EU Mediation in Spain's Judicial Council Crisis: Refining Dialogic Rule of Law within a Multilevel Constitutional Order

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EU's political mediation in internal constitutional matters as part of its evolving vision of the rule of law – Dimensions of the EU's dialogic rule of law: ontological, organic, and legitimising – The idea of the rule of law as embedded in intrincate political and social processes – The rule of law as the core driving force in creating spaces and boundaries for dialogue, interaction, and definition of the EU's multilevel constitutional system – Balancing inherent dialogue with decisive and strong action against member states breaching the rule of law – Multiple forms of the ideal of the rule of law within the EU's composite constitutional framework – No one-size-fits-all response: context-sensitive approaches to rule of law deviations – Institutionalising and legally integrating mediation as an instrument in the EU's Rule of Law Framework.

Introduction

In June 2024, the two main political parties in Spain, the governing Socialist Party and the main opposition, the Popular Party, reached an agreement to end the deadlock over the appointment of members to the Spanish Council of the Judiciary, which had been stalled for five years. The agreement was adopted in Brussels in the presence of former European Commission Vice President Věra Jourová after an 'exotic' mediation process that lasted six months. EU mediation arises from growing concerns about compliance with the rule of law and represents a new function within the EU's expanding role, focused on Article 2 TEU to protect the rule of law. The nature, justification, and scope of EU

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mediation in resolving domestic constitutional disputes remain largely uncharted and undertheorised, and this is what this article aims to explore.

The stalemate of the Spanish Council emerges in the context of a global democratic regression[1] that has also affected Europe over the last decade. Under the expression of rule of law backsliding,[2] one observes how aspects of liberal democracy, such as the independence of the judiciary, are gradually being eroded in a pattern that seems to threaten the existing system of checks and balances. Although Poland and Hungary might be the most notable examples of the assaults upon basic and traditional liberal tenets, serious issues around the rule of law are also afflicting other member states.

According to Article 2 TEU, the rule of law is one of the main values on which the EU is founded. In fact, the EU is a 'Community based on the Rule of Law'.[3] For a long time, this provision seemed nothing more than a mere proclamation of the core principles of liberal-democratic constitutionalism with only weak or indirect normative implications.[4] Breaches of these core values should be pursued through the political procedure of Article 7 TEU, over which the European Court of Justice had zero or limited jurisdiction (Article 269 TFEU). However, in the wake of the recent crises in Poland and Hungary, the rule of law has gained momentum. From the judiciary standpoint, considering the rule of law as a fundamental constitutional principle has enabled the European Court of Justice to assert its jurisdiction in areas where this has not been always straightforward.[5] From the political side, Article 2 TEU has assigned greater versatility to the EU, particularly the European Commission, in exercising its powers.

In a practice known as 'competence creep',[6] EU institutions have relied on Article 2 TEU to extend their powers through the use, among others, of budgetary conditionalities,[7] which constitute alternative mechanisms of

[1] *See* e.g. D. Larry, 'Democratic Regression in Comparative Perspective: Scope, Methods, and Causes', 28(1) *Democratization* (2021) p. 22.

[2] L. Pech, and K.L Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU', 19 *Cambridge Yearbook of European Legal Studies* (2017) p. 3.

[3] ECJ 23 April 1986, Case C-294/83, *Parti écologiste 'Les Verts'* v *European Parliament,* ECLI:EU:C:1986:166, para. 23.

[4] P. Van Elsuwege and F. Gremmelprez, 'Protecting the Rule of Law in the EU Legal Order: A Constitutional Role for the Court of Justice', 16(1) *EuConst* (2020) p. 8.

[5] Ibid., at p. 10.

[6] *See* e.g. S. Garben, 'Competence Creep Revisited', 57 *Journal of Common Market Studies* (2019) p. 205.

[7] In their judgments ECJ 16 February 2022, Case C-156/21, *Hungary* v *Parliament and Council,* ECLI:EU:C:2022:97 and ECJ 16 February 2022, Case C-157/21, *Poland* v *Parliament and Council,* ECLI:EU:C:2022:98 the ECJ found that Regulation 2020/2092 of 16 December 2020 on a general regime of conditionality for the protection of the Union budget was in accordance with EU law.

enforcement of the rule of law. Furthermore, the EU has deployed a set of instruments or 'toolbox',[8] with varying degrees of normativity aimed at safeguarding it. Through these subtle tools, the EU intervenes in matters that are traditionally considered internal to each member state. Indirect legislation, negative integration through case law, international (trade) agreements, economic governance, soft law or parallel integration are some of the tools used by the EU to uphold the rule of law. A prominent mechanism increasingly used by the European Commission to monitor member states' adherence to the rule of law is the annual reports assessing compliance (Rule of Law Reports by country). In the past two years, reports on Spain have focused on the country's failure to renew its Council of the Judiciary, a process stalled by internal disputes between the ruling and the opposition parties. The originality[9] of this situation is that the Commission, represented by former Justice Commissioner Reynders and later by former Vice-president Jourová, has mediated to break a deadlock that was severely affecting both the functioning of justice in Spain and public perception of it.

Mediation is a habitual commercial dispute resolution instrument between private actors in the EU. It may also be a common practice for peace-building processes in armed conflicts.[10] Yet, EU mediation as an instrument for resolving state members' political disputes is a novel phenomenon as regards its object (domestic political/constitutional conflicts). It is essential to illuminate this potentially significant new intervention by the EU – a role, as I argue, that might be meaningful as long as it is consistent with: (1) a dialogic conception of the rule of law that transcends mere legalism and that requires a comprehensive approach by the EU; and (2) the nature of the EU as a multilevel, or rather, composite constitutional system.[11] These two premises – the dialogic conception of the EU

[8]R. Bieber and F. Maiani, 'Enhancing Centralized Enforcement of EU Law: Pandora's Toolbox', 51 *CML Rev* (2014) p. 1057.

[9]In a formal capacity, the European Commission has explicitly taken on the role of mediator, implementing a specific mediation procedure identified as such. This does not mean that the EU has not previously engaged in behind-the-scenes mediation to resolve domestic constitutional issues. An instance of this can be seen in the EU's involvement in the political crisis in Romania, particularly in addressing challenges related to cohabitation governments within its semi-presidential system. *See* V. Perju, 'The Romanian Duble Executive and the 2012 Constitutional Crisis' 13(1) *International Journal of Constitutional Law* (2015) p. 246 at p. 270.

[10]*See* e.g. J. Bergmann, *The European Union as International Mediator: Brokering Stability and Peace in the Neighbourhood* (Springer 2019).

[11]When I use the widespread term 'multilevel constitutionalism', I am thinking in terms of the more precise concept of 'composite constitution', as this concept better captures the European constitutional framework where national constitutions and the EU are integrated on an equal footing, maintaining a relationship characterised by a relative heteronomy. *See* L.F.M. Besselink, *A Composite European Constitution* (Europa Law Publishing 2007).

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rule of law and the multilevel nature of the European constitutional system – are far from adequately developed and systematised in EU governance. Thus, the EU's mediation in the Spanish case provides a valuable opportunity to refine their definition and operability.

In this regard, the article will begin with a broad overview of the initial conception of the rule of law, before addressing its role in EU multilevel constitutionalism. It will outline the notions of the rule of law, adopting an approach that transcends mere legalistic understanding. The article explores the rule of law within the EU as a space for dialogue, debate, and discrepancy, emphasising that it is not a fixed set of regulations imposed by others but evolves through continuous checks and interactions among various stakeholders, including citizens, legal experts, lawmakers, judges, government officials, and EU and national political authorities.

