



European
University
Institute

ROBERT
SCHUMAN
CENTRE FOR
ADVANCED
STUDIES

WORKING PAPERS

RSCAS 2014/125

Robert Schuman Centre for Advanced Studies
Global Governance Programme-149

The EU's sense of the rule of law and the issue of its oversight

Gianluigi Palombella

European University Institute
Robert Schuman Centre for Advanced Studies
Global Governance Programme

The EU's sense of the rule of law and the issue of its oversight

Gianluigi Palombella

EUI Working Paper **RSCAS** 2014/125

This text may be downloaded only for personal research purposes. Additional reproduction for other purposes, whether in hard copies or electronically, requires the consent of the author(s), editor(s). If cited or quoted, reference should be made to the full name of the author(s), editor(s), the title, the working paper, or other series, the year and the publisher.

ISSN 1028-3625

© Gianluigi Palombella, 2014

Printed in Italy, December 2014

European University Institute

Badia Fiesolana

I – 50014 San Domenico di Fiesole (FI)

Italy

www.eui.eu/RSCAS/Publications/

www.eui.eu

cadmus.eui.eu

Robert Schuman Centre for Advanced Studies

The Robert Schuman Centre for Advanced Studies (RSCAS), created in 1992 and directed by Brigid Laffan since September 2013, aims to develop inter-disciplinary and comparative research and to promote work on the major issues facing the process of integration and European society.

The Centre is home to a large post-doctoral programme and hosts major research programmes and projects, and a range of working groups and *ad hoc* initiatives. The research agenda is organised around a set of core themes and is continuously evolving, reflecting the changing agenda of European integration and the expanding membership of the European Union.

Details of the research of the Centre can be found on:

<http://www.eui.eu/RSCAS/Research/>

Research publications take the form of Working Papers, Policy Papers, Distinguished Lectures and books. Most of these are also available on the RSCAS website:

<http://www.eui.eu/RSCAS/Publications/>

The EUI and the RSCAS are not responsible for the opinion expressed by the author(s).

The Global Governance Programme at the EUI

The Global Governance Programme (GGP) is research turned into action. It provides a European setting to conduct research at the highest level and promote synergies between the worlds of research and policy-making, to generate ideas and identify creative and innovative solutions to global challenges.

The GGP comprises three core dimensions: research, policy and training. Diverse global governance issues are investigated in *research* strands and projects coordinated by senior scholars, both from the EUI and from other internationally recognized top institutions. The *policy* dimension is developed throughout the programme, but is highlighted in the GGP High-Level Policy Seminars, which bring together policy-makers and academics at the highest level to discuss issues of current global importance. The Academy of Global Governance (AGG) is a unique executive *training* programme where theory and “real world” experience meet. Young executives, policy makers, diplomats, officials, private sector professionals and junior academics, have the opportunity to meet, share views and debate with leading academics, top-level officials, heads of international organisations and senior executives, on topical issues relating to governance.

For more information:

<http://globalgovernanceprogramme.eui.eu>

Abstract

The chapter addresses the much debated role of the European Union in defending its Treaty art. 2 values even inside the Member states' borders. The nature of the EU as a two-level systems is admittedly the first reason for a peculiar complexity of the issue. But some common places are discussed that might still foreclose an appropriate approach to the problem. To the forefront are brought questions, often overlooked in this context, concerning the meaning of the Rule of law that the EU upholds and practices, the possibility of a transitive notion of that normative ideal, its relation to democracy, both in the conceptual sense and in the EU contextual frame.

Keywords

Rule of law, Democracy, European Union, Constitutional failures, European values, multilevel orders

1. Introduction

If one seeks a notion of ‘Rule of Law’ (RoL) distinctive and relevant to the European Union as an autonomous entity, the main and current meaning that can be found is that which coincides with the idea of a legal order, its existence and functioning. In truth, the very fact of Europe as a legal order of its own *is* an achievement, and it meant the overcoming of an indefinite number of obstacles of political, social and legal nature. At the same time, it posited the premises for a progressive *iter*, heading to unique features, neither a State nor simply a common international law entity. The institution of a specific organisation of legality meant, among the rest, the framing of new forms of relationships, ordered through law, among the European States. But it is not only a new interface between pre-existing orders, it is a new level of order with the ambition of governing States, peoples and individuals¹.

The RoL has been always a *fil rouge* in the biography of the European construction, even before² its first appearance in the Treaty of Maastricht³, and eventually in the present form provided by art. 2 of the Lisbon Treaty: “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”. Its landmark invocation- and judicial application- in the ECJ *Les Verts* judgment famously explains that “the EEC Treaty, albeit concluded in the forms of an international agreement, none the less constitutes the constitutional charter of a Community based on the Rule of Law”⁴. The import of such an assumption is that the Community is “based on the Rule of Law, inasmuch as neither its Member States nor its Institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty. In particular, in Articles 173 and 184, on the one hand, and in Article 177, on the other, the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions”⁵. Unsurprisingly, the connection has been made between this meaning of the RoL and the doctrines of direct effect⁶ and supremacy⁷ at

¹ For this, see Case 26/62, *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR I

² G. Bebr, *Rule of Law within the European Communities*, Bruxelles, Université Libre de Bruxelles, 1965; A Arnall, ‘The Rule of Law in the European Union’, in Arnall, A. and Wincott, D. (eds.), *Accountability and Legitimacy in the European Union*, Oxford: Oxford University Press, 2002.

