

## **THE EU RULE OF LAW: CUTTING PATHS THROUGH CONFUSION**

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### **Abstract**

The Court of Justice of the European Communities (ECJ) has always been outspoken about the essence of the European Community (EC) as a Rule of Law Community. The notion of the Rule of Law entered the texts of the Treaty and arguably plays a crucial role in the Community legal order, serving as one of the fundamentals of ‘integration through law’. Yet, the analysis of numerous studies of the Rule of Law in Community context reveals that the understanding on the Rule of Law as a Community legal construct, as opposed to a notion borrowed from the legal systems of the Member States, is not receiving enough attention. Confusion persists between the Rule of Law as understood in the national contexts of the Member States and the Community concept, which presumably should be governed by EC law alone. This paper aims to bridge the gap between the obvious importance of the Community Rule of Law in the EC legal order and the country-specific vision, ascribed to the Rule of Law in each Member State, which results in a vague and even contradictory understanding of Community Rule of Law in different Member States, threatening to undermine the effectiveness and uniform application of Community Law throughout the entire territory of the Community. A substantive vision of Community Rule of Law is offered as a possible tool to be employed to this effect.

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## 1 Introduction and structure of the argument

As with democracy, the separation of powers, human rights, and the like, the Rule of Law<sup>1</sup> is a concept of overwhelming importance.<sup>2</sup> It is ‘not only a safeguard, but a legal embodiment of freedom’, as Hayek explained.<sup>3</sup> It plays a crucial role in the functioning of any modern democratic state.<sup>4</sup> The EU, a non-state entity sui-generis, also succumbed to the charm of this obviously attractive concept. It is clear, however, that a concept shaped in the context of a nation state legal system can hardly be transposed to the European legal order without any alteration of its meaning.<sup>5</sup> Given the profound differences that exist between the legal realities of the Community legal order and the legal orders of the Member States, one should always keep in mind Weiler’s warning of not confusing ‘oranges with apples’, initially issued in the context of a debate related to the transposition of the notion of democracy in such a way.<sup>6</sup>

<sup>1</sup> This article develops and recontextualises the points made in D. Kochenov, *EU Enlargement and the Failure of Conditionality* (The Hague: Kluwer Law International 2008) at 98.

<sup>2</sup> Literature on the Rule of Law is abundant. See for example B.Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press 2004); T.J. Zywicki, ‘The Rule of Law, Freedom, and Prosperity’, (2003) 10 *Supreme Court Economic Review* 1; P. Costa and D. Zolo (eds.) *Lo Stato di diritto: Storia, teoria, critica* (Milano: Feltrinelli 2002); M. Rosenfeld ‘The Rule of Law and the Legitimacy of Constitutional Democracy’ (2001) 74 *Southern California Law Review* 1307; P. Popelier, *Rechtszekerheid als beginsel voor behoorlijke regelgeving* (Antwerpen/Groningen: Intersentia Rechtswetenschappen 1997) at 35 (providing a good summary of literature); R.H. Fallon Jr., ‘“The Rule of Law” as a Concept in Constitutional Discourse’ (1997) 97 *Columbia Law Review* 1; M.J. Radin, ‘Reconsidering the Rule of Law’ (1989) 69 *Boston University Law Review* 781; J.W.M. Engels and others (eds.) *De rechtsstaat herdacht* (Zwolle: W.E.J. Tjeenk Willink 1989); W. Leisner, ‘L’État de droit – une contradiction?’ in M. Waline (ed.) *Receuil d’études en hommage à Charles Eisenmann* (Paris: Cujas 1977); N.S. Marsh, ‘The Rule of Law as a Supra-National Concept’ in A.G. Guest (ed.) *Oxford Essays in Jurisprudence* (Oxford: Oxford University Press 1961); A.L. Goodhart, ‘The Rule of Law and Absolute Sovereignty’ (1958) 106 *University of Pennsylvania Law Review* 7.

<sup>3</sup> F.A. von Hayek, *The Road to Serfdom* (Chicago: The University of Chicago Press, 1994 (1944)) at 90.

<sup>4</sup> On the relationship between the Rule of Law and democracy, see for example Kochenov above n. 1 at 110.

<sup>5</sup> Kochenov, ‘Behind the Copenhagen Façade. The Meaning and Structure of the Copenhagen Political Criterion of Democracy and the Rule of Law’ (2004) 8 *European Integration online Papers* at 10.

<sup>6</sup> J.H.H. Weiler, *The Constitution for Europe* (Cambridge: Cambridge University Press 1999) at 268.

This article will make a number of observations on the nature of the EU Rule of Law, advocating strict separation between the Rule of Law as applied in the national legal context of the Member States and the Rule of Law to be employed within the system of Community law. It should be up to the EU law alone to define the essence of EU Rule of Law, and the filling of the concept should not change from Member State to Member State, following the change of legal system and the change of language. Indeed, a linguistic aspect plays a prominent role here, promoting confusion: charged with multiple national-legal connotations, the notions corresponding to the English 'Rule of Law' in the other 22 Community languages can clearly harm the unity of the EU Rule of Law.

Observations on the desired nature of the EU Rule of Law will require making important choices between the varying understandings of the Rule of Law apparent in the nation-state context before these can be applied at the Community and the Union level. The most important role here is to be played by the analysis of the doctrinal divide existing between the formal and the substantive approaches to the nature of the Rule of Law as understood in legal theory and accommodating the EU Rule of Law within this divide.

The article will proceed as follows: Firstly, as a starting point of the analysis a brief summary of doctrinal thinking on the Rule of Law will be provided, outlining both the importance and the potential vagueness of the notion, as well as the doctrinal differences existing between a number of conflicting approaches to the nature of the Rule of Law. To make a concise argument, the analysis contained in the article mostly builds on the Anglo-American approach to the concept, which suffices to introduce the reader to the complexity of the Rule of Law and to provide a background for the debate related to the possible problems connected with the formulation and the practical use of the EU Rule of Law. Needless to say, such an approach should not be taken as a denial of the added value of the corresponding continental concepts (2). Secondly, the present practice of using the notion of the Rule of Law in the Community (and, eventually, the Union) legal context will be discussed, outlining the legal roots of the concept in the Community legal order as well as the limitations of the dominant use of the concept (3). Thirdly, the essential traits of the Community Rule of Law-to-be will be suggested, building on the clashes between the analysis contained in the first and second parts of the article and suggesting a change in the use of the concept at the Community level (4). The paper concludes by arguing for a substantive concept of EU Rule of Law to be defined by EU Law itself (5).