The second section of this narrative will address the significance and implications of considering the EU as a system of multilevel constitutionalism. In a seminal contribution, Ingolf Pernice coined the concept of 'multilevel constitutionalism' to describe the EU's evolving constitutional structure post-Amsterdam, framing integration as a process of constitution-making. Europe, he argued, has a 'multilevel constitution' composed of national constitutions bound together by a complementary constitutional body formed by the European treaties (*Verfassungsverbund*), reflecting a divided power structure and multiple overlapping political identities of its citizens (regional, national, and supranational).[12] Multilevel constitutionalism denotes the presence of two interconnected constitutional orders, the European and the national. Rather than forming distinct spaces, these frameworks coexist. A strict hierarchy cannot characterise their interaction; instead, they are juxtaposed in a pluralist sense. Thus, European and national constitutional norms are interwoven and interdependent in shaping a unified system of law.[13]

Within this multilevel constitutional system, the third section of the article examines the role of political mediation. In this regard, mediation emerges as a tool that surpasses mere conflict resolution and may be part of the broader space of essential inter-institutional dialogue. The article argues that under certain conditions, mediation may be meaningful in achieving the indispensable interpenetration and interlocking of national and supranational constitutional layers required by multilevel constitutionalism and by a dialogical conception of EU rule of law within the European *demos.*

[12]I. Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?', 36 *CML Rev* (1999) p. 703 at p. 707.

[13]I. Pernice, 'Multilevel Constitutionalism and the Crisis of Democracy in Europe', 11(3) *EuConst* (2015) p. 541 at p. 545.

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EU dialogical rule of law as an artifact against arbitrary power

In general. The rule of law beyond legalism

The rise of populism and a certain authoritarian tendency looming over Western democracies have brought the rule of law to the forefront. This issue is paramount in the EU, but not only here. The United States in the wake of Trump, Brazil under Bolsonaro, and Israel with its court-packing plan are other recent examples where the old concept of the rule of law has taken centre stage. At the EU level, efforts to uphold the rule of law have traditionally focused on judicial independence, a perspective often criticised as overly legalistic and reductive.[14] As the rule of law has gained prominence, more nuanced approaches have emerged, recognising the broader, multidimensional nature of the rule of law beyond judicial independence.

In this context, the Council of Europe's advisory body on constitutional matters (the Venice Commission) has played a pivotal role in advancing the rule of law.[15] In 2011, it launched its first attempt to define the rule of law with its *Report on the Rule of Law*,[16] but the difficulty of formulating a purely theoretical definition led to an operational approach. In 2016, it adopted the *Rule of Law Checklist*,[17] a practical tool for assessing compliance based on five pillars:[18] legality; legal certainty; prohibition of abuse of power; equality before the law; and access to justice. These conceptual advances have significantly contributed to the configuration of the EU's evolving understanding of the rule of law and its place within the Union's legal and institutional framework.[19]

[14]P-A. Van Malleghem, 'Legalism and the European Union's Rule of Law Crisis', 3(1) *European Law Open* (2024) p. 50.

[15]*See* e.g. Q. Qerimi, 'Operationalizing and Measuring Rule of Law in an Internationalized Transitional Context: The Virtue of Venice Commission's Rule of Law Checklist', 13(1) *Law and Development Review* (2020) p. 59.

[16]Venice Commission, *Report on the Rule of Law*, CDL-AD(2011)003, (2011) https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)003rev-e, visited 19 May 2025.

[17]Venice Commission, *Rule of Law Checklist*, CDL-AD(2016)007, (2016) https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf, visited 19 May 2025.

[18]These principles are largely inspired by those proposed by Lord Bingham, who distilled the core elements of 'good law' into eight principles: accessibility of the law; law as not discretion; equality before the law; accountability of power; protection of human rights; access to justice (dispute resolution); fair trial; and respect for international law. *See* T. Bingham, *The Rule of Law* (Allen Lane 2010) p. 37-129.

[19]*See* J. Beqiraj and L. Moxham, 'Reconciling the Theory and the Practice of the Rule of Law in the European Union: Measuring the Rule of Law', 14(2) *Hague Journal on the Rule of Law* (2022) p. 139 at p. 141.

An examination of the conceptualisation of the rule of law unveils a plurality of interpretations. The minimalist and seemingly simple vision of the rule of law, as enunciated by Joseph Raz, posits that the rule of law exists when the law effectively guides the behaviour of its subjects.[20] However, the simplicity of this statement is somewhat deceptive, as the rule of law is an intellectually protean phenomenon. Like Proteus, it has an infinite capacity to change its appearance to avoid being captured. As Rosenfeld expresses, the rule of law is an essentially contested concept.[21] Furthermore, it is characterised by its ambivalent nature:[22] while the rule of law assumes that the law (reflecting the majority's will) must be imposed on the citizen, the citizen can also invoke the rule of law and the protection of their rights to challenge laws and decisions when they result from an arbitrary exercise of power.

In his historical and political analysis of the rule of law, Brian Tamanaha[23] distinguishes between formal (thin) and substantive (thick) theories: the former focuses on legality's form and sources, while the latter incorporates moral or justice-based conceptions for evaluating what should be considered 'good law'. Building on this foundational distinction, scholars have offered refined approaches to bridge these conceptions. Paul Craig, in particular, articulates a framework that integrates both views, especially within the EU context. He identifies three core elements endorsed by EU institutions: first, the requirement that legislative and executive power must act based on lawful authority (principle of legality); second, laws must provide sufficient guidance for individuals to plan their lives (legal certainty); third, the protection of individual rights through judicial adjudication, based on the best available theory of justice at each historical moment.[24]

This article does not aim to provide an exhaustive overview of all approaches and initiatives that have emerged around this complex and challenging legal institution. Instead, it briefly outlines the essential features necessary to establish a foundation for adequately conceptualising and evaluating the EU's mediation

[20]J. Raz, 'The Rule of Law and Its Virtue', in J. Raz, *The Authority of Law* (Oxford Clarendon Press 1979) p. 210.

[21]M. Rosenfeld, 'The Rule of Law and the Legitimacy of Constitutional Democracy', 74(5) *Southern California Law Review* (2001) p. 1307 at p. 1308.

[22]Ibid., p. 1309.

[23]B.Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press 2004) p. 92.

[24]P. Craig, 'Definition and Conceptualization of the Rule of Law and the Role of Judicial Independence Therein: Perspective from Practitioners and Academics', in P. Craig et al. (eds.), *Rule of Law in Europe. Perspective from Practitioners and Academics* (European Judicial Training Network 2019) p. 1.

in this field. To begin with, the rule of law can be understood as a regulative ideal. As an ideal, the rule of law cannot be mistaken for the 'rule by law' or the 'exercise of power by law'. In this regard, the rule of law is not fulfilled simply by the existence of law, even if it has been adopted following all proper forms and procedures[25] (rule through law). Hence, the rule of law does not correspond to a self-referential legality typical of the pre-constitutional *Rechtsstaat*, where law was not the constraint but rather the form of the state's will.[26] It is expected to show some autonomous normativity beyond the explicit content of laws.

In seeking the 'magic twist' that elevates an ordinary legal system to one governed by the rule of law, Krygier offers us a crucial insight: rather than compiling lists of characteristics pertaining to official legal institutions, rules, and practices, we should look at the rule of law's ultimate purpose or *telos*.[27] It is not just about what the law is, but what it does, which ends are pursued. The response is that under the rule of law, the exercise of power – whether public or private – is constrained and guided by law, ensuring that it is not arbitrary.