³ See the Preamble “CONFIRMING their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the RoL” and Art. 1 “... to develop and consolidate democracy and the Rule of Law, and respect for human rights and fundamental freedoms”.

⁴ Case 294/83 *Partie Ecologiste ‘Les Verts’ v. Parliament* [1986] ECR 1339, § 23. Cf. Opinion 1/91 *EEA Agreement* [1991] ECR 6097.

⁵ ‘Les Verts’, *supra* at note 4, § 23.

⁶ Van Gend en Loos case, *supra* at note 1.

⁷ Case 6/44 *Flaminio Costa v. Enel* [1964] ECR 585

least in so far as a community legal order bearing a two level system could hardly work without them. This means that both supremacy and direct effect are being interpreted as pillars of a full-fledged order, whose instruments make it possible for legality to work. In the ECJ words in *Costa*: “the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, *without being deprived of its character as community law and without the legal basis of the community itself being called into question*”⁸. The main sense of the RoL thereby achieved at the layer of the European Union revolves around the value of legality including judicial review as a tool *vis à vis* non-compliance⁹. It must be noted that the strength of these concurring doctrines is supported and reinforced by the institution of the “preliminary reference”. With regard to *Van Gend en Loos*, Weiler notes the importance of “the confluence of the doctrine of direct effect with the (unintended and at the time unappreciated) genius of the preliminary reference system. Take away the preliminary reference and direct effect and a transnational system loses much of its impact”¹⁰.

2. What RoL?

2.1. The ideal evoked as the RoL in such an order -- gathering diverse peoples reasonably jealous of their own normative sovereignty-- has been essentially identified with the aspiration of becoming a community of law, well established, effective, and obeyed.

Legality, certainty, predictability encapsulate the sense of this kind of conception of the RoL. However, in one venerable version, in the “Burkean” mode, respect for the law is also more than formalism, and is held to protect the substantive values, the achievement of a country, it relies on the linkage between constituencies, their ethos, and the law. It conceives of the Courts as reflecting the whole experience of a nation¹¹. Similarly, lessons from Montesquieu’s *Esprit des Lois* cherish the laws

⁸ Emphasis added. Case 6/44 *Flaminio Costa v. Enel* [1964] ECR 585 (at p. 594).

⁹ This can also be read in ECJ, ‘*Kadi*’: Joined Cases C-402 & 415/05P, *Kadi & Al Barakaat Int’l Found. v. Council & Comm’n*, 2008 ECR I-6351, para 281: “it is to be borne in mind that the Community is based on the Rule of Law, *inasmuch as* neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the EC Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions (Case 294/83 *Les Verts v Parliament* [1986] ECR 1339, paragraph 23)” (emphasis added). In this same sense, see D. Kochenov, ‘The EU RoL: Cutting Paths through Confusion’, *Erasmus Law Review*, 2009, Vol. 2 (1), 5.

¹⁰ And: “Put differently, there is I contend a huge difference between, say, a ruling of the International Court of Justice (ICJ, the World Court) that a certain international norm at issue before it produces direct effect, but this ruling takes place in the normal procedural and substantive context of intergovernmental litigation and state responsibility, and an identical ruling of the ECJ (the European Court) within the procedural context of the preliminary reference.” (J.H.H. Weiler, ‘*Van Gend en Loos*: The individual as subject and object and the dilemma of European legitimacy’, in *International Journal of Constitutional Law*, (2014), Vol. 12, No. 1, 94–103, at 95).

¹¹ O. Wendell Holmes, in *Missouri v. Holland*, 252 U.S. 416, 433 (1920). and see R. Post, “The Challenge of Globalization to American Public Law Scholarship”, in *Theoretical Inquiries in Law*, (2001). 2: 323, at 326 ff.

as necessary relations among things¹². The law has to correspond to what it must regulate not *viceversa*. To protect the 'RoL in this jurisdiction', as solemnly the Supreme Court (in the US) usually calls it, in this sense, means to abide by 'our' law *vis à vis* external or internal threats to our social, moral, political achievements.

For this conception of the RoL to be credibly at the basis of the European emphasis upon 'a community based on the RoL', a fabric of feelings and shared values should develop at the European level, one that might even approximate the sense of legal patriotism once upon a time stemming from the unity of a nation. Nonetheless, and even in such a case, this conception simply would mean to ask that law and order be obeyed, either for their own sake, like in some formalist conceptions, or because of the community values that they can safeguard.

This way of thinking essentially shifts the issue from the RoL to the mentioned respect for the laws of a legal system. But the two things should not be conceived of as merely coincident. The RoL cannot mean just the self-referentiality of a legal order.