## **2 Essential aspects of the concept**

The Rule of Law is both popular and vague. While every lawyer has a more

or less articulated idea regarding its meaning, these ideas are often in clear contradiction to each other. Consequently, any recourse to the Rule of Law begs for an explanation, clarifying what exactly is meant by the concept.

## 2.1 Popularity v. the lack of clarity

The Rule of Law is recognised by international legal instruments and is used by lawyers and policy-makers alike.<sup>7</sup> The ‘export of the Rule of Law’<sup>8</sup> became a prominent topic in the rhetoric of States and international organisations engaged in dealing with countries in transition and in the countries of the developing world.<sup>9</sup> The same also applies to the European Union, engaged in the promotion of the Rule of Law both in the context of its enlargements<sup>10</sup> and as part of its neighbourhood policy.<sup>11</sup> The concept is thus widely regarded as an absolutely necessary element destined to play a prominent role in any modern democratic legal system. Consequently, any legal system engaged in the export of the Rule of Law presumably allows this concept to play a prominent role internally as well. As a result of this, the Rule of Law is to be found virtually everywhere. This is not the self-image of the countries of the ‘first world’ only. On the contrary, just as with democracy, almost every regime in the world is more likely than not to presume its Rule of Law nature. It does not mean that all or the majority of jurisdictions in the world adhere to the ideals of the Rule of Law. The value of such a conclusion would obviously be marginal, since the omnipresence of the Rule of Law first of all suggests that the concept is sufficiently vague to be easily found in any legal system, which does not only play against its claimed importance but also allows questioning its essential components. It has even been claimed that ‘il successo del termine [Rule of Law] sia dato

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<sup>7</sup> UN Universal Declaration of Human Rights, GA res. 217 A (III) 10 Dec. 1948, U.N. Doc. A/810, Preamble, § 3; European Convention on Human Rights 4 Nov. 1950, ETS 005, Preamble, § 6.

<sup>8</sup> On this process, see for example J.C. Reitz, ‘Export of the Rule of Law’ (2003) 13 *Transnational Law & Contemporary Problems* 429.

<sup>9</sup> See T. Carothers, ‘Promoting the Rule of Law Abroad: The Problem of Knowledge’ *Rule of Law series Working paper No. 34* (Washington D.C.: Carnegie Endowment for International Peace WP 2003); M. Stephenson, *Rule of Law as a Goal of Development Policy*, available at <<http://www.worldbank.org>>; J.M. Ngugi, ‘Policing Neo-Liberal Reforms: The Rule of Law as an enabling and Restrictive Discourse’ (2005) 26 *University of Pennsylvania International Economic Law* 513.

<sup>10</sup> See Kochenov, above n. 1.

<sup>11</sup> For critique, see A. Magen, ‘The Shadow of Enlargement: Can the European Neighbourhood Policy Achieve Compliance?’ 12 *Columbia Journal of European Law* 384.

dalla sua vaghezza'.<sup>12</sup>

It becomes clear that notwithstanding the abundant references to the 'Rule of Law', the meaning of it is probably much less articulated than one might presuppose at first glance. Popularity and functionality of legal concepts do not go hand in hand. To agree with Brörtl, 'pure fashion or playing with words can hardly introduce real changes into the life of a State or a society'.<sup>13</sup> Those who find the concept important also point out that its meaning is far from clear.<sup>14</sup> Not only is the Rule of Law associated with different possible types of relationships between State and law and between law and moral but it is also rooted in different European legal traditions, making the scope of this notion, which is quite vague in any case, also dependent on the legal tradition in which the concept is used. Consequently, the scope of the Rule of Law, *État de droit*, *Rechtsstaat*, *Estado de derecho*, *Stato di diritto*, and so on, is highly diverse.<sup>15</sup>

The presence of this concept in EC law does not ease the tension between all its possible meanings. The European understanding of the Rule of Law is only at the stage of articulation. While a number of elements of it are quite clear, the general scope of the European Rule of Law is yet to be outlined.

## 2.2 Most often outlined components of the concept

At the core of the Rule of Law is the idea that any exercise of power should be subject to the law:<sup>16</sup> the Rule of Law, not men.<sup>17</sup> The concept does not

<sup>12</sup> F. Biondo, 'Stato di diritto o stato di giustizia? Osservazioni critiche su un'alternativa troppo rigida' (2004) 4 *Diritto & questioni pubbliche* 7 at 7 [most likely, the term 'Rule of Law' is successful due to its vagueness].

<sup>13</sup> A. Brörtl, 'Challenges to the *Rechtsstaat*-Model in Slovakia' (1997) 17 *Rechtstheorie* 315.

<sup>14</sup> Carothers, above n. 9 at 8; Rosenfeld, above n. 2 at 1308; R. Grote 'Rule of Law, *Rechtsstaat* and *État de droit*' in C. Starck (ed.) *Constitutionalism, Universalism and Democracy – A Comparative Analysis* (Baden-Baden: Nomos Verlags-gesellschaft 1999) at 271; Fallon, above n. 2 at 1; Radin above nr. 2 at 781; M. Scheltema, 'De *Rechtsstaat*', in J.W.M. Engels and others (eds.) *De rechtsstaat herdacht* (Zwolle: W.E.J. Tjeenk Willink 1989) at 11.

<sup>15</sup> For an extensive overview of the differences and similarities in question, see Grote, above at n. 14.

<sup>16</sup> See K. Popper, *The Open Society and Its Enemies* (Princeton: Princeton University Press 1971) (advocating the idea that any power, even that acquired democratically should be checked: the Rule of Law can limit democracy).

