

The Rule of Law as a Constitutional Principle of the European Union

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Abstract

The rule of law is one amongst a number of principles that are together regarded as under-girding the EU polity and common to the EU Member States. This paper first asserts that the rule of law can be accurately described as a common principle. A series of “shared traits” are outlined with respect to the three dominant constitutional traditions in Europe (England, Germany and France) and it is argued that these “shared traits” are sufficiently robust to amount to an identifiable common denominator. To that end, the article rejects the argument that no such common denominator is identifiable. The meaning, scope of application and normative impact of the rule of law in the EU’s constitutional framework is then explored. This paper contends that similarly to national experiences, the “EU rule of law” constitutes a posited legal principle with a foundational nature. Secondly, the absence of any definition in the EU’s founding Treaties is neither unprecedented nor surprising considering the “umbrella” character of the rule of law. Thirdly, in fleshing this principle out, the Court of Justice has rightly refined its initial understanding. There has been a notable evolution away from a predominantly formal understanding and towards a more substantive or material understanding. Finally, the rule of law has been relied on by the Court as a “primary constitutional principle” rather than as a rule of law in itself. This is again neither unprecedented nor unwelcome. However, by contrast to national experiences, the EU rule of law has a broader scope of application than the one it normally has at the national level: Not only is the principle of the rule of law used as a politico-legal benchmark with respect to current EU Member States and prospective ones, it is also referred to as a fundamental policy objective in relation to so-called third countries and other regional organizations. These distinctive features do not illustrate or derive from an alternative understanding of what the rule of law should entail at the supranational level but reflect the EU’s original constitutional nature.

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The Rule of Law as a Constitutional Principle of the European Union

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“If however we confined our observation to the Europe of the year 1889 we might well say that in most European countries the rule of law is now nearly as well established as in England.” (Dicey)¹

“[T]he rule of law remains a complex and in some respects uncertain concept.” (House of Lords)²

1. Introduction

In a landmark judgment, the European Court of Justice famously referred to the European Community (EC) as “a Community based on the rule of law” inasmuch as neither the Member States nor the EC institutions can avoid review of the conformity of their acts with the EC’s “constitutional charter,” the EC Treaty.³ The Court has ever since continued to view the EC Treaty, albeit formally concluded in the form of a “mere” international agreement in 1957, as the constitutional document of a polity based on the rule of law.⁴ Remarkably, while the Court’s constitutional narrative has been subject to ferocious criticism emanating from different quarters,⁵ the reference to the traditional concept of the rule of law has been mostly welcomed even though this notion has mostly flourished and been theorized in the context of the nation-state. This positive response is not altogether surprising. Since the end of the Cold War, international organizations as well as national governments, regardless of the nature of their economic and political regimes, have been particularly keen to articulate their support – if only rhetorical – for the rule of law.⁶ Indeed, the rule of law, which is regularly equated with the idea of a “government of laws, not of men,”⁷ is generally assumed – including by the present

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¹ A. Venn Dicey, *An Introduction to the Study of the Law of the Constitution* (MacMillan, 5th ed., 1897), p. 180. By rule of law, Dicey meant here the absence of arbitrary power on the part of the government.

² House of Lords Select Committee on the Constitution, *Relations between the executive, the judiciary and Parliament* HL Paper 151(2006-2007), p. 12, para. 24.

³ Case 294/83 *Les Verts v. Parliament* [1986] ECR 1339, para. 23.

⁴ See e.g. Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat* [2008] n.y.r., para. 281.

⁵ For an analysis of the Court’s constitutional narrative, see recently L. Pech, “The Fabulous Destiny of the EC Treaty: From Treaty to Constitution to Treaty again?” (2008) 15 *Irish Journal of European Law* 49.

⁶ For a set of rather critical studies on the rule of law in Western as well as non-Western legal traditions, see recently P. Costa and D. Zolo (eds.), *The Rule of Law. History, Theory and Criticism* (Springer, 2007).

⁷ To recall Chief Justice Marshall’s celebrated formula in *Marbury v. Madison* (1803) 1 Cranch 137, p. 163: “The government of the United States has been emphatically termed a government of laws, and not of men.” It is less known that the phrase “a government of laws and not of men” in fact first appeared in the 1780 Bill of Rights of the Constitution of Massachusetts. Its Article XXX provides that “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

author – to be a “good thing.”⁸ This undoubtedly explains why the Court of Justice, in stressing the importance of the rule of law as a defining element of the EC’s constitutional character, did not encounter much criticism.

This widespread support for the rule of law, unfortunately, has not helped clarify the meaning and scope of the Court of Justice’s formula. Definitional concerns are not, however, a problem peculiar to the EC. Generally speaking, the undeniable high degree consensus on the rule of law is “possible only because of dissensus as to its meaning.”⁹ In what is now known as the European Union (EU),¹⁰ the emergence of such a consensus following the end of the East-West ideological divide, overrode any concern about what the rule of law precisely entails. In their capacity of “Masters of the Treaty,” The EU Member States responded to the increasing and irresistible emphasis on the rule of law by subjecting the EU’s founding Treaties to several important amendments. Yet in a good example of “why make it simple when it can be complicated,” the Member States have persistently refused to “constitutionalize” the Court of Justice’s innovative phrasing, i.e. “Community based on the rule of law.” Instead, in what is the most important Treaty provision referring to the rule of law, Article 6(1) of the Treaty on European Union (TEU), recognizes the rule of law both as a principle common to the EU Member States and one on which the EU is said to be founded. To English speakers, the Court of Justice’s formula and the Treaty provision’s phrasing may appear largely convergent if not almost identical. This is not so in other languages. When translated, for instance, into German and French, strikingly different concepts appear to be used. The notion of “community based on the rule of law” is translated by the notions of *Rechtsgemeinschaft* and *communauté de droit* respectively, whereas the Article 6(1) TEU reference to a “Union founded on the rule of law” gives, if literally translated, a Union founded on the principle of “a State governed by law” (*Rechtsstaatlichkeit/Etat de droit*).

Notwithstanding this semantic difficulty (the significance of which I address later), the enshrinement of the rule of law in the constitutional rulebook of a supranational polity raises important theoretical and practical questions. This is especially the case regarding the meaning, scope of application and normative impact of this principle. A comparative detour is imperative in order to adequately tackle these issues. It will help us to critically assess to what extent the rule of law as a constitutional principle of the EU (hereinafter:

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.”

⁸ See however on the “dark side” of the rule of law, U. Mattei and L. Nader, *Plunder: When the Rule of Law is Illegal* (Blackwell, 2008).

⁹ S. Chesterman, “An International Rule of Law?” (2008) 56 *American Journal of Comparative Law* 331, p. 332.

¹⁰ For didactic purposes, this paper will henceforth generally refer to the “EU” even though, technically speaking, the EU should not be confused with the EC. As is well known, the EU was originally established in 1992 by the Treaty on European Union (TEU) as an encompassing and (overly) complex framework aimed at including the pre-existing Communities (the EC, the European Atomic Energy Community and the European Coal and Steel Community), and two newly born intergovernmental pillars: the Common Foreign and Security Policy and Justice and Home Affairs (now known as the Police and Judicial Cooperation in Criminal Matters). In a positive development, the 2007 Treaty of Lisbon, not yet ratified, grants exclusive legal personality to the “Union,” meaning that the EU will replace and succeed the EC when (and if) the Treaty of Lisbon enters into force.

“the EU rule of law”) differs, if at all, from how this concept has been understood and applied in the main national constitutional traditions in Europe. One should then be in a position to decide whether the rule of law can be accurately described as a principle common to the EU Member States. This is not to say that the EU rule of law must necessarily be defined and applied in strict conformity with national understandings of the same principle.¹¹ As a matter of fact, Article 6 TEU does not formally require the EU to rely on national constitutional traditions to interpret the principle of the rule of law contrary to what it does as regards the principle of respect for fundamental rights.¹² This paper also rejects the opposite position which advocates “strict separation” between national definitions of the rule of law and the EU definition.¹³ Rather, national approaches will provide a useful and indispensable benchmark when the time comes to assess the extent to which the EU rule of law has been “Europeanized.” In other words, a detour via national approaches should make it easier to measure to what extent (if any) the EU rule of law has gained an “autonomous” meaning and whether it presents unique features as regards its meaning, scope of application and normative effect. Autonomous meaning does not imply, however, unprecedented meaning. National understandings in reality do and should necessarily inform or “inspire” the EU understanding. While EU institutions are entitled to give a “European sense” to the rule of law, it would therefore be wrong to think that they usually do so without regard for a common denominator in the constitutional traditions of the Member States,¹⁴ especially in the situation where the

¹¹ In a remarkable book, Verhoeven argues otherwise: “The Union cannot define the fundamental principles in an autonomous manner. The open-ended juxtaposition (‘... and the rule of law, principles which...’) contains a double message. It implies that the Union must respect fundamental principles *because* they are ‘common to the Member States’ and *as they are defined by* what is common in them. In other words, national constitutional traditions offer both the reason why fundamental principles are to be respected by the Union and a basis for determining what these principles mean in the Union context.” A. Verhoeven, *The European Union in Search of a Democratic and Constitutional Theory* (Kluwer Law International, 2002), p. 322. The problem is that he further adds (p. 323) that these principles “are open-ended categories” and that “there is a marked difference in how these principles are understood in the various Member States.” In these conditions, were Verhoeven’s interpretation correct, the Union would be under a legal obligation to define the rule of law on the basis of common denominator that does not appear to exist. In our view, Article 6(1) TEU rather requires to interpret the EU rule of law by reference to national legal orders. If no common denominator can be found – and this paper will seek to demonstrate otherwise – the EU is entitled to redefine the meaning and scope of the rule of law to fit the distinct features of its autonomous legal order.

¹² Article 6(2) TEU: “The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 *and as they result from the constitutional traditions common to the Member States*, as general principles of Community law.”

¹³ D. Kochenov, “The EU Rule of Law: Cutting Paths through Confusion” (2009) 2 *Erasmus Law Review* 5, p. 7. In this stimulating article, Kochenov does not deny that the definition of the EU rule of law should be guided and inspired by national understandings. Yet the need for a strict separation is defended on the ground that “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” (p. 14) and the author further argues that Article 6(1) TEU fails to recognize the “deep diverging trends existing between the concepts of the Rule of Law in different Member States” (p. 21).

¹⁴ Generally speaking, it is important to note that recourse to “internal” comparative law by the Court of Justice, with the primary aim to identify common legal principles and where the laws of the Member States converge, “has not been drawn upon as an occasional aid to interpretation but internalized as a normal method of interpretation of Community law.” N. Walker, “The Migration of Constitutional Ideas and the Migration of the Constitutional Idea: The Case of the EU” *EUI Working Paper Law No. 2005/04*, p. 5,

rule of law has been expressly recognized as a principle which is common to the Member States.¹⁵ Even if national understandings were to dramatically differ – a point this paper will demonstrate to be incorrect – the Court of Justice has shown, for instance, with respect to the general principles of Community law, that it can derive these principles from the laws of the Member States even when they are not unanimously recognized, differently understood or diversely applied at the national level. Furthermore, it is well-established that the Court of Justice always “Europeanizes” the legal principles applicable to the Community/Union, i.e. the content of these principles is primarily defined in light of the distinct features and needs of the Community/Union legal order.¹⁶

Before undertaking this study, three caveats are in order. Firstly, as prudently suggested by Craig, a “health warning” is in order for anyone venturing into the area of the rule of law.¹⁷ Not only is the modern literature extensive and diverse, “there is considerable diversity of opinion as to the meaning of the rule of law and the consequences that do and should follow from breach of the concept.”¹⁸ In other words, if there is one thing on which all scholars seem to agree, it is that the rule of law is “an exceedingly elusive notion” giving rise to a “rampant divergence of understandings” and analogous to the notion of the good in the sense that “everyone is for it, but have contrasting convictions about what it is.”¹⁹

Secondly, the rule of law is presented in this paper as a constitutional principle of the EU. Whilst it is true that the EU is formally based on international agreements, it has become common among scholars and judges to view the EU’s founding Treaties as its material

referring to a contribution by a former President of the Court: J. Mertens de Wilmars, “Le droit comparé dans la jurisprudence de la Cour de justice des Communautés européennes” (1991) *Journal des Tribunaux* 37.

¹⁵ This is where our approach marginally differs from Arnull’s call for the identification of an autonomous EU concept as he also suggests that “[t]he way the rule of law or allied concepts, such as *l’Etat de droit* or *Rechtsstaatlichkeit*, are understood in a national setting cannot be determinative, as this will be conditioned by a particular legal or historical context and may vary from State to State.” 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 University Press, 2002), p. 240. National understandings of the principle, although not “determinative,” are crucial elements that do and should necessarily inform EU interpretation of the rule of law and provide useful benchmarks to normatively assess the meaning and scope of this principle in the EU’s constitutional framework.

¹⁶ The Court of Justice’s principles of interpretation recall the interpretative practice of another European Court, the European Court of Human Rights. Indeed, it is not rare for the European Court of Human Rights to give an “autonomous meaning” to the European Convention on Fundamental Rights’ key terms in order to guarantee uniform interpretation and prevent states from redefining the scope of their obligations under the Convention. The European Court of Human Rights can hence give the terms a “European sense” which may differ from the meaning they have in the Member States of the Council of Europe. However, as pointed out by Brems, the independent character of autonomous concepts should not be overstated, “because the Court frequently relies to a certain extent on the common denominator in the legal traditions of the states parties when attributing autonomous meaning.” E. Brems, *Human Rights: Universality and Diversity* (Martinus Nijhoff, 2001), p. 396.

¹⁷ See P. Craig, “The Rule of Law,” Appendix 5 in House of Lords Select Committee on the Constitution, *Relations between the executive, the judiciary and Parliament*, HL Paper 151(2006-2007), p. 97.

¹⁸ *Ibid.*

¹⁹ B. Tamanaha, *On the Rule of Law. History, Politics, Theory* (Cambridge University Press, 2004), p. 3.

“Constitution”²⁰ and to describe the key legal principles of this “new legal order” as constitutional in nature.²¹ If the Court of Justice has yet to unambiguously refer to the rule of law in such terms, one may wish it does not refrain from doing so any longer as it is clearly a principle of a fundamental and compelling nature stemming from the common European legal heritage²² and which aims to regulate the exercise of public power.

Finally, any study focusing on the rule of law in the EU context faces intricate linguistic issues. As briefly discussed above, the protean nature of the English term, by comparison to other languages, is the major problem. For instance, “the rule of law” may be translated in French – without being exhaustive – by the following terms: *prééminence du droit* (translation historically favored by the Council of Europe²³), *Etat de droit* (term today favored by legal scholars when referring to the rule of law as a constitutional principle governing the State), *primauté du droit*,²⁴ *principe de légalité*. The term *règle de droit* may also be mentioned although it does not refer to *the* rule of law but rather to any rule of law.²⁵ In this paper, “the rule of law” will be used in a generic sense and will therefore not necessarily refer to the English legal tradition or any particular national/supranational understanding. To avoid any confusion, I will refer to the German *Rechtsstaat* or the French *État de droit*, etc., rather than translate the terms under the label

²⁰ Additional important remark, the notion of EU “Constitution” will regularly be used here to globally refer to the TEU and TEC although these two treaties offer distinct sets of legal rules with different legal effects. Unfortunately, the Treaty of Lisbon does not replace the TEU and TEC. Yet, by substantially reorganising the contents of these two treaties, it considerably reinforces the constitutional nature and coherence of the EU’s “Constitution”. See Pech, *supra* n. 5.

²¹ See recently Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat* [2008] n.y.r., para. 285: “[T]he obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights...”

²² H. Schermers and D. Waelbroeck, *Judicial Protection in the European Union* (Kluwer Law International, 6th ed., 2001), p. 28, para. 54. For a more exhaustive treatment of the notion of constitutional principle of EU law, see O. Wiklund and J. Bengoetxea, “General Constitutional Principles of Community Law” in U. Bernitz and J. Nergelius (eds.), *General Principles of European Community Law* (Kluwer Law International, 2000), p. 119; A. von Bogdandy, “Constitutional Principles” in A. von Bogdandy and J. Bast (eds.), *Principles of European Constitutional Law* (Hart, 2006), p. 3.

²³ See Article 3 of the 1949 Council of Europe Statute, which states that “Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms...” and the Preamble to the 1950 European Convention on Human Rights which mentions Europe’s “common heritage of political traditions, ideals, freedom and the rule of law.” In the French version of the Statute and of the Convention’s Preamble, the rule of law is equated with the notion of “*prééminence du droit*” while, in German, it is translated by “*vorherrschaft des gesetztes*.” It would appear that the reference to the rule of law in the Preamble of the Convention is due to a representative of the British government. See J.-Y. Morin, “La ‘prééminence du droit’ dans l’ordre juridique européen” in *Essays in Honour of Krystof Skubiszewski* (Kluwer Law International, 1996), pp. 668-669. Anecdotic evidence indicates that the rule of law, in Council of Europe’s literature, is now more frequently translated in French by *Etat de droit*. See e.g. Council of Europe, “2009: The year of the celebration of the 60th anniversary of the Council of Europe,” Press release 938(2008).

²⁴ See e.g. Preamble of the Canadian Charter of Rights and Freedoms: “Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law [*et la primauté du droit*].”

²⁵ See e.g. Article 230 EC: The Court of Justice shall “have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of *any rule of law* relating to its application, or misuse of powers.”

“rule of law” when specifically dealing with the German or French approaches. It should also be clear from the context when the English or EU understandings of the rule of law are specifically alluded to rather than the principle in the abstract.

This paper is structured as follows. It will first offer a preliminary overview of the EU’s “constitutional framework”²⁶ to briefly stress the progressive and increasing importance taken by the rule of law as a constitutional principle of the EU. The second part of this paper addresses the question of whether the rule of law can indeed be accurately described as a principle which is common to the Member States. A positive answer is offered and a series of “shared traits” are outlined with respect to the three dominant constitutional legal traditions in Europe (England, Germany and France). The argument according to which national constitutional traditions differ so substantially that no common denominator can be identified is therefore rejected.²⁷ This is not say, as previously argued, that the EU rule of law must necessarily and strictly be construed in light of what European constitutional traditions share, regardless of whether some convergence can be detected. More fruitful, and this is the primary aim of the final section, is to assess the meaning, scope and normative impact of the EU rule of law in light of these “shared traits” in order to discover the extent to which the rule of law has been “Europeanized.” An attempt at distinguishing between the conventional and distinctive features of the EU rule of law will be made. This paper suggests that similarly to national traditions, this principle has progressively and rightfully become a dominant organizational paradigm as regards the EU’s constitutional framework, a multifaceted or umbrella legal principle with formal and substantive elements and which lacks “full” justiciability. The EU rule of law nonetheless presents distinctive features and, in particular, has a broader scope of application than the one it normally has at the national level. Indeed, it is also used as a politico-legal benchmark with respect to current EU Member States and prospective ones, and as a policy objective in relation to so-called third countries and other regional organizations.

²⁶ To paraphrase AG Poiares Maduro’s Opinion in Case C-402/05 P *Kadi* [2008] nyr, para. 24.

²⁷ It may also be worth pointing out that the relationship between national understandings of the rule of law and the meaning and scope of the same principle at the EU level is *not* one-dimensional and static. EU constitutional developments as well as the case law of the European Court of Human Rights have influenced or, at the very least, led to a reappraisal of national understandings. In other words, the “Europeanization” of the rule of law is not a one-sided phenomenon. This aspect will be the subject of a future study and will only incidentally be alluded to. For further analysis, see E. Carpano, *Etat de droit et droits européens: L’évolution du modèle de l’Etat de droit dans le cadre de l’eupéanisation des systèmes juridiques* (L’Harmattan, 2005). In this excellent book, the author first argues – a point largely accepted by this paper – that the rule of law is a concept that encompasses broadly similar values and principles in all European constitutional traditions and that these values and principles have been subsequently assimilated by EU law. This assimilation by the EU does not mark, however, the end of the process. The development of EU law has also influenced or “retroacted,” in turn, on national understandings of what the rule of law should entail. Some scholars have used the label “intertwined constitutionalism” to describe this phenomenon of mutual influence. See J. Ziller, “National Constitutional Concepts in the New Constitution for Europe” (2005) 1 *European Constitutional Law Review* 452, p. 480.

2. The Rule of Law in the EU Constitutional Framework: Preliminary Overview

If we are to believe *Europa* – the EU’s official website – the EU is based on the rule of law because “everything that it does is derived from treaties, which are agreed on voluntarily and democratically by all Member States.”²⁸ The clear and succinct nature of this explanation, regrettably, does not reflect the complex nature of the EU principle of the rule of law. From a preliminary overview of the EU constitutional framework, one can easily deduce that this principle cannot simply be equated, for instance, with the basic principle of conferred competences. For the sake of clarity, a preliminary presentation of the rather tortuous history of the EU rule of law, and how this ideal progressively became a key constitutional principle, will first be offered. In a nutshell, the EC Treaty did not initially contain any explicit reference to the rule of law and it was not until a 1986 judgment of the Court of Justice that the concept was explicitly referred to. This first judicial reference was followed, starting in 1992, by multiple references made to the *principle* of the rule of law in the EU’s founding Treaties.

2.1 From Court’s Dictum...

In *Les Verts*, the Court of Justice, for the first time,²⁹ described the EC as a “Community based on the rule of law.”³⁰ This original formula appears to directly derive from the German term *Rechtsgemeinschaft* coined by Walter Hallstein, a renowned German Professor of Law who later became the first President of the European Commission from 1958 to 1967.³¹ In the French version of the judgment, *Rechtsgemeinschaft* is translated to *communauté de droit*. The Court, albeit obviously familiar with the classical notions of *Rechtsstaat* or *Etat de droit*, which are traditionally used by national lawyers to translate

²⁸ http://europa.eu/abc/treaties/index_en.htm (accessed on January 5, 2009).

²⁹ The Court of Justice made an earlier reference to “the principle of the rule of law within the Community context” in Case 101/78 *Granaria* [1979] ECR 623, para. 5: “Thus it follows from the legislative and judicial system established by the Treaty that, although respect for the principle of the rule of law within the Community context entails for persons amenable to Community law the right to challenge the validity of regulations by legal action...” In the German version of the judgment, the principle of the rule of law is translated by *Rechtsstaatlichkeit*. This explains why German scholars tend to view *Granaria* as the first judgment referring to the concept of *Rechtsstaat*. It may be worth pointing out here that the terms *Rechtsstaat*, *Rechtsstaatlichkeit* and *Rechtsstaatprinzip* are today often used interchangeably. One may note, however, that the last two terms derive from the ancient concept of *Rechtsstaat*. *Rechtsstaatlichkeit* is a term used to describe the concrete manifestation of this concept while *Rechtsstaatprinzip* is used when one mentions “the rule of law” as a legal principle of constitutional value. Viewed in this light, the French version of the judgment appears problematic as it refers to the *principe de légalité*. This translation seems inadequate as it clearly does not reflect – as will be explained *infra* in Section 3 – the broader nature of the English and German concepts. I should note, in passing, that the French translation further demonstrates that the concept of *Etat de droit* was not yet as dominant in political and legal discourses as it later became in the early 1990s. And as far as the EU is concerned, this translation difficulty already prefigures how any supranational use of the rule of law, as a constitutional principle, may raise some delicate translation issues.

³⁰ Case 294/83 *Les Verts v. Parliament* [1986] ECR 1339, para. 23.

³¹ M. Zuleeg, “Die Europäische Gemeinschaft als Rechtsgemeinschaft” (1994) *Neue Juristische Wochenschrift* 545, p. 546, referring to W. Hallstein, *Die Europäische Gemeinschaft* (Econ-Verlag, 5th ed. 1979), p. 51.

the English rule of law, has mostly refrained from making any use of them.³² The most likely explanation for the Court's reluctance to rely on the more classic national concepts – a reluctance which is difficult for English speakers to note as the English phrase does not refer to a state or government – is that Community judges were reluctant to use terms which could give ammunition to those who have constantly feared and denounced the emergence of a European “Superstate.”³³ The use of the term *Gemeinschaft/communauté de droit* – “community based on law” if literally translated – leaves indeed open the statehood question and the Member States themselves might not have welcome a judicial description of the Community as one which is governed by the principle of a “State” (*Staat/Etat*) governed by law. Another potential explanation is that the Court wished to acknowledge the existence of a genealogical link between all the national and EC concepts,³⁴ but also sought to preserve its power to construct an “autonomous” European understanding. A succinct analysis of the context in which the original expression of “Community based on the rule of law” was adopted will help clarify its core meaning as initially understood by the Court.

In *Les Verts*, the Court of Justice had to rule on the delicate question of whether the European Parliament could act as a respondent in annulments proceedings initiated by a private party, i.e. a French association known as *Les Verts - Parti écologiste*.³⁵ This was no easy legal question, not because of the substantive points raised by the applicant but because of the eminently constitutional question at issue. According to what was then Article 173 EEC (currently Article 230 EC), the Court's jurisdiction to hear and determine an action for annulment was expressly limited to actions brought against measures adopted by the Council and the Commission. In the words of the applicant, this limitation amounted to a “denial of justice,” an ancient and fundamental legal notion which has traditionally justified a large exercise of judicial interpretation when the right to obtain a ruling is at stake.³⁶ Not unsurprisingly, the European Parliament also realized that it would politically benefit, as an institution (rather than as a litigant), from advocating the view that the list of potential defendants in former Article 173 EEC should not be interpreted as being exhaustive.³⁷ In the name of the rule of law and by reference

³² Whilst the terms *Rechtsstaat* or *Etat de droit* sometimes appear in the Court's judgments, it is almost always at the initiative of the parties before the Court. See *infra* Section 4.1.3.

