law set aside by more stringent protections in the German constitutional order. The Court answered that a measure of the Union cannot be affected by national law, as that would "[…] have an adverse effect on the uniformity and efficacy of [EU] law."[96] However, the Court reached out, stating in the following paragraph that "[…] examination should be made as to whether or not any analogous guarantee inherent in Community law has been disregarded."[97] As the referring court saw itself faced with an answer that produced similar problems to the questions it had posed, it referred its case to the *BVerfG*, requesting a ruling on the compatibility of EU rights protection with the bar set by the German constitutional order. Due to the ECJ's opening on the protection of fundamental rights in the Union, the *BVerfG* could balance the interest of the German constitutional order with that of 'supremacy'.[98] This is inter-court dialogue protecting the Rule of Law; the Court of Justice opens up to the *jurisdictio* of fundamental rights that are influenced by the German norms. There is a mutual control that elevates the general standard. Yet this balance is precarious and this dialogue is easily shifted into a monologue.[99] Recent developments illustrate how the Court's slavish entrapment between the Scylla and Charybdis of supremacy and autonomy has caused a rift in the dialogue that may well threaten the Rule of Law in the EU.

The reverse

The current system of judicial dialogue is therefore only one in name, used through the decades to appease the constitutional courts of the Member States. Supremacy, the Court's reliance on legality as the implementation of the Rule of Law and the approach to the *acquis* as Biblical Truth has created a system whereby only the Court, is in fact the law. This can be seen as the result of options of a role as

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[93] Case 44/65 *Hessische Knappschaft v Maison Singer et fils* EU:C:1965:122 [1965] ECR I-1191.

[94] Case C-6/90 *Francovich* EU:C:1991:428 [1991] ECR I-5357 Cf. N Reich '*Francovich* Enforcement Analysed and Illustrated by German (and English) Law' in A Jakab and D Kochenov (eds.), *The Enforcement of EU Law and Values* (OUP 2017); M Breuer, 'State Liability for Judicial Wrongs and Community Law' (2004) 29 ELRev 243.

[95] However, see Komárek's opinion that the *Köbler* case law is in part building an appellant system of judicial hierarchy. J Komárek, 'Federal Elements in the Community Judicial System' (2005) 42 CMLRev 9.

[96] Case 11/70 *Internationale Handelsgesellschaft.*

[97] *Id*.

[98] 37 *BVerfGE* 271.

[99] Although given the disregard of the Court of Justice to certain existential problems it created by deciding Case C-105/14 *Taricco* EU:C:2015:555, it could be argued that the Court is prone to soliloquy.

either a Supreme Court or an equal partner, which we mentioned above.[100] As the Court positioned itself as the ultimate arbiter of EU law, and made use of the preliminary reference procedure as a carrot for national courts to refer cases, so too has it made use of a stick. It can in fact be argued, that every time the Court has given the national courts a carrot, for instance in the form of more autonomy, it has followed this up by a quick use of a stick to set the limits. Sarmiento gives the example of the interaction between the Court's approach in *CILFIT*,[101] granting national apex courts the jurisdiction, under specific conditions, to ascertain when a reference is not needed, followed up by *Foto-Frost*,[102] which denies them the jurisdiction to rule on the validity of EU law itself.[103] As the corpus of EU law expanded, the use of the carrot became less and less necessary, however the Court sees an increasing necessity for the use of the stick. Through the interpretation of autonomy and supremacy the Court secures the unassailable security of the position of the EU's legal order and with that, itself. This is perfectly exemplified in those cases in which the ECJ is asked to review the Treaty on the basis of the Rule of Law. In the case law regarding Article 263 TFEU, we are explicitly confronted by the circular reasoning. The core reasoning is this: the Union acts in accordance with the Rule of Law, as the Treaty states that the Union acts in accordance with the Rule of Law.[104] The slavish dedication to form over substance, can be best observed in two developments. First, the most direct result of the problematic evolution of values in the EU's constitutional order is the strain placed on the dialogue between a number of constitutional courts and the Court of Justice. Second, we can observe the Court's own valuation of formalistic values over the Rule of Law in its reasoning in Opinion 2/13.[105]