<sup>17</sup> U.S. Supreme Court, *Marbury v. Madison*, 5 U.S. 137, 163 (1803), where the government of laws is famously opposed to the government of men. The wording seems to originate in James Harrington's utopia *Oceania*, published in 1653. On the history of development of the concept of the Rule of Law see for example F.

leave room for any absolute arbitrary power.<sup>18</sup> Such an idea of government goes back to Locke<sup>19</sup> and the framers of the US Constitution<sup>20</sup> and was clarified at the end of the nineteenth century by A.V. Dicey in his seminal work 'Introduction to the Study of the Law of the Constitution'.<sup>21</sup>

Dicey outlined three main elements of the Rule of Law. The first is

absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, [which] excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government.<sup>22</sup>

The second is

equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts.<sup>23</sup>

Lastly, Dicey submitted that

with us under the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the courts.<sup>24</sup>

Although rooted in the English legal system of the time, Dicey's account captures the nature of the Rule of Law in general and remains one of the most influential to date.

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Dallmayr, 'Hermeneutics of the Rule of Law' (1990) 11 *Cardozo Law Review* 1449.

<sup>18</sup> Prohibiting the ultimate authority within a given system from being human and leaving it to the law. On the law as ultimate authority, see for example H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press 1961); H. Kelsen *General Theory of Law and State* (Cambridge, Massachusetts: Harvard University Press, 1945).

<sup>19</sup> J. Locke, *Two Treatises of Government* (1698), (I. Shapiro (ed.)) (New Haven/London: Yale University Press 2003) Second Treatise, § 137, 160 *et seq.*

<sup>20</sup> As well as earlier constitutional documents. See for example Art. XXX of the Bill of Rights of the Constitution of Massachusetts, 1780: 'In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a *government of laws and not of men* (emphasis added).'

<sup>21</sup> A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (London/New York: Macmillan and Co. 1907, 7<sup>th</sup> ed.).

<sup>22</sup> *Id.* at 198.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 199.

Most generally conceived, the Rule of Law requires, in accordance with Rosenfeld,

that the State only subject the citizenry to publicly promulgated laws, that the State's legislative function be separate from the adjudicative function, and that no one within the polity be above the law.<sup>25</sup>

Given the general character of such definitions, more detailed outlines of the meaning of the Rule of Law are clearly needed in order to grasp the meaning of the concept. One of the successful attempts to formulate the essence of the Rule of Law is that of Fallon.<sup>26</sup> Summarising the existing literature, Fallon formulated a five-element structure constituting the Rule of Law:<sup>27</sup>

1. 'The capacity of legal rules, standards or principles to guide people in the conduct of their affairs'.
2. 'Efficacy. The law should actually guide people'.
3. 'Stability. The law should be reasonably stable, in order to facilitate planning and co-ordinated action over time'.
4. 'Supremacy of legal authority. The law should rule officials, including judges, as well as ordinary citizens'.
5. 'Impartial justice. Courts should be available to enforce the law and should employ fair procedures'.

Thus, the essence of the concept roughly includes guiding the citizen's conduct and limiting the government, the latter element being of particular importance.<sup>28</sup> It is vital not to confuse the Rule of Law with the 'law and order' advocated by the lawyers of authoritarian states, emphasising restraints on the citizens, not on government. Nevertheless, even having distinguished the authoritarian tendencies to misuse the concept, a

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<sup>25</sup> Rosenfeld, above n. 2 at 1307.

<sup>26</sup> Numerous other lists of elements of the concept have been suggested. See for example A. Arnull, 'The Rule of Law in the European Union' in A. Arnull and D. Wincott (eds.) *Accountability and Legitimacy in the European Union* (Oxford: Oxford University Press 2002) at 240; Popelier, above n. 2 at 98; J. Raz, 'The Rule of Law and Its Virtue' (1977) 93 *Law Quarterly Review* 195 at 198; L. Fuller, *The Morality of Law* (rev. ed.), (New Heaven/London: Yale University Press 1964) at 38.

<sup>27</sup> Fallon, above n. 2 at 8.

<sup>28</sup> Limiting government is among the main aspects of constitutionalism. See also A. Sajó, *Limiting Government: An Introduction to Constitutionalism* (Budapest/New York: Central European University 1999). Some scholars build their definitions of the Rule of Law almost exclusively on the idea of limiting government. See for example Popelier above n. 2 at 82: *Rechtsstaat is 'een dualistische visie op de verhouding tussen recht en staat, die een voortdurende poging inhoudt tot beperking van overheidswillekeur door de binding van de overheid aan het recht'*.

substantial number of different lists of the elements of the Rule of Law is still available, providing largely diverging definitions of the concept. This theoretical abundance is not always helpful in clarifying the meaning of the Rule of Law and can even cause doubt as to its usefulness and workability. To penetrate the veil of myriad divergent definitions offered by scholarly literature, a fairly structured approach to the essence of the Rule of Law is required.

### 2.3 Formal and substantive approaches to the Rule of Law

Two main views of the Rule of Law can be distinguished: formal (procedural) and substantive.<sup>29</sup> According to the former, the Rule of Law is vital for the effectiveness of the legal order and comes down to the rule by law, irrespective of the contents of the law.<sup>30</sup> According to the latter, the Rule of Law can only exist if the legal system in question embraces a particular public morality, the laws being valued for their content: namely, a clear distinction is made between ‘good’ and ‘bad’ laws. Thus, the substantive vision of the Rule of Law goes far beyond the formal one.