³³ Although not a “State,” at least in any traditional sense of the word, it is far from unusual for some politicians to denounce the EU “Superstate.” For most EU scholars, however, the EU's original and not completely coherent “constitutional” nature makes it a *sui generis* entity: a supranational entity not bestowed with statehood but whose legal system is nevertheless reminiscent of a federal state. For further discussion, see L. Pech, *The European Union and its Constitution. From Rome to Lisbon* (Clarus Press, 2008), Chap. 1.

³⁴ D. Simon, *Le système juridique communautaire* (Presses Universitaires de France, 3rd ed., 2001), p. 96, para. 61.

³⁵ According to the applicant, the Parliament acted unlawfully as regards the reimbursement of expenditure incurred by the political groupings having taken part in the 1984 European elections. The Court agreed with the applicant that the relevant decision and rules adopted by the Parliament were void on the grounds that the setting up of a scheme for the reimbursement of election campaign expenses and the introduction of detailed arrangements for its implementation remain within the competence of the Member States.

³⁶ See e.g. Article 4 of the French Civil Code (1803): “The judge who refuses to decide on the pretext of silence, obscurity, or insufficiency of law may be prosecuted for denial of justice.”

³⁷ By the same token, the Parliament astutely suggested, should its acts be challengeable, that it should gain the capacity to bring annulment actions against measures adopted by the Council and the Commission. The

to the “general scheme” of the Treaty as well as its “spirit” as expressed in what is now Article 220 EC (“The Court of Justice ... shall ensure that in the interpretation and application of this Treaty the law is observed”), the Court agreed to reinterpret – some may say rewrite – Article 173 EEC as not excluding annulment actions brought against measures adopted by the Parliament intended to have legal effects vis-à-vis third parties.³⁸ It is in this context of manifest judicial activism that the phrase “Community based on the rule of law” first emerged in a key *obiter* which merits reproduction *in extenso*:

It must first be emphasized in this regard that 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 [230] and [241], on the one hand, and in Article [234], 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. Natural and legal persons are thus protected against the application to them of general measures which they cannot contest directly before the Court by reason of the special conditions of admissibility laid down in the second paragraph of Article [230] of the Treaty. Where the Community institutions are responsible for the administrative implementation of such measures, natural or legal persons may bring a direct action before the Court against implementing measures which are addressed to them or which are of direct and individual concern to them and, in support of such an action, plead the illegality of the general measure on which they are based. Where implementation is a matter for the national authorities, such persons may plead the invalidity of general measures before the national courts and cause the latter to request the Court of Justice for a preliminary ruling.³⁹

While the Court’s judgment does not precisely explain the origin and meaning of the rule of law at Community level – the notion was not yet explicitly mentioned as such in the EC Treaty – it is clear that the Court implicitly views it both as a positive good in itself and as one of the fundamental principles underlying the EC’s entire constitutional framework. This, in turn, explains why, in the eyes of the Court, a “generous and dynamic interpretation”⁴⁰ of the EC’s “Constitution” is not only a legitimate method of

Court partially agreed in Case C-70/88 *Parliament v. Council (Chernobyl case)* [1990] ECR I-2041. According to the Court, its duty is to ensure that “the Parliament’s prerogatives, like those of the other institutions, cannot be breached without it having available a legal remedy, among those laid down in the Treaties, which may be exercised in a certain and effective manner” (para. 25). As a consequence, the absence in the Treaties of any provision giving the Parliament the right to bring an action may be interpreted as a procedural gap which “cannot prevail over the fundamental interest in the maintenance and observance of the institutional balance laid down in the Treaties establishing the European Communities” (para. 26). This led the Court to recognize the Parliament’s right to challenge acts for the purpose of protecting its prerogatives.

³⁸ The Court *de facto* overruled a prior judgment where an opposite interpretation was adopted. See Case 91/76 *de Lacroix* [1977] ECR 225. The Court’s case law was later codified via an amendment to Article 230 EC which enabled challenges against acts of the Parliament intended to produce legal effects vis-à-vis third parties while the Nice Treaty finally added the Parliament to the list of “privileged applicants” (i.e. the Commission, the Council and the Member States) which possess the unconditional right to challenge any Community act “on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.”

³⁹ Case 294/83 *Les Verts v. Parliament* [1986] ECR 1339, para. 23.

⁴⁰ AG Jacobs, Opinion in Case C-50/00 P *UPA v. Council* [2002] ECR I-6677, para. 71. Referring in particular to *Les Verts* and other cases which have dealt with the rights of “privileged applicants” in

interpretation but may be, at times, preferable to a literal reading. Advocate General Mancini interestingly derived from the Court's case law the principle that "the obligation to observe the law" – a phrasing reminiscent of Article 220 EC previously cited – "takes precedence over the strict terms of the written law."⁴¹ As a result, "[w]henver required in the interest of judicial protection, the Court is prepared to correct or complete rules which limit its power in the name of the principle which defines its mission."⁴² Two important initial points can be derived from Mancini's analysis.

Firstly, a purposive interpretation is both legitimate and necessary when the objective is to correct any eventual gap in the legal system in order "to meet the requirements of the rule of law."⁴³ In such a situation, the Court may exercise "a creative function"⁴⁴ and act in a quasi constitutional capacity,⁴⁵ which is exactly what the Court did in *Les Verts*. Such judicial activism is not necessarily illegitimate. Indeed, it was obvious in 1986 that ex Article 173 EEC had not kept pace with the expansion of the Parliament's powers since the signing of the EEC Treaty in 1957. As Tridimas observes, "as the Community develops, the ensuing increase in the powers of the institutions has to be accompanied by adequate control mechanisms, if the rule of law is to be observed."⁴⁶ While some may find this exercise of judicial power objectionable, it is not unusual for constitutional courts to rely on the principle of the rule of law to (re)interpret the national constitution and eventually justify an extension of their jurisdiction or of the legal norms which may be used to assess the constitutionality of public authorities' actions. Furthermore, in the Community context, one may refer to Article 220 EC to make the additional argument that the Court of Justice is actually under a legal obligation to ensure that the rule of law is observed. While Article 220 EC does not expressly refer to the rule of law, it has been convincingly argued that the principle is inherent in this Treaty provision.⁴⁷

annulments proceedings, Jacobs describes the Court's interpretation in these cases as "generous and dynamic" or even "contrary to the text" and explains it by the need "to ensure that the evolution in the powers of the Community institutions does not undermine the rule of law and the institutional balance."

⁴¹ AG Opinion in Case 294/83 [1986] ECR 1339, p. 1350.

⁴² *Ibid.*

⁴³ T. Tridimas, *The General Principles of EU Law* (Oxford University Press, 2nd ed., 2006), pp. 52-53. Other "defining" constitutional principles such as the principle of institutional balance have been used to justify a purposive interpretation of the EC Treaty. See e.g. *Chernobyl* case cited *supra* n. 37.

⁴⁴ H. Schermers, D. Waelbroeck, *Judicial Protection in the European Union* (Kluwer Law International, 6th ed., 2001), p. 24, para. 46.

⁴⁵ J.P. Jacqu , then Professor at the Faculty of Law of Strasbourg and who acted as counsel for the European Parliament in *Les Verts*, speaks of "judicial amendment" of the EC Treaty. See his case note, "Recours en annulation, campagne d'information pour l' lection du Parlement europ en" (1986) *Revue trimestrielle de droit europ en* 500, p. 503.

⁴⁶ Tridimas, *supra* n. 43, p. 53. For another remarkable instance where the Court followed this rationale, see C-15/00 *Commission v. BEI* [2003] ECR I-7281: Measures adopted by the European Investment Bank (EIB), when it acts as a Community body, must be subject to judicial review to ensure observance of the rule of law (para. 75). This is so even if Article 237 EC makes no explicit reference to the Management Committee of the EIB, the organ that adopted the litigious measure in this case. For the Court, if Article 237(b) EC were to be interpreted as excluding such a measure from those amenable to challenge on the basis of that provision purely on the ground that the measure was adopted by a different organ of the EIB, the result would only be contrary to the spirit of Article 237(b) but "would also ignore the fact that the European Community is based on the rule of law."

⁴⁷ See e.g. M.L. Fernandez Esteban, *The Rule of Law in the European Constitution* (Kluwer Law International, 1999), pp. 103-104. While one can easily agree with the author's contention that the rule of

This leads to the second important and more problematic issue raised by *Les Verts*: How does the Court of Justice understand the rule of law? AG Mancini seems to equate it with the notion of judicial protection or control.⁴⁸ Although certainly preoccupied with the effectiveness of the individual right to effective judicial protection – a general principle of EC law which is also laid down in Articles 6 and 13 of the ECHR⁴⁹ – the Court appears to view the rule of law in more encompassing but no less procedural terms. In other words, the EC is said to comply with the rule of law because it offers a complete set of legal remedies and procedures in order to ensure (i) that its institutions (as well as its Member States where relevant) adopt measures in conformity with the fundamental sources of EC law and (ii) that natural and legal persons are able to challenge the legality of any act which affects their EC rights and obligations.⁵⁰ For the Court of Justice, therefore, the principle of the rule of law entails more than the individual fundamental right to judicial protection. It first provides the foundation for judicial review and implies the existence of comprehensive and complementary judicial review processes. These processes, in turn, enable the judiciary to ensure compliance with two key tenets of any genuine legal system: the principle of legality, that is essentially the requirement that public authorities enact measures in conformity with the legal system’s hierarchy of norms and the principle of judicial protection, which in particular implies the right to obtain an effective remedy before a competent court for any person whose rights or interests guaranteed by law are violated by public authorities. To put it differently, judicial review not only ensures that public authorities respect legally protected “individual” rights and interests, it also guarantees that these authorities enact measures in compliance with all relevant superior legal norms.

As a first provisional conclusion, the Court of Justice’s initial understanding of the notion of “Community based on the rule of law” can be described as legalistic and procedural as it is closely related to the traditional and interrelated legal principles of legality, judicial protection and judicial review, principles which are inherent to all modern and democratic legal systems. EU lawyers and judges, for the most part, have welcomed the Court’s rather narrow and formal approach and would likely broadly agree with Jacobs’

law “finds its best written expression” in Article 220 EC, it seems more questionable to argue that the Court of Justice “uses Article 220 EC and the expression rule of law “indistinctly.” It may be more accurate to contend that Article 220 EC initially offered the only written basis from which the Court could convincingly derive the principle of a Community based on the rule of law.

⁴⁸ This notion can be broadly understood and is regularly equated, especially in the French legal literature, with the “right to a judge”, which itself is often understood as entailing not only the right to an effective remedy but also the rights of access to an impartial tribunal, to legal aid, to a fair hearing and finally, the right to be judged within a reasonable time. See e.g. J. Rideau (ed.), *Le droit au juge dans l’Union européenne* (LGDJ, 1998).

⁴⁹ See Case 222/84 *Johnston* [1986] ECR 1651 and Article 47(1) of the (not yet legally binding) EU Charter of Fundamental Rights: “Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.”

⁵⁰ Remarkably, the Court of Justice’s emphasis on remedies is reminiscent of what the US Supreme Court stated in *Marbury v. Madison*: The government of the United States “will certainly cease to deserve this high appellation [a government of laws, and not of men], if the laws furnish no remedy for the violation of a vested legal right,” (1803) 1 Cranch 137, p. 163.

contention that “the key to the notion of the rule of law is ... the reviewability of decisions of public authorities by independent courts.”⁵¹ Viewed in this light, one may reasonably argue that the rule of law, in the EU, “has been effectively guaranteed by the wide jurisdiction conferred”⁵² on two independent courts, i.e. the Court of Justice and subsequently, the Court of First Instance. This is not to say that this is how the EU rule of law should be understood or that better or more effective compliance with this principle is neither possible nor desirable. For instance, the rules governing the *locus standi* of private parties in annulment proceedings⁵³ or the persistence of policy areas not subject (or only partially) to the jurisdiction of EU courts⁵⁴ have been regularly criticized. This paper’s aim, however, is not to subject the EU Constitution to a “rule of law audit”⁵⁵ but rather to explore the meaning, scope and impact of the rule of law as a constitutional principle of the EU. This objective requires the pursuit of our preliminary assessment of the EU’s constitutional framework. Indeed, a mere few years after the Court’s first innovative reference to it, the rule of law was endowed with formal Treaty blessing.

2.2 ...to a Formalized “Constitutional” Principle

The formal enshrinement of the rule of law in the EU’s founding Treaties should be understood in the political context of the time. Following the end of the cold war and what appeared, for a short time, as the universal and permanent triumph of the Western democratic and liberal model,⁵⁶ European countries agreed to commit themselves to promoting human rights, democracy and the rule of law as the three fundamental

⁵¹ F. Jacobs, *The sovereignty of law: The European way* (Cambridge University Press, 2007), p. 35.

⁵² *Ibid.*, p. 37. For similar arguments, see e.g. G. Bebr, “Court of Justice: Judicial Protection and the Rule of Law” in *Essays in Honour of Henry Schermers* (Martinus Nijhoff, vol. II, 1994), p. 303; J.-V. Louis, “The Rule of Law” in M. Westlake (ed.), *The European Union beyond Amsterdam* (Routledge, 1998), p. 99; K. Lenaerts, “The Rule of Law and the Coherence of the Judicial System of the European Union” (2007) 44 *Common Market Law Review* 1625. For an instructive contrast, see J. McCormick, “Supranational challenges to the rule of law: the case of the European Union” in D. Dyzenhaus (ed.), *Recrafting the rule of law* (Hart, 1999), p. 267. The author, a political scientist, essentially distinguishes between a liberal and a social democratic understanding of the rule of law, a distinction which legal scholars might find difficult to relate to, especially as a proper analytical framework to assess the case law of the Court of Justice.

⁵³ See e.g. K. Lenaerts and T. Corthaut, “Judicial Review as a Contribution to the Development of European Constitutionalism” in T. Tridimas and P. Nebbia (eds), *European Union Law for the Twenty-First Century* (Hart Publishing, vol. I, 2004), p. 64: “Expansion of the rules on standing will offer the Union courts the opportunity to contribute in a crosspillar context to uphold the institutional balance, transparency, accountability and democracy, as well as to protect fundamental rights through judicial review of all acts of the institutions. A Union based on the rule of law cannot afford anything less.”

⁵⁴ To put it concisely, while the EU courts are fully competent within the framework of the EC Treaty (with the exception of Article 68 EC), they have no jurisdiction with regard to legal acts adopted in the framework of the Common Foreign and Security Policy and limited jurisdiction as regards acts adopted in the area of Police and Judicial Co-operation in Criminal Matters. Accordingly, it has been argued that the TEU does not comply with the rule of law within the meaning of *Les Verts*. See e.g. B de Witte, “The Nice Declaration: Time for a Constitutional Treaty of the European Union?” (2001) 36 *International Spectator* 21 at 22-23 (the TEU suffers from a “rule-of-law deficit”). For further discussion and references, see “Editorial comments: The rule of law as the backbone of the EU” (2007) 44 *Common Market Law Review* 875.

⁵⁵ For an instructive attempt to analyze the extent to which the EU, and in particular its Court of Justice, complies with the rule of law, see Arnall, *supra* n. 15.

⁵⁶ See the emblematic book by F. Fukuyama, *The End of History and the Last Man* (Free Press, 1992).

principles on which the “new Europe” must be founded.⁵⁷ From then onwards, the rule of law became a dominant concept in political and legal discourses.⁵⁸ In these circumstances, the Court of Justice’s relatively original reference to the principle notwithstanding, it is not surprising that the EU Member States decided to insert not one but multiple references to the rule of law in the EU Treaties when negotiating the Maastricht Treaty (1992). These references were nonetheless largely symbolic at first. For instance, the Preamble of the TEU merely stipulates that the Member States confirm “their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law.” In addition, Article 11 TEU and Article 177(2) EC respectively assign to the EU’s foreign and security policy and the EC’s policy of development cooperation the same objective of developing and consolidating democracy and the rule of law and respect for fundamental rights.

A more noteworthy development occurred in 1997. A new fourth reference was made to the rule of law. According to Article 6(1) TEU as modified by the Amsterdam Treaty:

The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.

While Article 6(1) TEU will be subject to further analysis,⁵⁹ it may be useful at this stage to note that the TEU does not offer any definition of the primary principles on which the EU is said to be founded. Furthermore, the German and French versions of Article 6(1) TEU make clear that the Court of Justice’s description of a Community based on the rule of law (*Rechtsgemeinschaft/communauté de droit*) is not adopted. Instead, the EU is said to be founded on the principle of *Rechtsstaatlichkeit/Etat de droit*, i.e. on the principle of a *State* founded on the rule of law. Yet it is quite evident that the EU is not a State. Could it mean that the principle is only binding on the Member States? In the English language, the notions of a community based on the rule of law (Court of Justice’s phrasing) and of a Union founded on the principle of the rule of law (Article 6(1) TEU) do not appear dramatically different from a conceptual point of view. As we shall see, this may be for the best as the principles of *Rechtsgemeinschaft/communauté de droit* and of *Rechtsstaat/Etat de droit* give the wrong impression of an important dichotomy when in fact they illustrate the same basic idea: the exercise of public power is subject to the law. In other words, Article 6(1) means that the EU is a polity that complies with this *principle* rather than being itself a State founded on the rule of law.

Two additional and significant references made to the rule of law in 1997 need to be briefly mentioned. The first one (Article 7 TEU) concerns the current Member States while the second (Article 49 TEU) is applicable to the countries wishing to accede to the EU.

⁵⁷ See Charter of Paris for a new Europe adopted by the Heads of State or Government of the participating States of the Conference on Security and Co-operation in Europe on the 21st of November 1990.

⁵⁸ See e.g. J. Chevallier, “La mondialisation de l’Etat de droit” in *Mélanges Philippe Ardant* (LGDJ, 1999), p. 333.

⁵⁹ See *infra* Section 4.1.

With the entry into force of the Amsterdam Treaty, current Member States can theoretically be subject to EU sanctions under Article 7 TEU if they are guilty of “a serious and persistent breach ... of principles mentioned in Article 6(1),” i.e. liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law. This provision was further amended by the 2001 Nice Treaty to additionally authorize *preventive* sanctions in the situation where there is “a clear risk of a serious breach by a Member State.” The second innovation brought about by the Amsterdam Treaty is the formal use of the rule of law as a principle any candidate country must comply with in order to become a Member of the Union. According to Article 49 TEU, any European State wishing to become a Member of the EU must respect the principles on which the Union is founded.⁶⁰ This provision must be understood in the context of the controversial and permanent debate about the ultimate borders of the EU. Faced with fresh applications for admission after the fall of the Berlin Wall, the EU Member States decided – as they often do – to opt for the easy way: to define “objective” criteria rather than seeking an agreement on the geographical outer limits of Europe. In Copenhagen in 1993, the European Council *unanimously* approved the principle of the Union’s enlargement. However, candidate countries were asked to fulfill a set of criteria: the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities (political criterion); the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the EU (economic criterion); and the ability to take on membership obligations including adherence to the aims of political, economic and monetary union (criterion concerning adoption of the Community *acquis*). A few years later, as described above, the Amsterdam Treaty stressed the importance of the political criteria and inserted a new provision currently known as Article 49 TEU.

The Lisbon Treaty, if successfully ratified,⁶¹ will amend the wording of Articles 6, 7 and 49 TEU. In line with the defunct Constitutional Treaty, the Lisbon Treaty refers to all the

⁶⁰ “Any European State which respects the principles set out in Article 6(1) may apply to become a member of the Union. It shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the assent of the European Parliament, which shall act by an absolute majority of its component members ...” Save the rule of law, the principles of democracy and of respect for fundamental rights have always been viewed by all EU political actors as decisive elements any candidate country must strictly adhere to. See e.g. *Solemn Declaration on European Union* (known as the Stuttgart Declaration) where the Heads of State and Government of the EU Member States reaffirm “that respect for and maintenance of representative democracy and human rights in each Member State are essential elements of membership of European Communities,” *Bulletin of the European Communities*, no. 6/1983, point 1.6.1.

⁶¹ The Treaty of Lisbon, which amends the TEU and the EC Treaty, was signed by the Heads of State or Government of the 27 Member States in Lisbon in December 2007. At the time of writing, it is yet to be ratified by all the Member States. Particularly problematic was the Irish rejection of the Treaty by referendum in June 2008. In December 2008, after it obtained some legal guarantees addressing the concerns of Irish voters from other EU governments, the Irish government agreed to hold a second ballot before the end of 2009. For an overview of the Irish constitutional framework and Irish voters’ concerns before the first referendum, see L. Pech, “National Report Ireland”, in H. Koeck and M. Karollus (eds.), *Preparing the EU for the Future?* (FIDE XXIII Congress, Nomos, vol. 1, 2008), p. 213.

principles currently mentioned at Article 6(1) TEU as values.⁶² It also offers a fairly inflated list of those values upon which the EU is said to be founded:⁶³

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.⁶⁴

Strangely enough, the rule of law is still identified as a principle in the Preamble of the EU Charter of Fundamental Rights.⁶⁵ Is there a rational explanation for this vocabulary change? While one may theoretically distinguish between values and principles on the basis that “*values* have a more indeterminate configuration, whereas legal *principles* possess a more defined structure which, combined with their clear nature as ‘ought to be’ propositions, make them more suitable for the creation of legal rules through judicial adjudication,”⁶⁶ it is doubtful that those responsible for this terminological variation intended to introduce these type of theoretical distinctions into the EU Treaties. The replacement of the term “principle” by the term “value” is nonetheless regrettable.⁶⁷ A distinction between the EU’s fundamental moral values (human dignity, freedom, etc.) on which the EU is founded, and the “structural” principles (democracy and the rule of law) on the basis of which the EU must function, would have been more appropriate. It may very well be that the EU’s Member States did not view the use of the term “value” as a meaningful change but if “principle” and “value” should be understood as synonymous, the need for a terminological change does not appear pressing. If the term “value” indicates, however, that Member States intended to make it more difficult to sanction any violation of the “principles” mentioned at current Article 6(1) TEU, either by themselves or by the EU, this would hardly be reconcilable with the long advertised goal of increasing the EU’s legitimacy and the successive Treaty amendments which have been

⁶² As amended by the Lisbon Treaty, Article 7 TEU and Article 49 TEU also refer to the rule of law as a value.

⁶³ By increasing the number of values on which the EU is founded, the Lisbon Treaty formally reinforces the conditions of eligibility for accession to the EU. Not only will candidate countries have to respect additional European values such as equality and the rights of persons belonging to minorities, they will also have to demonstrate their commitment to promoting them although the new Article 49 TEU remains silent as to how to do so. The so-called Copenhagen criteria will also become legally binding although one may well argue that they are already indirectly guaranteed by a series of provisions in the EC and the EU Treaties.

⁶⁴ Current Article 6 TEU will become Article 2 TEU when the Lisbon Treaty enters into force.

⁶⁵ “Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law.” See also Article new Article 21(1) TEU: “The Union’s action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law...”

⁶⁶ Esteban, *supra* n. 47, pp. 40-41.

⁶⁷ See contra S. Millns, “Unraveling the ties that bind: National Constitutions in the Light of the Values, Principles and Objectives of the Constitution for Europe” in Ziller (ed.), *L’européanisation des droits constitutionnels à la lumière de la constitution pour l’Europe* (L’Harmattan, 2003), p. 100: “[T]he invocation of values in place of the previous language of foundational principles should help to clarify somewhat the distinction between these core values and the various other non-foundational principles of EU law.” This might be so but one needs to precisely explain first the nature of the difference between a foundational principle and a core value.

adopted to strengthen the democratic and rule of law dimensions of the EU. This is why this terminological variation will not be interpreted here as implying any substantive change.

More decisive and more intriguing is the multiplication of Treaty references to a principle/value that is nowhere defined in EU primary law but rather presented as one which is common to the Member States. A comparative overview of how the rule of law has emerged and been relied on in different European legal traditions seems therefore in order before attempting to outline and assess the emergent unique meaning and scope of the EU rule of law. This is not to say that from a legal point of view, the EU rule of law must necessarily be interpreted and applied in conformity with national understandings but that these understandings will provide a useful benchmark when it is time to assess the extent to which the principle of the rule of law has been “Europeanized.” One also needs to explore the accuracy of the argument according to which the rule of law cannot simply be described as a common principle to the EU Member States. This lack of common understanding, the argument goes, makes it either vain for the EU to rely on the rule of law or necessary for it to develop its own and entirely autonomous understanding.

3. A Principle Common to the Member States?

Notwithstanding the naturally different terms used to convey the concept of “the rule of law” in different languages, Article 6(1) TEU presents the rule of law as a principle common to the EU Member States. When one examines what the rule of law entails in what are arguably the most influential national legal traditions in Europe – the British, German and French traditions – it is possible to outline some divergences between these national understandings. Yet the importance of these divergences should not be overstated.⁶⁸ Firstly, some degree of disagreement in reality persists within *any* legal system as regards the precise meaning, scope of application and normative impact of the rule of law. Secondly, these disagreements are for the most part theoretical in nature and quite remarkably, national scholarly debates are actually conducted on largely identical terms. Last but not least, national understandings have now largely converged.⁶⁹ There is, broadly speaking, an identifiable consensus with regard to the core meaning, scope and impact of the rule of law as a constitutional principle especially if the approach is grounded in positive law.

⁶⁸ See *contra* Kochenov, *supra* n. 13, p. 14: “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. 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.”

⁶⁹ One major factor explaining this convergence in Europe between national understandings of the rule of law appears to be membership of the EU and of the Council of Europe. See Carpano, *supra* n. 27.