Based on Krygier's approach, some authors observe a splitting of the law, a 'duality of law'[28] between *gubernaculum* (the will of the sovereign) and *jurisdictio* (the capacity to say what the law is). Hence, the duality of law reflects an inherent tension necessary for a legal system to function under the rule of law. This approach has direct implications for how law is applied and understood. First, the rule of law protects individuals from arbitrary domination by those who wield power.[29] Second, it demands that there be space for contrast, questioning, and objection to any arbitrary exercise of power that is not in accordance with the law. While this may not be a requirement in all democratic regimes, it is essential in constitutional democracies. In fact, the autonomy of the '*jurisdictio*' facet of the law, along with its ties to rights and holistic common values, is now extensively codified in national constitutions and international conventions.[30] The creation of this space for contrast, or ultimately for dialogue about the appropriateness of the use of power through law, implicitly requires that those exercising power in

[25]Rosenfeld, *supra* n. 21, p. 1325.

[26]While the common law conception of the rule of law was rooted in a somewhat antagonistic relationship between the state and the rule of law, its pre-constitutional *Rechtsstaat* counterpart was fundamentally based on a genuine symbiosis between the law and the state: ibid., p. 1319.

[27]M. Krygier, 'Why the Rule of Law is Too Important to be Left to Lawyers', 4 *Law of Ukraine: Legal Journal* (2013) p. 18 at p. 23.

[28]G. Palombella, 'The Rule of Law as Institutional Ideal', in L. Morlino and G. Palombella (eds.), *Rule of Law and Democracy: Inquiries into Internal and External Issues*, Vol. 115 (Brill 2010) p. 31.

[29]Krygier, *supra* n. 27, p. 21. The author adopts Philip Pettit's vision of republicanism.

[30]Palombella, *supra* n. 28, p. 22.

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establishing and applying norms adhere to the principles of transparency, accountability, and responsiveness.[31]

Ultimately, the rule of law, conceived as a counterbalance to the sovereign will and arbitrary power, does not stem from state self-restraint but from a sense of 'justice',[32] a form of social normativity that transcends the sovereign's normative monopoly and retains the autonomy to challenge arbitrary authority. Thus understood, the rule of law calls for a broader perspective that incorporates its social and democratic dimensions, which become inherent to its essence and merit specific attention. Moreover, the institutional forms that embody the rule of law vary with historical and social contexts, allowing each society to realise this ideal through diverse forms.

The dialogic nature of the rule of law in the EU context: three dimensions

Beginning with the *Portuguese judges*[33] case and against the backdrop of court packing programs in Hungary and Poland, the European Court of Justice has expanded the powers of the EU to oversee domestic judicial organisation. This occurs in instances where national measures, such as altering the retirement age for judges[34] or weaponising the disciplinary regime for judges,[35] are deemed to threaten the rule of law. Although the rule of law and other values of Article 2 TEU are not directly justiciable for the time being, the European Court of Justice determined that Article 19 TEU gives 'concrete expression'[36] to the value of the rule of law. Through a contentious legal interpretation,[37] the European Court of Justice stretched the reach of EU law and its own supervisory powers by asserting that the second subparagraph of Article 19(1) TEU imposes a binding obligation

[31]L. Morlino, 'The Two "Rules of Law" between Transition to and Quality of Democracy', in Morlino and Palombella, *supra* n. 28, p. 61.

[32]The rule of law does not encompass a substantive conception of justice outside the law. Justice in this context refers to law (*jus dicere*), 'but in this domain men have the duty to say it, not to choose or decide': Palombella, *supra* n. 28, p. 18.

[33]ECJ 27 February 2018, Case C-64/16, *Associaçao Sindical dos Juizes Portugueses*, ECLI:EU:C:2018:117.

[34]ECJ 24 June 2019, Case C-619/18, *Commission* v *Poland (Independence of the Supreme Court)*, ECLI:EU:C:2019:531; ECJ 15 July 2021, Case C-192/18, *Commission* v *Poland* (*Independence of the Ordinary Courts*), ECLI:EU:C:2019:924.

[35]ECJ 15 July 2021, Case C-791/19, *Commission* v *Poland (Régime disciplinaire des juges*), ECLI:EU:C:2021:596.

[36]ECJ Case C-64/16, *Associaçao Sindical*, *supra* n. 33, para. 32.

[37]For a more detailed explanation of this constitutional move *see* M. Bonelli and M. Claes, 'Judicial Serendipity: How Portuguese Judges came to the Rescue of the Polish Judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical dos Juízes Portugueses', 14(3) *EuConst* (2018) p. 622.

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on member states to uphold judicial independence. This obligation extends beyond the fundamental right to a fair hearing before an independent tribunal enshrined in Article 47 Charter, whose direct applicability remains limited by Article 51(1) Charter, which confines its binding force to situations where 'member states are implementing Union law'.[38] In doing so, the Court established an EU primary law obligation concerning the independence of domestic courts, recognising them as part of the 'European judiciary' insofar as they may be called upon to apply and interpret EU law.

This expansion of EU competence through the case law of the European Court of Justice has been regarded by many as a constitutional transformation on par with the landmark cases of *Costa/ENEL* and *Van Gend en Loos*.[39] The European Court of Justice's role is not unprecedented; it follows a long-standing tradition in EU law where the Court positions itself as the principal constitutional actor[40] and a key driver of European integration. Its constitution-making influence, however, can be controversial and often raises questions of legitimacy.[41] Moreover, as previously suggested, in the process of combating rule of law backsliding, a response focused primarily on safeguarding judicial independence might be insufficient to adequately address the social and political complexities embedded in the rule of law.[42] Therefore, it seems reasonable to conclude that the EU's approach to the rule of law cannot neglect its dialogic character.

The dialogic nature of the EU's rule of law implicitly unfolds into three distinct but interrelated dimensions: a functional-ontological one; an organic-constitutional one; and a legitimacy-based one. If we assert that the rule of law presupposes a space for contrast, objection, and oversight of the sovereign's arbitrary power – a *jurisdictio* distinct from the *gubernaculum* – it seems straightforward to conclude that the rule of law is ontologically dialogical. Dialogue – a process of 'speaking or reasoning' (*logos)* 'through or across' (*dia*) an exchange of views between two or more parties – would serve the crucial function of constructing this duality of law, maintaining the necessary tension to prevent the arbitrary exercise of power (functional ontological dimension). Second, the

[38]ECJ Case C-64/16, *Associaçao Sindical*, *supra* n. 33, para. 29.

[39]Van Malleghem, *supra* n. 14, p. 51.

[40]E. Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution', 75(1) *American Journal of International Law* (1981) p. 1.

[41]C. Thornhill, 'Constituent Power and European Constitutionalism', in X. Contiades and A. Fotiadou (eds.), *Routledge Handbook of Comparative Constitutional Change* (Routledge 2020) p. 282. Thornhill echoes the critique about the unwarranted exercise of constituent power by institutions like the ECJ only being *pouvoir constitué.*

[42]P. Blokker, 'Populism, Human Rights, and (Un-) Civil Society', in L. Antoniolli and C. Ruzza (eds.), *The Rule of Law in the EU: Challenges, Actors and Strategies* (Cham. Springer International Publishing 2024) p. 73.

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presence of diverse constitutional levels and authorities within the EU necessitates dialogue among all constitutional actors for the application of legal principles, even when harmonised or normatively equivalent (EU organic-constitutional dimension). This aspect will be examined in the following section. Finally, the dialogic nature of the rule of law bolsters the legitimacy of law enforcement, a fundamental issue in constitutional democracies and a particularly critical element in the case of the EU (legitimacy-based dimension).

Regarding the first dimension, the EU may position itself as an objective and independent referee that can exercise an increasingly preventive role of *prima facie jurisdictio* before threats to the rule of law that are of a systemic nature in the member states. This aligns with the ethos of the EU Rule of Law Framework, which was introduced by the Commission in 2014.[43] EU mediation in a domestic constitutional conflict such as the Spanish one for ensuring compliance with the rule of law would undoubtedly be a form of *soft jurisdictio* at the disposal of the EU, fully justified by the nature of the political situation motivating the crisis. In this context, Spain's failure to implement the European rule of law does not result from a deliberate challenge to the European standard or the authority of the EU (as might occur in the cases of Poland or Hungary). Rather, it stems from disagreements among the relevant political actors within the member state regarding how to put it into practice, making EU mediation a valuable instrument to overcome the crisis. Therefore, although the Spanish conflict does not entail a direct clash between the European and national constitutional layers, the mediation process nonetheless fosters a dialogue that contributes to shape the evolving contours of the rule of law. As will be shown, the current appointment system for Spain's judicial council, though constitutionally valid, must be brought into conformity with EU standards.