It seems extremely difficult, if at all possible, to choose between the two, since the concepts are clearly very different, if not contradictory. Advocates of the formal Rule of Law submit that determining when law is ‘good’ and when it is ‘bad’ would amount to complicated social philosophy and could result in the politicisation of the system:

laws would be condemned or upheld as being in conformity with, or contrary to, the Rule of Law in this substantive sense when the condemnation or praise would simply be reflective of attachment to one particular political theory.<sup>31</sup>

Raz emphasised that the Rule of Law is ‘just one of the virtues by which a legal system may be judged’,<sup>32</sup> pointing to the fact that coupling the principle of the Rule of Law with the formal assessment of the quality of the laws might lead to confusion between the Rule of Law on the one hand and democracy, justice, and equality on the other – thus making the concept totally unusable. Indeed, ‘we have no need to be converted to the rule of law

<sup>29</sup> For details, see for example P. Craig, ‘Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework’ (1997) *Public Law* 467; Radin, above n. 2 at 784; M.L. Fernandez Esteban, *The Rule of Law in the European Constitution* (The Hague/London/Boston: Kluwer 1999) at 91; also Biondo, above n. 12 at 11.

<sup>30</sup> Raz, above n. 26; R.S. Summers, ‘A Formal Theory of the Rule of Law’ (1993) 6 *Ratio Juris* 127. Dicey was also approaching the Rule of Law largely from the formal perspective. For the analysis of Dicey’s views in this light, see Craig, above n. 18 at 470; Kelsen, above n. 18 at 77.

<sup>31</sup> Craig, above n. 29 at 468 (discussing the views of Raz).

<sup>32</sup> Raz, above n. 26 at 196 (emphasis added).

just in order to discover that to believe in it is to believe that good should triumph.<sup>33</sup> However, it would be unwise always to turn a blind eye to the substance of the laws and to the goals they strive to achieve. In other words, while elaborate social-philosophical systems informing particular ‘thick’ concepts of the Rule of Law can ultimately undermine the principle, taking the contents of laws into account can be viewed as a natural requirement of any legal system striving to label itself as a Rule of Law regime. This can be especially acute in the context of development of the concept of Community Rule of Law, the Community largely being nothing but a consequence of the terrible cataclysms of the past century, which legal formalism failed to prevent. To agree with Biondo,

non si può separare la definizione di Stato di diritto dall’analisi di quali principi di giustizia sono sottesi alle particolari declinazioni dell’ideale del “governo delle leggi”.<sup>34</sup>

The formal conception of the Rule of Law boils down to two main ingredients: laws are passed correctly and legally by Parliament and they are ‘capable of guiding one’s conduct in order that one can plan one’s life’.<sup>35</sup> The substantive conception adds to this a requirement that law should be used to foster liberty and ‘capture and enforce moral rights’.<sup>36</sup> Making an analogy with the formal-substantive divide, if the Rule of Law is regarded merely as a procedural principle, it is possible to discuss the Rule of Law in a ‘narrow sense’,<sup>37</sup> contrasting it with a ‘broader sense’ of the Rule of Law. The working of the Rule of Law in the ‘narrow sense’ can have repugnant and unjust consequences. To illustrate this claim, it is sufficient to turn to the USA during the time of slavery.<sup>38</sup> To provide more recent examples, it has

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<sup>33</sup> *Id.*

<sup>34</sup> See Biondo, above n. 29 at 31 (it is impossible to separate the definition of the Rule of Law (*Stato di diritto*) from the analysis of the principles of justice informing the particular filling of the ideal of the rule by law (*governo delle leggi*)).

<sup>35</sup> See Craig, above n. 29 at 469. The latter element, writes Craig, includes a number of sub-elements: ‘that the laws should be prospective, not retrospective; that they should be relatively stable; that particular laws should be guided by open, general and clear rules; that there should be an independent judiciary; that there should be access to the courts; and that the discretion which law enforcement agencies possess should not be allowed to undermine the purposes of the relevant legal rules.’

<sup>36</sup> R. Dworkin, *A Matter of Principle* (Cambridge, Massachusetts: Harvard University Press 1985) at 12; F.A. von Hayek, *The Political Ideal of the Rule of Law* (Cairo: National Bank of Egypt 1955); Fuller, above n. 26. (Radin claims that Fuller was an adherent of the formal Rule of Law theory: Radin, above n. 2, fn. 13).

<sup>37</sup> See Rosenfeld, above n. 2 at 1313.

<sup>38</sup> Consider Rosenfeld’s example of holding a federal law providing for the emancipation of a slave brought to federal territory unconstitutional as a deprivation

been pointed out that even the ‘principles used to organise Nazi Germany met in some formal sense the requirements of the Rule of Law’.<sup>39</sup>

The two visions of the Rule of Law are so substantively different that a clarification is always needed whenever criticism is levelled at the authority based on the substantive Rule of Law argument. If this critique is employed, as underlined by Craig, ‘then intellectual honesty requires that this is made clear, and it also demands clarity as to the particular theory of justice which informs the critique.’<sup>40</sup>

#### 2.4 Diverging understandings of the concept by different legal traditions

The Rule of Law controversy does not end at the formal-substantive divide. The differences between the content of the Rule of Law as understood in virtually any legal system in the world – obviously including all the EU Member States – add to the complexity of discovering what the Rule of Law could mean when transposed into the legal context of the European legal order with a view to making the best possible contribution to its functioning and development. The meaning of the concepts that correspond to the Rule of Law in the legal systems of EU Member States (and the candidate countries preparing to accede to the Union) differs to a considerable extent.<sup>41</sup> Since the legal systems of all modern democratic States only embrace certain elements of the concept and accord them different meanings, it is impossible to draw direct parallels between the national legal orders with respect to the precise meaning of the Rule of Law espoused by each system. As a consequence, even the correct translation of the term ‘Rule of Law’ into other languages is barely possible.<sup>42</sup>

These differences are analysed in the academic literature in

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of the master of his property right without due process of law: U.S. Supreme Court, *Dred Scott v. Sanford*, 60 U.S. 393, 459 (1857).

<sup>39</sup> R.A. Epstein, ‘Beyond the Rule of Law: Civic Virtue and Constitutional Structure’ (1987) 56 *George Washington Law Review* 152; Biondo, above n. 12 at 13. This observation would have been vigorously opposed by Hayek, who was suspicious of any ‘narrow technical meaning’ of the Rule of Law: Hayek, above n. 3 at 91 and also 80 & fn. 1, where he dismisses a narrow view espoused by Dicey. For a discussion of a fascinating example of successful application of the principles of the Rule of Law and equality to strike down ethnic segregation of students in pre-war Austrian universities by the Constitutional Court, going against main-stream anti-semitism see M.L. Marcus, ‘Austria’s Pre-War *Brown v. Board of Education*’ (2004) 32 *Fordham Urban Law Journal* 1.