3.1 Rule of law, Rechtsstaat and Etat de droit⁷⁰

In accordance with the unspoken rule followed by most scholars in the Anglo-American literature, Dicey's understanding of the rule of law will be briefly considered before exploring how the notion was subsequently understood and applied in the English legal tradition. The concepts of *Rechtsstaat* and *Etat de droit*, traditionally viewed in Germany and France as the closest conceptual equivalent of the English rule of law, will finally be analyzed with a view of determining whether "the rule of law" is indeed a principle common to all the EU Member States.⁷¹

3.1.1 The Rule of Law in the English Legal Tradition

The English legal tradition is rightly celebrated for its unique and ancient contribution to the concept of the rule of law. As neatly observed by Tamanaha, "England deserves special mention, for it has achieved the longest-running continuous tradition of the rule of law, it was the home of Locke, it provided the prime exemplar for Montesquieu, its culture influenced the authors of the *The Federalist Papers*, and it was the tradition within which Dicey made his arguments about the modern decline of the rule of law."⁷² The passage of time has not led, unfortunately, to the emergence of an uncontested view in particular as regards the meaning of "the rule of law" in the Anglo-American world. On the contrary, its exact content continues to remain controversial "with opposing views

⁷⁰ While the literature on the rule of law is extremely abundant, comparative studies are less so. Among the most instructive studies in English, see J.-Y. Morin, "The Rule of Law and the *Rechtsstaat* Concept: A Comparison" in E. McWhinney, J. Zaslove and W. Wolf (eds.), *Federalism-in-the Making: Contemporary Canadian and German Constitutionalism, National and Transnational* (Martinus Nijhoff, 1992), p. 60; R. Grote, "Rule of law, Rechtsstaat, and Etat de Droit. The Origins of the Different National Traditions and the Prospects for their Convergence in the Light of Recent Constitutional Developments" in C. Starck (ed.), *Constitutionalism, Universalism and Democracy – a Comparative Analysis* (Nomos, 1999), p. 269; M. Rosenfeld, "The Rule of Law and the Legitimacy of Constitutional Democracy" (2001) 74 *Southern California Law Review* 1307; J. Rivers, "*Rechtsstaatsprinzip* and Rule of Law revisited" in R. Grote et al., *Die Ordnung der Freiheit. Festschrift für Christian Starck zum siebzigsten Geburtstag* (Mohr Siebeck, 2007), p. 891; D. Zolo, "The Rule of Law: A Critical Reappraisal" in P. Costa and D. Zolo (eds.), *The Rule of Law. History, Theory and Criticism* (Springer, 2007), p. 3.

⁷¹ The *Rechtsstaat* principle has proved particularly influential in Continental Europe and in particular, in Italy since the end of the nineteenth century. It would be therefore certainly instructive to also analyze the Italian *Stato di diritto* and other national experiences. However, for the sake of concision, only the concept of *Etat de droit* will be studied here to reflect on how the *Rechtsstaat* principle has been "internalized," especially after World War II, in a country which, by contrast to most Western democracies, long refused to implement effective constitutional review mechanisms. While this paper will also allude to the numerous constitutions of the "new" EU Member States where the principle of a State governed by the rule of law is enshrined, space and direct knowledge constraints preclude a treatment of the no doubt interesting question of how the "rule of law" has been interpreted and applied in practice in countries where jurists have long been taught about the principle of "socialist legality." Further research is therefore required but broadly speaking, it appears reasonable to contend here that the *Rechtsstaat* principle has greatly influenced legal scholarship and the judicial uses of the rule of law in Central and Eastern European countries, with the consequence that no significant divergence can be today outlined with respect to the meaning, scope and normative impact of the rule of law as a constitutional principle. For further analysis, see A. Czarnota, M. Krygier, W. Sadurski (eds.), *Rethinking the Rule of Law after Communism* (Central European University Press, 2006).

⁷² Tamanaha, *supra* n. 19, p. 47.

having been expressed over time by different judges, academics and practitioners.”⁷³ The author of a comprehensive study went as far as to say that its precise meaning “may be less clear today than ever before.”⁷⁴

In his *Introduction to the Study of the Law of the Constitution* (1885), whose Part II is dedicated to the rule of law, Albert Venn Dicey identified three fundamental meanings. The rule of law means in the first place “that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land.”⁷⁵ It also implies that “every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.”⁷⁶ Finally, Dicey argued that the British constitution “is pervaded by the rule of law on the ground that the general principles of the constitution ... are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts.”⁷⁷ To follow Craig’s analysis,⁷⁸ the first two principles essentially require that people’s actions should be governed by legal norms regularly passed as opposed to arbitrary norms, the equal subjection of all legal persons to the law of the land as well as equal access to a system of ordinary courts. In other words, Dicey’s rule of law entails the traditional principles of legality and equality before the law. Dicey’s third and final principle is more peculiar. It has to be understood in light of the author’s dislike for French administrative law – whose subtle nature the eminent British scholar did not yet fully appreciate – and assumes the superiority of the common law technique over the “Continental tradition” when it comes to protecting some human rights. Dicey was in particular wary of the French practice of enshrining (non-justiciable) individual rights into constitutional texts, which were furthermore regularly repealed, and thought, not without good reasons, that the rights of British citizens were better protected as they flowed from ancient and repeated judicial decisions.

While Dicey’s three meanings continue to be regarded as an indispensable point of departure, contemporary discussions are marked by multiple and at times competing understandings and categorizations. Focusing on what the rule of law as a legal concept entails, Craig offers a useful synthesis which also discerns three modern meanings from the work of reputed scholars such as Raz and Dworkin and the extra-judicial writings of renowned British judges such as Sir John Laws and Lord Bingham.⁷⁹

⁷³ Lord Falconer, HL Deb, 7 December 2004, vol. 667, col. 741.

⁷⁴ R. Fallon, Jr., “The “Rule of Law” as a Concept in Constitutional Discourse” (1997) 97 *Columbia Law Review* 1, p. 1.

⁷⁵ A. Venn Dicey, *An Introduction to the Study of the Law of the Constitution* (MacMillan, 5th ed., 1897), p. 179.

⁷⁶ *Ibid.*, p. 185.

⁷⁷ *Ibid.*, p. 187.

⁷⁸ P. Craig, “Formal and Substantive Conceptions of the Rule of Law: an Analytical Framework” (1997) *Public Law* 467.

⁷⁹ *Ibid.* See also Craig, “The Rule of Law,” *supra* n. 17. For an additional particularly enlightening study for those not familiar with the Anglo-American academic literature, see J. Rose, “The Rule of Law in the Western World: An Overview” (2004) 35 *Journal of Social Philosophy* 457.

Compliance with the rule of law first essentially means “that the government must be able to point to some basis for its action that is regarded as valid by the relevant legal system.”⁸⁰ This obviously goes beyond the idea of rule *by law*,⁸¹ and is rather reminiscent of the traditional principle of legality. In countries possessing a constitution, this principle demands that acts of public authorities, to be lawful, must be authorized by a prior and proper legal norm and must comply with all superior norms in accordance with the hierarchy of norms set out in the national constitution. To guarantee the effectiveness of this principle, the constitutional text normally ensures that all public acts, including legislative ones, are, save narrow exceptions, subject to judicial review. As is well-known, the United Kingdom is in a rather exceptional position in the sense that it neither possesses a codified formal constitutional text with superior status nor does it recognize the “People” as the sovereign power and primary source of public authority. As a matter of fact, according to the long-established doctrine of Parliamentary sovereignty, the British Parliament not only exercises power by virtue of its own right but is the supreme law-making authority in the country, which concretely means that courts cannot question the validity of Parliamentary legislation.⁸² As a result, the principle of legality primarily applies to ministers and public officers and essentially means that they “must exercise the powers conferred on them reasonably, in good faith, for the purpose for which the powers were conferred and without exceeding the limits of such powers.”⁸³ To broadly equate the rule of law with the requirement that public authorities act on the basis of a proper legal basis, says little about the precise meaning and scope of the rule of law. Indeed, the principle that governmental action must be authorized by law and not implemented in an unlawful or arbitrary manner is the *sine qua non* condition of any genuine legal system. If the rule of law is merely a synonym for legality, its conceptual usefulness may be seriously questioned. This is why most scholars tend to rapidly evacuate this first understanding of the rule of law to further distinguish between formal/procedural approaches and substantive ones.⁸⁴

⁸⁰ Craig, “The Rule of Law”, *supra* n. 17, p. 98.

⁸¹ As rightly pointed out by Tamanaha, “understood in this way, the rule of law has no real meaning,” *supra* n. 19, p. 92.

⁸² For further analysis, see e.g. K. Armstrong, “United Kingdom – Divided on Sovereignty” in N. Walker (ed.), *Sovereignty in Transition* (Hart, 2003), p 327.

⁸³ Lord Bingham, “The Rule of Law” (2007) 66 *Cambridge Law Journal* 67, p. 78.

⁸⁴ The conceptions emphasizing the formal/procedural aspects of the rule of law are also often referred to as “thin” theories and distinguish from “thick” theories that additionally incorporate substantive notions of justice. See e.g. R. Peerenboom, “Varieties of Rule of Law. An Introduction and Provisional Conclusion” in R. Peerenboom (ed.), *Asian Discourses of Rule of Law. Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the US* (Routledge, 2004), pp. 2-10. Additional classifications have been suggested. Barber, for instance, notes that Craig’s division might give the wrong impression of a hard and straightforward division between the formal and substantive approaches, and rightly points out that it may not make sufficiently clear that “substantive” considerations relating to the content of the law can arise in both approaches. Accordingly, he proposes to distinguish between legalistic and non-legalistic conceptions, i.e. conceptions that include rights which are not directly related to the structure of law or the processes of the legal system. These conceptions are further divided between those operating within legal theory and those operating within a broader political theory. See N. Barber, “Must Legalistic Conceptions of the Rule of Law Have a Social Dimension” (2004) 17 *Ratio Juris* 474. Tamanaha’s nomenclature is also attractive as it better reflects the reality of a broad spectrum of rule of law conceptions among scholars. While his starting point is to distinguish between formal and substantive versions, each category is further subdivided in three categories: Formal versions range from thinnest to thin (rule by law, formal legality,

According to the “formal school,” and this is the second meaning distinguished by Craig, the rule of law essentially requires that legal rules “should be capable of guiding one’s conduct in order that one can plan one’s life.”⁸⁵ This view set out by Dicey and popularized by Hayek⁸⁶ and Fuller,⁸⁷ holds that the rule of law is properly understood as a set of ideal attributes that a given legal system must strive towards. In other words, to follow Raz’s influential account, legal norms should have the following “formal” attributes:⁸⁸ They must be prospective, adequately publicized, clear, relatively stable and lawmaking should also be guided by open, stable, clear and general rules. But the rule of law is not merely about the “quality” of legal norms as standards capable of providing effective guidance, it requires, according to the distinguished author, the protection of the right to a fair trial as well as “easy” access to courts while an independent judiciary should be granted the power to review that laws comply with the “qualities” mentioned above. Finally, the discretionary powers of “crime-preventing agencies,” i.e. the police and prosecuting authorities, should be limited. As can easily be deduced from this “wish list,” the formal school is not exclusively preoccupied with the content or attributes of legal norms but is also concerned with the interpretation and enforcement of laws. In other words, formal conceptions of the rule of law also often imply compliance with some *institutional* requirements (the principle of separation of powers and in particular the existence of an independent judiciary, the power of judicial review, etc.) as well as individual *procedural* rights (e.g. the right to be heard, the right to effective judicial remedies, the right to access to courts, etc.) despite Raz’s insistence that in his conception, the rule of law “says nothing about fundamental rights.”⁸⁹

democracy and legality) and substantive versions from thick to thickest (individual rights, right of dignity and/or justice, and social welfare). Similarly to Barber, Tamanaha rightly emphasizes the fact that “the formal versions have substantive implications and the substantive versions incorporate formal requirements,” *supra* n. 19, p. 92.

⁸⁵ Craig, “The Rule of Law”, *supra* n. 17, p. 99.

⁸⁶ See e.g. F.A. Hayek’s celebrated definition in *The Road to Serfdom* (1st ed. 1944, Routledge Classics, 2001), pp. 75-76: “Stripped of all technicalities, [the rule of law] means that government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one’s individual affairs on the basis of this knowledge.”

⁸⁷ American legal scholar Lon Fuller identified eight distinct “routes to failure” in the enterprise of creating law and eight kinds of “legal excellence.” To put it differently, in a system based on the rule of law, there must be (1) general rules to govern disputes and these rules must be (2) publicized, (3) prospective, (4) intelligible, (5) consistent, (6) not impossible to obey, (7) relatively permanent and (8) congruence between their actual implementation and the rules as promulgated must be guaranteed. See L. Fuller, *The Morality of Law* (Yale University Press, Revised edition, 1977), Chap. 2.

⁸⁸ J. Raz, “The Rule of Law and its Virtue” in J. Raz, *The Authority of Law. Essays on Law and Morality* (Clarendon Press, 1979), pp. 214-218. For further “lists,” see e.g. J. Finnis, *Natural Law and Natural Rights* (Clarendon Press, 1980), pp. 270-273; G. Walker, *The Rule of Law* (Melbourne University Press, 1988), pp. 23-42; R. Summers, “The Principles of the Rule of Law” (1998-1999) 74 *Notre Dame Law Review* 1691, pp. 1693-1697.

⁸⁹ Raz, *ibid.*, p. 214.

Within the Western legal tradition, these “thin” understandings of the rule of law have been criticized for their indifference to the content or the substantive aims of the law.⁹⁰ According to the substantive or material school – third approach distinguished by Craig – not only does the rule of law require compliance with certain formal requirements, it *also* encompasses elements of political morality such as democracy and substantive rights for individuals. For instance, according to Dworkin, a rights-based conception of the rule of law that captures and enforces moral and political individual rights is preferable to what he calls the “rule-book conception” under which the rule of law and substantive justice are viewed as separate and independent ideals.⁹¹

While this paper’s primary purpose is not to take sides in this long-disputed debate, the theoretical divide between formal and substantive theories appears to us somewhat misleading and largely artificial. Because the rule of law is first and foremost an ideal “it seems inevitable that any plausible conception of the Rule of Law will include at least minimal moral elements,”⁹² and indeed, “virtually every self-proclaimed adherent of a “thin” conception has been charged with covertly importing a substantive component.”⁹³ In other words, even the narrowest understandings contain substantive demands by requiring, for instance, “that citizens have a right of access to court, or that discretionary powers accorded to officials be constrained by law.”⁹⁴ As a result, it is far from unusual to see more “pragmatic” authors relying on both formal and substantive elements when attempting to outline the core elements of the rule of law.⁹⁵ To mention just one example, Lord Bingham articulates eight “sub-rules” that are said to comprise the rule of law.⁹⁶ Most of these sub-rules are concerned with the formal “qualities” of the legal system and of legal norms, i.e. their accessibility and intelligibility, but it is also clear that the author understands the rule of law as entailing the substantive principle that the law must afford adequate protection of human fundamental rights. Furthermore, it is quite common – and sensible – to view judicial review as one core component of the rule of law. It is important to emphasize, however, that through judicial review, public power is subject to

⁹⁰ Critics are particularly concerned with Raz’s assertions that a non-democratic legal system based, for instance, on the denial of human rights, may, in principle, conform to the requirements of the rule of law or that the law may institute slavery without violating the rule of law. See e.g. J. Shklar, “Political Theory and the Rule of Law” in A. Hutcheson and P. Monahan (eds.), *The Rule of Law: Ideal or Ideology* (Carswell, 1987), pp. 13-14. It may be worth emphasizing that Raz was mostly concerned with the fact that scholars tend to confuse, according to him, the rule of law with democracy, justice, equality and human rights. This is a legitimate conceptual concern. As Craig concisely puts it, “we may all agree that laws should be just, that their content should be morally sound and that rights should be protected within society. The problem is that if the rule of law is taken to encompass the necessity for ‘good laws’ in this sense then the concept ceases to have an independent function,” “The Rule of Law”, *supra* n. 17, p. 100.

⁹¹ See R. Dworkin, *A Matter of Principle* (Harvard University Press, 1985), Chap. 1 on “Political Judges and the Rule of Law,” esp. pp. 11-12.

⁹² Fallon, *supra* n. 74, p. 23.

⁹³ *Ibid.*, p. 54, fn. 260.

⁹⁴ N. Barber, “The Rechtsstaat and the Rule of Law” (2003) 53 *The University of Toronto Law Journal* 443, at 445. This is why the author suggests a new division between “legalistic” conceptions of the rule of law and “non-legalistic” ones. See *supra* n. 84.

⁹⁵ See e.g. J. Jowell, “The Rule of Law and its Underlying Values” in J. Jowell and D. Oliver (eds.), *The Changing Constitution* (Oxford University Press, 6th ed., 2007), p. 5; T.R.S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2003).

⁹⁶ Lord Bingham, “The Rule of Law”, *supra* n. 83, p. 69 et seq.

constraints that “are in part procedural and in part substantive,” the range of which varies but which “normally includes ideas such as: legality, procedural propriety, participation, fundamental rights, openness, rationality, relevancy, propriety of purpose, reasonableness, equality, legitimate expectations, legal certainty and proportionality.”⁹⁷

One could not end this succinct theoretical overview without mentioning a recent and remarkable development in positive law: the first statutory reference to the rule of law in the United Kingdom. According to Section 1 of the Constitutional Reform Act 2005 (hereafter: CRA), “This Act does not adversely affect (a) the existing constitutional principle of the rule of law, or (b) the Lord Chancellor’s existing constitutional role in relation to that principle.” In light of the numerous typologies and controversial doctrinal debates previously outlined, it is not exactly startling to realize that the 2005 Act does not offer any definition of the *constitutional* and *existing* principle of the rule of law. It is worth noting that troubled by its open-ended nature, the House of Lords Select Committee on the Constitution commissioned a paper from Professor Craig to assist the Committee’s understanding of the term. After noting that his paper “shed much light on the matter,” the Committee nevertheless concluded that “despite its inclusion in the statute book, the rule of law remains a complex and in some respects uncertain concept.”⁹⁸ During the parliamentary debates, the then Lord Chancellor, Lord Falconer, seemed rather uncertain as to how, precisely, to define it and offered instead this rather murky explanation: “The rule of law goes beyond specific black letter law; it includes international law and it includes, in my view, settled constitutional principles. I think there might be a debate as to precisely what are settled constitutional principles but it goes beyond, as it were, black letter law.”⁹⁹

While the question of what the rule of law precisely entails is not new, the statutory reference confirms the rather artificial nature of the formal/substantive divide. What is more unprecedented is the discussion of the justiciable nature of the rule of law following the adoption of the CRA. Although referred to as a constitutional principle in Section 1, one may reasonably contend that the rule of law, being a rather open-ended concept, should lack justiciability.¹⁰⁰ This view, however, is not universally shared. For Lord Bingham, for instance, the statutory affirmation of the rule of law should not be viewed as a political statement but rather implies “that the judges, in their role as journeymen judgment-makers, are not free to dismiss the rule of law as meaningless verbiage, the jurisprudential equivalent of motherhood and apple pie, even if they were inclined to do so. They would be bound to construe a statute so that it did not infringe an existing constitutional principle, if it were reasonably possible to do so.”¹⁰¹ More ambitiously,

⁹⁷ Craig, “The Rule of Law”, *supra* n. 17, p. 101.

⁹⁸ House of Lords, *supra* n. 17, p. 12, para. 24.

⁹⁹ *Ibid.*, p. 12, para. 25.

¹⁰⁰ See e.g. Lord Kingsland: “I agree with the noble and learned Lord the Lord Chancellor that any rule of law clause in the Bill should not be justiciable. That reflects the constitutional tradition. The rule of law is a term that is not explained in any detailed measure in our constitution; and to make it justiciable would give the judges too wide a scope to determine what our constitutional law should be.” HL Hansard, 7 Dec. 2004, col. 742.

¹⁰¹ Lord Bingham, “The Rule of Law”, *supra* n. 83, p. 69. On the question of justiciability and the scope of judicial review, see also the instructive developments offered by Allan, *supra* n. 95, p. 161 et seq.

private parties have attempted to directly rely on the principle of the rule of law as a ground of review of public action but the case law does not appear to favor such an approach.¹⁰² At a minimum, the statutory reference to the rule of law seems to us as obliging British courts to take this defining principle into account. Although the extent of its justiciability remains controversial, the rule of law, as an “overarching principle of constitutional law,”¹⁰³ must necessarily inform the interpretation of all legal norms and may be relied upon by the judiciary to derive more concrete legal principles to assist it in its mission of interpreting statutes as well as scrutinizing and eventually invalidating governmental actions.¹⁰⁴ To a large extent, courts have already answered this call as they have been, since the mid-nineties, “breathing added life into the notion of the rule of law” with the consequence that “[i]ts scope today is wider by far than could be accommodated under Dicey’s narrow conception; it contains both procedural and substantive content.”¹⁰⁵

3.1.2 Continental Variations on the Same Theme

¹⁰² An instructive judgment recently brought this issue to the fore. Following the high-profile decision of the Director of the Serious Fraud Office (SFO) to end the investigations into allegations of bribery by a British aircraft company in relation to an arm deal with Saudi Arabia, on the ground that the continued investigation would harm “the public interest”, a NGO challenged the decision before the High Court and argued in particular that the Director’s conduct was contrary to the constitutional principle of the rule of law. Giving the judgment of the Divisional Court, Lord Justice Moses accepted that “there continues to be debate about the meaning and scope of the rule of law” but noted that “rule of law is nothing if it fails to constrain overweening power.” See *Corner House Research and Campaign Against Arms Trade v. Director of the Serious Fraud Unit* [2008] EWHC 714 (Admin), para. 61 and para. 65. In the circumstances of the present case, the Lordship interpreted the rule of law as the obligation for courts to ensure “that a decision-maker on whom statutory powers are conferred, exercises those powers independently and without surrendering them to a third party,” the third party being in this case a foreign state. In yielding to the threats made by “Saudis representatives,” the SFO director failed to exercise to make an independent judgment as required of him by Parliament and did not give adequate consideration to the rule of law. A submission to a threat is lawful only when, the judgment goes on to say, “it is demonstrated to a court that there was no alternative course open to the decision-maker.” This line of reasoning, however, did not convince the House of Lords which later overturned the High Court’s ruling. The Law Lords unanimously agreed that the SFO director’s action was lawful in light of *well-settled principles of public law* according to which the right question is whether the Director, when it balanced the public interest in pursuing an important investigation and the public interest in protecting the lives of British citizens, made a decision outside the lawful bounds of the discretion entrusted to him. See *R v. Director of the Serious Fraud Office* [2008] UKHL 60, para. 38, per Lord Bingham. Such an approach, according to Lord Bingham – the author of a remarkable study on the rule of law previously quoted – “involves no affront to the rule of law, to which the principles of judicial review give effect” (para. 41). As applied in this case, the rule of law does not seem to constitute a justiciable principle but rather a legitimizing principle which justifies the imposition on decision-makers of well-recognized legal standards (i.e. reasonable exercise of powers, good faith, etc.) whose respect the courts traditionally impose by way of judicial review.

¹⁰³ Lord Steyn, “Democracy through Law” (2002) *European Human Rights Law Review* 723, p. 727.

¹⁰⁴ By virtue of the doctrine of Parliamentary sovereignty, as previously noted, courts do not have the power to annul legislation. To follow the concise explanation offered by Jacobs, this means “there have traditionally been no legal limits on the sovereignty of Parliament: even today, the only exceptions are those entailed by membership of the European Union. There is otherwise no judicial review of Acts of Parliament; indeed the term ‘judicial review’ has been expropriated by administrative law to refer exclusively to review of the executive ... and the expression ‘judicial review’ is now used as a technical term to denote the application to the court for a remedy for such unlawful administrative action.” Jacobs, *supra* n. ..., p. 7.

¹⁰⁵ J. Jowell, “Parliamentary Sovereignty under the New Constitutional Hypothesis” (2006) *Public Law* 562, p. 576.

Not unlike Britain where, until the 2005 CRA, no statute authoritatively and explicitly referred to the rule of law as a principle of the British Constitution, the French Constitution continues to lack any express reference to the principle of *Etat de droit*, a term commonly used nowadays as the equivalent of the English rule of law.¹⁰⁶ Another peculiar aspect of the French *Etat de droit* is that the term itself did not emerge until the beginning of the 20th century when it was popularized by some eminent law professors. The explanation is that the French term was originally conceived as the literal translation of the German *Rechtsstaat*, whose meaning and scope of application will therefore be considered first.¹⁰⁷

Although it is customary to consider Kant as the spiritual father of the concept of *Rechtsstaat*, the term itself was apparently first coined by Wilhelm Petersen (alias Placidus) in 1798 and was initially mostly used in opposition to the notion of “police State” (*Polizeistaat*). In the first half of the 19th century, the neologism was popularized by liberal scholars and in particular, Mohl who defined the main objective of a *Rechtsstaat* as “organiz[ing] the living together of the people in such a manner that each member of it will be supported and fostered, to the highest degree possible, in the free and comprehensive exercise and use of his strengths.”¹⁰⁸ Although it rapidly gained some traction in political and legal circles, the concept of *Rechtsstaat* almost disappeared from constitutional doctrine at the end of the 19th century as a result of the rise of legal positivism. It mostly retained a meaning in administrative law and was transformed “into a mere principle of legality.”¹⁰⁹ To put it concisely, compliance with the *Rechtsstaat* principle was narrowly understood as requiring judicial review of the administrative acts mostly on procedural grounds, and not constitutional review of legislative acts.¹¹⁰ Its main purpose was to protect against illegal or arbitrary administrative decisions, not to

¹⁰⁶ Following a successful referendum, the Constitution of the Fifth Republic was promulgated on October 4, 1958. Despite regular revisions and in particular, a voluminous and substantial set of amendments in July 2008, the term *Etat de droit* is yet to be enshrined in the constitutional text.