In relation to the legitimacy-based (third) dimension, it is possible to say that intuitively the dialogic character of the rule of law has the potential to confer legitimacy on the legal system. This is crucial for a project like the EU, which continues to face structural deficits in democratic legitimacy. In his analysis of the conditions under which legitimate laws appear, Habermas proposes a proceduralist paradigm of law in which the law would be legitimate when it emerges in a 'constitutionally regulated circulation of power', which should be nurtured by interactions within an uncorrupted public sphere. This public sphere, in turn, would be grounded in the associational network of a liberal civil society and would garner support 'from the core private spheres of the lifeworld'.[44]

[43]Communication from the Commission of 11 March 2014, A new EU Framework to strengthen the Rule of Law, COM (2014) 158 final.

[44]J. Habermas, 'Paradigms of Law', 17 *Cardozo Law Review* (1996) p. 771 at p. 777.

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In fact, the dialogic character of the rule of law is implicit in this Habermasian conception of legitimacy dialogically established through communicative action.

This dialogic conception also ties in with the notion of the 'rule of law from below',[45] an approach that advocates for a shift in perspective when analysing the rule of law towards a bottom-up approach. In this paradigm, societal aspects and the interests of individuals and groups within civil society are emphasised, enabling a better understanding and addressing of the structural causes of rule of law backsliding. Moreover, this outlook appears to be more consistent with the parameters of the rule of law in constitutional democracies and with the sense of 'justice' that permeates social normativity beyond the state. In fact, subsequent developments or 'updates' of the 2014 Rule of Law Framework[46] seem to point in that direction when they refer to the need to overcome EU institutions and the importance of involving civil society at both regional and local level.[47]

Multilevel constitutionalism and the rule of law as a structuring element

Background: the Spanish national dispute

Spain has not been immune to the escalating political polarisation seen in other Western liberal democracies. However, since Pedro Sánchez, leader of the Socialist Party, ousted Mariano Rajoy, then leader of the Popular Party, from the government after a motion of no confidence in June 2018, supported by Podemos and pro-independence Basque and Catalan nationalist parties, the deterioration of political discourse has reached intolerable levels. Consequently, no significant agreement between the two main Spanish parties seems conceivable today.[48]

The judiciary has not been immune to the growing tension in Spanish politics. In December 2018, the time had come to renew the members of the Council of the Judiciary following the regulations outlined in the Constitution and the Spanish Organic Act on the Judiciary,[49] the latest version of which, dating back to 2013, had been approved by initiative of the Popular Party. According to Article 122(3) of the Spanish Constitution, the Council of the Judiciary shall consist of

[45]A. Buyse et al., 'The Rule of Law from Below – A Concept under Development', 17(2) *Utrecht Law Review* (2021) p. 1.

[46]European Commission Communication, *Further Strengthening the Rule of Law within the Union: State of Play and Possible Next Steps*, COM (2019) 163 final and European Commission Communication, *Strengthening the Rule of Law within the Union. A Blueprint for Action*, COM(2019) 343 final.

[47]COM (2019) 163, ibid., p. 11.

[48]*See* e.g. L. Miller, *Polarizados: la política que nos divide* (Ediciones Deusto 2023).

[49]Organic Act 6/1985 of 1 July on the Judiciary (Ley Orgánica del Poder Judicial)

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the President of the Supreme Court, who shall preside over it, and 20 members appointed for a five-year term, consisting of 12 judges or magistrates and eight lawyers of recognised competence with more than 15 years' professional practice. The two-thirds majority required for this renewal necessitates an agreement between the two major parties. Except for some isolated episodes of deadlock in the appointment of judicial council members in the past,[50] there has historically been an implicit political understanding between both parties that the governing party would have the prerogative to nominate the majority of the Council members.

Yet, the Popular Party adamantly refused to proceed with the renewal of the Council, thereby perpetuating what appeared to be an 'undue' conservative majority within it. The justifications given by the party have been varied, ranging from the alleged support of former ETA terrorists for the new government to the presence of 'radical communists' (Podemos) in the coalition government. Since April 2021, the conservatives have focused on demanding the reform of the nomination system for the 12 judges or magistrates of the Council prior to its renewal. In contrast to the current arrangement, where Parliament selects candidates from a list provided by the Council, the conservatives argue that judges and magistrates themselves should directly elect the 12 judicial members of the Council. This shift in the conservatives' proposal, differing from their stance during their time in government in 2013, underscores the party's current conviction that the majority of judges and magistrates harbour conservative inclinations.

Contrary to some assumptions, the organisation of state national judiciaries and, in particular, the dysfunctions observed in the appointment of the Spanish judicial council, are not solely a matter of concern within the Spanish constitutional system. This type of gridlock also potentially affects the European constitutional order, notably Article 2 TEU and the rule of law as one of the Union's core values.[51] The current scenario led the European Commission to recommend that Spain, via its aforementioned Rule of Law Reports (2022 and 2023), should promptly proceed with the renewal of the Council and initiate a 'process in view of adapting the appointment of its judges-members, taking into account European standards on Councils for the Judiciary'.[52] The prolonged

[50]In 2008, the first politically significant cross-party agreement to renew the General Council of the Judiciary was reached to end a nearly two-year deadlock. *See* F. Garea, 'El PSOE y el PP se aseguran el control del nuevo Consejo del Poder Judicial', *El País*, 9 September 2008, https://elpais.com/diario/2008/09/09/espana/1220911201_850215.html, visited 19 May 2025.

[51]P. Van Elsuwege and F. Gremmelprez, 'Protecting the Rule of Law in the EU Legal Order: A Constitutional Role for the Court of Justice', 16(1) *EuConst* (2020) p. 19.

[52]Commission Staff Working Document 2023 Rule of Law Report. Country Chapter on the rule of law situation in Spain SWD (2023) 809 final. Accompanying the document Commission Communication COM (2023) 800 final of 5 July 2023, 2023 Rule of Law Report, p. 2.

stalemate in renewing the Council resulted in the EU's mediation of the conflict between the main Spanish parties. This mediation led to an agreement on the renewal of the Spanish General Council of the Judiciary and analysis of the reform of the Organic Law on the Judiciary, following three meetings between representatives of both political parties, alongside Commissioner Reynders.[53] As we will see, the prominence given to the rule of law by the EU has made it one of the main structuring axes of multilevel constitutionalism, thus becoming the 'pretext' for intervening, to varying degrees, in the internal constitutional functioning of member states.

EU multilevel constitutionalism: legal-interpretative component

The EU navigates and operates in a diffuse and novel territory that lies somewhere between the territory of 'hierarchically organised nation-state governing structures and heterarchically structured global governance structures'.[54] This post-Westphalian scenario aligns with Neil Walker's idea of constitutional pluralism, which challenges the limitations of state-centred constitutionalism and recognises the coexistence of multiple constitutional authorities in a heterarchical relationship.[55] In particular, multilevel constitutionalism defines the European legal space as a system where national and European constitutional orders are interwoven and connected.[56] Multilevel constitutionalism implies the abandonment of the dogma of absolute national sovereignty and involves the diffusion of political power centres and legal authorities, which sometimes overlap and whose effective functioning depends on relatively willing cooperation.[57] It is grounded in the notion of shared sovereignty, reflected in multiple layers of governance and culminating in the coexistence of national and European constitutional frameworks, embedded in the legal and political tension characteristic of the EU's composite constitutional order. It is in this scenario that the second dimension of a dialogical conception of the rule of law (the EU

[53]*See* https://ec.europa.eu/commission/presscorner/detail/en/statement_24_3469, visited 19 May 2025. For the text of the agreement in Spanish *see* https://elpais.com/espana/2024-06-25/texto-integro-del-acuerdo-entre-psoe-y-pp-para-renovar-el-poder-judicial-tras-mas-de-cinco-anos-de-bloqueo.html, visited 19 May 2025.