<sup>40</sup> See Craig, above n. 29 at 487.

<sup>41</sup> F. Hoffmeister, ‘Changing Requirements for Membership’, in A. Ott and K. Inglis (eds.) *Handbook on European Enlargement: A Commentary on the Enlargement Process* (The Hague: T.M.C. Asser Press 2002) at 94.

<sup>42</sup> See Marsh, above n. 2 at 229.

sufficient detail.<sup>43</sup> A short example building on the essence of the *État de droit* and *Rechtsstaat* compared to the Rule of Law should suffice to provide an illustration. Thus, the *Rechtsstaat* can be viewed as ‘State rule through law’<sup>44</sup> and *État de droit* as ‘a means to vindicate fundamental rights through law’.<sup>45</sup> Clearly, both are essentially different from the Rule of Law discussed *supra*. This is not to say that other legal traditions know approaches to the Rule of Law simpler than the Anglo-American one; however, in all the European legal traditions the Rule of Law is a complex concept surrounded by academic debate. In discussing the Rule of Law, it is indispensable to bear in mind constantly the danger of oversimplification. Nevertheless, having a large number of different approaches to scope and meaning for the concept of the Rule of Law does not mean that any attempt to find the underlying core of these concepts discoverable in all its diverging manifestations are bound to be futile. On the contrary, it is believed that such generalisations are possible. Attempts to outline such a meta-concept of the Rule of Law have been made since the middle of the previous century, as lawyers have tried to produce a common vision of the Rule of Law on a world scale.<sup>46</sup> Such attempts notwithstanding, Rule of Law is simply not a universal concept, as research demonstrates.<sup>47</sup>

### 3 The nascent EU Rule of Law

Notwithstanding the difficulties related to diverging views on the substance of the Rule of Law to be observed in different legal systems and in scholarly

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<sup>43</sup> For a brief account of the differences, see for example Rosenfeld, above n. 2 at 1318; Grote, above n. 14; Fernandez Esteban, above n. 29 at 66. (all with further references, analyzing each notion). See also Costa and Zollo, above n. 2 at 173, for specific analyses of the English, American, German and French concepts largely corresponding to the Rule of Law and also their historical development.

<sup>44</sup> See Rosenfeld, above n. 2 at 1318; on *Rechtsstaat* see also Fernandez Esteban, above n. 28 at 81 et seq.

<sup>45</sup> See Rosenfeld, above n. 2. at 1329; see also Fernandez Esteban, above n. 29 at 75 et seq. (discussing the concept ‘*Règne de la Loi*’).

<sup>46</sup> See Marsh, above n. 2, *passim*. While such attempts at the world scale were far from successful (largely due to the Soviet concept of *Sotzialisticheskaja zakonnost* [Socialist legality] which, though being similar to the Rule of Law, was still too different), in the Western democracies this exercise was a success. Now that the Soviet empire has collapsed, there is no longer a conflict regarding this issue. On the comparison between Socialist legality and the Rule of Law, see Marsh, above n. 2 at 235; O.S. Ioffe and M.D. Shargorodsky, *Voprosy teorii prava* (Moskva: Juridicheskaja literatura 1961) at 267.

<sup>47</sup> For example D.J. Simsovic, ‘No Fixed Address: Universality and the Rule of Law’ (2001) 35 *Revue Juridique Themis* 739 at 772.

literature,<sup>48</sup> European law has also embraced this principle. Clearly, the Rule of Law has been one of the milestone principles of the law of the European Communities from the moment of their creation.<sup>49</sup>

### 3.1 Legal roots of the concept in Community and Union Law

Although not part of the Treaties until the Treaty of Maastricht entered into force,<sup>50</sup> the concept certainly played a significant role in Community law before that,<sup>51</sup> stemming from the case-law of the ECJ, from the Court's obligation to 'ensure that in the interpretation of [the] Treaty the law is observed',<sup>52</sup> as well as from the national constitutional traditions of the Member States, as a source of legal principles recognised by the ECJ.

With the introduction of a reference to the Rule of Law into the EU Treaty, the importance of the principle in EU law augmented drastically, codifying (in what is now Art. 6(1) EU) the long-recognised importance of this principle in the legal system of the Union and also reshaping the Rule of Law idea in general terms, making it one of the guiding written principles of European law. Article 7 EU also seems to be of importance in this regard, as serious and persistent breaches of the principle by the Member States can be sanctioned following the procedure described therein.<sup>53</sup> Although it can be claimed that Article 7 EU communicates the vital importance of this principle for the Union, the Member States-oriented nature of this provision should not be underestimated. It is not about the Rule of Law of the Community, but the Rule of Law of its constituent parts.

As well as Article 6(1) EU, the principle of the Rule of Law is also mentioned in the Preamble to the Charter of Fundamental Rights of the European Union.<sup>54</sup> The Lisbon Treaty, pending ratification, not only includes the Rule of Law in the list of values on which the Union is based but also

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<sup>48</sup> See n. 43 above.

<sup>49</sup> Scholars started thinking about the Rule of Law as a principle of the Community legal order very early in the process of integration. See for example G. Bebr, *Rule of Law within the European Communities* (Bruxelles: Institut d'Etudes Européennes de l'Université Libre de Bruxelles 1965).

<sup>50</sup> The principle is mentioned in the Preamble to the EU Treaty (recital 3) and Arts. 6 (1) EU; 11(1) EU, 177(2) EC.

<sup>51</sup> On the principle of the Rule of Law within the Community law context, see for example Arnall, above n. 26; Fernandez Esteban, above n. 29; Lord Mackenzie Stuart, *The European Communities and the Rule of Law* (London: Stevens and Sons 1977); Bebr, above n. 49.