¹⁰⁷ Among a plethora of studies, see for a general and historical overview E.-W. Böckenförde, “The Origin and Development of the Concept of the *Rechtsstaat*” in E.-W. Böckenförde, *State, Society and Liberty* (Berg Publishers, 1991), p. 47. For more exhaustive and critical studies, see P. Kunig, *Das Rechtsstaatsprinzip: Überlegungen zu seiner Bedeutung für das Verfassungsrecht der Bundesrepublik Deutschland* (Mohr Siebeck, 1986); K. Sobota, *Das Prinzip Rechtsstaat: Verfassungs- und verwaltungsrechtliche Aspekte* (Mohr Siebeck, 1997). Our understanding of the *Rechtsstaat* principle was also considerably eased by the reading of O. Jouanjan (ed.), *Figures de l’Etat de droit. Le Rechtsstaat dans l’histoire intellectuelle et constitutionnelle de l’Allemagne* (Presses Universitaires de Strasbourg, 2001). For additional excellent comparative studies, see L. Heuschling, *Etat de droit, Rechtsstaat, Rule of Law* (Dalloz, 2002); Carpano, *supra* n. 27.

¹⁰⁸ R. von Mohl, *Die Polizei-Wissenschaft nach den Grundsätzen des Rechtsstaates* (Laupp, vol. 1, 1844), p. 8, cited by K.-P. Sommermann, “The Rule of Law and Public Administration in a Global Setting” in *Governance and Public Administration in the 21st Century* (Brussels: International Institute of Administrative Sciences, 2002), p. 70.

¹⁰⁹ See Grote, *supra* n. 70, p. 281. One of the major reasons for such a development was the failure of the liberal revolution of 1848-1849.

¹¹⁰ Only with the Weimar Republic (1919-1933) did the idea of constitutional review of legislation resurface, and only with the entry into force of the Basic Law (1949) were effective mechanisms actually created. See e.g. D. Currie, *The Constitution of the Federal Republic of Germany* (The University of Chicago Press, 1994), pp. 4-8 and pp. 27-30.

enforce substantive human rights. In other words, the concept of *Rechtsstaat* was primarily understood in a formal or “thin” sense.

With the entry into force of a new constitution in 1949, known as the Basic Law (*Grundgesetz*), the *Rechtsstaat* reemerged as a central and “thick” constitutional principle, with both formal and substantive components, on which the whole politico-legal system is said to be based and to which all state activity must conform. However, unlike federalism, democracy and the *Sozialstaat*, which are all explicitly guaranteed as basic institutional principles at the heart of the German constitutional order,¹¹¹ the *Rechtsstaat* is not explicitly referred to as a principle binding on the Federal Republic but rather as one binding on the *Länder* under Article 28(1): “The constitutional order in the States must conform to the principles of the republican, democratic, and social state under the rule of law, within the meaning of this Constitution.”¹¹² Yet it seems reasonable to interpret this provision as necessarily implying that the federal State itself is governed by the principle of the rule of law. For the German Federal Constitutional Court, this debate is somewhat irrelevant as it views the *Rechtsstaat* principle as one of the fundamental principles of the Basic Law¹¹³ whose existence can be clearly derived from several constitutional provisions.¹¹⁴ For instance, the *Rechtsstaat* principle is said to be inherent or implicit in Article 19(4) which provides that “if anyone’s rights are violated by public authority, recourse to the courts is open to him/her,” or in Article 20(3) which states that “the legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.”

Leaving the question of its textual foundations aside, a more fundamental question concerns the meaning and scope of application of the *Rechtsstaat* principle. At its core, this constitutional principle means that public power is constrained by the law. The practical consequences of this idea, however, have been diversely interpreted over the course of German history. Following the horrors of the Nazi era, the failure of positivism and the realization that respect of the will of the majority led to terrible human rights violations, the meaning and scope of the principle was greatly expanded under the 1949 Constitution.

With respect to its meaning, a remarkable change is that the *Rechtsstaat* is not merely viewed as encompassing a set of formal requirements. The inclusion of a catalogue of procedural as well as substantive fundamental rights into the Basic Law has led most legal scholars and judges to construe the *Rechtsstaat* from a rights-based approach.¹¹⁵ This explains why it has become customary to broadly distinguish – a typology reminiscent of the doctrinal debates in the Anglo-American literature – between the

¹¹¹ Article 20(1): “The Federal Republic of Germany is a democratic and social federal state.”

¹¹² Another provision introduced in 1992 refers to the *Rechtsstaat* principle but only in relation to the European Union. See Article 23(1): “With a view to establishing a United Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law...”

¹¹³ BVerfGE 20, 323 (331).

¹¹⁴ See e.g. BVerfGE 2, 380 (403); BVerfGE 30, 1 (24); BVerfGE 85, 90 (121); BVerfGE 94, 49 (104).

¹¹⁵ For a concise and clear overview, see Grote, *supra* n. 70, pp. 289-291.

formal (including procedural) elements of the principle and substantive ones. Among these formal elements, the concept of *Rechtsstaat* is traditionally presented as encompassing – the following list is not exhaustive – the principles of legality, legal certainty, proportionality, the prohibition on retroactive laws, etc. Judicial review, and in particular judicial review for breach of constitutional rights, is also closely associated with the *Rechtsstaat* principle. As for its substantive elements, the most important point, as one could easily deduce from the preceding reference to constitutional rights, is that this principle is also understood as encompassing the principle of fundamental rights protection. But respect for fundamental rights is more than a mere component of the *Rechtsstaat*. Indeed, the ultimate purpose of the German “free liberal democratic”¹¹⁶ legal order is to protect fundamental rights and in particular the cardinal value of human dignity. It implies, according to the Constitutional Court, an extensive and dynamic interpretation of individuals’ fundamental rights and an effective enforcement of those rights by the judiciary. This, in turn, has had an impact on the interpretation of the formal and procedural features of the *Rechtsstaat* principle. Contrary to what the “formal school” in the Anglo-American legal tradition seems to suggest, most German scholars or judges view formal and substantive components of the *Rechtsstaat* as indissociable. Furthermore, the interpretation of the formal components of the *Rechtsstaat* must and have been informed by its substantive elements under the auspices of the Basic Law. As regards the scope of the *Rechtsstaat* principle, and to put it concisely, under the 1949 Constitution, all public authorities, federal and sub-federal, executive authorities as well as legislators and judges must comply with the rule of law.¹¹⁷ In addition to Article 20(3) quoted above, this idea can also be illustrated by mentioning Article 1(3) which provides that the fundamental rights protected by the German Constitution “shall bind the legislature, the executive, and the judiciary as directly applicable law.”

Another remarkable aspect of the *Rechtsstaat* principle is that it has been relied on by the Constitutional Court to derive additional legal principles and standards that were not explicitly mentioned in the 1949 constitutional text. One may in particular mention the principles of legal certainty and proportionality as well as the rule prohibiting retroactive non-criminal legislation. Hence the *Rechtsstaat* does not merely operate as a constitutional principle that must inform the creation, interpretation and application of all legal norms, it can also fulfill a gap-filling function as well as offer a justification for dynamic judicial interpretation. These legal uses of the *Rechtsstaat* principle are quite remarkable considering – a trait shared with the English rule of law – the lack of any definition in positive law.

¹¹⁶ D. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Duke University Press, 2nd ed., 1997), p. 34.

¹¹⁷ This explains why some scholars have discussed the emergence of the *Verfassungsstaat*, i.e. “a rule of law-state” or rather a constitutional state governed by the rule of law, to illustrate the fact that the German legal order has been “constitutionalized,” meaning that the Constitution has now become the supreme, central and fully justiciable legal norm of the German legal order thanks to the frequent use of individual constitutional challenges and a proactive Federal Constitutional Court. See U. Karpen, “Rule of Law” in U. Karpen (ed.), *The Constitution of the Federal Republic of Germany* (Nomos, 1988), pp. 175-181. See also Grote, *supra* n. 70, p. 288 (the *Verfassungsstaat* “is to a substantial degree the result of the judicial activism displayed by the Federal Constitutional Court in interpreting the Basic Law, which is especially evident in the field of fundamental rights and has led to an increasing “constitutionalization” of the legal order”).

The rather open-ended nature of the German *Rechtsstaat* has not precluded it from being “borrowed”,¹¹⁸ by most of the new democracies in Central and Eastern Europe following the end of the cold war¹¹⁹ and before that, by the drafters of the Portuguese and Spanish democratic constitutions of 1976 and 1982.¹²⁰ Before it became an overarching principle

¹¹⁸ On the notion of constitutional “borrowing”, see e.g. the collection of essays published in 2003 in the *International Journal of Constitutional Law* (vol. 1, no. 2). For a challenging attempt to replace the “borrowing” analogy with a new metaphor, see S. Choudhry (ed.), *The Migration of Constitutional Ideas* (Cambridge University Press, 2006), esp. pp. 19-25.

¹¹⁹ Out of the twelve countries from Central and Eastern Europe that have joined the EU since 2004, nine refer to the principle of the rule of law or more often, to the principle of a state governed by law in their constitutions (if we believe the English translation of these texts offered by *Constitutions of the Countries of the World Online* available at: www.oup.com/online/oceanalaw). This latter wording has the merit of better reflecting the fact that relevant constitutional provisions were more often that not influenced by the *Rechtsstaat* principle rather than its English counterpart. See e.g. Article 2(1) of the 1949 Hungarian Constitution (as amended in 1989): “The Republic of Hungary is an independent, democratic state governed by the rule of law;” Article 4(1) of the 1991 Bulgarian Constitution: “The Republic of Bulgaria is a law-governed state;” Article 1(3) of the 1991 Romanian Constitution: Romania is a democratic and social state, governed by the rule of law” (Article 8 on political parties and Article 40 on freedom of association also refer to the principle of the rule of law); Article 10 of the 1992 Estonian Constitution: “The rights, freedoms and duties set out in this Chapter ... conform to the principles of human dignity and of a state based on social justice, democracy, and the rule of law;” Preamble of the 1992 Lithuanian Constitution: “The Lithuanian Nation... striving for an open, just, and harmonious civil society and State under the rule of law...;” Article 2 of the 1991 Slovenian Republic: “Slovenia is a law-governed and a social state” (see also Article 3, inserted into the Constitution in 2003, that provides that Slovenia “may transfer the exercise of part of its sovereign rights to international organisations which are based on respect for human rights and fundamental freedoms, democracy and the principles of the rule of law and may enter into a defensive alliance with states which are based on respect for these values”); Article 1(1) of the 1992 Slovak Constitution: “The Slovak Republic is a sovereign, democratic state governed by the rule of law...” (see also Article 134 which states that judges of the Constitutional Court must promise, in their oaths, to protect, among other duties, “the principles of the of the state governed by the rule of law”); Article 1(1) of the 1992 Czech Republic: “The Czech Republic is a sovereign, unitary and democratic, law-abiding State, based on respect for the rights and freedoms of man and citizen” (see also Article 9: “The substantive requisites of the democratic, law-abiding State may not be amended”); Article 2 of the 1997 Polish Constitution: “The Republic of Poland is a democratic state governed by law implementing the principles of social justice.” Croatia, the next country likely to join the EU in 2010, also refers to the rule of law in its Constitution: “Freedom, equal rights, national equality and equality of genders, love of peace, social justice, respect for human rights, inviolability of ownership, conservation of nature and the environment, the rule of law, and a democratic multiparty system are the highest values of the constitutional order of the Republic of Croatia and the ground for interpretation of the Constitution” (Article 3).

¹²⁰ See Article 2 of the Portuguese Constitution on Democratic State based on the Rule of Law (“*Estado de direito democrático*”): “The Portuguese Republic is a democratic State based on the rule of law, the sovereignty of the people, the pluralism of democratic expression and democratic political organization, and respect and effective guarantees for fundamental rights and freedoms and the separation and interdependence of powers, that has as its aims the realization of economic, social and cultural democracy and the deepening of participatory democracy.” The reference to the principle of a State based on the rule of law was inserted in 1982 and was therefore not originally mentioned in the 1976 Constitution. As regards the 1982 Spanish Constitution, Article 1(1) states that “Spain is hereby established as a social and democratic State, subject to the rule of law, which advocates freedom, justice, equality and political pluralism as highest values of its legal system.” The Preamble to the Constitution also refers to “a State of Law which ensures the rule of law [*Estado de Derecho*] as the expression of the popular will.” Interestingly, Article 9(3) offers what a clear account of the formal elements at the heart of the principle of the rule of law: “The Constitution guarantees the principle of legality, the hierarchy of legal provisions, the publicity of legal statutes, the non-retroactivity of punitive provisions that are not favorable to or restrictive

of German constitutionalism, the concept of *Rechtsstaat* also heavily influenced European legal doctrine in countries such as Italy (*Stato di diritto*), France (*Etat de droit*) and Spain (*Estado de derecho*), where the first scholarly works debating the German notion can be respectively dated to 1880, 1901 and 1933.¹²¹

In France, the concept of *Etat de droit* was initially popularized by eminent legal scholars such as Duguit and Carré de Malberg in order to promote the idea of judicial review of statutory law.¹²² It progressively disappeared from legal discourses in the 1920s when, among other things, it became clear that such a reform had no chance of being adopted. This explains the lack of any formal reference to the principle of *Etat de droit* in the 1958 French Constitution. Following the increasing practical importance taken by constitutional review of statutory legislation, a reform formally introduced in 1958, the term made a remarkable “comeback” in the mid-1970s. Before comparing further the modern meaning of this principle to its German equivalent, it may be worth briefly clarifying why France lacked for so long a term similar to the English rule of law or the German *Rechtsstaat*. Two brief remarks can be made in this respect.

To begin with, the lack of any term similar to the “rule of law” or *Rechtsstaat* may be explained by the centrality and the liberal definition of three ancient terms in French legal vocabulary: *Etat*, *République* and *Constitution*. For Rousseau, for instance, “every State governed by law” can be described as a *République*.¹²³ Similarly, the word *Etat* has been used to describe the phenomenon of the submission of political power to law. According to Montesquieu, the State could hence be described, in its essence, as a “society where you have laws.”¹²⁴ There was therefore no need for an additional concept such as *Etat de droit* as it was conceptually difficult to speak of a “State” which is not a State governed by law and subject to the law. In the same way, the term *Constitution* has traditionally been understood as entailing the submission of public authorities to legal restraints. It is enough to cite Article XVI of the 1789 Declaration of the Rights of Man and of the Citizen (“Any society in which the guaranty of rights is not assured or the separation of powers established, has no Constitution”) to see that the rule of law, as a generic concept, was implicitly present as this ancient provision does equate constitutional government with two decisive components of the principle of the rule of law: separation of powers and respect for fundamental rights. The long-time lack of a concept similar to that of the English rule of law or the German *Rechtsstaat* could then be explained by the specific French understanding of the notions of State, Republic or of Constitution.

of individual rights, legal security, the accountability of public authorities and the prohibition of arbitrary action of public authorities.” Yet at the same time, Article 1(1) unmistakably indicates that the Spanish *Estado de Derecho*, like the German *Rechtsstaat*, has a substantive dimension in the sense that it pursues or rather serves substantive values such as freedom, justice, etc. Although not as explicit, a similar conclusion can be deduced from the Portuguese Constitution.

¹²¹ For further references and a broad historical overview of the “reception” of the German *Rechtsstaat* in these three national legal traditions, see Carpano, *supra* n. 27, pp. 117-195.

¹²² The following developments draw upon passages from my article “Rule of Law in France” in R. Peerenboom (ed.), *Asian Discourses of Rule of Law* (Routledge, 2004), p. 79.

¹²³ *Contrat social* (1762), Livre II, Chap. VI.

¹²⁴ *L’Esprit des lois* (1748), Livre XI, chap. 3.

A more pragmatic reason also explains the late arrival of the term *Etat de droit*: the increasing popularity in the 19th century of the notion of *Etat legal*, which was traditionally used in opposition to the notion of *Etat de police* (police state). Originally, the principle of *Etat legal* was, theoretically speaking, closely related to the German *Rechtsstaat* which, as previously explained, became increasingly defined in a formal way in the second half of the 19th century until the Weimar Republic (1919-1933). In this way, the situation in Germany was therefore relatively similar to the situation in France, with the caveat that the French *Etat legal* was “inextricably linked to parliamentary sovereignty and parliamentary democracy.”¹²⁵ Yet, in both countries, constitutional review of statutory provisions failed to be effectively implemented and legal scholars as well as judges became increasingly preoccupied with developing general principles of administrative law to protect individual rights and interests against potential abuses of powers by administrative authorities. In France, it fell on the Council of State, as the French Supreme Administrative Court, to recognize and apply several “unwritten” *principes généraux du droit* to review administrative actions. While most of these “general principles of law” were procedural in nature, they also served to protect a number of substantive fundamental rights like, for example, freedom of thought and opinion.¹²⁶

Not unlike what happened in Germany following the entry into force of the 1949 Basic Law, but at a later stage and to a lesser extent, the introduction of constitutional review in France in 1958, progressively led to an increasing “constitutionalization” of the French legal order and obliged scholars to redefine the purpose and scope of constitutional law. Indeed, by setting up a *Conseil constitutionnel* with the power to determine whether legislation adopted by Parliament complies with constitutional norms, the 1958 Constitution put an end to the long-established “Rousseauian” tradition of parliamentary domination of both the political and legal systems. While the Vichy regime (1940-1944) did not commit crimes that can be compared to the horrors committed by the Nazi regime, legal positivism and the myth of the legislator’s infallibility also suffered irremediable damage from this shameful episode. Politicians and lawyers progressively realized that the Parliament can actually be more of a threat than a trusted guardian of human rights. The Rubicon was crossed in 1971 when, in a landmark decision¹²⁷ often referred to as France’s *Marbury v. Madison* because of its tremendous impact on constitutional law,¹²⁸ the Constitutional Council finally decided to hold a statute incompatible with the Constitution on the basis that it violated a fundamental constitutional provision. This first concrete departure from the tradition of parliamentary sovereignty, which was followed by regular and numerous judgments where statutory laws were struck down pursuant to a broad set of formal and substantive constitutional principles and standards, led to the triumphant (rhetorical) return of the *Etat de droit*. One

¹²⁵ Rosenfeld, *supra* n. 70, p. 1330.

¹²⁶ For further references, see L. Neville Brown, J. Bell and J.-M. Galabert, *French Administrative Law* (Oxford University Press, 5th ed., 1998), p. 216 et seq. Interestingly, the authors note that the French general principles of law may be compared to the English principles of natural justice even though the *Conseil d’Etat* did not restrict itself to protecting restricted procedural rules.

¹²⁷ Decision no. 71-44 DC, 16 July 1971.

¹²⁸ G. Haimbaugh, Jr., “Was It France’s *Marbury v. Madison*?” (1974) 35 *Ohio State Law Journal* 910.

eminent author went as far as to say that the idea of realization of the *Etat de droit* has since dominated French modern constitutional law.¹²⁹

By contrast to the situation in Germany, the term *Etat de droit* is not mentioned in the Constitution and the Council is yet to formally refer to it in its case law, even though parties before it have regularly suggested that it does so. One explanation for the Council's reluctance is that French courts are traditionally wary to rely on principles not explicitly guaranteed by either the Constitution or legislation. It would seem, therefore, that the normative impact of the *Etat de droit* largely differs from the impact the *Rechtsstaat* principle had on German constitutional law. A closer look at the Constitutional Council's case law in the last decade suggests that Article 16 of the 1789 Declaration, a legally binding constitutional norm in France since the 1971 decision previously cited, has been at times used by the Council as the functional equivalent of the principle of *Etat de droit*. In a manner reminiscent of the German Constitutional Court's practice, the Council has derived principles such as the right to effective judicial protection¹³⁰ or the principles of accessibility and intelligibility¹³¹ from the Constitution, and justified its on the basis of Article 16 of the 1789 Declaration. As a result, it may be argued that the principle of *Etat de droit* should now be understood as essentially and implicitly contained in this ancient provision. What is indeed striking is that the set of legal principles and standards derived by the Constitutional Council from Article 16 is similar to those derived by other constitutional courts in Europe from the principle of the rule of law. Furthermore, it is clear that the notion of *Etat de droit* is regularly used by legal scholars as well as constitutional judges¹³² to assess the strengths and shortcomings of the French constitutional architecture, of legislation or of the case law.

The meaning and scope of the French *Etat de droit* is also reminiscent of the *Rechtsstaat* principle post 1949. While French positive law does not offer any definition, most commentators agree with the following description adopted by the French President, Valéry Giscard d'Estaing, in a 1977 speech, as the most authoritative one: "When each authority, from the modest to the highest, acts under the control of a judge who insures that this authority respects the entirety of formal and substantive rules to which it is subjected, the *Etat de droit* emerges."¹³³ In other words, if one accepts this conventional understanding, France can now be convincingly described as an *Etat de droit* because its legal order guarantees that all public authorities, including the Legislature, act under the

¹²⁹ "Le droit constitutionnel, droit de la Constitution et constitution du droit" (1990) 1 *Revue française de droit constitutionnel* 71, p. 79. I should note, in passing, that Favoreu's popular constitutional law textbook is divided into two main parts, the first of which deals with the *Etat de droit*. See L. Favoreu et al., *Droit constitutionnel* (Dalloz, 11th ed., 2008). On the impact of Favoreu's scholarship, see the special issue of the *International Journal of Constitutional Law*, vol. 5(1) (2007).

¹³⁰ See e.g. Decision no. 99-416 DC, 23 July 1999, para. 38.

¹³¹ See e.g. Decision no. 98-421 DC, 14 December 1999, para. 13.

¹³² See e.g. the speech by the President of the Constitutional Council in which he presents the Council as one of the key institutional tenets of the French *Etat de droit* and identifies the extension of its jurisdiction, following the 2008 revision of the French Constitution, with a strengthening of the *Etat de droit*. Speech by J.-L. Debré, VII^{ème} Congrès de l'Association française de droit constitutionnel, 25 Sept. 2008 (available at www.conseil-constitutionnel.fr).

¹³³ Cited by J. Chevallier, *L'Etat de droit* (Montchrestien, 2nd ed. 1994), p. 128. Dean G. Vedel, one of the most distinguished French law professors of the past century, is said to have written the President's speech.

control of a judge who ensures that these authorities respect the entirety of the formal and substantive rules stated in the Constitution, which is itself located at the top of the internal hierarchy of norms.¹³⁴ This understanding undeniably recalls the meaning and scope of the *Rechtsstaat* principle under the Basic Law. There is, however, a difference between Germany and France. Rather than reinterpreting the initial concept of *Etat legal*, which was largely similar to the positivistic *Rechtsstaat* pre 1949, an additional concept was used in France to mark the shift towards the establishment of an increasingly “constitutionalized” legal system.¹³⁵ Regardless of these semantic variations, the meaning, scope and normative impact of the principles of *Etat de droit* and *Rechtsstaat* seem to have largely converged. Both redefine the nature and purpose of their respective polities and regulate, through formal and substantive requirements, the definition and implementation of state policies with the view of guaranteeing better compliance with the basic values (liberty, equality, dignity, etc.) on which the national constitutional order is based.

3.2 Unity and Diversity in the National Understandings of the Rule of Law

Following this overview of the concept of the rule of law in three dominant legal traditions in Europe, the question of whether Article 6(1) TEU accurately refers to the rule of law as a principle common to the EU Member States, can now be addressed. In broad agreement with several authors,¹³⁶ I will attempt to briefly demonstrate here that

¹³⁴ As a result, it does not seem entirely accurate to argue that the concept of *Etat de droit*, unlike the principles of the rule of law and *Rechtsstaat*, “does not refer to law as a whole, but rather to fundamental rights as having the force of law,” Rosenfeld, *supra* n. 70, at 1330. While it is true that most French scholars closely link *Etat de droit* with respect for fundamental rights against the Legislator, the concept is also generally understood as encompassing a set of formal and procedural components as regards, for instance, the quality of the legal norms being produced by the same Legislator.

¹³⁵ Interestingly, in both countries, the ever increasing constitutionalization of the legal order has convinced some scholars to speak of the emergence of “a constitutional State governed by law” (*Verfassungsstaat/Etat de droit constitutionnel*). The “constitutionalization” of the French legal order is nevertheless not as extensive as in Germany in the absence of an individual right to challenge the constitutionality of legislation. The recent amendment of the French Constitution, which introduced a new – and rather complex – mechanism to enable individuals to do just that is likely to significantly alter this diagnosis in the near future. See F. Fabbrini, “Kelsen in Paris: France’s Constitutional Reform and the Introduction of a *Posteriori* Constitutional Review of Legislation” (2008) 9 *German Law Journal* 1297.