[54]P.F. Kjaer, 'Constitutionalizing Governing and Governance in Europe', 9(1) *Comparative Sociology* (2010) p. 86.

[55]N. Walker, 'The Idea of Constitutional Pluralism', 65(3) *Modern Law Review* (2002) p. 317 at p. 337.

[56]C. Calliess and A. Schnettger, 'The Protection of Constitutional Identity in a Europe of Multilevel Constitutionalism', in C. Calliess and G. van der Schyff (eds.), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2020) p. 348 at p. 350.

[57]N. MacCormick, 'Beyond the Sovereign State', 56(1) *The Modern Law Review* (1993) p. 1 at p. 17.

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organic-constitutional dimension) emerges. In addition to its inherently dialogic ontological nature and the democratic legitimacy that supports this dialogic approach, the composite nature of EU constitutional pluralism naturally demands that the understanding of the EU rule of law be dialogic among the various constitutional layers operating within it.

The assumptions underlying multilevel constitutionalism are not immune from criticism,[58] with one of the main criticisms revolving around the perceived lack of (democratic) legitimacy within the European constitutional framework. Critics argue that the legitimacy of the EU is merely mediated and derived from the original sovereignty of national states. In response to this criticism, thinkers such as Habermas argue for a *pouvoir constituent mixte* to sustain the EU's legitimacy, based on the dual identity of citizens as members of nation-states and of a potential European federation.[59] This duality would provide the European constitutional system with its own, non-derived legitimacy that would coexist with the other national constitutional polities. Similarly, Pernice advocates viewing citizens as constituent elements of a Euro-Polity,[60] in which the European constitution finds its origin and legitimacy in the will or consensus of the citizens concerned.[61]

Hence, leaving aside ongoing questions of legitimacy, the intertwining of these two constitutional domains, each asserting its autonomous and distinct constitutional authority[62] yet interconnected and interdependent, must confront two sets of issues. First, the imperative for systematic coherence in the application and interpretation within a context of legal pluralism (legal-interpretative component), and second, the establishment of an institutional structure facilitating the adoption of joint decisions through coordination and loyal cooperation (legal-institutional component) as implied in Article 4(3) TEU. Though often intertwined, these two dimensions largely capture the dynamics of the EU project: a continuous process of political negotiation between member states and the EU at the institutional level, and a legal framework of constitutional norms, values, and principles ultimately decided by courts.[63]

Regarding the legal-interpretative component, constitutional pluralism arises from the need to establish a constitutional framework within an ontologically plural legal reality, one that has transcended the classical monistic normative

[58]Pernice, *supra* n. 13, p. 546-547.

[59]J. Habermas, *The Crisis of the European Union: A Response* (Polity Press 2013) p. 34-37.

[60]Pernice, *supra* n. 12, p. 720.

[61]I. Pernice, 'Elements and Structures of the European Constitution', WHI Paper 4/02 (2002) p. 1 at p. 3.

[62]M. Poiares Maduro, 'Three Claims of Constitutional Pluralism', in M. Avbelj and J. Komárek (eds.), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing 2012) p. 67.

[63]M. Claes, 'Negotiating Constitutional Identity or Whose Identity is it Anyway?', in M. Claes et al. (eds.), *Constitutional Conversations in Europe* (Intersentia 2012) p. 205-206.

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nature[64] and necessitates interactive, rather than hierarchical, relations among legal systems.[65] The EU is not a federal or confederal state but something different;[66] it represents a union that does not seek homogenisation, uniformity, absolute certainty or supreme authority around a *grundnorm*. Instead, it is inherently 'doomed' to accommodate the coexistence of diverse legal and constitutional orders and normative authorities in a heterarchical manner. Attempting the opposite may be counterproductive.[67] Yet, constitutional pluralism remains a contested concept, eliciting many intriguing questions and contradictions,[68] which, regrettably, cannot be fully addressed within the confines and purposes of this article.

Nevertheless, within the framework of plural constitutionalism, which recognises the existence of two potentially applicable constitutional orders, multilevel constitutionalism, conceived as composite constitutionalism, offers a unique approach to everyday legal issues and specific cases. It goes beyond merely identifying the final authority for applying rules based on meta-principles of constitutionalism. Instead, multilevel constitutionalism demands the development of hetero-integrative legal responses that take into account the composite nature of the relevant legislative and constitutional orders, ensuring the coherent functioning of the entire system.[69] The process of normative integration goes beyond simply applying predetermined criteria and exceeds the interpretative function of judges in judicial proceedings. It fosters material and procedural connectivity and cohesive interweaving between legal orders through a framework of shared normativity, permeability,[70] and procedural solidarity. This pursuit of unity in legal responses does not mean uniformity but rather a dynamic, ongoing process of discussion and dialogue adjusted to particular cases and contexts.

This interweaving and permeability are legally operationalised through a range of instruments that enable each institutional layer to safeguard its respective

[64]M. Avbelj and J. Komárek, 'Four Visions of Constitutional Pluralism – Symposium Transcript', 4(3) *European Journal of Legal Studies* (2008) p. 323 at p. 324-326.

[65]N. MacCormick, 'The Maastricht Urteil: Sovereignty Now', 1(3) *European Law Journal* (1995) p. 259 at p. 264.

[66]N. Barber, *The Constitutional State* (Oxford University Press 2010) p. 179.

[67]G. de Búrca, 'The Institutional Development of the EU: A Constitutional Analysis, Evolution of EU Law', in P. Craig and G de Búrca (eds.), *The Evolution of EU Law* (Oxford University Press 1999) p. 80.

[68]*See* e.g. N. Krisch, *Beyond Constitutionalism. The Pluralist Structure of Postnational Law* (Oxford University Press 2010).

[69]Calliess and Schnettger, *supra* n. 56, p. 358.

[70]A. Schnettger, 'Article 4(2) TEU as a Vehicle for National Constitutional Identity in the Shared European Legal System', in Calliess and Schnettger, *supra* n. 56, p. 12.

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authority, thus cultivating a dynamic of mutual respect and restraint.[71] In this spirit, respect for the national identity of each state as outlined in Article 4(2) TEU, the necessary sincere cooperation between different constitutional levels as mandated by Article 4(3) and the principles of conferral, subsidiarity and proportionality as stated in Article 5(1) TEU delineate the framework within which EU governance operates. Among these mechanisms, national identity plays a significant role, functioning as an interface that mediates the sometimes fraught relationship between divergent constitutional orders within the EU composite system. Conceived as a response to the potential absolute primacy of EU law,[72] which sparked significant resistance from the constitutional bodies of member states,[73] national identity embodies the composite nature of the EU's constitutional structure. This constitutional framework should also preclude any interpretation of national identity that would allow member states selectively to choose areas *à la carte*, and how they are exempt from complying with EU law, as attempted by populists and authoritarians.[74] In particular, it is the values enshrined in Article 2 TEU that constitute the supreme values of a shared European identity, potentially serving as a limit to some exorbitant claims of national identity.[75] Furthermore, the EU's rule of law has gained a special prominence in defining these boundaries. As the European Court of Justice notes, 'whilst they have separate national identities, inherent in their fundamental structures, political and constitutional', member states are expected to 'adhere to a concept of the rule of law which they share, as a value common to their own constitutional traditions'.[76]

Multilevel constitutionalism: legal-institutional component

As mentioned above, the functionality of multilevel constitutionalism rests on legal systems governed by principles of sincere cooperation and mutual respect

[71]Barber, *supra* n. 66, p. 171.