<sup>52</sup> Art. 220 EC. On the key-role played by this article in the course of the articulation of the Community Rule of Law, see Fernandez Esteban, above n. 29 at 106.

<sup>53</sup> Art. 7 EU does not mention the principle of the Rule of Law directly, making a reference to Art. 6(1) EU instead.

<sup>54</sup> 2<sup>nd</sup> recital, OJ (2000) C 364/01.

mentions this concept in the Preamble.<sup>55</sup>

Before the Rule of Law was incorporated into the Treaties, its normative basis in EU law was not quite clear.<sup>56</sup> Consequently, the ECJ had to assume the leading role in the promotion of this principle within the European legal order. The ECJ stated, for example, that ‘the EEC Treaty, albeit concluded in the forms of an international agreement, none the less constitutes the constitutional charter of a Community based on the Rule of Law.’<sup>57</sup>

Given that the scope and the meaning of the Rule of Law varies depending on the legal system of the Member State concerned, it is clear that though it is mentioned in the Treaties and used by the ECJ, de facto the Rule of Law is not a purely EU law term, lying ‘at the crossroads of different constitutional traditions’ instead.<sup>58</sup> This is also related to the fact that the constitutional traditions of the Member States guaranteeing the Rule of Law are among the sources of legal principles of the Community legal order. Inter alia, Article 6(1) EU is clear that the Rule of Law is one of the ‘principles which are common to the Member States’. How true is it, actually, given the huge discrepancies existing between the concepts corresponding to the Anglo-American ‘Rule of Law’ in the legal traditions of 26 other Member States? The precise legal concept referred to in Article 6(1) EU and translated into the 23 official languages of the European Union is extremely vague to say the least. What Article 6(1) EU makes clear is that, to use the words of Lord Mackenzie Stuart in reflecting on the longstanding practice that Article 6(1) EU codified,

Communities rest on the concept that Member States are free and democratic societies which share the belief that relations between citizen and the state should rest upon the rule of law.<sup>59</sup>

But what does this statement, together with the reference to the Rule of Law in Article 6(1) EU, do in order to clarify and explain the nature of the EU Rule of Law, resting on the necessary separation between the legal systems of the Union and the 27 Member States? It can only mean that the EU itself should be inspired by almost three dozen diverging theoretical-legal concepts loosely corresponding to what the Rule of Law is in the English system.

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<sup>55</sup> OJ (2008) C 115/1.

<sup>56</sup> See Fernandez Esteban, above n. 29 at 102.

<sup>57</sup> Case 294/83 *Partie Ecologiste ‘Les Verts’ v. Parliament* [1986] ECR 1339, § 23; Opinion 1/91 *EEA Agreement* [1991] ECR 6097. For an overview of the role played by the ECJ establishing the Rule of Law at Community level, see Fernandez Esteban, above n. 29 at 102.

<sup>58</sup> *Id.* at 65.

<sup>59</sup> See Mackenzie Stuart, above at n. 51 at 5, 104.

### 3.2 Possibilities for confusion

In practice, since the Treaty refers to different terms while making references to the Rule of Law, depending on the language and, consequently the national legal system(s) corresponding to each of the languages, the Rule of Law in EU law co-exists with *État de droit*, *Rechtsstaat*, and other national doctrines of the Member States, which, while being close in meaning, are nevertheless not identical. The substance of these national concepts obviously influences the interpretation of Community/Union legal instruments by the national courts of the Member States concerned. This somewhat paradoxical situation can result in confusion. Clearly, in order to achieve consistency in the interpretation of the Treaties in all Member States, the Rule of Law at the EU level cannot be understood in the same way as any of the corresponding national concepts (the Rule of Law, *État de droit*, *Rechtsstaat* etc.) are understood within the national legal orders of the Member States. This holds, notwithstanding the fact that the same word is used in each of the Community languages to refer to the Rule of Law as understood in the national legal tradition of a given Member State and to the EU understanding of the Rule of Law to be found in the Treaties and in the case-law of the ECJ.

To make this difference clear, positive developments are required within the European legal order. More specifically, to agree with Arnall, an ‘autonomous Union concept of the Rule of Law needs to be identified’.<sup>60</sup> In practice it can be argued that this concept (theoretically at least) already exists. This is despite the fact that it is not well articulated and is mostly confined to the ideas of procedural legality and judicial review, as the case-law of the ECJ demonstrates.<sup>61</sup> Given the strong connection between the national legal orders of the Member States and the Community/Union legal order, the existence of such a concept results in a kind of double *dédoublement* of the Rule of Law, while at the EU level numerous national concepts compete with the EU concept. The latter exists at the national level side-by-side with the national conceptions of the Rule of Law, unlikely to result in any possibly unified approach to the concept in the EU context: the concept is thus context-dependent, its meaning being determined by the Member State where it is to be applied. This situation certainly does not add clarity to the meaning of the Rule of Law in any particular context. In view of this curious development, it has been predicted that ‘the paradox of the “two paradigms of law”, created by the co-existence of the two visions of the Rule of Law will become more and more evident.’<sup>62</sup>

The EU Rule of Law is thus a deep and multilayered concept in the

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<sup>60</sup> See Arnall, above n. 26 at 240.

<sup>61</sup> For example Case 294/83 *Les Verts* above n. 57 at § 23.

<sup>62</sup> See Fernandez Esteban, above n. 29 at 210.

process of articulation.

### 3.3 EU Rule of Law in the present: limited and vague

Unfortunately, the Treaties are silent on what the substance of the concept might be, ‘not indicat[ing] which meaning [of the Rule of Law] should prevail in the Community law context’.<sup>63</sup> Clearly, the Union Rule of Law cannot be identical to any of the Rule of Law concepts that developed within the legal systems of the Member States. Simultaneously, it can potentially build on the ensemble of these concepts.