¹³⁶ See e.g. N. McCormick, “Der Rechtsstaat und die Rule of Law” (1984) 39 *Juristenzeitung* 56; Esteban, *supra* n. 47, pp. 65-100; Carpano, *supra* n. 27, pp. 115-239; E. Wennerström, *The Rule of Law and the European Union* (Iustus Förlag, 2007), pp. 48-89; Zolo, *supra* n. 70, pp. 18-29; A. Weber, “Rechtsstaatsprinzip als gemeineuropäisches Verfassungsprinzip” (2008) 63 *Zeitschrift für öffentliches Recht* 267. Among many others, see *contra* the particularly rich study offered by Rosenfeld, *supra* n. 70, p. 1318: “The German *Rechtsstaat*, the French *État de droit*, and the corresponding British and American conceptions all endorse the rule of law in the narrow sense but otherwise diverge significantly from one another.” By narrow sense, the author means generalized rule through law, legal predictability, a significant separation between the legislative and the adjudicative function and the principle of equality before the law. In most cases, those who are of the view that European countries do not share a common concept of the rule of law contend that the meaning of the English rule of law is more formal in nature than substantive when compared, for instance, to the *Rechtsstaat* principle. Yet some authors, quite surprisingly, also defend an opposite view. See e.g. E. Zoller, *Introduction to Public Law: A Comparative Study* (Martinus Nijhoff, 2008), p. 114, fn 7: “The rule of law is not the perfect mirror of the continental *Rechtsstaat*; its content is more substantive than formal.” It is also sometimes argued that the *Rechtsstaat* and the English rule share

despite different constitutional traditions and the persistence of some significant differences between these traditions as regards how compliance with the rule of law is “institutionalized,”¹³⁷ a series of shared traits can be outlined.

First and foremost, the rule of law has progressively become a dominant organizational paradigm of modern constitutional law in all the EU Member States, and is unanimously recognized as one of the foundational principles undergirding all European constitutional systems. To put it differently, not only is the rule of law a shared political ideal, it has also become in most European countries a posited legal principle of constitutional value. This is not to say that this principle is always explicitly guaranteed in each national constitution. This is especially true for countries in the “old Europe.” With the exceptions of Portugal and Spain, themselves heavily influenced by the German constitutional experience, the rule of law is not always enshrined in the national constitution. Yet constitutional judges as well as academic lawyers regularly refer to it to describe and normatively assess national constitutional arrangements or deal with specific legal problems. And where the rule of law is not explicitly mentioned, it is often said to constitute a principle that is inherent to the national constitution. For instance, until the CRA of 2005, the United Kingdom was lacking “grand statutory exhortations,”¹³⁸ yet no British lawyer has ever doubted that it constitutes a fundamental principle of the British (uncodified) constitution that courts must take into account.¹³⁹ By contrast to the situation in the “old Europe,” a large majority of the constitutions of the “new” EU Member States explicitly refer to the rule of law. This formal constitutional enshrinement illustrates the fact that this principle has gained wide recognition in political and legal circles following the end of the cold war.

Second common trait, the rule of law is never precisely defined either by national constitutions or by courts.¹⁴⁰ This is true not only in Germany but also, for instance, in the United Kingdom. Indeed, despite a recent and unprecedented statutory reference to the principle, the legislator has remained silent on what the rule of law precisely entails. In other words, it seems that regardless of the national legal system, it is always left to

the same moral foundations but remain quite divergent with respect to the methods used to implement these notions. See e.g. Morin, *supra* n. 70, p. 60: “The paths taken by England and Germany in coping with the problem of power have been quite divergent and remain so today.”

¹³⁷ From a theoretical point of view, the reference to the “State” in the German *Rechtsstaat* is traditionally viewed as the most important difference with the English rule of law. While it can hardly be denied that the concept of *Rechtsstaat* is inherently linked to the concept of state, the modern understanding of this principle seems to indicate that it is now predominantly understood and applied as a generic constitutional principle of governance, a concept whose most important purpose is to regulate public power and which can be applied to any legal order and not necessarily to the sole internal legal order of a state. Accordingly, the EU can be properly described as a polity based on the principle of “a State governed by law.”

¹³⁸ Lord Falconer, HL Deb. 7 December 2004, vol. 667 col. 739.

¹³⁹ For Rivers, however, one of the major differences between the *Rechtsstaat* principle and the English rule of law is that “the *Rechtsstaatsprinzip* is a principle expressed within the German Basic Law, and thus amenable as such to judicial interpretation and application” whereas “the Rule of Law is not a posited legal principle, but a principle of political morality constructed out of relevant constitutional traditions.” Rivers, *supra* n. 70, p. 891.

¹⁴⁰ With the arguable exception of Spain as the Constitution includes a rather complete list of the formal components which are at the heart of the *Estado de Derecho*.

scholars and judges to flesh the principle out. Unsurprisingly, therefore, another similarity lies in the fact that there continues to be debate about the precise meaning and scope of the English rule of law, the German *Rechtsstaat* and the French *Etat de droit*. Despite their ancient pedigree, and perhaps because of it, the proper use of these concepts “inevitably involves endless disputes,” which, “although not resolvable by argument of any kind, are nevertheless sustained by perfectly respectable arguments and evidence.”¹⁴¹ Equally striking is the fact that scholarly debates in these three European countries are conducted largely on similar terms.¹⁴² In addition to the question of whether the rule of law should be understood in a predominantly formal or substantive manner, the strongest criticism made against the rule of law is that its relative and elusive nature makes it an unhelpful legal concept or rather illustrates that it is a mere neologism. What a distinguished Belgian historian wrote about the *Rechtsstaat* principle: “the problems ... start with the very word,”¹⁴³ may well be applicable to the English rule of law or the French *Etat de droit*.¹⁴⁴

Their problematic dogmatic values notwithstanding, the English rule of law, the *German Rechtsstaat* and the French *Etat de droit* are concepts (third shared trait) which provide similar answers to similar questions.¹⁴⁵ At the risk of oversimplification, they all appear to constitute “meta-principles” which provide the foundation for an independent and effective judiciary and essentially describe and justify the subjection of public power to formal and substantive legal constraints with a view to guaranteeing the primacy of the

¹⁴¹ W.B. Gallie, “Essentially Contested Concepts” (1955-56) 56 *Proceedings of the Aristotelian Society* 167, p. 169, cited by Fallon, *supra* n. 74, p. 7, n. 22. On the question of what “essential contestability” means, see the stimulating analysis of J. Waldron, “Is the rule of law an essentially contested concept (in Florida)?” (2002) 21 *Law and Philosophy* 137, p. 148 et seq.

¹⁴² A similar diagnosis can be made as regards Italy, Portugal and Spain. See Carpano, *supra* n. 27, pp. 197-224. While our direct knowledge of the new EU Member States’ legal scholarship and case law is limited, the rule of law appears to be subject to the same theoretical debates that have long preoccupied legal scholarship in Western Europe. See e.g. R. Arnold, “Le principe de l’Etat de droit dans les nouvelles constitutions de l’Europe centrale et orientale” in P. Mahoney et al. (eds.), *Protection des droits de l’Homme: la perspective européenne. Mélanges à la mémoire de Rolv Ryssdal* (Carl Heymanns Verlag KG, 2000), p. 65.

¹⁴³ R. van Caenegem, “The “Rechtsstaat” in Historical Perspective” in R. van Caenegem, *Legal History: A European Perspective* (Hambledon Press, 1991), p. 185.

¹⁴⁴ It seems at first that the English rule of law, by not referring to the term state, cannot be subject to the traditional Kelsenian criticism according to which the concept of *Rechtsstaat* is nothing more than a pleonasm. Indeed, if one agrees to identify the State with law, the concept of *Rechtsstaat* is then redundant because every State is then, by definition, a “State of law.” Similar arguments have been voiced by legal scholars in most European countries where the *Rechtsstaat* principle has influenced the shaping of national equivalents. If this particular criticism would be difficult to make with regard to the concept of “rule of law,” it seems to be more in reason of particular historical circumstances, as Locke spoke of “Lawful Government” in his *Two Treatises of Government* before the term rule of law became more influential with the work of Dicey. One may further note that Raz, not unlike Kelsen before him, has questioned the tautological nature of the rule of law if it is understood to mean “that all government action must have foundation in law” as “[a]ctions not authorized by law cannot be the actions of the government as a government,” *supra* n. 88, p. 212.

¹⁴⁵ To paraphrase N. Barber, “The Rechtsstaat and the Rule of Law” (2003) 53 *The University of Toronto Law Journal* 443, p. 444. This author nevertheless notes the existence of an important difference between the *Rechtsstaat* and the rule of law: “In essence, while *Rechtsstaat* rests on some sort of connection between the legal system and the state, the rule of law is a quality of, or theory about, a legal order.”

individual and its protection against the arbitrary or unlawful use of public power.¹⁴⁶ Furthermore, by contrast to the position adopted by a majority of Anglo-American scholars, who tend to favor formal conceptions over substantive ones, it may be worth stressing that most if not all constitutions or courts in Europe reject this dichotomy and view the formal and substantive components of the rule of law as interdependent and not mutually exclusive. Indeed, the formal and procedural components of the rule of law in liberal and democratic European polities (proportionality, non-retroactivity, access to courts, fundamental rights protection, etc.) are supposed to serve the substantive values (human dignity, individual autonomy, social justice, etc.) upon which these societies are founded. By crystallizing a broad set of legal standards and of moral values, the rule of law fulfills multiple and valuable functions. Legally speaking, it gives in particular coherence and purpose to the whole politico-legal system. To put it differently, the strong emphasis on the rule of law as a defining constitutional principle, has progressively led to or at least, legitimizes the “instrumentalization” of the “State” whose purpose is to serve the individual and protect his rights, and the “subjectivization” of the law, i.e. individuals must be able, in principle, to challenge acts of public authorities that allegedly violate their fundamental rights.¹⁴⁷ This is also true of the United Kingdom, even if this is an evolution the country seemed to have been reluctant to embrace if only because of its peculiar and ancient constitutional arrangements.¹⁴⁸

This leads us to another important point: It would be wrong to believe that the English, German or French conceptions are static in nature. On the contrary, all the national conceptions have in common a dynamic understanding of the rule of law, which is often used as a political and/or legal benchmark to assess the shortcomings of current constitutional arrangements or legislation. The meaning and scope of application of the principle in each national tradition, and its evolution, must also be understood in relation to historical experiences. For instance, the *Rechtsstaat* principle and the emphasis on its substantive content post 1949 cannot obviously be understood without reference to the failure of positivism during the Nazi period. Therefore, even if a common underlying conception of the rule of law can be derived from different constitutional traditions, this principle can still be interpreted and implemented in different ways. As a result, it is no

¹⁴⁶ Carpano, *supra* n. 27, para. 11, p. 23.

¹⁴⁷ See J. Chevallier, “L’Etat de droit”, (1988) *Revue du droit public* 365, p. 367.

¹⁴⁸ The coming into force of the *Human Rights Act 1998* (HRA), and which gives “further effect” to rights and freedoms guaranteed under the European Convention on Human Rights (ECHR), is generally viewed as a decisive milestone with respect to the changing character of the British Constitution and the strengthening of the rule of law. While the doctrine of Parliamentary sovereignty explains that the HRA still prohibits courts from questioning the validity of Parliamentary Acts, it enables them to make a “declaration of incompatibility” when a legislative provision violates ECHR rights. Regardless of this mechanism’s effectiveness, the HRA has had a significant impact on the British legal system. It further constitutionalizes politics in the sense that “senior judges are now required to police constitutional boundaries and determine sensitive human rights issues in a way which would have been unthinkable forty years ago. This new judicial role is still developing, but ... the effect of this trend will be to reshape the relationship between the judiciary and the other branches of government,” Professor Kate Malleson cited in House of Lords, *Relations between the executive, the judiciary and Parliament*, *supra* n. 17, para. 33, p. 15. While different constitutional remedies to protect fundamental rights are available in Germany and France, politics in both countries has been similarly subject to a general process of “judicialization”. On this topic, see e.g. A. Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (OUP, 2002).

surprise that the precise list of principles, standards and values the rule of law entails may vary in each country even though European legal systems share in common the use of formal and substantive legal standards and values and have all known an “intensification of judicial review,”¹⁴⁹ in particular as far as fundamental rights are concerned. The “institutionalization” of the rule of law has also led to the implementation of different constitutional mechanisms. For instance, in Germany and in France, while respect for the rule of law has justified the establishment of constitutional courts to review statutory laws, the jurisdiction of the French Constitutional Council is much narrower than its German counterpart. In a striking contrast, the United Kingdom, still formally faithful to the doctrine of Parliamentary sovereignty, forbids its courts, save “the EU exception,”¹⁵⁰ from striking down a validly enacted statute. British courts must focus instead on reviewing administrative action. Despite these “institutional” differences, the logic at work is largely similar. With the notable exception of the acts of the “Sovereign” – the People in Germany and France or the Parliament (in combination with the Monarch) in the United Kingdom – whose validity cannot be normally questioned,¹⁵¹ all acts of the

¹⁴⁹ To paraphrase G. Nolte, “General Principles of German and European Administrative Law: A Comparison in Historical Perspective” (1994) 57 *The Modern Law Review* 191, p. 205.

¹⁵⁰ Membership of the EU has had a dramatic impact on this traditional vision. As is well-known, the European Court of Justice views Community law as having primacy over national law in situations where they conflict. The *Factortame* litigation made clear that British law must take into account the EU supremacy doctrine and that national courts must give effect to Community law and set aside – technically speaking Community law does not require national courts to invalidate Acts of Parliament – conflicting domestic law. See in particular *R v/ Secretary of State for Transport, ex p Factortame (No. 2)* [1991] 1 All ER 70. In practice, therefore, the doctrine of Parliamentary sovereignty has been largely qualified by UK membership of the EU. And as noted above, the HRA has also introduced a “weak form” of judicial review, which might, over time, morph into “strong form.”

¹⁵¹ It is difficult to address this difficult question in a few sentences. While, in France, the dominant legal position argues that the *pouvoir constituant* knows no legal limits and can therefore freely violate “the rule of law,” German scholars have long debated the question of “unconstitutional constitutional norms.” Indeed, in Germany, the 1949 Constitution’s so called “eternity clause” (Article 79(3)) formally prohibits the *pouvoir constituant* from amending key constitutional principles. Yet unless one believes in natural law, the Sovereign may, for instance, “legally” override this obstacle by first amending or deleting the “eternity clause” before remodeling the national constitution as it wishes. Were this to happen, the Constitutional Court could certainly object to such procedural “abuse,” but, ultimately, the admissible nature of the *pouvoir constituant*’s action is a political question rather than a legal one. Interestingly, a similar debate recently took place in England in the context of the legal challenge brought against the validity of the Hunting Act 2004. The doctrine of Parliamentary sovereignty theoretically implies that even “constitutional” statutes (e.g. the HRA) are no different, formally speaking, from any other piece of legislation and can therefore be repealed by a posterior Act of the Parliament. Some British judges have debated the potential conflict between the doctrine of Parliamentary sovereignty and the rule of law by taking the example of a fictional Act abolishing judicial review and suggested that such a law might be held incompatible with the constitutional principle of the rule of law. See e.g. Lord Steyn in *R(Jackson) v Attorney General* [2005] UKHL 56, para. 102: “The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the *general* principle of our constitution. It is a construct of the common law. ... If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is [a] constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.” One may however contend that such a judicial finding would violate the British Constitution. For recent analysis of this topical issue, see J.

public authorities can be subject, in principle, to judicial review and eventually annulled by the judicial branch.

Last but not least, the principle of the rule of law, while it is understood as providing the foundation for judicial review, is commonly viewed as not justiciable in itself. In other words, the rule of law is not traditionally used as *a* rule of law. This is not to say that this constitutional principle lacks normative effect and merely fulfills a descriptive function. On the contrary, as a legally binding constitutional principle, either explicitly contained in the constitutional text or deduced from it by the constitutional court, courts may rely on the rule of law both as a “transversal” principle that must guide the interpretation of all legal norms (including constitutional ones) and a basis from which a set of “hard” legal principles, formal as well as substantive, can be derived to help the judiciary in their day-to-day mission to interpret and scrutinize the validity of public authorities’ measures. This is, for instance, what clearly happened in Germany. While the case law in countries such as the United Kingdom and to a much greater extent France, may not be as straightforward and plentiful when it comes to recognizing the normative impact of the rule of law, there is no doubt this constitutional principle shapes the development of the law and has also implicitly or explicitly led to the recognition of new and fully justiciable principles. Furthermore, in these three countries, the rule of law is now regularly relied on by parties in judicial proceedings to convince the courts to strictly apply well-recognized standards which the courts impose by way of judicial review.

To conclude on the question of whether the rule of law, as stated by Article 6(1) TEU, is a common principle to the EU Member States, a positive answer is in order. The rule of law is not merely a common political ideal it is also a common constitutional principle. It follows that it does not seem immediately relevant to seek to determine whether the EU rule of law conception is Common Law-inspired or *Rechtsstaat*-inspired.¹⁵² Not only do the English and German legal traditions, broadly speaking, provide similar answers to similar questions, but the EU, and in particular, the Court of Justice, as the ultimate guardian of the Union legal order, is free to give an “autonomous” meaning to the EU principle of the rule of law even though the Court generally seeks to identify a common denominator in the constitutional traditions of the Member States when making use of a concept which was first developed at the national level. And even if a similar meaning can be outlined, the scope of application and normative impact of the rule of law at the EU level could nevertheless legitimately differ from the one it has in the Member States if only because of the specific constitutional arrangements of this complex supranational polity. It would be therefore surprising if the rule of law were to fulfill entirely the same functions it does at the national level. The previous developments will enable us to assess the extent of the “autonomous” nature of the EU rule of law while questioning its merits as well as its eventual shortcomings.

Jowell, “Parliamentary Sovereignty under the New Constitutional Hypothesis” (2006) *Public Law* 562 and Lord Bingham, “The Rule of Law and the Sovereignty of Parliament” (2008) 19 *King’s Law Journal* 223.

¹⁵² Wennerstrom, *supra* n. 136, p. 89.

4. Shared and Distinctive Features of the EU Constitutional Principle of the Rule of Law

The rule of law, as a constitutional principle of the EU, is regularly assessed in light of the Court of Justice's case law.¹⁵³ This approach lacks the required depth as it fails to take into account that the EU rule of law is not merely a constitutional principle that can be referred to and applied in judicial proceedings. It may be more fruitful, in order to assess the meaning, scope and impact of the EU rule of law, to analyze its unique and shared features in light of the common traits identified in the preceding section.¹⁵⁴ In doing so, one discovers that the EU rule of law is similarly a dominant organizational paradigm as regards EU constitutional arrangements, a multifaceted or umbrella legal principle with formal and substantive elements which lacks "full" justiciability. The EU rule of law also presents distinctive features. In other words, it has a broader scope of application than the one it normally has at the national level. Indeed, it is also used as a politico-legal benchmark with respect to current EU Member States and prospective ones and as a policy objective in relation to so-called third countries and other regional organizations. These distinctive features do not illustrate or derive from an alternative understanding of what the rule of law should entail at the supranational level. They rather reflect the EU's original constitutional nature. As a supranational and "dynamic" organization theoretically open to all European countries who share the same values and whose main objectives are to promote peace and prosperity on the international plane, the EU has naturally additional uses for the rule of law.

4.1 Shared features

Reflecting most national constitutional experiences in Europe, the EU rule of law is first and foremost a posited legal principle with a foundational nature. The absence of any formal and precise definition of what the principle entails is also a typical feature and should not necessarily be criticized considering the "umbrella" character of the rule of law in all legal systems. Finally, the rule of law, in conformity with what national practices have taught us, has been reasonably relied on by the Court of Justice as an interpretative guide and as a source from which additional more specific legal standards may be derived, rather than as a rule of law in itself.

4.1.1 The Rule of Law as a Foundational Principle

By stipulating that the EU is "founded" on – and must not merely respect – the principles of liberty, democracy, respect for fundamental rights and the rule of law, Article 6(1)

¹⁵³ More problematic is the scholarly use of the phrase "the rule of law" to describe the main institutional features of the EU legal system or the key doctrines of EU law. In this situation, the rule of law may indeed be said to refer "to everything and to nothing" in particular and to that extent, this author shares the concerns expressed by Kochenov, *supra* n. 13, pp. 19-21.

¹⁵⁴ This paper's predominantly legalistic treatment may usefully be read in conjunction with one which primarily focuses on the social significance of the rule of law in the supranational domain and in particular at the EU level: N. Walker, "The Rule of Law and the EU: Necessity's Mixed Virtue" in G. Palombella and N. Walker (eds.), *Relocating the Rule of Law* (Hart, 2008), p. 119.

TEU makes clear that these are foundational or defining principles.¹⁵⁵ To put it differently, this provision offers the overarching principles or values of political morality that “underlie and inform the purpose and character”¹⁵⁶ of the EU’s politico-legal system as a whole. To that extent, it is fair to say that the EU founding Treaties have come to give “primary importance” to these principles.¹⁵⁷ Furthermore, by explicitly recognizing the rule of law as a posited legal principle, Article 6(1) TEU is clearly reminiscent of the countries where the rule of law has long been enshrined in the national constitution. While there continues to be some confusion about this aspect, the Treaty reference to the rule of law does not mean that the EU is itself a sovereign state-like entity or pursues this ambition. While, in languages other than English, Article 6(1) TEU refers to the principle of a *State* founded on the rule of law, the reference to “State” can be explained by the historical circumstances which have presided over the birth and conceptualization of the *Rechtsstaat* principle. As a regulating principle, the principle of a State governed by law seems perfectly applicable to a non-state polity.¹⁵⁸ In other words, as far as the EU is concerned, the reference to the notions of rule of law/*Rechtsstaat*/*Etat de droit* broadly means that the Union is also governed by a general and fundamental principle, which is common to the Member States, and according to which the exercise of public power is subject or regulated by a set of formal and substantive limitations. Undeniably, the codification of the rule of law as a fundamental principle on which the EU is founded has further consolidated the dominant character of the rule of law as an organizational paradigm of modern constitutional law at the national and international levels.¹⁵⁹ The

¹⁵⁵ This interpretation has been recently confirmed by the Court of Justice in Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat* [2008] nyr. Faced with the absurd argument raised by the United Kingdom that Article 307 EC (the rights and obligations arising from pre-Community or pre-accession agreements of the Member States shall not be affected by the provisions of the EC Treaty) and Article 297 EC (which does not prohibit obstacles to the operation of the common market when they are caused by measures taken by a Member State to carry out the international obligations it has accepted for the purpose of maintaining international peace and security) allow the Member States to eventually derogate from Article 6(1) TEU, the Court held that these provisions cannot “be understood to authorise any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) EU as a foundation of the Union” (para. 303). With respect to Article 307 EC, the Court felt compelled to add that it “may in no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order” (para. 304). One may note that, curiously, the rule of law is not explicitly mentioned when the Court refers to the principles contained in Article 6(1) TEU.

¹⁵⁶ To paraphrase Allan, *supra* n. 95, p. 4.

¹⁵⁷ In his opinion in Case C-354/04 P *Gestoras Pro Amnistía et al. v. Council* [2007] ECR I-1579, AG Mengozzi spoke of the “primary importance which the versions of the EU and EC Treaty resulting from the Treaty of Amsterdam [gave] to the principle of the rule of law and the protection of fundamental rights” (para. 75). Yet an overarching or “primary” principle of constitutional law does not necessarily constitute a supra-constitutional norm. In other words, the principles contained in Article 6(1) TEU may form part of the very foundations of the Community legal order, as the Court put it in *Kadi*, it does not mean that the Court has come to accept the idea of a *formal* hierarchy between EU *primary* law norms. The Court rather emphasized the fundamental nature of Article 6(1) principles from a *material* point of view. In practice, this means that all EU norms must be interpreted with a view of strengthening compliance with these principles. This aspect will be dealt with *infra* in Section 4.1.3.

¹⁵⁸ A. Schmitt Glaeser, *Grundgesetz und Europarecht als Elemente Europäischen Vergassungsrechts* (Duncker & Humblot, 1996); D. Buchwald, “Zur Rechtsstaatlichkeit der Europäischen Union”, (1998) *Der Staat* 189. This position is also adopted by Carpano, *supra* n. 27, p. 257.

¹⁵⁹ Not surprisingly, the increased scholarly interest in the past decade on the “constitutionalization” of international law has been followed by a substantial number of studies questioning the applicability of the

EU's strong and explicit emphasis on the rule of law might explain, for instance, the 2005 statutory recognition of the rule of law as an *existing* constitutional principle in the United Kingdom.

From a legitimacy point of view, Article 6(1) TEU represents a positive development in the sense that European citizens can only but welcome the explicit linkage of the EU's constitutional system with the key tenets of Western constitutionalism. In the age of globalization and the serious challenges to the democratic legitimacy of the nation state this phenomenon has raised,¹⁶⁰ as observed by Tridimas, this “enshrinement of values in constitutional texts seeks to achieve protection, legitimacy, legal certainty and historical continuity. At the heart of this new European constitutionalism lies an aspiration that a new social and political order can be attained and that the transfer of powers to supra-national organizations is acceptable provided that it is accompanied by shared commitment to abstract principles imbued in liberal ideals.”¹⁶¹ Advocate General Poiares Maduro recently expressed a similar point of view:

Article 6 TEU expresses the respect due to national constitutional values. It also indicates how best to prevent any real conflict with them, in particular by anchoring the constitutional foundations of the European Union in the constitutional principles common to the Member States. Through this provision the Member States are reassured that the law of the European Union will not threaten the fundamental values of their constitutions. At the same time, however, they have transferred to the Court of Justice the task of protecting those values within the scope of Community law.¹⁶²

While it would be interesting to also address the question of whether the foundational principles mentioned in Article 6(1) TEU could help forge, in practice, a common European identity,¹⁶³ it may be sufficient here to stress that the EU, in giving emphasis to

rule of law at the international level. For a particularly instructive overview of this growing body of literature and the argument that only a formal conception of the rule of law must be “externalized” on the international plane, see S. Beaulac, “The Rule of Law in International Law Today” in G. Palombella and N. Walker (eds.), *Relocating the Rule of Law* (Hart, 2008), p. 197.

¹⁶⁰ See e.g. A. Hurrelmann, S. Schneider and J. Steffek (ed.), *Legitimacy in an Age of Global Politics* (Palgrave Macmillan, 2008).