The deepening of European integration without any real perspective on the fundamental rights or, dedication to the Rule of Law, ensured in Member State legal orders, or a substantive implementation thereof by the Union itself has produced now famous cases such as *Melloni* and *Gauweiler*. *Melloni* is the continuation of the saga of the problematic Arrest Warrant (EAW) legislation. The EAW proved incompatible with the manner in which the Spanish Constitutional Court had interpreted the right to a fair trial. As is expected, the ECJ did not offer any room for discussion on the extent to which Spain could apply more stringent protections. Of greater interest is the manner in which the Spanish Court subsequently applied the ECJ's answer. Through interpretation on its Declaration 1/2004, which analysed the constitutionality of the Constitution for Europe, the Spanish Constitutional Court came to the conclusion that the Treaty respected the rights and limitations laid down in the Spanish constitution. Yet it reaffirmed that the primacy of EU law did not violate the supremacy of the constitution. Going further, the Spanish Constitutional Court gave the caveat that if Union law were to deviate and go against these values, the Constitutional Court would protect the sovereignty of the Spanish people and the supremacy of the constitution.[106]

That reassertion of the supremacy of the national constitution does not stand on itself. The *Gauweiler* case will not only be remembered for the fact that it has been the first case in which the *BVergG* made

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[100] See p. 10, with reference to K Alter (n. 87)

[101] Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* EU:C:1982:335 [1982] ECR I-3415

[102] Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* EU:C:1987:452 [1987] ECR I-4199

[103] D Sarmiento, 'Cilfit and Foto-Frost: Constructing and Deconstructing Judicial Authority in Europe' in MP Maduro and L Azoulai (eds), *The Past and Future of EU Law* (Hart) 195.

[104] See for a specific example: Case C-50/00 P *Unión de Pequeños Agricultores* EU:C:2002:462 [2002] ECR I-6677 para. 38ff.

[105] Opinion 2/13 (*ECHR Accession No. 2*) EU:C:2014:2454 para. 174: "In order to ensure that the specific characteristics and the autonomy of that legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law."

[106] Stc 16/2014 *Boletín oficial del Estado* 11 March 2014, p. 91.

its first reference, but the manner in which it did will be long discussed.[107] The *BVerfG* has the task to defend the constitutional identity of the German Federal Republic. In that capacity, it did not as such pose a question on the democratic safeguards in place regarding the ECB and the programme of Outright Monetary Transactions (OMT), it set out a position on which it wished the ECJ to agree. Unless the OMT decision was interpreted in the light of the *BVerfG*'s criteria, it stated that it would clearly be *ultra vires.*[108] Although the ECJ secured the position of the ECB in its judgment, its application by the *BVerfG* is a clear expression of the German constitutional protector's dislike of the manner in which it has been treated.[109] The 'crisis' might be averted, yet the conflict remains.[110]

The ECJ does not demonstrate a wish to adhere to the values set out by Article 2 TEU. The Rule of Law in these situations of dialogue has clearly been derogated in favour of the gods of supremacy, autonomy and consistency – not the Rule of Law. Yet it has to be asked, whether the European legal order would truly have suffered if the ECJ had earnestly addressed the fears of the *BVerfG* over the democratic guarantees underpinning the OMT's by the ECB, a notoriously problematic institution to oversee.[111] Similarly, given the nature of the EAW due to the manner in which it has been adopted through the third pillar on Police and Judicial Cooperation in Criminal Matters, where the powers of both parliament and the Court are limited, would the scrutiny requested by the constitutional courts in the numerous cases on this act have had a detrimental effect on the effectuation of the Law? Even the most ardent fan of Luxembourg must see that the Rule of Law is now being offered on an altar constructed purely out of self-justification.

There are now numerous examples: the Italian constitutional court that requests the ECJ to revisit the judgment in *Taricco* as it would lead to a breach of legal certainty in Italy;[112] the Danish supreme court has ruled that it does not see itself bound by 'general principles' following *Kücükdeveci,*[113] after the ECJ had rejected the reasoning the Danish court offered in its reference;[114] to a lesser extent, the forced mutual recognition of the EAW has also caused problems for the French constitutional council.[115] These cases may seem to the uninitiated a response by constitutional courts to growing euroscepticism, but in fact they are the culmination of a process that has been taking place behind the curtains for a while. It has been merely the fact that the main actors have been the German

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[107] It is only logical that the German Law Journal devoted a special issue to the reference. Two authors in that issue addressed the relationship between the two courts: M Kumm, 'Rebel without a Good Cause: Karlsruhe's Misguided Attempt to Draw the CJEU into a Game of Chicken and What the CJEU Might Do about It' (2014) 15 German LJ 203; A Thiele, 'Friendly or Unfriendly Act: The Historical Referral of the Constitutional Court to the ECJ Regarding the ECB's OMT Program' (2014) 15 German LJ 241.

[108] T Tridimas and N Xanthoulis, 'A Legal Analysis of the *Gauweiler* Case' (2016) 23 MJ 17.