The risks of such a view might well be seen in a famous example, the judgement of the former Court of First Instance in the case Kadi, which maintained that the RoL, prevailing in the International Law jurisdiction, required the European institutions to abide by the Security Council resolution depriving Mr Kadi of his rights to defence, to a judge and to property, and failed to think of the RoL instead as an independent criterion to scrutinise the international legal order itself¹³. The same stance, *mutatis mutandis*, was held by the ECJ, when it carefully assumed that "any judgment given by the Community judicature deciding that a Community measure intended to give effect to such a [UNSC] resolution is contrary to a higher Rule of Law in the Community legal order would not entail any challenge to the primacy of that resolution in international law"¹⁴.

The invocation of the RoL is at risk of being transformed into an opportunity for making 'our' own legal system a fragment of a pluralist Babel of meanings, that such an invocation would enhance as a case for separatedness and autonomy.

This fate is incumbent in any circumstances when different legal orders, however integrated they can be, even within the European Union, might diverge, for example, as to the interpretation of the soundness and legality of their legislative or constitutional norms. It is rather naïve or disingenuous to assume that some invocations of 'our' own RoL are credible and others are not. It is rather contingent how many or how few 'good values' one system is thereby locking against external intrusions. The

¹² Ch. L. de Secondat, Baron de Montesquieu, *The Spirit of Laws* (Thomas Nugent, Cincinnati, R. Clarke & Co., 1873) *Pref.*, at p. XXXII.

¹³ CFI, *Kadi v Council of the EU and Commission of the EC* (T-315/01) [2005] ECR II-3649. See also G. Palombella, 'The Rule of Law beyond the State: Failures, Promises and Theory', in *International Journal of Constitutional Law*, 2009

¹⁴ ECJ, 'Kadi': Joined Cases C-402 & 415/05P, *Kadi & Al Barakaat Int'l Found. v. Council & Comm'n*, 2008 ECR I-6351, para 288.

point is instead the nature and the content of a RoL principle, regardless of where it is predicated, in the EU law or elsewhere. And despite in most occasions, as said above, the EU has not done much to elaborate the notion in a different and more mature mode, the existence and functioning of a legal order is only the precondition for the ideal of the RoL to be pursued; although compliance and certainty are necessary for a legal order to exist, they are hardly sufficient for the RoL to be achieved.

Consequently, the RoL requires something that apparently goes beyond the requisites for efficient legality standards, and its ideal hints to a notion that, although can be elaborated upon by the concurrence of many, cannot be simply reduced to a jurisdiction or a system relative meaning. On this premise, the RoL should fit the transnational level, inasmuch as it can afford the transitive nature of its features.

2.2. We should neither rely on the belief that RoL is already universally agreed upon, nor accept that its pretensions be unbounded. Thus, some, albeit briefly sketched, reconstruction of the RoL ideal, its meaning and import is in order. As I submitted elsewhere¹⁵, the RoL means more than compliance with rules¹⁶. Such a conception as “a law of rules” to be complied with bears however the valued fight against arbitrary power. At this level of meaning, as it is commonly noted, Joseph Raz enriched the set of RoL requirements by elaborating on those firstly suggested by Lon Fuller, regardless of the moral value that the latter recognised in their resulting effect.¹⁷ But it is true that the RoL is conceived differently on a scale of degrees, and sometimes we are recommended to further include in the concept the protection of fundamental rights, or the full content of a liberal democratic, or welfare State etc.¹⁸ But on one side, as Martin Krygier remarked, this ‘anatomic’¹⁹ hypotheses overlooks the central point of the RoL, that is its teleology, instead of its alleged requisites; on the other side, listing requirements, be they formal, procedural, or substantive constitutionalist and democratic, seem questionable, partly because they either may end up equating the RoL with the *functioning* efficiency of a legal order *as such*, or on the contrary, because they ask the RoL ideal to match one of its possible historical and institutional incarnations, in order to incorporate some extraneous, though valuable, objectives, like the democratic control of power, or the satisfaction of material needs of individuals, and the like. The pursuit of extraneous goals that typically inspire different spheres as politics, ethics, economy, is what

¹⁵ “The RoL as an Institutional Ideal” in L. Morlino, G. Palombella, *Rule of law and Democracy. Internal and External Issues*, Leiden and Bsoth, Brill Pub., 2010.

¹⁶ For such a view, see instead A. Scalia, “The RoL as a law of rules”, 56 *U. Chi. L. Rev.* 1175 (1989).

¹⁷ Generality, clarity, promulgation, stability, consistency between rules and behaviours, non retroactivity, non contradictory rules, nor requiring the impossible: Lon Fuller, *The Morality of Law*, ch 2 (2nd ed., Yale U Press 1969) . About the moral value implied in fullerian requisites see, A. Marmor, ‘The Rule of Law and Its Limits’, *LAW AND PHILOSOPHY*, 23 (Jan., 2004), 1-43, see at pp 39 ff. See also Neil MacCormick “Natural Law and the Separation of Law and Morals,” in Robert P. George (ed), *Natural Law Theory: Contemporary Essays*, Clarendon Press, Oxford, 1992, pp. 123 ff.

¹⁸ See Paul P Craig, “Formal and Substantive Conceptions of the RoL: An Analytical Framework”, *PUBLIC LAW* (autumn 1997), 467–87 and also TRS Allan, *Constitutional Justice*, Oxford, OUP, 2001.