The usual meaning of the Community Rule of Law as described in the scholarly literature is in most cases in close relation to legality. For instance, Lord Mackenzie Stuart characterised the Rule of Law as applied in Community Law as follows: ‘those who administer the Communities are themselves subject to limitations imposed by law and that those who are administered have rights in law which must be protected.’<sup>64</sup> The role played by the ECJ in the establishment of the Community Rule of Law régime is particularly emphasised.<sup>65</sup> Thus, to Alter, the Rule of Law in Europe is largely linked to the doctrines of supremacy and direct effect.<sup>66</sup> She describes the emergence of the

international rule of law in Europe where violations of the law are brought to court, legal decisions are respected, and the autonomous influence of law and legal rulings extends to the political process itself [...] the governments are not above the law.<sup>67</sup>

The ECJ was quite clear on this issue:

the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its Institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty. In particular, in Articles 173 and 184, on the one hand, and in Article 177, on the other, the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions.<sup>68</sup>

The essence of the EU Rule of Law is quite a peculiar one, not only due to its layered nature and the poor articulation of its core meaning in the

<sup>63</sup> See Hoffmeister, above n. 41 at 94; also Arnall, above at n. 26 at 240.

<sup>64</sup> See Mackenzie Stuart, above at n. 51 at 3.

<sup>65</sup> J. K. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford: Oxford University Press 2001) at 209.

<sup>66</sup> *Id.* at 218.

<sup>67</sup> *Id.* at 229.

<sup>68</sup> Case 294/83 ‘*Les Verts*’, above n. 57 at § 23.

Treaties. Another key aspect affecting the scope of this concept in the Community is in direct relation to the dual status of the Member States within the Community legal order. Each Member State is both subject to Community law and to a *pouvoir constituant*. As a consequence of this dual position, the Treaties, being the sources of primary law of the European legal order, are at the same time not solely the products of the Community legal order as such. Instead, they are negotiated and concluded by the Member States at the Intergovernmental Conferences with subsequent ratification in accordance with the Member States' own constitutional requirements.<sup>69</sup> This legislation–constitution divide inherent in the Community legal order affects the Union Rule of Law. For instance, partly as a consequence of this divide, the hierarchy of norms of Community law – an issue vital for establishment of the Rule of Law – although recognised by the ECJ,<sup>70</sup> is far from being a settled issue, thus provoking academic debate.<sup>71</sup>

The EU Rule of Law concept is also marked by a somewhat unfocused essence. While its importance is undisputed, nobody has been able to clearly summarise what it actually is and precisely how it is different from all its counterparts in the national law of the Member States. It is possible, however, to outline certain key features of the Community legal system that allow one to regard the Community as a Rule of Law entity. Such an exercise has recently been performed by Temple Lang, who focused on fourteen EC features that safeguard the Rule of Law in the Community:<sup>72</sup>

1. Every measure must have an identifiable legal basis;
2. Every measure must include a statement of reasons for its adoption;
3. All EC measures must comply with all the relevant EC rules of both substantive and procedural law;
4. If an EC measure infringes some fundamental or overriding rules, the Community may have to pay compensation;
5. Community institutions may tie their own hands as to how they will exercise

<sup>69</sup> Art. 52 EU, Art. 313 EC. The Institutions formally take part in convening an IGC: Art. 48 EU. This results in 'nearly complete separation between legislation and constitution (=Treaty) making': R. Bieber and I. Salomé, 'Hierarchy of Norms in European Law' (1996) 33 *Common Market Law Review* 911.

<sup>70</sup> For example Case 38/70 *Deutsche Tradax GmbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1971] ECR 145; Case 114/78 *Yoshida GmbH v. Industrie- und Handelskammer Kassel* [1979] ECR 115.

<sup>71</sup> A. Tizzano, 'The Instruments of Community Law and the Hierarchy of Norms' in J.A. Winter and others (eds.) *Reforming the Treaty on European Union: The Legal Debate* (The Hague/Boston/London: Kluwer 1996); Bieber and Salomé, above n. 69.

<sup>72</sup> J. Temple Lang, 'Checks and Balances in the European Union: The Institutional Structure and the "Community Method"' (2006) 12 *European Public Line* 1 at 128. For another attempt to outline the scope of the notion of the Rule of Law at the Community level, see Fernandez Esteban, above n. 29 at 153.

their powers;

6. EC powers must not be used for purposes other than those for which they were intended;
7. The EP may bring a case in the ECJ to assert or defend its prerogatives;
8. All EC measures must comply with fundamental rights principles;
9. The European Commission has no power to create new obligations;
10. No EC action may be taken which is not legally authorised;
11. EC measures may sometimes be invalid if they are contrary to rules of public international law binding the Community;
12. Community measures must be adopted in accordance with EC procedures and safeguards;
13. Private parties can take the Commission to Court under Art. 232 EC if it fails to adopt an act addressed to them;
14. There is a right of judicial review of all EC measures.

An analysis of this list demonstrates that all the features are generally confined to the idea of legality: viewing the law through the prism of procedural rules and a possibility for judicial review. The same applies to the Union at large, through the introduction, for instance, of the Union duty of loyalty, similar to that of Article 10 EC.<sup>73</sup> Is it enough for the formation of a genuine and functional concept of the Rule of Law to belong to the Community legal order? To answer in the positive would mean to embrace the thin concept of the Rule of Law.

#### **4 Towards the new EU Rule of Law?**

Thus far, the idea of the Rule of Law in European law has been characterised by an extremely high level of formalism and has suffered from a number of obvious contradictions inherent in its formulation. All this has come to undermine the potential of the Rule of Law principle in EU law.

The most important of the irregularities is directly related to the origin of the Rule of Law in the European legal order and is due to the connection that is made (both *de jure* and *de facto*) between the notion of the Rule of Law and the legal systems of the Member States. This is not to say that making connections between the Community/Union legal order and the legal orders of the Member States is problematic. However, in the case of the Rule of Law, such a connection, made *inter alia* through the mentioning of the Rule of Law in Article 6(1) EU, denies this notion its complexity. The Treaty does not recognise the deep diverging trends existing between the concepts of the Rule of Law in different Member States. Consequently, it is not quite clear what is left over for the EU to own as its own concept of EU

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<sup>73</sup> Case C-105/03 *Criminal Proceedings against Maria Pupino* [2005] ECR I-5285, para 42.