[109] A Pliakos and G Anagnostaras, 'Saving Face? The German Federal Constitutional Court Decides *Gauweiler*' (2017) 18 German LJ.

[110] A Steinbach, 'All's Well That Ends Well? Crisis Policy after the German Constitutional Court's Ruling in *Gauweiler*' (2017) 24 MJ 140.

[111] F Amtenbrink, 'New Economic Governance in the European Union: Another Constitutional Battleground?' in K Purnhagen and P Rott (eds), *Varieties of European Economic Law and Regulation* (Springer 2014).

[112] And the ICC has a number of problems fitting in the 'supremacy' of preliminary ruling into the Italian legal order. G Repetto, 'Pouring New Wine into New Bottles-The Preliminary Reference to the CJEU by the Italian Constitutional Court' (2015) 16 German LJ 1449.

[113] Case C-441/14 *Dansk Industri* EU:C:2016:278, perpetuating Case C-555/07 *Kücükdeveci* EU:C:2010:21 [2010] ECR I-365 on a prohibition of age discrimination. The Danish Supreme Court implemented the reference by way of Case no. 15/2014, 6 December 2016.

[114] MR Madsen, HP Olsen and U Šadl, 'Competing Supremacies and Clashing Institutional Rationalities: the Danish Supreme Court's Decision in the Ajos Case and the National Limits of Judicial Cooperation' (2017) 23 ELJ 140.

[115] F Millet and N Perlo, 'The First Preliminary Reference of the French Constitutional Court to the CJEU' (2015) 16 German LJ 1471.

constitutional court, which has been known to be at least critical of letting go of the supremacy of its constitutional regime;[116] and the courts of relatively new additions to the Union in Poland and the Czech republic, that the breakdown of the dialogue has been able to be played down. In all of these cases there is the clear stand-off between constitutional courts and their role as custodians over their values and principles, and the ECJ which through the twin dogmas of supremacy and effectiveness does not allow for any deviation or, which is more problematic, substantive discussion. There is no longer a dialogue between equals, in effect the ECJ sees itself now as the hegemon in a single legal order. Sovereigns do not enter into conversations, they hold audiences.

Conclusion

Dialogical Rule of Law implying the tension between *jurisdictio* and *gubernaculum* enforced via an array of different means and dialogical in nature is very effective in discussing the state of the Rule of Law in any given legal order. It allows for analysing the adherence to that essentially contested concept, regardless of the precise list of terms that fall within it. The EU is a problematic example of a legal system where 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 *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.

That the dialogical Rule of Law is in peril, we have shown, is due to the ECJ's imposition of the strict adherence not to the rule of law, but to these principles of EU law that it itself has created in order to pre-empt any substantive value-based arguments able to challenge the autopoetic orthodoxy the ECJ is busy enforcing. This is especially problematic as it requires constitutional courts who see it as their task to protect inherent constitutional values and rights to set aside these values in favour of vague euro-speak such as coherence and supremacy. However, if the ECJ would allow for actual dialogue instead of the current Ciaușeschian monologue, the conditions for the Rule of Law in the EU to flourish could be created, turning the EU into a much richer constitutional system. Not only would it create a greater willingness for constitutional courts to engage with the ECJ, if the ECJ were to allow for the slight constitutional pluralism that would result from that dialogue there would be a greater oversight fostered by a greater support. The balance and tension between *jurisdictio* and *gubernaculum* would be restored.

This active choice on the part of the ECJ leads to the conclusion that without any change, there lie only two possible scenarios at the end of this road. Either the constitutional courts, and later lower courts, will start to ignore the edicts of the Court in Luxembourg in the name of the fundamental and indispensable constitutional essentials of their legal systems they are obliged to protect, or there is a slow but steady decline of the rule of law as the failure to enforce it and the other values of the Union lead to an increase in the political stale-mates such as they are currently occurring in Poland and Hungary. It therefore has to be concluded that the only option open the ECJ and the EU itself, is a reinvigorating of the judicial dialogue as the to this day only successful form of dialogical Rule of Law deployable in the Union.

[116] As apparent from, amongst other things, the *Maastricht* Judgment (BVerfGE 89, 155 dd. 12. October 1993), as commented upon by: Everling, 'The *Maastricht* Judgment of the German Federal Constitutional Court and Its Significance for the Development of the European Union' (1994) 14 YEL 1; The BVerfG has also given its critical opinion of the Lisbon Treaty (BVerfG, Judgment dd, 30. June 2009, Az. BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08 and 2 BvR 182/09), as commented upon by Kiiver in 'The *Lisbon* Judgment of the German Constitutional Court' (2010) 16 ELJ 578.