¹⁹ Martin Krygier, ‘The Rule of Law: Legality, Teleology, Sociology’, in G. Palombella N. Walker (eds.), *Re-locating the Rule of Law*, Hart Publishing, Oxford 2009.

Joseph Raz had probably in mind when he distinguished the RoL from the “rule of the good law”, as he aptly dubbed the stance taken by Hayek, in conflating his liberal market economy ideal with the very definition of the RoL²⁰.

The RoL prescribes only *legal* features. It does not ask for the law to bear some specific content, the good law, nor does it claim to dictate the internal form of the realm of power (for example, that power be organized democratically). RoL means respect for a legally desirable situation, in which- in the pursuit of the fundamental aspiration of liberty which is the root of the notion- dominating law appears to be contestable, as a matter of law, on the basis of some independent legal force and institutional structures in the interest of everyone. Let me briefly explain this assumption.

In general, an enlightening route should better be faithful and reflective of the historical records of the “RoL” ideal and the ways through which it has developed at least since XIII century, through, say, the XIX century influential account by A.V Dicey to the present debate²¹: as a general caveat it should be born in mind that the RoL ideal through this itinerary refers to features that the law is wanted to embody, mainly in order to insure protection from a monopolising legal power and on the basis of some positive law which is factually and legally located beyond the reach of the sovereign and his sheer whim. What the English tradition provided, through counterbalancing sovereign law by judicial precedents, the common law, *consuetudo* and conventions belonging to the law of the land, had been barely available in the European continent, where it was substantively erased by the experience of codification and the dogma of legislative supremacy. Records may be resumed showing the RoL rationale as one referred to (and to be based on) a *duality of law*, where some other *positive* law, beyond sovereign’s law, exists which escapes the purview of the dominant exercise of sovereign jurisgenerative power. In its medieval roots, the law was deemed to be only partly “gubernaculum,” i.e., under the will of the sovereign. It was also, partly, “jurisdictio,” where the fundamental laws of the land stand beyond the sovereign’s reach, as McIlwain reminded us²². That *duality* is visible in subsequent times, mainly in the constitutional couple of rights and legislation as terms endowed with equal standing. In continental Europe one can fairly say that such an achievement, finally granting equal force to rights before legislation, was reached only recently, due to the constitutional restructuring of the legal state in the second half of XX century. However, such a rationale shows a *fil rouge*, a scheme of balance, of legal non domination, that can have varied institutional incarnations. The pre-constitutional XIX and XX century *Rechtsstaat* in continental Europe can be shown as in itself non arbitrary, rule-based, hierarchically rigorous, one where the administration of power was

²⁰ J. Raz, “The RoL and Its Virtue” in Id., *The Authority of Law*. Oxford: Clarendon Press, 1979, p. 227; See Friedrich Hayek, *The Road to Serfdom*, London: Routledge, 1944. And Id., *The Constitution of Liberty*. Chicago: Chicago University Press 1960. Wilhelm Scheuermann, “The RoL and the Welfare State. Toward a new Synthesis”, in *Politics and Society*, 22:195–213 (1994).

²¹ Cf G. Palombella, ‘The RoL as an Institutional Ideal’, supra at note 15.

²² Charles McIlwain, *Constitutionalism: Ancient and Modern*, Ithaca, Cornell University Press 1947, pp. 67-92.

submitted to legislation alone, and nonetheless far from the distinctive rationale of the English “RoL” root²³. The latter, in turn, compared to the Legislative power of the continental European State, prevents the sovereign legislation from being the sole source of the law. The true reason why a sovereign’s action can be neither “unlimited” nor “unbridled,” is that beyond the free (and legitimate) exercise of “gubernaculum,” a “jurisdictio” side of law has positively developed, which lies beyond his reach.²⁴

For these very reasons, it is likewise inadequate a description of this normative ideal that quintessentially focuses on its procedural²⁵ quality. No doubt, procedure and non-arbitrariness might go hand in hand. Nonetheless, even if procedures might allow for participation, empower citizens, enhance their dignity, this hardly can be different either from the listing of requisites for a legal order to properly function (Fuller) or from instilling through procedures democratic presuppositions. Moreover, in the absence of the characterising feature of the RoL, procedures would only achieve the good (if any) that can be provided through the substantively unbridled choices of the sovereigns²⁶. If in truth the RoL does not afford any specific contents in the posited norms (unless it slips into the “rule of the good law”²⁷), nonetheless, it requires another law (be it procedural or substantive, or both) where separate and independent sources can lay down counter-limits and guarantees. It is this equilibrium as such that fosters both the right/ duty of the sovereign to rule, and justice, safeguards of individual expectations, minority rights. Thus, it can be said that the ideal refers naturally to preventing monopoly over the sources of law, and the subsequent *legal domination*. It refers to (and is in need of) the existence, within a legal order, of some *other* positive law which stands on a somehow separate side, either belonging, say, in the “common law” as with the English tradition, or receiving a supra-legislative guarantee by a constitution, and so forth, whatever institutional instruments might be required from time to time for that result to be feasible. For instance, the sheer fact that some rights are actually provided by law is not determinant or decisive for the RoL to be realised. The issue of the RoL depends upon the existence of an autonomous guarantee of rights, norms, and any other principles of law, one that would defend them from being legally cancelled on the basis of some

²³ I dealt with the issue in my “The Rule of Law and Its Core”, in G. Palombella, N. Walker, (eds.) *supra* note 19.