[72]A. von Bogdandy and S. Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty', 48(5) *CML Rev* (2011) p. 1417 at p. 1419.

[73]For a thorough analysis of the constitutional jurisprudence in this respect in Germany, Italy, France and Spain, *see* P. Cruz Mantilla de los Ríos, *La Identidad Nacional de los Estados Miembros en el Derecho de la Unión Europea* (Aranzadi 2021) p. 204-285.

[74]J. Scholtes, 'Abusing Constitutional Identity', 22(4) *German Law Journal* (2021) p. 534 at p. 552-554.

[75]N. González Campañá, 'La Unión Europea como Contrapoder Político de los Estados Miembros y los Límites de su Actuación', in J.M. Castellà Andreu and E. Expósito (eds.), *Contrapoderes en la Democracia Constitucional ante la Amenaza Populista* (Marcial Pons 2024) p. 431 at p. 451.

[76]ECJ 16 February 2022, Case C-156/21, *Hungary* v *Parliament and Council*, *supra* n. 7, para. 234.

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(Article 4(3) TEU), minimal coercion, self-restraint, and a spirit of generous compromise. Therefore, the challenge for the EU composite system to function smoothly lies in structuring a complex institutional framework that fosters fluid inter-institutional collaboration.

Largely, the exploration of the institutional structure necessary for a stable and robust constitutional pluralism has often unfolded through crises that have already reached the courts, where the debate is framed in absolute terms, focusing on who holds the final constitutional authority. Setting aside the controversial judicial rulings of certain populist constitutional courts of questionable legal legitimacy,[77] there has been a persistent conflict between national constitutional courts and the EU regarding the perceived 'undue' erosion of their constitutional identity, attributed to actions considered to exceed the EU's legal authority. One of the most relevant and destabilising recent cases of the EU composite regime was the *PSPP* case, where the German Federal Constitutional Court asserted that the right to democracy for German citizens limits the EU's authority. The German court argued that the Basic Law 'prohibits conferring upon the European Union the competence to decide on its own competences' (*no Kompetenz-Kompetenz*),[78] implying that the EU could be acting beyond its legal powers (*ultra vires*).[79] In this type of instance, national constitutional bodies may view EU intervention as an unacceptable encroachment, prompting them to invoke the *contralimiti* doctrine[80] against the latter.

In this context, the EU's evolving role as the supreme guardian of the rule of law among its member states adds intrigue to the traditional tensions over who holds the final authority. The additional complexity in the EU's Rule of Law Framework arises from its protection now serving as a boundary to the concept of

[77]A pertinent example of such populist judicial decisions is the ruling issued by the Polish Constitutional Court (*Trybunal Konstytucyjny* Ref. No. K 3/21 of 7 October 2021) challenging the ECJ's interpretation of Arts. 1, 2, and 19(1) TEU as inconsistent with the Polish Constitution. For a critical examination of this judgment, *see* A. Gliszczyńska-Grabias, and W. Sadurski, 'Is It Polexit Yet? Comment on Case K 3/21 of 7 October 2021 by the Constitutional Tribunal of Poland', 19(1) *EuConst* (2023) p. 163.

[78]Bundesverfassungsgericht [Federal Constitutional Court], case No. 2 BvR 859/15 of 15 May 2020 at para. 102.

[79]For an analysis of the position of the German Constitutional Court in relation to PSPP *see* I. Feichtner, 'The German Constitutional Court's PSPP Judgment: Impediment and Impetus for the Democratization of Europe', 21(5) *German Law Journal* (2020) p. 1090.

[80]The doctrine of *contralimiti*, developed by the Italian *Corte Costituzionale* – being *Frontini* (No. 183/1973), the first of the saga – asserts that while EU law generally has supremacy, this dominance is not absolute. National constitutional courts reserve the right to resist EU law when it conflicts with core constitutional principles, such as national sovereignty, constitutional identity, or fundamental rights.

counterlimits to EU action. Consequently, the debate over who has the final say encompasses two layers of inquiry: the scope and content of national identity; and, second, the existence of conditions that allow for limits on this identity. While, *de jure,* this controversy appears to be addressed through the *Europeanisation*[81] of national identities via Article 4(2) TEU, and their integration into the *acquis communautaire*, significant legal and political complexities persist. Doctrine has been creative in proposing new models for addressing this type of crisis, primarily focusing on judicialised scenarios where conflicts escalate into constitutional crises. Amid innovative proposals for the establishment of third instances, and the concerns about how such structures could complicate the already intricate European judicial system,[82] dialectical models of judicial cooperation[83] appear to offer a more pragmatic and reasonable solution from a multilevel constitutional approach.

However, proper multilevel functioning requires a proactive approach to preventing and anticipating potential constitutional crises, which could jeopardise the integrity of the entire European legal architecture at any moment. Within the institutional-legal dimension, EU governance has mechanisms of synchronisation and shared vision to advance in loyal cooperation as outlined in Article 4(3) TEU. Apart from the preliminary reference procedure outlined in Article 267 TFEU, which exemplifies an institutionalised judicial dialogue, other mechanisms could significantly enhance connectivity and permeability between constitutional spheres. An example of such mechanisms could be the one outlined in Article 12 TEU, which regulates the engagement of national parliaments in European legislative processes, or the comitology system.[84] Against this backdrop, the focus placed on the rule of law by EU authorities has made it a key structuring force in shaping the European composite system. As we will explore next, EU mediation in internal constitutional crises that affect the EU constitutional order – such as the Spanish case under analysis – is both a reflection and a direct consequence of this composite constitutional configuration built around a dialogic and rich concept of the rule of law.

[81]Claes, *supra* n. 63, p. 221.

[82]A. Torres Pérez, *Conflict of Rights in the European Union: A Theory of Supranational Adjudication* (Oxford University Press 2009) p. 64-66.

[83]Cruz Mantilla, *supra* n. 73, p. 320-327.

[84]W. Wessels, 'Comitology: Fusion in Action. Politico-administrative Trends in the EU System', 52(2) *Journal of European Public Policy* (1998) p. 209.

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Mediation as a byproduct of the dialogic approach to the rule of law: lessons from the Spanish case

Multilevel constitutionalism shaped by the rule of law

As previously discussed, the rule of law has emerged as a fundamental component in shaping the EU's multilevel constitutionalism. If we accept that a dialogic rule of law is a condition of possibility for the coherent operation of a multilevel system, it is essential to assess the depth of this dialogue, the hurdles it faces, and how it materialises. This dialogue extends beyond courts or court-legislature interactions. In the EU ecosystem, the dialogic dynamic can manifest itself across different levels and constitutional actors. It cannot be limited to resolving at the judicial level the most serious violations of the rule of law, as these violations often represent advanced (and sometimes incurable) stages of the disease. Normally, constitutional mutations towards illiberal regimes with little respect for the rule of law are due to structural causes that have been brewing for a long time, making a preventive approach to early problems essential for embedding the rule of law in the EU's composite constitutional system.