Rule of Law. Obviously, generalisations are always possible, resulting in long summaries of the overlapping elements of all the national theories, but how well will the Union's own concept grow in such soil? To date, the purely formalist vision of the Rule of Law embraced by the Institutions at the Community level clearly has not resulted in the formulation of a truly workable and appealing self-standing concept. On the contrary, it seems that the notion of the Rule of Law has merely been used to describe the build-up of the system instead of enriching it and guiding its development.

In practice, the link made between the EU Rule of Law and the notions corresponding to it in the legal theory of the Member States means that getting rid of the burden of the national way to interpret the notion in a situation where the EU notion should have come into play might be extremely difficult if not impossible. This leads to the unclear border lines between the EU Rule of Law (or the translation of this term into all the official Union languages) and the national concepts of the Rule of Law employed in the Member States. This observation has implications for the legalistic side of the problem as well: as long as no separation between the national and EU notions is made, the concept cannot be employed in an effective manner.

The second irregularity is related to a *de facto* emptiness of the notion at the Community/Union level. Since neither the Treaties nor the Court explained with clarity what the Rule of Law actually means at the Community level, the presumption of commonness in approaches taken by the legal systems of the Member States in filling the idea of the Rule of Law with substance almost hangs in a vacuum: only the minimal idea of legality and judicial review is to be found in the ECJ's case-law. Most likely, this is indeed something shared by all the Member States, but as a consequence of such a minimalist perspective, the actual potential effects of the Rule of Law at the level of EU law have been unable to achieve expected proportions.

The Rule of Law certainly suffers from a limited use made of it by the European Court of Justice. Although it plays a significant role, its importance stops short of being a true guiding principle in Community/Union law, something that could be expected of it given the prominent role this concept plays in the national legal systems of the Member States. This is why only a simplistic idea regarding its essence exists today in the EU. If it were to guide the EU in a true legal sense, the Court would be bound to embrace the substantive notion of the Rule of Law and employ it alongside the formal one. Such a move would also make it impossible to avoid formulating a well-defined EU-law approach to the concept.

This is where the reasons for all the outlined shortcomings are rooted: they all relate to the limited vision of the Rule of Law adopted in EU law, focusing on a narrow formal approach. Scholars studying the functioning of the Rule of Law in the European legal context rarely go

beyond a pure description of how the Community/Union legal system functions. It is obvious that any true legal system will adhere to the basic minimalist Rule of Law idea, and the EU is not an exception. In other words, instead of guiding the development of the system and enriching the legal realities of the EU, the Rule of Law functions merely as a term referring to everything and to nothing. To say, for instance, that supremacy and direct effect as formulated by the ECJ became the cornerstones of the EU Rule of Law is not to say anything, because they simply constituted the Community/Union legal system as we know it. Thus, what is the practical use of the term 'the Rule of Law' in such a context? The Rule of Law is a genuinely important legal principle with a potential to explain the ongoing process of legal-political development of European integration as well as to improve people's lives. To use it merely as a tag, not as a tool, seems to be a waste of its potential.<sup>74</sup>

This is all the more paradoxical given that in general the EU and especially the Community legal system is not formalistic at all. Marked by the pro-active use of the teleological method of interpretation by the ECJ and the increasing importance of the goals of integration, enabling even the reassessment of the Community competences in their light, there is a place for a more inclusive concept of the Rule of Law in the system. In a way, it has in fact always been there, only not called such. The objectives of integration outlined in Article 2 EC and Article 2 EU can be viewed as the 'moral good' to provide the Rule of Law with substance. Consequently, this is beginning with the goals of integration that the idea of the EU Rule of Law needs to be analysed. Adhering to the substantive reading of the Rule of Law, the Court will acquire an additional tool in its arsenal of legal means to ensure that the law is observed. The potential impact of the employment by the Court of the principle of the Rule of Law as a substantive Rule of Law (as opposed to a purely formal concept) is likely to have far-reaching effects. It will not only allow shaping a true EU-law notion of the Rule of Law (based on the goals of the Treaties, it will not necessarily belong anymore to the legal-theoretical perceptions dominant in the Member States) but it will also better use the potential offered by the very idea of the Rule of Law. The Court will thus be enabled to employ the Rule of Law as a functional tool for the promotion of integration as opposed to a purely descriptive concept with limited added value for the shaping of the Communities and the Union.

In other words, in order to deal with the present shortcomings related to the functioning of the concept of the Rule of Law at the Community/Union level, two main developments can be of assistance: a clear formulation of the principle of the Rule of Law at the level of EU law,

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<sup>74</sup> For an unflattering analysis of the general state of the EU legal theory, see N. Walker, 'Legal Theory and the European Union: A 25th Anniversary Essay' (2005) 25 *Oxford Journal Legal Studies* 581.

and the employment at the Community level of a substantive concept of the Rule of Law, allowing the goals of integration to play the leading role in the construct. The substantive concept of the Rule of Law is thus to be reinvented at the EU level, the 'filling' of it coming from the very rationale behind the integration edifice.

## **5 Concluding remarks**

This article looked at the way the concept of the Rule of Law is understood in legal theory and how it is applied in the legal context of European integration. Although the potential of the notion is clear, problems abound with regard to its application. They are related to the vagueness of the notion itself, to the number of different approaches existing in legal theory to the meaning of the Rule of Law, and also to the discrepancies between the scope and functioning of the Rule of Law and similar concepts in the legal orders of the Member States. The article argued that the Rule of Law as one of the principles of EU law stops short of its potential. As used in the doctrine to this day, it is purely descriptive of the European legal system and never transcends the limitations of a purely formalistic approach to the Rule of Law, mostly focusing on the idea of legality and procedural guarantees. In order to enrich its meaning, the concept of the Rule of Law to be used in European law should also acquire a substantive dimension, to add substance to its procedural aspects. This substance is nothing other than the objectives of integration. The formulation of a genuine EU-law concept of the Rule of Law independent of those of the Member States should naturally mean stepping away from formalism.