²⁴ In the case of the constitutional liberal democratic state, owing to the equal force eventually granted, by way of a constitution, to rights and other principles on one side *and* the democratic principle of legislation on the other.

²⁵ J. Waldron, “The Rule of Law and the Importance of Procedure”, in G. E Fleming (ed), *Getting to the Rule of Law*, New York, NYU Press 2011, pp. 3-31.

²⁶ See what, unobjectionably, writes (in a comment on Waldron’s article *supra* note 25) R. West, “The Limits of Process”, in G. E Fleming (ed), *Getting to the RoL*, New York, NYU Press 2011 p. 42: “Procedural justice, in other words, can be *demoralizing*. After all, you had your day in court, what’s to complain of? The procedural justice, then, strengthens the system by legitimating it, all the more so in an unjust regime. If that effect – the legitimizing effect, for short – is substantial, then the procedural justice of a trial in an unjust regime may perversely increase the overall injustice of the regime, making it all the more invulnerable to change, whether through politics, revolution, or subterfuge. A legal system that abides by the RoL, where the latter is defined by reference to procedural criteria, is not necessarily thereby more just. When it isn’t, it’s not clear where the value of all that procedure lies, other than in the fodder it provides modernist writers”.

²⁷ J. Raz, “The Rule of Law and Its Virtues” (1977), in Id., *The Authority of Law*, Oxford, Clarendon, 1979, p. 267.

sovereign legislative authority. The point is in such a tension and balance of the two sides, through the existence of an 'independent' law, due to the fact that the most powerful rule-maker could not modify it in a legally legitimate capacity²⁸.

3. Rule of Law in supra-state scene

Of course, the concept concerns the composition and sources of law, not of the State, and its scheme, as such, can be referred to the transnational setting as much as to the domestic order. Indeed, on the supra-State arena, its normative meaning is persisting, unless one does conflate an ideal concerning the law into a notion centred upon the State and some of its special characters (as it is done by normally translating the RoL into *Stato di diritto*, and its equivalents). What is distinctive is not the limitation of the State through law, but more properly the *limitation of law through law*.

In the supranational sphere it seems rather common to stress what should be called the *Rule by law* dimension, an insistence that is premised on a (sometimes justified) prejudice in favour of the good values of which the international order is the holder *vis à vis* reluctant States; and not much differently the same presupposition supports the primacy of European law over its Member States, thereby simply asking addressees, States in particular, to "obey the law". As it is suggested: "They should treat it as authoritative and let it guide and constrain their actions"²⁹. Such an interpretation possibly misunderstands the main problem of the RoL and risks being unfaithful to its import, since it overlooks the contingency of the good embodied in the rulings of any supranational actor. It also sets aside the Hobbesian³⁰ truth, behind the auspice that the sovereign be *subject to its law*: that is, the fact that sovereigns are *ceteris paribus* entitled to make the law themselves, and to change it at their will; and all the more so in the international environment. In this sense, such a Rule *by law* concept would hardly make sense of the motto, *the Rule of Law, not men*³¹. If one follows the reconstruction of the concept, for instance taking account of a line drawn by scholars like Haskins, Goodhart, and Reid³², the RoL stands in contrast against the rule *by law*³³, excluding thereby that a simply instrumental use

²⁸ Likewise, such a guarantee should insure at the same time the full jurisgenerative governmental power to pursue its political visions of the common good, without being undermined in its own sphere by some tyranny of traditional forms of inherited legality, and the like.

²⁹ Matthias Kumm, 'International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model', in *Virginia Journal of International Law*, 44, 2003, p. 22.

³⁰ Th. Hobbes, *Leviathan*, edited by M. Oakeshott, Oxford: Basil Blackwell, [1651] 1946, ch. 46, part 11.

³¹ More about this in G. Palombella, 'The Rule of Law as an Institutional Ideal', *supra* note 15.

³² Arthur L. Goodhart, 'The Rule of Law and Absolute Sovereignty', *University of Pennsylvania Law Review*, 106 (May 1958), 947. Philip Reid, 'Rule of Law: The Jurisprudence of Liberty in the Seventeenth and Eighteenth Centuries', DeKalb, North Illinois Univ. Press 2004; George L. Haskins, 'Executive Justice and the RoL: Some Reflections on Thirteenth-Century England', *Speculum*, 30, (1955), 529.