If, as discussed above, we understand the rule of law as having a social and political dimension beyond mere legal technicality, its analysis and treatment must be dialogical. It should be sensitive to the evolving social and political processes where the law, undoubtedly, constitutes a vertebral element but not the only or omnipotent one. In a multilevel constitutional system, the rule of law involves formal and informal exchanges and necessary interactions between authorities, creating a dynamic system of checks and balances that shapes the EU's composite constitutionalism. Yet, when an anomaly is recognised as pathological and there is an unwillingness for mutual recognition, as evidenced by the disregard for prior warnings or recommendations, the dialogic nature of the rule of law cannot justify delays or mischief on the part of those seeking to distort the system's spirit.[85]

The 2019 updates to the EU Rule of Law Framework partly reflect an understanding of the rule of law's complexity in a multilevel system. This approach involves a learning process to better grasp rule of law backsliding. While respecting subsidiarity and the role of member states in addressing such issues, the EU aims to strengthen prevention by identifying 'warning signs' earlier. As the Framework notes, 'certain warning signs can only be identified by acquiring a deep understanding of member states' practices through a dialogue with authorities and stakeholders. Such country-specific knowledge is essential to help preventing possible rule of law threats and to respond to them effectively where

[85]R. Uitz, 'The Perils of Defending the Rule of Law through Dialogue', 15(1) *EuConst* (2019) p. 1.

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necessary'. Notably, it highlights the role of citizens, academia, civil society, education systems, and independent media as key 'watchdogs' for healthy democracies,[86] thus embracing a broad dialogical rule of law. EU management is intended to be based on premises that emphasise the principle of loyal cooperation and leave confrontation as a last resort. Along with highlighting loyal cooperation, the Framework underscores the need to prevent abuses and malpractices in the dialogue-based rule of law resolutions, proposing well-structured processes to ensure a comprehensive oversight and timely action by avoiding undue delays.[87] Finally, it is essential that the process is structured to address issues promptly, preventing past abuses or manipulations of the dialogue, as noted in the updates to the Rule of Law Framework. These processes should also be cumulative and progressively assertive, depending on the member state's conduct.

EU mediation in the Spanish dispute as a case of the dialogic rule of law in action

It is within this ethos and against this background that the EU's atypical mediation between the Spanish government, and the main Spanish opposition party may, in fact, be framed. Little is known about the particulars of the mediation undertaken by the European Commission in the person of its former Commissioner for Justice, Mr Didier Reynders. Of interest in this regard is the statement of intent expressed by the Commission in its press release prior to the start of the mediation[88] and once the mediation concluded. In the statement initiating the mediation, the European Commission referred to substantive and procedural issues of the mediation process. The Commission first expresses its readiness to 'play its role to ensure compliance with EU law', thereby recognising its concurrent and shared competence on the matter (the use of the term 'its role' instead of referring to it as 'its power' denotes a multiplicity of actors and actions in the process). Second, it establishes the renewal of the appointment of the members of the General Council of the Judiciary and the adaptation of the nomination process of its judges-members as the substantive objective of the process. Finally, it proposes to 'pursue a *structured dialogue*' (emphasis added) to ensure the implementation of the two limbs of the recommendation of the Commission. It is significant that the Commission uses the term 'dialogue' and the adjective 'structured' to refer to the mediation process. This approach aligns

[86]COM (2019) 163 final, *supra* n. 46, p. 8-9 and COM(2019) 343 final, *supra* n. 46, p. 4, 6.
[87]COM (2019) 163 final, *supra* n. 46, p. 9.
[88]European Commission Statement, STATEMENT/24/445, 26 January 2024, https://ec.europa.eu/commission/presscorner/detail/en/statement_24_445, visited 19 May 2025.

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with the dialogical nature of the EU rule of law and with the aforementioned legal-institutional dimension that the material and procedural connectivity between constitutional orders entail for the operability of European multilevel constitutionalism.

Mediation holds significant potential as a mechanism for conflict prevention and resolution. Unlike the adversarial nature of the judicial system, which often leads to zero-sum outcomes, mediation employs integrative processes aimed at achieving mutually satisfactory results for all parties involved.[89] In addition to resolving the specific dispute, mediation fosters dialogue and trust by creating opportunities for ongoing dialogue and reconciliation over the long term, even among parties with conflicting or non-harmonious interests. Mediation, therefore, appears to be a suitable instrument for the permanent and dynamic dialogue required for the proper functioning of a multilevel constitutional system within the Union. Mediation mechanisms could potentially mitigate the highly disruptive confrontations recently witnessed between the EU and some member states.

Recourse to mediation has been a familiar practice for the EU in two distinct contexts unrelated to the internal constitutional integration function discussed in this article. First, the EU has employed mediation in the context of peace-building processes, a standard international response to armed conflicts since the end of the Cold War.[90] The EU's position is reflected in the conceptual framework developed by the Council of the European Union in 2009.[91] Second, the EU sees mediation as an alternative method for resolving disputes in cross-border trade relations. European Directive 2008/78/EC[92] (Directive on commercial mediation) embodies the EU's legal framework. The EU's approach to mediation in both of these contexts offers valuable insights for addressing and shaping the new role of the European Commission in political mediation for resolving national constitutional disputes affecting the internal constitutional order.

According to Article 3(a) of the Directive on commercial mediation:

> 'mediation' means a 'structured process, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the

[89]A. Gottesfeld, 'Mediation in the Creation of Public Policy', 74(2) *Dispute Resolution Journal* (2019) p. 33 at p. 34.

[90]R. Gowan, and S.J Stedman, 'The International Regime for Treating Civil War, 1988–2017', 147(1) *Daedalus* (2018) p. 171 at p. 175.

[91]General Secretariat of the Council of the European Union, *Concept on Strengthening EU Mediation and Dialogue Capacities* (2009) https://eeas.europa.eu/archives/docs/cfsp/conflict_prevention/docs/concept_strengthening_eu_med_en.pdf, visited 19 May 2025.

[92]Directive 2008/78/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, O.J. 2008, L 136/3.

> settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a member states'.

As in the Commission's statement announcing its mediation in the Spanish conflict, the Directive uses the adjective 'structured', which can be understood as comprising a prearranged scheme with clearly defined phases, procedures, rules, and objectives. While designed for commercial disputes, it may serve as guidance for the mediation process undertaken by the Commission. Furthermore, as per the Rule of Law Framework, in those cases when there are clear indications of a systemic threat to the rule of law in a member state, the Commission will initiate a structured exchange with that member state. That process is composed of three stages: the Commission assessment; the Commission's recommendation; and the follow-up to the Commission's recommendation. Although these phases are envisaged for more serious situations with clear indications of systemic threat, they can also provide inspiration for the structured process of mediation. In general, mediation processes can be delineated into three phases: (1) mediation onset; (2) mediation process;[93] and (3) post-mediation phase. In the context of political mediation initiated to safeguard the rule of law in domestic disputes, each phase will exhibit distinctive characteristics.

The mediation initiation phase involves determining when the conditions for initiating the process are met and who will conduct the mediation. The conditions prompting the initiation of a mediation process are threefold: first, there must be a conflict or the presence of persistent irregularities impacting the constitutional system of a member state; second, the conflict must have garnered the EU's attention, through the expression of concern regarding the European rule of law (e.g. via the annual Rule of Law Reports); third, the parties to the conflict must show a genuine willingness to accept EU mediation and acknowledge its authority. The first logical conclusion from this premise is that such mediation is not envisaged for resolving conflicts involving a direct clash between the national constitutional order and that of the EU, where the latter's legitimacy is contested. EU-led mediation is therefore meaningful primarily in the context of internal constitutional conflicts where the parties involved acknowledge the authority of the EU to mediate.

In line with a rich understanding of the rule of law encompassing its social and political dimensions, the parties to the conflict should be all those actors who, in one way or another, are involved and capable of contributing to the resolution of the specific constitutional dispute at a given moment and who, therefore, possess

[93]S. Hellmüller, 'Mediation', in O.P. Richmond, and G. Visoka (eds.), *The Palgrave Encyclopedia of Peace and Conflict Studies* (Springer Nature 2022) p. 804 at p. 806-808.