¹⁶¹ Tridimas, *supra* n. 43, p. 12.

¹⁶² Opinion of AG Poiares Maduro in Case C-127/07 *Arcelor* [2008] nyr, para. 16. The Advocate General further interestingly noted that the French *Conseil d'Etat* “is correct in assuming that the fundamental values of its constitution and those of the Community legal order are identical.” Yet no evidence is offered to substantiate this claim.

¹⁶³ It has been said that in the United States, “[r]espect for the Rule of Law is central to our political and rhetorical traditions, possibly even to our sense of national identity,” Fallon, *supra* n. 74, p. 3. In the EU, the rule of law has long been formally identified as one of the “fundamental elements of the European Identity,” *Declaration on the European Identity* by the Nine Foreign Ministers on 14 December 1973 in Copenhagen, Bull. EC, December 1973, No. 12, p. 118. In the last decade, Habermas has proposed to strengthen EU's legitimacy by promoting a sense of European “constitutional patriotism.” In other words, social cohesion, as far as the EU is concerned, should be mostly derived from an attachment to the fundamental and abstract values of this polity, as embodied in the EU's “Constitution,” and from the right to participate in the governing of the polity. In practice, it is less certain whether the principles/values mentioned in Article 6(1) TEU can be successfully relied upon to create a genuine sense of Europeaness. While one may agree that the EU cannot build its identity on some ethno-cultural criteria, any European sense of belonging, if exclusively based on principles such as the rule of law or democracy, is likely to continue to remain less developed than the “thick” sense of collective identity one can find in national

these abstract “ideals,” is not particularly innovative. A more remarkable aspect of the enshrinement of the rule of law into the EU’s founding treaties is that it is hardly ever mentioned as a *stand alone principle*. In most cases, the principles of liberty, democracy and respect for fundamental rights immediately accompany the rule of law.¹⁶⁴ This is the right approach. While the rule of law is traditionally considered “one of the most important political ideals of our time,”¹⁶⁵ it is obviously not the only one. Indeed, it “is one of a cluster of ideals constitutive of modern political morality; the others are human rights, democracy, and perhaps also the principles of free market economy.”¹⁶⁶ Those faithful to a strict “formal” conception of the rule of law have nevertheless controversially argued that it should not be confused with democracy, justice, equality, etc. and that it can even be “compatible with gross violations of human rights.”¹⁶⁷ The EU offers a striking counter-model to this doctrinal approach and in doing so, more accurately reflects the positive law of most if not all European countries.

In EU constitutional law, the rule of law is rightly understood as sharing a consubstantial, one may say organic, link with the other foundational principles mentioned in Article 6(1) TEU.¹⁶⁸ This makes it difficult to assess the rule of law, as a constitutional principle of the EU, in light of the traditional – yet largely artificial – theoretical divide between formal and substantive approaches, especially if one wrongly believes that formal and substantive features of the rule of law are mutually exclusive. Indeed, the EU offers a mixed model. By distinguishing the rule of law from other foundational principles such as democracy or fundamental rights, Article 6(1) TEU may seem to suggest the adoption of a narrow and predominantly formal understanding of the rule of law (i.e. judicial review, principle of legality, hierarchy of norms, etc.).¹⁶⁹ Such an interpretation, however, would not do full justice to the fact that the EU’s “Constitution,” viewed as whole, strongly indicates that all the principles referred to in Article 6(1) TEU are interdependent and must be construed in light of each other. The EU is founded on all of them simultaneously and violation of any of them should necessarily mean that the others cannot be satisfactorily complied with. This reading seems to be validated by Articles 7 and 49 TEU. It also appears to have gained ground in the case law of Court of Justice as

democracies. For further discussion, see M. Kumm, “Why Europeans will not embrace constitutional patriotism” (2008) 6 *International Journal of Constitutional Law* 117.

¹⁶⁴ This appears to reflect an old tradition. See e.g. the 1973 *Declaration on the European Identity* previously cited: “Sharing as they do the same attitudes to life, based on a determination to build a society which measures up to the needs of the individual, [the nine EC Member States] are determined to defend the principles of representative democracy, of the rule of law, of social justice — which is the ultimate goal of economic progress — and of respect for human rights.”

¹⁶⁵ J. Waldron, “The Concept and the Rule of Law” (2008) 43 *Georgia Law Review* 1, p. 3.

¹⁶⁶ *Ibid.*

¹⁶⁷ Raz, *supra* n. 88, p. 221.

¹⁶⁸ One may therefore regret that “indivisible” does not precede the list of principles enumerated by this provision.

¹⁶⁹ Recalling the arguments of Raz, Arnall welcomes this formal understanding. While he acknowledges that “[t]he dividing-line between the formal and the substantive conception of the rule of law can be difficult to draw, not least because some of the technical elements of the rule of law are regarded as fundamental rights,” he favors a formal conception for the EU on the grounds that such a conception “enables the rule of law to be given a meaning which is distinct from, though complementary to, that of the other principles on which the Union is said to be founded.” Arnall, *supra* n. 15, p. 254.

will be shown below. Although it is true that the Court's initial understanding was predominantly formal and procedural in nature, an evolution towards a more expansive and substantive understanding can be detected.¹⁷⁰

4.1.2 *The Rule of Law as an Umbrella Principle with Formal and Substantive Components*

While Article 6(1) TEU clearly stresses the fundamental character of the rule of law as one of the fundamental constitutional principles on which the EU is founded, it does not attempt to define it. Scholars often regret this lack of a formal definition,¹⁷¹ but it seems excessive to criticize, on this basis, the Treaty reference to the rule of law. This lack of definition is far from unprecedented and does not necessarily mean that the EU rule of law is necessarily and unjustifiably vague. Where national constitutions explicitly refer to the rule of law, they do not specify what this principle precisely and exhaustively entails. A similar diagnosis can be made in relation to constitutional courts. This general reluctance to give a precise meaning to the rule of law may be a wise choice considering the polysemic and contested nature of this principle. In the EU context, the absence of any definition has had the consequence of allowing or rather obliging the EU courts to flesh the principle out. The most remarkable aspect of the Court of Justice's case law post *Les Verts* lies in the broader interpretation of the rule of law. This is to be welcomed as the rule of law should be understood as an "umbrella principle"¹⁷² with formal and substantives components or sub-principles.¹⁷³ In reflecting this understanding, the Court's case law is not particularly innovative but on the contrary, replicates to a great extent national constitutional experiences and in particular, the German one. Before listing the legal sub-principles that the EU rule of law, as outlined by the Court, entails, it may be useful to briefly explain the nature of an umbrella principle.

Following *Les Verts*, the formula "Community based on the rule of law" was rightly described as a "principle" in 1990,¹⁷⁴ a few years before Article 6(1) TEU made explicit that the rule of law, legally speaking, is neither a mere political ideal nor a rule of law. It is an umbrella constitutional principle from which more concrete legal principles can be

¹⁷⁰ Space precludes what would certainly be an interesting comparison with the European Court of Human Rights' understanding of the rule of law.

¹⁷¹ See e.g. Arnulf, *supra* n. 15, p. 240: "What is less clear is what it means in a Union context, any attempt of a formal definition having been eschewed."

¹⁷² See G. Marshall, "The Rule of Law. Its Meaning, Scope and Problems" (1993) 24 *Cahiers de philosophie politique et juridique* 43, p. 43: Both the rule of law and the separation of powers "are umbrella terms or labels for a range of institutional provisions whose various elements have to be assembled in the shape of numerous more detailed rules." See also Grote, *supra* n. 70, p. 305: the rule of law is law is characterized by its programmatic character which means that it "comprises a whole set of principles which govern the morality of the exercise of public authority in a society at a certain time in its history"; Fallon, *supra* n. 74, p. 6: "the Rule of Law is best conceived as comprising multiple strands, including values and considerations."

¹⁷³ D. Simon, "Y a-t-il des principes généraux du droit communautaire" (1991) 14 *Droits* 73. Simon offers an interesting alternative to the traditional material/substantive divide by categorizing these sub-principles around two main ideas, "the right to rights" and "the right to a judge."

¹⁷⁴ See e.g. Case C-2/88 *Zwartveld* [1990] ECR I-3365.

derived with the aim of subjecting the exercise of public power to some “limitations”.¹⁷⁵ It is not, however, a neutral principle. As clearly indicated in *Les Verts*, the central “moral” purpose of the EU rule of law is to guarantee the existence of a legal order where natural and legal persons subject to this order, as a matter of principle, are judicially protected against any eventual arbitrary or unlawful exercise of Community/Union power. To protect, in practice, the subjects of this “new” legal order, the Court initially focused on guaranteeing formal/procedural principles, the most important of which are the principle of judicial review and the right to an effective remedy, the principle of legal certainty, the principle of legitimate expectations and the principle of proportionality. But the EU rule of law does not simply demand compliance with a set of formal principles. In fact, in most if not all European constitutional traditions, the rule of law is generally understood by courts as requiring that the exercise of public power be subject to procedural *as well as* substantive limitations.¹⁷⁶ As a consequence, the direct and explicit linkage, which has been made by the Court of Justice, to the general principle of fundamental rights protection since the *UPA* judgment of 2002, is neither surprising nor objectionable:

The European Community is, however, a community based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with the Treaty and with the general principles of law which include fundamental rights. Individuals are therefore entitled to effective judicial protection of the rights they derive from the Community legal order ...¹⁷⁷

The Court’s first explicit reference to fundamental rights makes clear at last that the EU rule of law does not merely encompass compliance with formal and procedural requirements. It has a substantive dimension in the sense that the rule of law also demands, according to the Court, judicial remedies and processes to protect procedural as well as substantive fundamental rights. To further argue that the *UPA* case also shows that the Court views fundamental rights, not only as a component of the rule of law but as its *foundation* may nonetheless be questioned. Indeed, there is no express indication that the Court understands judicial review as being ontologically and primarily justified by the need to protect fundamental rights. Rather, the Court merely indicates that respect for fundamental rights is of particular importance when it has to review the “constitutionality” of EU institutions’ actions. This interpretation is perfectly reasonable in light of Article 6(1) TEU and illustrates the existence of a consubstantial link between the principles of the rule of law and of respect for fundamental rights. One may nevertheless concede that while not being a formal foundation of the rule of law, the modern core theoretical or philosophical purpose of this concept is the protect the

¹⁷⁵ This point had been made early by Lord Mackenzie Stuart, then the British judge at the Court of Justice: The Community rests on the rule of law as it is a legal system “founded on the principles that 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,” Lord Mackenzie Stuart, *The European Communities and the Rule of Law* (The Hamlyn Lectures 29th Series, Stevens, 1977), p. 3.

¹⁷⁶ See Tridimas, *supra* n. 43, p. 4. Tridimas explains that the concept of community based on the rule of law is akin to the *Rechtsstaat* principle but the English rule of law and the French *Etat de droit* could be similarly understood. This is not to say that all EU countries possess an identical catalogue of “limitations” and even when they do, national courts may diversely interpret and apply them as long as the problem at issue is not governed by EU law.

¹⁷⁷ Case C-50/00 P *UPA* [2002] ECR I-6677, paras. 38-39.

primacy and dignity of the individual and therefore his/her fundamental rights.¹⁷⁸ In Germany, this has led to a rights-based interpretation of the *Rechtsstaat* principle and the legally enforceable “sub-principles” it encompasses. The Court of Justice’s recent series of judgments on the EU “terror list” are worthy of note in this respect as they appear to construct more explicitly the EU “Constitution” as an “objective order of values”¹⁷⁹ where the principle of the rule of law and its components must always be interpreted through “fundamental rights lenses,” i.e. they must be interpreted and applied with a view to guaranteeing the most effective protection of these rights:

[T]he review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a Community based on the rule of law, of a *constitutional guarantee* [our emphasis] stemming from the EC Treaty as an autonomous legal system ...¹⁸⁰

It follows that one important, if not the most important, purpose of judicial review, according to the Court, lies in the protection of natural and legal persons’ fundamental rights. This means, for instance, that the interpretation and application of the formal components of the EU rule of law must permanently be guided by this purpose and that “strict judicial scrutiny” should be the rule when public interferences with individual fundamental rights are at issue.¹⁸¹

While the Court’s “deepening” of the rule of law is a positive development, its traditional formula since *Les Verts* (the EC is a community based on the rule of law) would benefit from some adjustment to make the substantive dimension of the principle more explicit.

¹⁷⁸ This is not to deny, however, that the history of the rule of law runs long before the protection of individual rights. Indeed, its initial primary orientation was the Sovereign (or public authorities) operate within legal restraints. While one set of those restraints have focused on protecting individuals’ dignity, restraining public action has also long been justified by the sole need to guarantee predictability and certainty. This, obviously, is also of importance for individuals as the rule of law, in this sense, protects individuals’ freedom and security of action within rules known in advance.

¹⁷⁹ For the German Constitutional Court, the Basic Law does not merely protect substantive rights it also frames an objective order of values. In other words, the values at the heart of the German constitutional order (e.g. the choice for a liberal, democratic and social federal state) “have an independent reality under the Constitution” and impose “a positive obligation on the state to ensure that [they] become an integral part of the general legal order,” Kommers, *supra* n. 116, p. 47.

¹⁸⁰ Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat* [2008] nyr, para. 316.

¹⁸¹ In the *Kadi* case, the British government and the Commission argued that the Court of Justice should exercise minimal review in respect of Community acts aimed at preventing international terrorism. Recalling the Court’s duty to preserve the rule of law, AG Poiares Maduro disagreed with this argument and offered the view that the Court need not apply less stringent or stricter standards of review to protect fundamental rights when the public interference is motivated by the legitimate objective of preventing international terrorism. Rather, he went on to suggest, the Court must balance the different interests on a case by case basis under normal standards of judicial review. See AG Poiares Maduro’s Opinion in Case C-402/05 P *Kadi* [2008] nyr, paras. 45-46. Although this is a reasonable approach, to better reflect the foundational value of the principle of respect with fundamental rights, it would be preferable for the Court to formally treat direct restrictions on fundamental rights as exceptions that need to be effectively controlled and strictly justified. Only when the Court examines the proportionality of the public interference with the fundamental rights of the applicant should the nature and legitimacy of the public objective pursued by the public authorities play a role and should be assessed on a case by case basis.

My suggestion is for the Court to use the likely entry into force of the Lisbon Treaty as the perfect opportunity to revise its formula along those lines:

The European Union is a Union¹⁸² founded on the values of human dignity, freedom, equality and solidarity¹⁸³ and governed *inter alia* by the principle¹⁸⁴ of the rule of law [*Rechtsstaat, Etat de droit*, etc.¹⁸⁵], which primarily means that its institutions are subject to judicial review of the compatibility of their acts, save narrowly construed exceptions, in order to guarantee their compatibility with the constitutional order created by the EU's founding treaties and in particular the whole range of fundamental rights it protects.

Regardless of whether one agrees with this suggestion, the most important point here is that the Court of Justice has refined its understanding of the rule of law and its constitutive components since *Les Verts*. A move towards a more “material” and “demanding” conception can be detected.¹⁸⁶ This is to be welcomed and accurately reflects the subsequent enshrinement of the rule of law as one of the foundational principles on which the EU is founded. This codification of the rule of law legitimizes judicial references made to it and would seem to justify a more explicit linkage of the rule of law with the other foundational principles with which it is invariably associated. Yet and somewhat intriguingly, the Court of Justice has continued to refer to the rule of law somewhat parsimoniously and has not *directly* relied on it to regulate the exercise of EU power. This reluctance to apply the rule of law as *a* rule of law is not, however, uncommon.

4.1.3 *The Rule of Law as a Rule of Law*

¹⁸² According to Article 1 TEU as amended by the Lisbon Treaty, “The Union shall replace and succeed the European Community.” Any reference to a “community” would therefore be legally awkward unless it is made clear it is meant as a substitute for polity.

¹⁸³ Rather than emulating the “ugly” phrasing and excessive length of the future Article 2 TEU (see *supra* section ...), the Court would be well inspired to follow the Preamble to the EU Charter of Fundamental Rights, which nicely and concisely states that “the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law.”

¹⁸⁴ As amended by the Lisbon Treaty, the EU's founding Treaties simultaneously and confusingly describe the rule of law both as a value (see e.g. Article 2 TEU) and as a principle (see e.g. Article 21 TEU). The TEU's Preamble also first describes the rule of law as one of the universal values at the heart of Europe's inheritance before describing it as a principle the Member States confirm their attachment to. So another alternative for the Court is to solely refer to the rule of law as a value governing the Union and for the sake of simplicity, make no mention of the Charter's Preamble distinction between values and principles.

¹⁸⁵ While the reasons behind the Court's decision to use unprecedented terms in languages other than English (*Rechtsgemeinschaft, communauté de droit*, etc.) might have been historically justified, it is time for the Court to take into account the formidable Treaty changes since *Les Verts* and avoid unnecessary and confusing terminological inflation. This phrasing (“...governed by the principle...”) would also present the pragmatic advantage of not radically differing from the structure of the German/French translation for instance.

¹⁸⁶ Carpano, *supra* n. 27, pp. 259-260. Contrary to the European Court of Human Rights, the principle of the rule of law is not (yet?) explicitly linked to the principle of democracy, on which the EU is also said to be founded. The case of *Les Verts* may nonetheless be cited as an example where democratic concerns implicitly influence how the Court understands what the rule of law entails in the Community legal order.

The normative added-value of the rule of law, as a constitutional principle of EU law, has been challenged. For some critics, either when it is mentioned at Article 6(1) TEU or relied on by the Court of Justice, the rule of law is a mere umbrella term whose unique function is, from a legal point of view, to synthesize a series of sub-principles in an attractive and valorizing formula.¹⁸⁷ This criticism is not entirely warranted. While scholars and the Court, the latter not always explicitly, have invoked the notion of community based on the rule of law to justify the “discovery” of a set of fully justiciable general principles of law, it would be wrong to conclude that the rule of law’s alleged lack of justiciability necessarily implies a complete lack of normative effect. The rule of law, as a “structuring principle,” can in particular guide judicial interpretation. Before looking at the rule of law’s interpretative function, the extent of its justiciable nature should be further explored.

It would be difficult to deny that the Court of Justice does not view the rule of law as a rule of law actionable before a court.¹⁸⁸ For instance, parties in legal proceedings cannot *directly* rely on the rule of law to seek annulment of the acts of EU institutions.¹⁸⁹ The reason is that the rule of law is not one of the principles of judicial review but rather provides the constitutional foundation for judicial review at EU level. This explains the relatively minor number of instances where the rule of law has played a *direct* role with respect to the outcome of the cases before the EU courts, even where the Court of Justice or the Court of First Instance have been invited to do so by the private parties’ counsels or by the Advocates General.¹⁹⁰ This finding is not entirely surprising as the rule of law

¹⁸⁷ Heuschling, *supra* n. 107, para. 312, p. 304.

¹⁸⁸ AG Mengozzi did once describe the principles of respect for human rights and of the rule of law not only as foundational values of the Union but also as criteria for assessing the legality of the action of its institutions and of the Member States in the matters for which the Union has jurisdiction. See Opinion of AG Mengozzi in Case C-354/04 P *Gestoras Pro Amnistía et al. v. Council* [2007] ECR I-1579, para. 79. It is not clear, however, what he meant by “criteria.”

¹⁸⁹ As is well known, in annulment proceedings (Article 230 EC) applicants may rely on one or more of these four grounds: lack of power; misuse of powers; infringement of an essential procedural requirement; infringement of the TEC or any rule of law relating to its application. This last ground notably includes the general principles of law.

¹⁹⁰ While Advocates General and the parties before the EU courts regularly refer to the notion of “Community based on the rule of law” (*Rechtsgemeinschaft/Communauté de droit*), the EU courts appear somewhat reluctant to explicitly rely on this notion to justify a particular outcome. See e.g. R. Hofmann, “Rechtsstaatsprinzip und Europäisches Gemeinschaft” in R. Hofmann et al. (eds), *Rechtsstaatlichkeit in Europa* (C.F. Müller Verlag, 1996), p. 321. In his overview of the EU courts’ case law (from *Les Verts* until the end of 2002), Carpano, *supra* n. 27, p. 298, found 54 cases where the courts refer to the notion of “Community based on the rule of law” yet in less than 10 cases, he points out, had this principle a direct influence on the outcome of the proceedings: See Case 294/83 *Les Verts* [1986] ECR 1357; Order in Case C-2/88 *Zwartveld and Others* [1990] ECR I-3365; Opinion 1/91 [1991] ECR I-6079; Case C-314/91 *Weber* [1993] ECR I-1093; Joined Cases T-222/99, T-327/99 and T-329/99 *Martínez et al. v. European Parliament* [2001] ECR II-2823; Case T-177/01 *Jégo-Quéré v Commission* [2002] ECR II-2365; Case C-50/00 P *UPA* [2002] ECR I-6677. As for the number of references to the principle of the rule of law (*Rechtsstaat/Etat de droit*), a similar diagnosis is in order. References are almost exclusively to be found in the opinions of Advocates General and in cases involving German courts or applicants. It is also worth noting that references to the principle of the rule of law had even less impact on the outcomes of the relevant cases (19 cases are identified by Carpano, *supra* n. 27, p. 270) than references to the notion of community based on the rule of law. See e.g. Case 45/69 *Boehringer Mannheim c. Commission* [1970] ECR 769: For the applicant, the action of the Commission is “incompatible with the principles of the rule

is, above all, a foundational principle with an umbrella nature. Therefore, it is not an ideal standard for day-to-day judicial work. Indeed, if the rule of law were treated as a rule of law, it would potentially run afoul of its own requirements for the simple reason that the rule of law itself is not entirely clear or certain in meaning. This is why, not unlike national judicial practices, EU judges have been more naturally inclined to rely on more concrete and less open-ended principles to scrutinize public authorities' measures. The prudent use of the principle of the rule of law also presents the advantage of being less likely to opening up a debate on Europe's judicial activism. This is not to say that the rule of law is not a legal principle or that it completely lacks legal effect.¹⁹¹ As a fundamental proposition of law which underlies the European legal order, the rule of law can be used both as a source from which more narrowly defined or concrete principles can be derived, and as a constitutional norm which should guide the interpretation of other constitutional and infra-constitutional norms.

of law" (para. 16) but the Court does not directly address the argument; Case 182/80 *Gauff v. Commission* [1982] ECR 799: The applicant contends that the Commission failed to hear her during disciplinary proceedings in violation of "the requirement, inherent in the rule of law, of the right to a hearing" (para. 7) but again the Court deals with this point without explicating relying on the rule of law; Case C-221/97 P *Schröder et al. v. Commission* [1998] ECR I-8255: The applicants submit that the Commission's action infringes "the principle that in a State governed by the rule of law the law must be clearly defined" (para. 41); Case T-54/99 *max.mobil Telekommunikation v. Commission* [2002] II-313: On its own motion, the Court of First Instance describes both the right to sound administration and judicial review as two of the general principles "that are observed in a State governed by the rule of law and are common to the constitutional traditions of the Member States" (paras. 48 and 57). Our own review of the case law post *UPA* (C-50/00 P [2002] ECR I-6677) indicates an increasing number of references to the rule of law. Yet it is important to distinguish between the cases referring to the notion of community based on the rule (24 cases), and the ones referring to the principle of a state or society governed by the rule of law (13 cases), to the principle or principles of the rule of law (14 cases), and finally, to the rule of law as enshrined in Article 6(1) TEU (6 cases). Remarkably, in most cases (40 out of a total of 57), references to the rule of law originate from the parties – private applicants, the Member States or EU institutions – in the context of annulment proceedings and yet the EU courts generally abstain from making any explicit mention of the rule of law when dealing with the parties' arguments. In a minority of cases, however, the EU courts recall that the Community/Union is based on the rule of law before indicating that the legal norms at issue will be interpreted in light of this principle. In practice, the EU courts often seem to refer to the rule of law to justify, some may say, legitimize, the scope of their power of judicial review. For more details, see Annex: References to "the rule of law" in the case law of the EU courts (Sept. 2002- Dec. 2008).

¹⁹¹ The fact that the jurisdiction of the EU courts is still formally limited as regards Article 6(1) TEU is of no practical importance. According to the awkwardly worded Article 46 TEU, the powers of the Court of Justice and the exercise of those powers cannot apply to Article 6(1) TEU with the exception of the principle of respect with fundamental rights. This does not mean that the rule of law is not a legally binding principle but implies that the *judicial* enforcement of the rule of law *on the basis* of this provision is excluded. This rather complex situation might explain why the Court of Justice has continued to describe the EC as a community based on the rule of law rather than one founded on the principle of the rule of law as stated by Article 6(1) TEU. Yet Article 46 TEU never precluded the Court from referring to Article 6(1) TEU. To our knowledge, only once did the Court clearly do so but this was in the context of proceedings instituted against an act adopted under Article 34 TEU. See Case C-354/04 P *Gestoras Pro Amnistía et al. v. Council* [2007] ECR I-1579: "As is clear from Art. 6 EU, the Union is founded on the principle of the rule of law and it respects fundamental rights as general principles of Community law" (para. 51). Furthermore, the Court has always had the option to protect and apply the principle of the rule of law as a fundamental principle of the *Community* legal order. The fact that the Lisbon Treaty repeals Article 46 TEU is likely to lead the Court to rely more regularly and directly on Article 6(1) TEU (to be known as Article 2 TEU when the Lisbon Treaty enters into force) to give more textual grounding to, and eventually revise, its traditional description of the EC as a community based on the rule of law.