³³ Such reference to the RoL as a rule *by law* is often held: for example, M. Kumm, *International Law in National Courts: The International RoL and the Limits of the Internationalist Model*, *supra* note 29. Or S. Beaulac, "The Rule of Law in International Law Today", in G. Palombella, N. Walker, *Relocating the rule of Law*, *supra* note 19.

of law be taken as the appropriate interpretation. On the contrary, at issue is precisely that the law is built in an institutional context where it is not simply up to the most powerful Masters of Treaties, or to the omnipotent global regulators, and there is a legal side that the latter have no authority to reverse. This could hold true, of course, in any supranational order that is built upon some fundamental primary laws, principles, and rights deemed of higher rank, and working in fact as criteria of recognition of legality and validity of other norms. It can at the same time appear in a two levels system, depending on the legal capacity of the plurality of member states' orders to interact on a confrontational stage: that is, on the basis of legal reasons, balancing, proportionality, margin of appreciation, equal protection, and similar argumentative topoi, operating, if needed, in the place of a hierarchically ordered formalist monism. All the more so, in an international environment where supranational entities, or even worse, a number of politically deracinated 'global regimes', unaccountable to their addressees³⁴, purport to regulate an indefinite array of peoples, individuals, states, and to pursue straightforwardly some field-related and one-sided normative power.

Of course, this claim about the logics embedded in the RoL does not match those narratives that are content with listing the features that the law needs to embody in order to be law, thereby overlooking much of the issue at stake, not least the problem of the monopolization and instrumentalisation of law.

4. Diagnoses and justification

4.1. Although in the records of the European Union there is poor traces of such a complexity of the RoL, one should take seriously its attachment to it, and the autonomy of the RoL within a provision as art 2 TEU, that mentions the RoL in particular, alongside human rights and democracy. Of course, a RoL crash in a Member State is correctly identified through structural deficiencies. However, and accordingly, their reparation is impossible to pursue *only* thanks to the diligence of a Court, a supranational commission, and the like. It can affect the identity of a legal order, and as a consequence liberty, democracy, rights, and everything else. Although the cure and the pursuit of new equilibria does not come from the simple impulse of a Court's sentencing, admittedly a Court can anticipate and foster them, and arguably, it can work directly on some consequences of the problem, first of all, as Andras Jakab³⁵ would have them, in protecting fundamental rights.

Some serious indicia of a RoL crisis in the continent have been described in a few circumstances and a regret has been voiced for the insufficiency of the device allowed by art. 7³⁶, that leaves too

³⁴ Cf. my 'Global legislation and its discontents', in J. Petman, R. Livoja, *International Law Making*, Routledge, London, 2013.

³⁵ See Andras Jakab's paper for C. Closa, D. Kochenov (eds), "Reinforcing Rule of Law Oversight in the EU", Cambridge University Press, *forthcoming*.

³⁶ Accordingly, suggestions are proposed on how to resolve the issue, K. Scheppele paper for C. Closa, D. Kochenov (eds), "Reinforcing Rule of Law Oversight in the EU", Cambridge University Press, *forthcoming*.

much to *political* discretion and negotiation; as it is said, the enforcement of the RoL throughout the Member States, lacks an efficient safeguarding tool.

It must be noted, though, that the absence, the risks, or the gross violation of the RoL in a country are often more than what the EU might manage as an administrative issue. It might even be taken as a governance problem, of the kind that can be inquired upon through the list of indicators, that experts, committees, commissions, agencies and epistemic authorities of means-efficiency can straightforwardly identify and apply. But simply putting a State on trial or submitting it to economic sanctions, in the neutral form of governance edicts, might be, in one or another way, necessary perhaps, and still disappointing: does it end here what we should expect 'our' European Union to do?

Again the case of gross infringement of art.2 EU should mean that a country has lost its capacity to protect its tension between *gubernaculum* and *jurisdictio*, it has made one to prevail over the other. Not that the limitation of the sovereign power is always what is needed: it can well be the reverse. In some central-European countries it might have been, in the recent past, that the *modernization* through law and new parliamentary legislation have been the progressive and civilizing part, curbing and reshaping the normative fabrics of the land, overwhelmed with traditions, pre-modern legal institutions, ethical barriers, economic privileges, old aged cultural prejudices. This can make us more cautious in simply following stereotypes, since the RoL is the search for an equilibrium that must be preserved, but admittedly it is an idiosyncratic matter, and some RoL factors can of themselves remain opaque to indicators.

And we should bear in mind that often conservatives and neo-liberals fear the "injection of any substantive concerns into adjudication or discretionary authority in administration" as a threat to a full-formal idealised rule of law; while radicals complain about the de-regulatory effect of legislative indeterminacy, delegation to the Executive, and the like.³⁷ As Krygier writes: "That suggests that not every potential source of threat to the rule of law will be equally salient in different legal orders: some will be much threatened, others less so, by the same things. It also suggests that different threats might require different defences. Not to mention that we might want to do more than ward off threats"³⁸.

The proof of a RoL crisis is a high threshold. This notwithstanding, in her speech³⁹ of September 2013, Viviane Reding, the EU Justice Commissioner, suggested to improve the action of the EU in reinforcing the RoL by allowing the CJEU to hear cases regarding Article 2 TEU, that is, concerning alleged breaches of the RoL principle. It has been fairly noted that according to such a proposal (along with others exposed in that speech) "the Court could henceforward hold Member States accountable not only for the breach of concrete provisions of EU law, but also of vaguely defined 'values', which

³⁷ Krygier, 'Transformations of the Rule of Law: Legal, liberal, and neo-', p. 21 [WP available in draft at <http://www.kcl.ac.uk/law/research/centres/kjuris/papers/Transformations-krygier.pdf>]

³⁸ Ibidem.