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constitutional agency in that context. The parties are free to resort to mediation, to be involved in the mediation process and to ensure that all agreements are reached through informed consent (self-determination principle).[94] At times, however, it would not be unreasonable in a system of multilevel constitutionalism for the law to contemplate the need to resort to EU mediation when the stalemate persists with no prospect of a solution. Refusing to engage the EU in a conflict related to the rule of law could serve as a warning sign within the framework of the EU rule of law. Regarding the competent body to conduct the mediation process and following Article 17 TEU, the European Commission seems to be well suited to its role as guardian of the European treaties.

Regarding the second phase (the mediation process itself), it seems reasonable to expect that the mediation process will be conducted within a predetermined timeframe (Commissioner Reynders set a two-month period in the Spanish conflict) and under the principles of good faith[95] and confidentiality. In constitutional mediation, where issues are inherently public, confidentiality serves a different function than in private disputes. It safeguards the integrity of ongoing negotiations by preventing leaks that could undermine trust and a space for open dialogue. However, once mediation concludes, confidentiality should not obstruct the public airing of issues in a public forum.[96] This is significant for a comprehensive and dialogic understanding of the rule of law, where the debates and pertinent issues must resonate with public opinion. In the battle for the narrative surrounding the rule of law, transparency, engagement with national social and political actors, and disseminating information about the prevalence of public support for these principles can strengthen the perceived legitimacy of EU interventions[97] and might reduce the risk of a rally-around-the-flag effect.

As to the mediator's performance, the mediation undertaken by the EU is not disinterested and detached but is oriented and circumscribed to ensure adherence to the European rule of law. In this context, the European mediator will not be merely a facilitator[98] but may actively engage in mediation with a comprehensive

[94]J. Nolan-Haley, 'Self-Determination in International Mediation: Some Preliminary Reflections', 7 *Cardozo Journal of Conflict Resolution* (2005) p. 277 at p. 279.

[95]L. Nussbaum, 'Mediation as Regulation: Expanding State Governance over Private Disputes', 2 *Utah Law Review* (2016) p. 361 at p. 387.

[96]R.A. Max, 'Mediation in Public Policy', 47(2) *Cumberland Law Review* (2016-2017) p. 293 at p. 299.

[97]*See* D. Toshkov et al., 'Enforcement and Public Opinion: The Perceived Legitimacy of Rule of Law Sanctions', 32(2) *Journal of European Public Policy* (2025) p. 550 at p. 553. For a study finding no evidence of a 'rally-around-the-flag' effect on EU intervention in Poland, *see* Ø. Stiansen et al., 'Enforcing the Rule of Law in the EU: Effects on Public Opinion', 32(2) *Journal of European Public Policy* (2005) p. 522.

[98]On the types of mediator, *see* P. Román Marugán, 'La mediación política: concepto, procesos y problemáticas', 50(1) *Política y Sociedad* (2013) p. 39 at p. 47.

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understanding of the multilevel constitutional system's context and the EU rule of law. This validates the EU's role as an interventionist mediator, capable of leveraging its political and economic influence to exert pressure and achieve a resolution that upholds the European rule of law.

Finally, upon conclusion of the mediation process, regardless of its outcome, the competent EU body should prepare a report ensuring transparency of European institutions in exercising their powers. This report should address any lack of good faith by national actors, identify barriers to agreement, and outline criteria used to assess proposals' conformity with the European rule of law. Similarly, mechanisms should be established for the oversight and follow-up of agreements related to the operability of the rule of law, ensuring a relationship that remains both permanent and dynamic over time among the various constitutional authorities. By creating a body of case-by-case resolutions, mediation could contribute to giving content to the meaning of EU rule of law and the configuration of the EU's multilevel constitutional system, thus facilitating resolution or better preventing future conflicts.

The Commission's mediation to break the deadlock in the appointment of new members to the Spanish Council of the Judiciary should serve as a reference for future EU-led political mediation in national disputes affecting the rule of law. Institutionalising a regulatory structure within the Rule of Law Framework would enhance clarity and security in the EU's actions. Concerning the material provisions of the mediated agreement, it is noteworthy that while the current appointment system for the Council of the Judiciary has not raised constitutional issues, it appears to conflict with EU rule of law standards. In this context, the Commission's statement specifies that the process should proceed to 'immediately after the renewal, a process in view of adapting the appointment of its judges-members, taking into account European standards on Councils for the Judiciary'. At the time of writing, the substantive criteria for appointing judges-members to the Spanish judicial council remain undefined and are expected to be developed through a complex (dialogical) process reconciling Spain's constitutional identity with European rule of law standards.

A significant critique is the missed opportunity to clarify and elaborate the scope of 'European standards for Councils for the Judiciary'. When defining those European standards, the work undertaken within the Council of Europe, particularly by the Venice Commission, is of particular significance.[99] Acknowledging the diversity of legal systems and the absence of judicial councils in some older democracies, the Venice Commission advocates for independent

[99] *See* e.g. R. Bustos Gisbert, 'La influencia de los textos no vinculantes del Consejo de Europa sobre independencia judicial en el TEDH y en la UE', 47 *Teoría y Realidad Constitucional* (2021) p. 161.

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councils with a pluralistic composition, where a substantial part, if not the majority, of members are judges elected by their peers, and the remaining members are appointed by Parliament from among legally qualified individuals.[100] Although this body of *soft law* is not binding on EU institutions, its underlying principles are extremely helpful for accurately defining the rule of law as a limiting factor in national constitutional identity, as they emphasise the need for judicial councils to be depoliticised and insulated from parliamentary majorities and political party influence, while also ensuring democratic legitimacy. Within a constitutional structure that is, as we recall, composite and inherently pluralist, these two conditions (the absence of interference by shifting political majorities and the requirement of democratic legitimacy) appear to represent the core of those European standards, whose definition and specification would lie within the discretion of national systems with judicial councils.

Final remarks

The EU's mediation in unblocking the Spanish Council of the Judiciary was initially viewed as an unusual intervention with a difficult fit. Although the substantive criteria for the appointment of judges-members to the Spanish Council remain undefined, the successful resolution of the deadlock, coupled with the recent shift in the Polish Government towards one more aligned with EU constitutional standards, has been hailed by European institutions as a victory for the EU's rule of law strategy. In recent years, the EU has implemented a growing set of mechanisms for the promotion and protection of the rule of law beyond the Article 7 TEU procedure, which has proven challenging to enforce due to both legal and political constraints. What characterises these EU measures is their proactive nature and dialogic conception of the rule of law. This approach involves broadening the understanding of the complex socio-political processes underpinning robust rule of law systems, fostering dialogue between the EU and national political and social actors. It also includes a forward-looking strategy aimed at anticipating structural threats to the rule of law that could pave the way for illiberal or semi-authoritarian regimes. As a result, the EU has elevated the rule of law to a fundamental structuring axis that shapes multilevel constitutionalism by prompting greater interaction, contrast, and dialogue between constitutional actors, thereby reinforcing the checks and balances.

This evolving approach explains the EU's mediating role in the Spanish constitutional conflict. The success of this mediation underscores the need to

[100]Venice Commission, *Report on the Independence of the Judicial System: Part I – The Independence of Judges*, CDL-AD(2010)004, 2010, p. 17, https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)004-e, visited 19 May 2025.

delineate clear and concise rules on when, how, and for what purpose EU mediation should be deployed within the broader framework of its rule of law agenda. Yet, mediation is not a panacea for all cases of rule of law backsliding. A more refined understanding of the rule of law reveals that each member state's challenges are distinct, requiring a careful examination of the underlying causes to determine the most appropriate political or judicial responses. At present, it is premature to fully assess the long-term effectiveness of this enriched conception of the rule of law, as its true impact will unfold over time. For now, the EU must continue learning through a process of trial and error while upholding the rule of law as a core regulatory ideal, one that will undoubtedly be pivotal in shaping the EU in the years to come.

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