As previously noted, the Court of Justice has developed a rich body of jurisprudence on the so-called general principles of law. While the most important ones have already been identified, their modus operandi and their relationship have not been fully explained. The general principles of Community law constitute, similarly to Treaty provisions, a primary source of Community law, i.e. they are located at the top of the Community's hierarchy of norms. Their main purpose is to operate as grounds of review, i.e. Community courts can invalidate EC "legislation" and administrative measures (and in some circumstances, national measures) when they conflict with the general principles of law. Historically, most of these general principles were drawn by the Court of Justice, before the judgment in *Les Verts*, from the laws of the Member States,¹⁹² and therefore were not explicitly linked to the principle of the rule of law. The case law post *Les Verts* is, regrettably, not much more explicit. This is unfortunate, conceptually speaking, as the general principles share an obvious connection with the rule of law.¹⁹³ Indeed, they are "concrete" emanations of the rule of law as their primary purpose is to regulate public power according to material and substantive standards. The rule of law can therefore be used to legitimize and bring coherence to the judicial "discovery" of these plainly justiciable general principles. The Court of First Instance, on one occasion at least, made explicit the existence of such a relationship by referring to the right to sound administration and the principle of judicial review as "general principles that are observed in a State governed by the rule of law and are common to the constitutional traditions of the Member States."¹⁹⁴ This innovative – and welcome – wording, which, to my knowledge, the Court of Justice has yet to adopt, conveniently relays two important ideas previously discussed: (i) the rule of law, at the national and EU levels, must primarily be viewed as a foundational principle of constitutional value; (ii) the general principles of law protected under Community law are inherent to any polity governed by the rule of law.

The rule of law also functions as a key interpretative guide and this is the second important normative function this principle fulfills in the EU context.¹⁹⁵ As one of the few constitutional principles which has a defining character and on which all modern and liberal political systems are expected to be based, the rule of law is in a "preferred position" when the Court must interpret the EU's constitutional charter. The rule of law

¹⁹² This judicial process of extrapolating unwritten general principles of law is not unheard of at the national level. For instance, the French *Conseil d'Etat*, since the early twentieth century, has regularly derived a series of "general principles of law" from some undefined ideals or traditions. These principles were (and still are) mostly used to protect citizens against arbitrary acts of the executive and public officials. Additional important remark as regards the EU, a general principle of law does not have to be recognized in the laws of all the Member States. The Court of Justice may simply decide to borrow a principle which is implicitly or explicitly guaranteed in a simple majority of the Member States and work on the basis of the most sophisticated national construction. The German legal tradition has proved particularly influential in this respect.

¹⁹³ See e.g. Simon, *supra* n. 173, p. 82 (the general principles of law in the Community legal order are not some occasional rules guaranteed by the Courts for circumstantial reasons but rather express the requirements of the *Rechtsstaatlichkeit*); Bogdandy, *supra* n. 22, p. 18 (the rule of law contains numerous sub-principles which are known in the EU legal order as general principles of law).

¹⁹⁴ Case T-54/99 *Max.mobil Telekommunikation* [2002] ECR II-313, paras. 48 and 57. The appeal judgment makes no reference to the rule of law: C-141/02 P [2005] I-1283.

¹⁹⁵ This is not to say that general principles of law cannot be relied on to interpret EC law.

may not be fully justiciable and does not have the nature of a principle formally “superior” to other EU Treaty norms.¹⁹⁶ Yet as a “structuring principle”¹⁹⁷ or “primary constitutional principle,”¹⁹⁸ it must always inform the interpretation of other constitutional and infra-constitutional norms.¹⁹⁹ To put it differently, the rule of law, alongside the principles of democracy, liberty and fundamental rights protection, represents a foundational value of the EU legal order that the Court of Justice and the Court of First Instance must always take into account in their day-to-day adjudicative role with a view of strengthening concrete compliance with it. In practice, and in most cases, the Courts have rightly referred to the notion of “community based on the rule of law” to justify a dynamic and, at times, *contra legem* reading of “restrictive” Treaty provisions, i.e. provisions which may be viewed as constituting exceptions to the rule of law. Judicial references to the rule of law have also been made to justify the exercise of a strict degree of judicial scrutiny over EU measures.²⁰⁰

4.2. Distinctive Features

¹⁹⁶ The existence of an informal hierarchy among constitutional norms has been regularly debated in most European countries. Even more controversial is the question of the “supra-constitutional” nature of some principles or rights. It is not our intention to suggest that the rule of law is, formally speaking, a superior constitutional norm or that it should be treated as one.

¹⁹⁷ On this notion, see e.g. Simon, *supra* n. 34, p. 86, para. 55.

¹⁹⁸ With respect to the European Convention on Human Rights (ECHR), Greer distinguishes between primary and secondary constitutional principles and includes among his primary principles, the principles of effective protection of Convention rights, of democracy, and of legality/rule of law. See S. Greer, *The European Convention on Human Rights. Achievements, Problems and Prospects* (Cambridge University Press, 2006), pp. 195-203. Interestingly, this author suggests that the “remaining principles of interpretation” should be subordinate to these principles.

¹⁹⁹ The European Court of Human Rights speaks of “general principles” of interpretation but the idea is similar. When it comes to interpreting provisions of the ECHR, the core underlying values and principles of the Convention (the maintenance and further realization of human rights, freedom, democracy and the rule of law) play a key role. As regards the rule of law, it may worth mentioning what the European Court of Human Rights early held that “it would be a mistake” to see in the ECHR Preamble’s reference to the rule of law “a merely ‘more or less rhetorical reference’, devoid of relevance for those interpreting the Convention,” *Golder v. United Kingdom* (1975) A-18, para. 34. The Court has since regularly described the rule of law as one of the fundamental principles of a democratic society, a concept said to be inherent in all the Articles of the Convention and from which the whole Convention draws its inspiration. In practice, in order to protect and promote these values, the Court has adopted a dynamic interpretation of the rights protected under the Convention and restrictively interpreted the clauses enabling public authorities to limit the exercise of these rights.

²⁰⁰ In some but fortunately rare instances, the Court did not take the references it made to the rule of law “seriously” and hid behind its lack of authority to go against the letter of Treaty provisions to justify the status quo. See e.g. Case C-50/00 P *UPA v. Council* [2002] ECR I-6677. Judicial self-restraint is also obvious in Joined Cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01 *Philip Morris v. Commission* [2003] ECR II-1, para. 124: “Although it may seem desirable that individuals should have, in addition to the possibility of an action for damages, a remedy under which actions of the Community institutions liable to prejudice their interests but which do not amount to decisions may be prevented or brought to an end, it is clear that a remedy of that nature, which would necessarily involve the Community judicature issuing directions to the institutions, is not provided for by the Treaty. *It is not for the Community judicature to usurp the function of the founding authority of the Community in order to change the system of legal remedies and procedures established by the Treaty.*”

In the EU constitutional framework, the rule of law is used as a benchmark to assess the actions of its members and candidate countries and as a foreign policy objective. Viewed in light of national constitutional traditions, these features may seem quite original. Two caveats are nonetheless in order. The EU's supranational and dynamic character explains the first feature. While federal states may have constitutional clauses according to which their constitutive entities must comply with *inter alia* the rule of law, one of the EU's *raison d'être* is to expand and welcome more members. As a result, compliance with the rule of law is also a prior condition for EU membership. This largely explains why the rule of law is one of the key objectives of the EU's "foreign policy." This does not obviously mean that its Member States cannot or do not seek to promote compliance with this principle as part of their own foreign policies. As a supranational and goal-oriented organization with conferred powers, the EU naturally possesses a complex and much more detailed rulebook than most countries. In other words, unlike most national constitutions, the EU's "Constitution" includes a long description of its policies and exhaustive lists of the objectives it must pursue. To that extent, it is not surprising that the rule of law was also enshrined in the EU's rulebook as a foreign policy objective but in this context, the rule of law, arguably, completely ceases to operate as a constitutional principle. In other words, the rule of law as a foreign policy objective should fall outside the scope of this paper and as a result, only brief developments will be offered here.

4.2.1 The Rule of Law as a Politico-Legal Benchmark

By comparison to other national practices, the use of the rule of law by the EU – along with liberty, democracy and respect for fundamental rights – as a benchmark or standard to assess and eventually sanction the actions of its current and prospective members is rather unique. This aspect, however, is not entirely unprecedented on the international plane. To mention a single example, the Council of Europe possesses a formal mechanism under which any of its 47 members can be suspended from the organization in the context where a "serious" violation of the principles of the rule of law and respect for fundamental rights occurs.²⁰¹ EU mechanisms nonetheless appear both more ambitious and sophisticated.

With respect to current EU Member States, Article 7 TEU enables the Council to take measures against any country guilty of "a serious and persistent breach" of the principles mentioned in Article 6(1) TEU. Preventive sanctions are also possible in situations where there is "a clear risk of a serious breach."²⁰² With respect to candidate countries, Article

²⁰¹ See Article 8 of the 1949 Statute of the Council of Europe: "Any member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw..." According to Article 3 of the same Statute: "Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms..."

²⁰² See also *supra* Section 2. For further analysis, see e.g. M. Nowal, "Human Rights 'Conditionality' in Relation to Entry to, and full Participation to the EU" in P. Alston (ed.), *The European Union and Human Rights* (Oxford University Press, 1999), p. 687; European Commission, *Communication on Article 7 of the Treaty on European Union. Respect for and promotion of the values on which the Union is founded*, COM(2003) 606 final, 15 October 2003.

49 TEU provides that any European State wishing to become a member of the Union must respect the principles on which it is founded.

A remarkable aspect of these two provisions is that they confirm the interdependent nature of the EU's foundational principles. Although the awkward wording of Article 7 TEU theoretically enables EU institutions to sanction an individual Member State for seriously and persistently violating only one of the four principles mentioned in Article 6(1), subsequent attempts at implementing this provision have indicated that these principles should be understood as being interdependent.²⁰³ Furthermore, as amended by the Lisbon Treaty, Article 7 TEU clearly indicates that these principles are to be taken together: The Council may either determine that there is a clear risk of a serious breach by a Member State, or the existence of a serious and persistent breach by a Member State, of “*the*” values (and not “of principles”) referred to in Article 2 TEU (currently Article 6(1) TEU).

This debate may nevertheless be relatively insignificant for several reasons. Firstly, the fact that there must be a *clear* risk or that the actual breach must be simultaneously *serious* and *persistent*, indicate that the thresholds for activating Article 7 TEU will be hard to satisfy. Any implementation of this provision is further circumscribed by demanding voting thresholds and the Council's discretionary power to sanction the relevant Member State.²⁰⁴ Secondly, the contested and “umbrella” nature of all these principles and the lack of any explicit Treaty definition call for a political judgment, rather than a legal one, to establish whether a current member or a candidate country is in breach of these principles. Finally, the question of sanctioning a Member State or agreeing to the admission of a new country is governed by broad political and geopolitical concerns which preclude any strict reading of Articles 7 and 49 TEU.²⁰⁵ Save a *coup*

²⁰³ See the “Wise Men Report” on Austria by M. Ahtisaari, J. Frowein, and M. Oreja, adopted in Paris on 8 September 2000. Following a governmental alliance in October 1999 between the mainstream right-wing political party and one representing extreme-right views, Austria's EU partners set up a “wise men” committee to investigate the political and human rights situation in Austria. They later concluded that Austria's record and commitment to common European values, including the rights of minorities, refugees and immigrants, was satisfactory if not better than most Member States.

²⁰⁴ The determination of whether there is a clear risk of a serious breach requires (1) a proposal by one third of the Member States, by the Parliament or the Commission; (2) the assent of the Parliament (i.e. a two-thirds majority of the votes cast, representing a majority of its members); (3) a majority of four fifths in the Council of Ministers. As for the determination of an existing serious and persistent violation, the same conditions apply with two differences: It is for the European Council, i.e. the Heads of State or Government of the Member States, to act and it must do so by unanimity. Even though abstentions do not prevent unanimity to be reached – the same is true obviously of the vote of the “guilty” Member State – the procedural requirements make it virtually impossible that the Council would ever be in a position to adopt sanctions (e.g. to suspend the voting rights of the Member State in the Council, see Article 309 TEC). Furthermore, the Council is actually under no legal obligation to do so even in a situation where it concludes that a Member State is in breach of Article 6(1) principles. This aspect clearly shows the predominant political nature of Article 7 TEU.

²⁰⁵ For an exhaustive and excellent overview of the role played by the principles of the rule of law and democracy in this enlargement process, see D. Kochenov, *EU Enlargement and the Failure of Conditionality* (Kluwer Law International, 2008). The author makes the interesting point that compliance with these principles may be almost impossible to measure, and that any judgment grounded in them will necessarily suffer from some subjectivity.

d'Etat or the *actual* implementation of xenophobic or theocratic policies, no Member State is likely to ever suffer the ignominy of being formally found in breach of the principles of liberty, democracy, respect for fundamental rights and the rule of law.²⁰⁶ The fact that the Court of Justice was given no direct role to play is a not so subtle indication that the Member States understand mechanisms as political ones whose value is essentially if not exclusively symbolic.

With respect to Article 7 TEU, the Court lacks the jurisdiction to review the legality of any decision determining that there is a clear risk of a breach of the Union's foundational principles or a serious and persistent breach of these principles. The Member States deliberately limited the Court's jurisdiction to review the "purely procedural stipulations in Article 7" to merely guarantee that the "guilty" Member State's defense rights are respected.²⁰⁷ In other words, Article 7 TEU mechanisms whose main purpose is to guarantee permanent compliance with the rule of law, among other principles, may paradoxically be criticized for not fully satisfying rule of law's requirements. In practice,

²⁰⁶ Unsurprisingly, Article 7 TEU has never been used to either sanction the existence of a serious breach or a simple potential risk of a breach. The Austrian episode of 2000 could have provided the perfect opportunity but Article 7 did not yet authorize suspension proceedings in the situation where there was "merely" a risk of breach. I should also note, in passing, that it was widely acknowledged afterwards that the actions of the "EU" (in fact, Austria EU's partners acted outside the EU framework) proved counterproductive and excited nationalistic passions in Austria. This seems to explain why the arrival of a similar governmental coalition in Italy in 2001 was quietly accepted by Italy's EU partners. It has now become clear that EU Member States may even participate to plainly illegal policies (i.e. the CIA-sponsored "rendition" program) or host secret "torture centers" without fearing any implementation of Article 7 TEU. To realize the (almost unbelievable) extent of the criminal activities undertaken by some "old" and "new" EU Member States in the name of fighting terrorism, see the two reports by Senator Marty on behalf of the Parliamentary Assembly of the Council of Europe: *Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states*, Report, Doc. 10957, 12 June 2006; *Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report*, Doc. 11302 rev., 11 June 2007. Diplomatic considerations and the widespread nature of European governments' collusion with the Bush administration, rather than the existence of demanding procedural thresholds, explains why Article 7 proved ineffective in these instances.

²⁰⁷ See Article 46(e) TEU. This provision has been slightly amended and made clearer by the Lisbon Treaty. The new Article 269 TFEU will read as follows: "The Court of Justice shall have jurisdiction to decide on the legality of an act adopted by the European Council or by the Council pursuant to Article 7 of the Treaty on European Union solely at the request of the Member State concerned by a determination of the European Council or of the Council and in respect solely of the procedural stipulations contained in that Article. Such a request must be made within one month from the date of such determination. The Court shall rule within one month from the date of the request."

A rather unusual 2004 case is also worth mentioning here as it brings some clarifications with respect the EU court's jurisdiction as regards Article 7 TEU. In Case T-337/03, *Bertelli Gálvez v. Commission* [2004] ECR II-1041, a Spanish lawyer, on the basis of his alleged prosecution by the Spanish judiciary following his criticism of the improper conduct of national courts, the applicant asked the Court of First Instance to declare that the Commission has failed to act in not investigating the serious breach by Spain of the principles mentioned in Article 6(1) TEU. Before concluding that it has no jurisdiction to adjudicate on the present action for failure to act brought by the applicant, the Court noted that the TEU "gives no jurisdiction to the Community judicature to determine whether the Community institutions have acted lawfully to ensure the respect by the Member States of the principles laid down under Article 6(1) EU or to adjudicate on the lawfulness of acts adopted on the basis of Article 7 EU, save in relation to questions concerning the procedural stipulations contained in that article, which the Court may address only at the request of the Member State concerned" (para. 15).

such a formal limitation may nonetheless appear rather superfluous as the Court of Justice, like any court of law, is simply not equipped to review the material merits of a Council decision concluding that there is a *systemic* risk of a breach or that an actual breach has occurred.²⁰⁸ By contrast, Article 49 TEU does not bar the Court from reviewing the application of this provision. The lack of any formal limitation on the Court's jurisdiction is nonetheless of little practical significance as fulfillment of the condition according to which all countries seeking to accede to the Union must respect its foundational principles or values, simply grants the candidate country the option to apply, not a right to accede to the EU. Were the European Parliament to reject a membership application on the ground that a candidate country does not satisfy, for instance, the principle of the rule of law, one cannot realistically expect the Court to review the material merits of such an eminently political determination.²⁰⁹

Their limitations and defects notwithstanding, Articles 7 and 49 TEU serve a useful purpose. While individual Member States or candidate countries cannot realistically fear respectively any formal sanction or the rejection of their membership application for violating the foundational principles on which the Union is based, national governments must always be ready to defend the legitimacy of their actions in light of principles they cannot individually set aside. In that regard, the rule of law fulfills a distinctive and useful purpose when compared to the uses made of this principle at the national level. Another original aspect of the EU rule of law is that it is referred to as a foreign policy objective.

4.2.2 The Rule of Law as a Foreign Policy Objective

Since the end of the Cold War, promotion of the rule of law has become a major and recurrent objective of the EU when it acts *externally*, and more precisely on the international scene. In this particular context, the rule of law, arguably, ceases to fulfill a constitutional function. As a policy objective, it does not impose legally-binding obligations on EU institutions but rather operates as a “soft” ideal that is supposed to broadly guide EU actors when they act in the international arena.²¹⁰ In the words of

²⁰⁸ It may be useful to note, although this may seem obvious, that the risk or breach identified must “go beyond specific situations and concern a more systematic problem.” See Commission, point 1.4.1. Accordingly, whenever individuals allege a breach of the principles mentioned at Article 6(1) TEU, normal procedures should be used, i.e. a case should be brought before the competent jurisdiction.

²⁰⁹ On this aspect, see Case 93/78 *Matteus v. Doego* [1978] ECR 2203 (the content of the legal conditions for admission of new Member States are to be determined not by the Court but by the current Member States and the applicant State). At the time, the relevant Treaty provision did not refer to any set of principles or values candidates countries were expected to comply with. In the current context, it might be a good idea for the Court of Justice to “borrow” the US political question doctrine according to which a controversy is non-justiciable when, for instance, there is “a lack of judicially discoverable and manageable standards for resolving it” or it is impossible for a court to decide “without an initial policy determination of a kind clearly for non-judicial discretion,” *Baker v. Carr*, 369 US 186 (1962), p. 217.

²¹⁰ This is made crystal-clear by new Article 21(1) and 21(2)(b) TEU, one of the general provisions dealing with the EU's external action: “The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect

Advocate General Mengozzi, in its external dimension, the rule of law is now a “value to be “exported” beyond the borders of the Union by means of persuasion, incentives and negotiation.”²¹¹

Technically speaking, one may distinguish between three areas where the rule of law is formally viewed as a “pure” policy objective rather than a politico-legal benchmark as in the case of the EU enlargement policy. The development and the consolidation of democracy and the rule of law is first mentioned as one of the EU’s foreign and security policy objectives,²¹² while the EC Treaty refers to the rule of law as one of the general objectives of the EC’s policy of development cooperation and as one of the EC’s policy in the area of economic, financial and technical cooperation measures with third countries.²¹³ The multiplication of Treaty provisions has, unsurprisingly, led to a proliferation of policy initiatives, instruments and norms. In practice, the external promotion of the rule of law can mostly be found “in clauses of agreements, as an objective of financial and technical assistance, as a key element of conditionality and as part of the Union’s developing conflict prevention and crisis management policies.”²¹⁴

Rather than exhaustively reviewing all these EU policies and the multiple references made to the rule of law, it appears more useful to stress two important aspects as regards the meaning and scope of the rule of law. Firstly, the rule of law is once again clearly linked to the principles – or values – of democratic government and human rights guarantees.²¹⁵ Indeed, these principles are so often intrinsically linked in practice that it appears impossible to clearly differentiate between them. This is reminiscent of our previous conclusion regarding the existence of a consubstantial link between these principles. EU legislation further demonstrates that the rule of law as a foreign policy objective of the EU goes beyond the formal approach favored by the followers of Raz, to mention one but eminent author, and includes substantive components as well.²¹⁶

Secondly, the rule of law is rarely subject to explicit definitions and when definitions are offered, they often lack consistency or rather they tend to focus on specific formal and/or substantive components of the rule of law. In this respect, one author has interestingly distinguished between three conceptions or models of the rule of law in EU external relations: the Co-operation model, the Development model and the Security and Defense

for the principles of the United Nations Charter and international law”; “The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to ... consolidate and support democracy, the rule of law, human rights and the principles of international law ...”

²¹¹ Opinion in Case C-354/04 P *Gestoras Pro Amnistía* [2007] ECR I-1579, para. 79.

²¹² Article 11(1) TEU.

²¹³ See Article 177(1) EC and Article 181(a)(1) EC respectively.

²¹⁴ M. Cremona, “The European Neighbourhood Policy: Legal and Institutional Issues,” *Center on Democracy, Development, and the Rule of Law Working Papers*, Stanford Institute for International Studies, no. 25, 2 November 2004, p. 10.

²¹⁵ See e.g. Council Common Position 98/350/CFSP on human rights, democratic principles the rule of law and good governance in Africa, OJ 1998 L 158/1.

²¹⁶ In Common Position 98/350/CFSP, Article 2(c) describes the rule of law as a principle “which permits citizens to defend their rights and which implies a legislative and judicial power giving full effect to human rights and fundamental freedoms and a fair, accessible and independent judicial system.”

model.²¹⁷ However, to criticize the EU for lacking a uniform and precise definition and suggest that the EU rule of law cannot, therefore, constitute a rule of law, seems to miss the point. National experiences have taught us that the rule of law, as a constitutional principle, is rarely defined. Furthermore, the rule of law is rarely if ever used as a rule of law but rather encompasses different components which can be used as legal standards by courts on a case by case basis. It fulfills a diverse set of constitutional functions and in particular, as a foundational value, it plays a legitimating role. The question of whether the rule of law constitutes a rule of law also appears misplaced when analyzing the impact of this principle as a foreign policy objective. The primary purpose of EU external policies in this context is to change the situation “on the ground,” i.e. to institutionalize compliance with the rule of law through diverse structural reforms with a view of guaranteeing a “better functioning” of the executive, legislature and judiciary. In this particular situation, it seems reasonable for EU institutions to emphasize compliance with some components of the rule of law to the detriment of others, in order to reflect different priorities and contexts. This is not akin to creating a different concept of the rule of law per policy area. In addition, while it may be true that EU external policies sometimes reflect questionable understandings of what the rule of law should entail (e.g. anti-corruption), the core demands of the rule of law (principle of legality and existence of effective legal remedies to guarantee the protection of fundamental rights) appear to be always taken into account. This is not to say, however, that the EU would not benefit from adopting a more explicit, transversal and integrated approach when it comes to promoting, in its relations with third countries and regions of the world, the foundational principles on which the Union is said to be founded.

5. Conclusion

Seeking to explore the meaning of democracy, Dahl observed that the term is today “like an ancient kitchen midden packed with assorted leftovers from twenty-five hundred years of nearly continuous usage.”²¹⁸ The rule of law could certainly inspire a similar reflection. Not only does it have extremely ancient roots in Western political thought,²¹⁹ definitional debates on its meaning and scope have proved to be both enduring and controversial. Like the term democracy, the rule of law is a contested concept which has meant many things to many different people.

If, however, one focuses on the rule of law as a constitutional principle in modern European legal traditions, a series of shared and significant traits can nevertheless be identified. First and foremost, the rule of law has become a dominant organizational paradigm of modern constitutional law in all the EU Member States and has gained

²¹⁷ Wennerström, *supra* n. 136, Chap. 5.

²¹⁸ R. Dahl, *Dilemmas of Pluralist Democracy* (Yale University Press, 1982), p. 5.

²¹⁹ See Aristotle, *Politics*, book 3, part XVI (Kessinger Publishing, transl. B. Jowett, 2004): “And the rule of the law, it is argued, is preferable to that of any individual. On the same principle, even if it be better for certain individuals to govern, they should be made only guardians and ministers of the law. ... Therefore he who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast; for desire is a wild beast, and passion perverts the minds of rulers, even when they are the best of men. The law is reason unaffected by desire.”

unanimous recognition, since the end of the Cold War, as one of the foundational principles on which all European constitutional systems must be based. Second common trait, the rule of law is never precisely or exhaustively defined either by national constitutions or by the courts. Yet, and this is the third shared trait, as understood by most lawyers and judges, the English rule of law, the *German Rechtsstaat* and the French *Etat de droit*, to take the three most influential legal traditions in Europe, provide similar answers to similar questions. Broadly speaking, these “meta-principles” provide the foundation for an independent and effective judiciary with the power of judicial review, and essentially describe as well as justify the subjection of public power to formal and substantive legal constraints with a view to guaranteeing the primacy of the individual and its protection against the arbitrary or unlawful use of public power. Fourth, all the national conceptions have in common a dynamic understanding of the rule of law. In other words, practical differences between EU Member States with respect to how compliance with the rule of law is “institutionalized” can naturally be found. Furthermore, the precise list of principles, standards and values the rule of law entails may vary in each country even though European legal systems share in common the use of formal and substantive legal standards and values and have all known an “intensification of judicial review,” in particular as far as fundamental rights are concerned. Last but not least, another consensual point is that the rule of law is not commonly viewed as constituting a rule of law but rather as a fundamental principle to which courts may refer in order to guide their interpretation of the law or use as a source from which they can derive fully justiciable principles. In light of these shared traits, this paper offered a positive answer to the question of whether the rule of law can be correctly recognized as a principle common to the Member States as Article 6(1) TEU puts it. The argument according to which national constitutional traditions differ to such a substantial extent that no common denominator can be identified is therefore rejected.