³⁹ Viviane Reding, *The EU and the RoL – What next?*, at http://europa.eu/rapid/press-release_SPEECH-13-677_en.htm

include not only the RoL, but also ‘non-discrimination’, ‘pluralism’, ‘solidarity’, or ‘tolerance’.” As a consequence the CJEU would be turned into “a judicial super-institution with nearly unlimited powers to use those vague concepts as a pretext for interfering everywhere and at all levels. This would be the end of Member States’ sovereignty”⁴⁰. The warning and the remedies have been criticized also on the basis of the contestability of the *diagnosis* on which they are premised: that is, it appears to be controversial that problems arisen in France, in Hungary and in Romania in the last years represent structural failures of the RoL⁴¹.

The above considerations might well lead to appreciate instead that the handling of art. 7 TEU, and the devices provided therein, seem to entrust the political capacity of the EU *vis à vis* the Member States, instead of prompting an easy and ready made legal or technocratic guillotine. The ‘infringement’ of the RoL requires counter-measures that should be working internally at a deeper level, cannot be simply imposed from an external authority alone. In the latter case, the RoL has been often understood in couple with some other goods, whose promotion it is supposed to determine, in most cases, economic development, democracy, human rights, social welfare.

The recent case of an overwhelming popular majority achieving the capacity to alter previous constitutional structures and guarantees (in Hungary) might be seen in its different sides: on the one side, its fidelity to a formal principle of legality, on the other, the dangers for political rights of minorities, for the independence of the judiciary, the risk that a non-dominant social culture be oppressed or discriminated against, the risk that constitutional checks and balance be erased, and the like. The example proves, regardless of the accuracy of the diagnosis, that the RoL criterion and the conception behind it largely exceed law-obedience and judicial review. Therefore they overtake the idea of legality for which the EU as an autonomous entity has been exemplary, one that is yet too thin and not sufficiently developed: conceptions of the RoL based on unqualified procedural requirements, even including the availability of judicial guarantees, are elusive and would capture the idea of a well-established, rule-channelled, obeyed legal order, and still, not yet our intuition of a RoL proficiency. It is a good set of parameters or litmus tests, on the contrary, the one that recalls especially pervasive corruption, abuse of power, and the ‘unconstitutional’ use of a constitution⁴²: properly so, since among diverse causes, what makes it possible for the RoL to disappear is a disfiguring use of legality (the ‘abuse’ of the power or of a right, to the pursuit of aims for which the power or the right were not

⁴⁰ Jakob Cornides, ‘RoL or rule of judges?’, *EJIL Talk*, at <http://www.ejiltalk.org/the-european-union-rule-of-law-or-rule-of-judges/>

⁴¹ Ibidem.

⁴² Carlos Closa, Dimitry Kochenov and J.H.H. Weiler, ‘Reinforcing RoL Oversight in the European Union’, *RSCAS 2014/25 WP*, p.4: “Three profoundly interrelated criteria could be employed as key signs of which kind of problems we are witnessing. The first is Jan-Werner Müller’s ‘constitutional capture’ – a problem, which was spreading through the region and beyond the EU as well, also characterised as unconstitutional constitutionalism or a constitutional *coup d’Etat*: a profound reshuffling and abuse of power through perfectly legal means. The second criterion is the general dismantlement or profound undermining of the liberal democratic state and the third is a reference to systemic corruption, which can be an overwhelming problem undermining Article 2 TEU compliance”.

meant)⁴³, along with the substantive immunization of normative power from those obligations and limits due to other laws and guarantees that the ‘sovereign’ in theory cannot himself overwrite.

4.2. Once made an agreeable diagnosis, the issue comes of the grounds on which the EU should be (before the people in a Member State) entitled to dictate substantive RoL measures within a member country, that do not attach to the infringement of any other law of the EU itself.

The main, genuinely ‘European’, justification for such EU interference into a Member State domain should simply be in the relevance of the peoples and individuals directly to the Union as an autonomous supranational ‘unity’. Admittedly, indicia for the ‘europeanization’ of categories previously coped with as inter-borders problem, have been laid down, eminently by the ECJ, and meaningfully with regard to citizenship⁴⁴.

The quality of a distinctive EU RoL, as an ultimate safeguard and a template of reference should come to the forefront. Of course, since ‘being normative’ (toward the MSs) for the EU implies being itself consistent (between its own ‘supranational’ behavior and the requests that it imposes onto the Member states)⁴⁵, whatever has been taught by the EU (internal) practice should be made the interpretive example of the RoL, a judgmental criterion, from the monitoring European institutions. But all in all, the main aspects of the RoL propounded in this realm, concisely amount to the idea of vertical legality (on a mainly market driven viability) and to some not fully defined RoL as a system-relative notion (cf. *supra*, Kadi, ECJ). Moreover, some relevant further aspects are in order: the chronic lack of legal (let alone political) accountability of EU itself, particularly in its substantive governance mode (especially in the well known infra-structure of agencies and comitology), decision making process’s relative independence of legal review, let alone the innovating practice stretching the limits of legally legitimate powers in the times of financial crisis. It is since some time remarked that the functioning structure underpinning the survival of the EU governmental strength is relying upon those varied “modes of governance” that “tend, albeit to varying degrees and with important differences, to cut themselves free of legal ties.”⁴⁶ All in all, it is because of this that Beck and Grande could describe, in the increasing weight of the Executive administrative power, the EU “as a decentralized, territorially differentiated, transnational negotiation system dominated by elites”⁴⁷.