Since the Court of Justice, and subsequently Article 6(1) TEU, refer to the EU as a polity based or founded on the rule of law, this paper also explored the meaning, scope of application and normative impact of this principle in the EU’s constitutional framework. While this paper rejected the point of view that the EU rule of law must necessarily be defined and applied in strict conformity with national experiences, it relied on them to determine the extent to which the EU rule of law has been “Europeanized,” and concluded that the EU rule of law largely emulates national experiences. The EU rule of law also constitutes a posited legal principle with a foundational nature. Secondly, the absence of any EU definition is neither unprecedented nor surprising considering the “umbrella” character of the rule of law. Thirdly, in fleshing this principle out, the Court of Justice has refined its initial predominantly formal understanding and a positive evolution towards a more substantive understanding can be noted. Finally, the rule of law has been relied on by the Court as a “primary constitutional principle,” i.e. as an interpretative guide and as a source from which additional more specific legal standards may be derived, rather than as a rule of law in itself. This is again neither unprecedented nor unwelcome. By contrast to national experiences, the EU rule of law has a broader scope of application than the one it normally has at the national level: Not only is the principle of the rule of law used as a politico-legal benchmark with respect to current EU Member States and prospective ones, it is also referred to as a fundamental policy

objective in relation to so-called third countries and other regional organizations. These distinctive features do not illustrate or derive from an alternative understanding of what the rule of law should entail at the supranational level but reflect the EU's original constitutional nature.

As a constitutional principle of the EU, the rule of law is not a mere slogan. It fulfills different useful functions and in particular, it has had a positive impact on the development of a sophisticated and – from the point of view of the individuals subject to it – protecting European legal order. This does not obviously mean that all is for the best in the best of all possible worlds. Compliance with the rule of law is almost always a matter of degree and with respect to the EU, one can easily think of several constitutional shortcomings which are hard to reconcile with this principle. This will be the subject of our next enterprise. Sufficient unto the day is the evil thereof.

Laurent Pech,
April 2009.

Annex: References to “the rule of law” in the case law of the EU courts (Sept. 2002-2008)²²⁰

- Case C-475/98 *Commission v. Austria* [2002] ECR I-9797: In the context of an action for failure to fulfill obligations, the Austrian Government argues that the excessive duration of the pre-litigation procedure is “incompatible with the principles of the rule of law” (para. 34). The plea is rejected without the Court making any explicit reference to the rule of law.
- Case C-182/99 P *Salzgitter v. Commission* [2003] ECR I-10761: The appellant presents the guarantee of a lawfully constituted court as a corollary of the principle of the rule of law (para. 23). No further reference to the rule of law.
- Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale v. Commission* [2003] ECR II-435: The Court of First Instance recalls (para. 167) that the right to sound administration is “one of the general principles that are observed in a State governed by the rule of law” (citing Case T-54/99 *max.mobil Telekommunikation* [2002] ECR II-313, para. 48) before holding that the applicants’ argument alleging infringement of the obligation of impartiality cannot be upheld.
- Case C-496/99 P *Commission v. Succhi di Frutta* [2004] ECR I-3801: Answering the Commission’s argument that successful tenderers alone are entitled to challenge a Commission decision amending the conditions of the invitation to tender after the award of the contract, the Court noted that an outcome of that kind would be contrary both to Article 230(4) EC and “to the fundamental principle that, in a community governed by the rule of law, adherence to legality must be properly ensured” (para. 63). Accordingly, the Court of Justice upheld the Court of First Instance’s ruling with respect the admissibility of the applicant’s action for annulment.
- Case C-15/00 *Commission v. BEI* [2003] ECR I-7281: In the context of a general discussion regarding the types of acts which are susceptible to review under Article 230 EC and the Court’s power to review measures adopted by an organ of the European Investment Bank under Article 237(b) EC, the Court relies on “the fact that the European Community is based on the rule of law” (para. 75) to justify a broad interpretation of Article 237(b) EC and subject the EIB to judicial review.
- Case T-44/00 *Mannesmannröhren-Werke v. Commission* [2004] ECR II-2223: The applicant submits that “in accordance with the principles inherent in a State subject to the rule of law, it is only where that information is given that the person against whom the evidence is invoked will be able to plead his defence properly” (para. 77). No further reference to the rule of law.
- Joined Cases T-254/00, T-270/00 and T-277/00 *Hotel Cipriani* [2008]: The Court of First Instance makes a passing reference to the rule of law when describing the principle of sound administration as one of the general principles that are observed in a State governed by the rule of law (para. 210).
- Case T-310/00 *MCI v. Commission* [2004] ECR II-3253: To defend the admissibility of its annulment action, the applicant refers to the case of *Les Verts* and argues that in a Community governed by the rule of law, effective judicial review of the Commission’s decision-making power under the relevant Merger Regulation cannot in any way be affected by the existence of judicial proceedings in other jurisdictions (para. 33). A subsequent reference “to the fundamental principle according to which, in a community governed by the rule of law, adherence to legality must be properly ensured” is made by the Court (para. 61, citing Case C-496/99 P *Commission v. CAS Succhi di Frutta* [2004] ECR I-3801, para. 63) before holding that the applicant retains an interest sufficient to pursue the proceedings even though the proposed merger, which the Commission found incompatible with the common market, was later abandoned by the applicant.
- Joined Cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01 *Philip Morris et al. v. Commission* [2003] ECR II-1: The applicants argue that since the EC is based on the rule of law, where the

²²⁰ Cases are listed by number in the order in which they were lodged at the relevant Registry.

admissibility of an action is in issue in annulment proceedings, the Community judicature must be guided by the need to ensure that the parties involved are afforded sufficient legal protection (para. 69). The Court finds that the contested acts are not acts which may be challenged under Article 230 EC and only alludes to the notion of Community based on the rule of law to answer the applicants' additional argument that they will then suffer a denial of justice (para. 121). For the Court, access to justice is indeed one of the constitutive elements of a Community based on the rule of law but individuals are not denied access to justice because conduct lacking the features of a decision cannot be challenged by way of an action for annulment since an action for non-contractual liability under Article 235 EC and Article 288(2) EC is available if the conduct is of such a nature as to entail liability for the EC. See also appeal judgment *infra*: Case C-131/03 P *Reynolds Tobacco et al. v Commission* [2006] ECR I-7795.

- Case T-63/01 *Procter & Gamble v. OHMI* [2002] ECR II-5255: The applicant claims that in most States in which the rule of law applies, judges, arbitrators or court experts are required to withdraw in a specific case if they have previously adjudicated on the matter in one or other of those capacities (para. 14). No further reference to the rule of law. The action is dismissed as unfounded.
- Joined Cases T-64/01 and T-65/01 *Afrikanische Frucht-Compagnie v. Council* [2004] ECR II-521: The applicants submit that since the EC is a community governed by the rule of law, its non-contractual liability must be capable of being incurred when the EC legislature adopts an act whose validity cannot be reviewed due to a failure to state reasons (para. 122). No further reference to the rule of law. The plea alleging failure to state reasons is declared unfounded.
- Order in Case T-85/01 *IAMA Consulting v Commission* [2003] ECR II-4973: Seeking the annulment of some measures taken by the European Commission, the applicant contends that these measures infringe, inter alia, the rule of law (para. 47). This claim is declared inadmissible and no further reference to the rule of law is made.
- Case C-147/01 *Weber's Wine World* [2003] ECR I-11365: One party contends that neither EC law nor the principles of a State subject to the rule of law and the protection of legitimate expectations imply that a taxable person is to be enriched by repayment of a tax (para. 65). The Court answers the argument without mentioning the rule of law.
- Case C-224/01 *Kobler* [2003] ECR I-10239: For the French government, the recognition of a right to reparation on the ground of an allegedly mistaken application of Community law by a definitive decision of a national court would be contrary to the principle of *res judicata*, which itself allegedly constitutes a fundamental value in legal systems founded on the rule of law (para. 23). When the Court subsequently addresses this point, no reference is made to the rule of law. One may also note that, in the French version of the judgment, the rule of law is translated by *prééminence du droit*, a term normally used by the organs of the Council of Europe.
- Case T-306/01 *Yusuf and Al Barakaat* [2005] ECR II-3533: On its own motion and as a preliminary point when discussing the scope of the review of legality that the Court must carry out, the Court notes that “it is to be borne in mind that the European Community is based on the rule of law” and cites *Les Verts* (para. 260) before emphasizing that it will examine the pleas alleging breach of the applicants' fundamental rights must be examined in light of this consideration among others.
- Case T-315/01 *Kadi* [2005] ECR II-3649: Same as above.
- Case C-361/01 P *Kik v. OHIM* [2003] ECR I-8283: Seeking to challenge the legality of the rules governing languages at the Office for Harmonisation in the Internal Market, the appellants argue that the EC legislature is bound by the rule of law (para. 58) and that “multilingualism is an indispensable component of the effective operation of the rule of law in the Community legal order” (para. 60). No further reference to the rule of law.

- Order in Case C-35/02 *Vogel* [2003] ECR I-12229: The applicant submits that to assign to the EC Directives at issue a higher rank than the German law on the practice of dentistry would be contrary *inter alia* to the principles of the rule of law (para. 18). No further reference to the rule of law.
- In Case C-93/02 P *Biret International v. Council* [2003]: The applicant refers to the “defence of the rule of law” (para. 70) to convince the Court to develop of a system of no-fault liability for the EC in respect of its normative acts. No further reference to the rule of law.
- Case C-94/02 P *Etablissements Biret v. Council* [2003]: Same as above.
- Order in Case T-154/02 *Villiger Söhne v. Council* [2003] ECR II-1921: The applicant contends that that the theoretical nature of a reference for a preliminary ruling from the Court of Justice and the impossibility of bringing direct action before the EU courts are contrary to the principle of judicial protection and the principle of the rule of law laid down in Article 6 TEU (para. 18). No further reference is made to the rule of law and the application is dismissed as inadmissible.
- Case T-228/02 *Organisation des Modjahedines du peuple d’Iran* [2006] ECR II-4665: According to the applicant, the principles of a State governed by the rule of law, as enshrined in Article 6(2) TEU, apply to all of the EU’s acts and the right to obtain a judicial determination is part of the foundation of a State governed by the rule of law (para. 39). Accordingly, the applicant submits all EU acts must fall within the scope of judicial review by the Court of Justice and the Court of First Instance. The Court of First Instance annuls the contested decision but makes no mention of the rule of law.
- Order of the Court of First Instance in Case T-229/02 *PKK and KNK v. Council* [2005] ECR II-539: For the Court, “in a community governed by the rule of law, it cannot be accepted that an act establishing continuing restrictive measures in respect of persons or entities could be applicable without limitation unless the institution which has promulgated them readopts them regularly following a review” (para. 44). It follows that organizations subject to restrictive measures, following their inclusion on a “Terror list,” can challenge a new Council decision which keeps them on the list without violating the principle of *lis pendens*. See the appeal judgment *infra*: Case C-229/05 P *PKK and KNK v. Council* [2007] ECR I-439.
- Order in Case C-232/02 P(R) *Commission v. Technische Glaswerke Ilmenau* [2002] ECR I-8977: On its own motion, the President of the Court of First Instance in interlocutory proceedings recalls (para. 85) that the right to sound administration is “one of the general principles that are observed in a State governed by the rule of law” (citing Case T-54/99 *Max.mobil v Commission* [2002] ECR II-313, para. 48). It follows that the Commission may have, at least *prima facie*, an obligation to communicate to the recipient of state aid observations which the Commission has expressly requested from a competitor.
- Case T-279/02 *Degussa v. Commission* [2006] ECR II-897: The applicant submits that the Commission’s decision at issue conflicts with the principle of proportionality between offences and penalties, “which, as a generally accepted principle in States governed by the rule of law, applies to the Community legal order pursuant to Article 6(1) EU” (para. 345). The Court makes no further reference to the rule of law and finds no infringement of the principle of proportionality.
- Order in Case T-370/02 *Alpenhain-Camembert-Werk et al. v. Commission* [2004] ECR II-2097: According to the applicants, the Court of First Instance has emphasized that access to the Community judiciary is one of the constituent elements of a Community governed by the rule of law (para. 50). No further reference.
- Case T-141/03 *Sniace v Commission* [2005] ECR II-1197 : Answering the applicant’s reference to its right to effective judicial protection, the Court recalls that the European Community is indeed a community based on the rule of law and that individuals are therefore entitled to effective judicial protection of the rights they derive from the Community legal order (para. 39). For the Court, however, the applicant has failed to demonstrate that it has a vested and present interest in bringing the proceedings yet the applicant is not deprived of any effective judicial protection as alternative remedies are available.

- Case C-160/03 *Spain v. Eurojust* [2005] ECR I-2077: In the context of an action for annulment, the Spanish government recalls that the EC is a community based on the rule of law and submits accordingly that no act emanating from a body with legal personality which is subject to EC law can be exempt from judicial review (para. 32). The Court answers this point by simply stressing the fact that the applicants had in reality access to the EU courts under the conditions laid down in the Staff Regulations even though the Court lacked jurisdiction under Article 230 EC as the contested measures (adopted under Article 35 EU) were not EC measures. More ambitiously, in his opinion, AG Maduro proposed to interpret Article 35 EU as enabling certain applicants to seek the annulment of any measures adopted in the context of Title XVI which produce legal effects vis-à-vis third parties on the ground that “the very idea of legality’, as it must prevail in a Union governed by the rule of law, requires that to be the case” (para. 21).
- Case T-198/03 *Bank Austria Creditanstalt v. Commission* [2006] ECR II-1429: The Commission refers to the principle of publicity of legal acts inherent in a State governed by the rule of law (para. 66) to argue that the Regulation at issue does not limit the Commission’s freedom to publish a version of its decision that is fuller than the minimum necessary and also to include information whose publication is not required, in so far as the disclosure of that information is not inconsistent with the protection of professional secrecy. The Court agrees but does not refer to the rule of law.
- Order in Case T-264/03 *Schmoldt v. Commission* [2004] ECR II-1515: To answer the plea of inadmissibility raised by the Commission, the applicants refer to the fact that since the entry into force of the Treaty of Nice, the principle of the rule of law has been an express basis of the EU (para. 67). No further reference.
- Order in Case T-308/02 *SGL Carbon v. Commission* [2004] ECR II-1363: In the applicant’s view, to transfer competence for the administration’s discretionary decisions to a judicial body contravenes the principle of the rule of law (para. 31). No further reference.
- Case C-131/03 P *Reynolds Tobacco et al. v Commission* [2006] ECR I-7795: On appeal, the Court of Justice recalls what it held in *Les Verts* without mentioning, however, the notion of Community based on the rule of law and dismisses the argument raised by the applicants that the Court of First Instance denied them effective judicial protection. AG Sharpston, while acknowledging that the right to effective legal protection is not so absolute that any act must be open to challenge or that anyone may bring an action, referred to access to justice and the availability of an effective remedy together with respect for fundamental rights, as “the cornerstones of a Community governed by the rule of law” (para. 72).
- Order in Case T-337/03 *Bertelli Gálvez v. Commission* [2004] ECR II-1041 : In a rather unusual case, the applicant, a Spanish lawyer, submits that he has been persecuted by the Spanish judiciary following his criticism of the improper conduct of Spanish courts and asks the Court to declare that the Commission has failed to act in not investigating the serious breach by Spain of the principles mentioned in Article 6(1) TEU (see paras. 5 and 9). The Court concludes that it has no jurisdiction to adjudicate on the present action for failure to act brought by the applicant.
- Joined Cases T-391/03 and T-70/04 *Franchet and Byk v. Commission* [2006] II-2023: The applicants submit that the right to a fair hearing is “an overriding right which constitutes the basis of the rule of law and democracy in a State” (para. 65). No further reference.
- Order in Case T-2/04 *Korkmaz v. Commission* [2006] ECR II-32: In answering the applicants’ argument according to which Article 6(1) TEU, among other provisions, oblige the Court to recognize the admissibility of their action for annulment, the Court recalls that the principle of access to the courts is indeed one of the elements of a Community governed by the rule of law (para. 55). The Court holds, however, that “individuals are not deprived of access to the courts by reason of the fact that a measure not producing binding effects capable of affecting their interests by bringing about a significant change in their legal position cannot be the subject of an action for annulment, an action to establish non-contractual liability provided for in Article 235 EC and the second paragraph of Article 288 EC being available to them

if such a measure is capable of causing the Community to incur liability” (para. 55). The action is dismissed as inadmissible.

- Case T-99/04 *AC-Treuhand v. Commission* [2008]: The applicant refers to the rights of the defence, the principle of *nullum crimen, nulla poena sine lege* and the principle of legal certainty as principles intrinsic to a society governed by the rule of law (paras. 30, 84 and 166). No further reference.
- Case T-193/04 *Tillack v Commission* [2006] ECR II-3995: Faced with the argument that 230 EC must be interpreted in the spirit of a Community based on the rule of law with a view of enabling the applicant to obtain judicial protection against the action of the European Anti-Fraud Office (para. 65), the Court does not mention the rule of law but holds that the lack of effective judicial protection is irrelevant as that argument is not, in itself, sufficient to justify the admissibility of an action.
- Case T-253/04 *KONGRA-GEL v Council* [2008]: The applicants take the view that to dismiss their claim as inadmissible would be incompatible with, among other principles, the principle of the rule of law. No further reference.
- Case C-354/04 P *Gestoras Pro Amnistía et al. v. Council* [2007] ECR I-1579: Faced with the argument raised by the appellants that the “Union is a community governed by the rule of law” (para. 34) and that the contested Common Position leaves them without a remedy in violation of the requirement of effective judicial protection, the Court agrees that “as is clear from Art.6 EU, the Union is founded on the principle of the rule of law and it respects fundamental rights ... It follows that the institutions are subject to review of the conformity of their acts with the treaties and the general principles of law, just like the Member States when they implement the law of the Union” (para. 51). Yet the Court concludes that the appellants are wrong to maintain that the contested common position leaves them without a remedy, contrary to the requirement of effective judicial protection, on the grounds that several procedural avenues are available to them.
- Case C-355/04 P *Segi* [2007] ECR I-1657: Answering the appellants’ argument that the Court of First Instance erred in declining jurisdiction to consider their action for damages, the Court of Justice rules that the appellants cannot validly argue that they are deprived of all judicial protection after stressing the fact that, “as is clear from Article 6 EU, the Union is founded on the principle of the rule of law...” (para. 51).
- Case C-411/04 P *Salzgitter Mannesmann v. Commission* [2007] ECR I-959: The use of evidence of anonymous origin is presented by the applicant as incompatible with the principle of the rule of law. The Court answers this point without mentioning the rule of law.
- Case F-1/05 *Landgren v. European Training Foundation (ETF)* [2006] FP-I-A-1-123, ECR II-A-1-459: The EU Civil Service Tribunal makes an incident reference to the rule of law in the context of a case brought by a dismissed employee of the ETF. In its discussion of whether the contract for an indefinite period of a member of the temporary staff may be terminated unilaterally without a statement of reasons, the Court declares that “account must be taken of the existence of international standards fixing the minimum conditions necessary under the rule of law to prevent the unfair dismissal of workers” (para. 69).
- Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco* [2008]: On appeal, the applicant contends that the Court of First Instance, in refusing to recognize that opinions of the Council’s legal service can be disclosed to the public, contravened the principle that the Community legal order is based on the rule of law. While the Court of Justice makes no further reference to this principle, it sets aside the judgment under appeal on the ground that that the contested decision did not with the obligation to give reasons.
- Case T-185/05 *Italy v. Commission* [2008]: In order to argue that the Member States are not entitled to bring an action for annulment under Article 230 EC when the matter at issue involves the Commission and its civil servants, the Commission mentions a previous judgment (see *supra* C-160/03 *Spain v. Eurojust*) where the Court of Justice debated the right to effective judicial protection in a community based on the rule of law. In this judgment, the Court of First Instance denies that such a conclusion can be drawn from

this judgment, does not refer to the notion of community based on the rule of law and rapidly concludes that there can be no doubt as to the applicability of Article 230 EC in the present case.

- Case C-229/05 P *PKK and KNK v. Council* [2007] ECR I-439: On appeal, the Court of Justice recalled that the EC is a community based on the rule of law before emphasizing that the effectiveness of the right to judicial protection is particularly important in situations as in the present case, where the EC adopts restrictive measures which have serious consequences on the rights and interests of the individuals concerned (para. 109). It follows that the organization subject to restrictive measures, although his continuous existence is debated, continues to have an existence sufficient to contest this measure.
- Case C-232/05 *Commission v. France* [2006] ECR I-10071: To reject the French argument that the litigious national rules preventing the recovery of illegal state aid are essential for ensuring effective judicial protection, the Court recalls that the EC is a community based on the rule of law and that such protection is already fully ensured by the means provided by the EC Treaty and in particular, the action for annulment under Article 230 EC.
- Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633: The Court notes that it will examine the validity of the relevant Framework Decision in the light of several principles, among which the Court mentions the principle of the rule of law on which the Union is founded (para. 45).
- Case T-345/05 *Mote v. Parliament* [2008]: Before deciding on whether the European Parliament's decision to waive the applicant's parliamentary immunity constitutes a decision which is open to challenge, the Court first recalls that "[i]t is apparent from settled case-law that the European Community is based on the rule of law" (para. 21).
- Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat* [2008]: Answering the applicants' argument that the Court of First Instance wrongly held that the contested Regulation could not be subject to judicial review of its internal lawfulness, save with regard to its compatibility with the norms of *jus cogens*, the Court of Justice refers to its previous case law and in particular to the fact that "the Community is based on the rule of law" (para. 281) before concluding "that the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty" (para. 285).
- Order in Case T-447/05 *Societe des plantations de Mbanga v. Commission* [2007] ECR II-1: The applicant refers to the *Jégo-Quééré* judgment and argues that the Court must find its application admissible in order to avoid a denial of justice incompatible with the principles of a Community based on the rule of law (para. 51). With no mention made of the rule of law, the Court finds the applicant not individually concerned by the contested regulation and his application is therefore ruled inadmissible.
- Joined cases C-120/06 P and C-121/06 P *FIAMM and Fedon v. Council and Commission* [2008]: On appeal, the applicant argues that Article 288(2) EC is intended to safeguard the fundamental principle of a State based on the rule of law and unsurprisingly (para. 159). No further reference to the rule of law.
- Case T-187/06 *Schröder v Community Plant Variety Office (CPVO)* [2008]: In support of his application for annulment, the applicant refers in particular to a violation of the "general prohibition, in a State governed by the rule of law, on taking decisions by surprise" (para. 50). This plea is rejected as ineffective in the circumstances of the case.
- Joined Cases C-428/06 to C-434/06 *UGT-Rioja* [2008]: The Court makes a passing reference to a point raised by the Spanish Government during the hearing and according to which the existence of judicial review is inherent in the existence of the rule of law (para. 80). In the context of a general discussion on the procedural autonomy of the so-called Historical Territories in Spain, the Court agrees before concluding

that it cannot validly be found that an infra-State body lacks autonomy solely on the ground that the acts which it adopts are subject to judicial review.

- Case T-411/06 *Sogelma v. European Agency for Reconstruction (EAR)* [2008]: To decide whether it has jurisdiction under Article 230 EC, the Court of First Instance first mentions the case of *Les Verts* before concluding that “the general principle to be elicited from that judgment is that any act of a Community body intended to produce legal effects vis-à-vis third parties must be open to judicial review” and that “it cannot be acceptable, in a community based on the rule of law” that acts of Community bodies endowed with the power to take measures intended to produce legal effects vis-à-vis third parties “escape judicial review” (para. 37). As a result, the Court holds that decisions taken by the EAR in the context of public procurement procedures and intended to produce legal effects vis-à-vis third parties are acts open to challenge before the Community judicature.
- Case C-521/06 P *Athinaiki Techniki AE v. Commission* [2008]: “It is apparent from the case-law that, as the European Community is a community based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with the EC Treaty, the procedural rules governing actions brought before the Community courts must be interpreted in such a way as to ensure, wherever possible, that those rules are implemented in such a way as to contribute to the attainment of the objective of ensuring effective judicial protection of an individual’s rights under Community law” (para. 45). As a result, for the Court of Justice, the Commission cannot avoid review by the Community judicature simply by failing to adhere to certain formal requirements. In the present case, the act adopted by the Commission produces legal effects which are capable of affecting that company’s interests and, therefore, constitutes an act open to challenge for the purposes of Article 230 EC.
- Order in Case T-91/07 *WWF-UK v Council* [2008]: The applicant, a leading environmental organization, submits that not to grant him legal standing in this case “would be abhorrent to the rule of law for there to be no person, body, institution or government able or willing in practice to take steps to ensure that emergency measures to ensure the survival of an environmental resource” (para. 59). The Court makes no further reference to the rule of law and finds the application inadmissible.
- Case C-443/07 P *Centeno Mediavilla v. Commission* [2008]: According to the appellants, the Court of First Instance “made impossible any judicial review of the legislature’s power, contrary to the very foundations of the rule of law and in particular of the separation of powers” (para. 70). No further reference to the rule of law.