All the above is not in itself a better proxy to European citizens than the deficiencies or failures in the RoL within Member States. And it is equally complex for the EU to propound a valued ideal

⁴³ G. Palombella, ‘The Abuse of Right and the Rule of Law’, in A. Sajo (ed.) *The Dark Side of Fundamental Rights*, Eleven Pub., 2006.

⁴⁴ Case C-135/08 Janko Rottmann v. Freistaat Bayern [2010] ECR I-1449; Case C-34/09 Gerardo Ruiz Zambrano v. Office national de l’emploi (ONEm) [2011] ECR I-1177.

⁴⁵ Not by chance that is one of the 8 Lon Fuller’s requirements for *the law to exist* (see *supra* note 17).

⁴⁶ Ch. Joerges, ‘How the Rule of Law might survive the new turn to Governance’, in *RECON WP 9*, 2007, p. 2.

⁴⁷ Ulrich Beck, Edgar Grande, *Cosmopolitan Europe*, Polity Press, London, 2007, p. 53.

phrasing it through requirements of thicker import than that which itself has practiced on a very thin interpretation. So, a vicious circle surfaces: the deep justification for a RoL oversight reinforcing by the EU can be traced back to the protection of persons *as Europeans* and is pointed upon the aspiration of the EU to be- and grow up as- an autonomous polity and an autonomous legal order. But the RoL records of such a supranational entity, made of peoples and individuals (not just by Member States), would hardly be seen as fully credible and reliable. For the EU can certainly be a RoL *guardian* over its Member States due, among the rest, to associative obligations already agreed upon by States: but to be such a guardian is much different from being itself the *justification* and the ultimate reference, the space of citizenship of its peoples and of each Europeans, independently of the authority of their national States. In this case, the European citizens should be met by EU exemplary RoL evidence and reputation: something that they would now barely recognise.

5. Nature (and limits) of the Democratic caveat

5.1. Such a weakness is not to be conflated with the lack of democracy in the EU: it is, if any, a question of RoL ideal and practice, a RoL deficit. Indeed, for normative and historical reasons, there is no necessary coexistence between the two ideals nor between the two deficits; and it is true that recent events like those in Hungary are thought of as a *contrast* between democratic power and the guarantees of the RoL; and even in the EU, the two are dissociated: one might think that democracy is faded while the RoL is in strength⁴⁸, although for independent reasons, this is disputable, as reminded above. Nonetheless, the foregoing considerations pave the way to questions about the democratic problem and its relation to a European RoL enforcement, a controversial subject where understandably opposite stances are confronted. In response to comprehensive theories of the RoL as embodying every kind of goods, from rights to democracy, welfare and social guarantees, it is worth repeating that democracy and the RoL are different things, and if the first concerns the organization of legality in a given context, democracy concerns the organization of the political power of the sovereign. Indeed, to put it bluntly, the RoL might even be followed by States where political authority is not democratically organized: so it has been in the past, and can be in the future as well. However, let me first remind- before the questions of democratic caveats be put the forefront- that the RoL issue in a supranational entity, or a two level system, on one hand means an interference against the autonomy of a Member State because it requests that domestic legal configuration be conforming some externally defined RoL template. On the other hand, it firstly demands consistency between the two levels. It is naturally a reflexive instance of the RoL notion⁴⁹. Being the RoL a constitutional domestic ‘value’

⁴⁸ As J.H.H. Weiler does with the auspice that a EU RoL be accompanied by a democratic support now lacking. Cf. his contribution (on which I return infra): Carlos Closa, Dimitry Kochenov and J.H.H. Weiler ‘Reinforcing RoL Oversight in the European Union’, *RSCAS 2014/25* WP

⁴⁹ I am not suggesting here that for the RoL to be respected in the MStates, the EU needs to be better founded on democratic basis. As I shall later on remark, depending on the conception of the RoL, it can be a shared value even regardless of the democratic nature of a supranational organization.

itself, it can be argued by a State that it *is* complying with ‘internal’ RoL, even if it is blamed for not complying with International law or the European law. This hypothesis has been often current in the *sui generis* relations between powerful countries, like the United States and (the rule of) *international* law⁵⁰. However, the case of art. 2 TEU bears the special feature of imposing the Member State respect for the very RoL that is relevant *inside* the domestic domain, that is, the content of the European law to be complied with (art. 2 TEU) *is domestic* RoL itself. In fact, art. 2 TEU- in conjunction with art 7- amounts to a meta-norm whose infringement arises precisely in the two levels at the same time. The only way to avoid an instrumental use of the RoL as a self-protecting shield lies in the convergence upon a ‘transitive’ meaning of the RoL as a common denominator among the two levels, as the one I have suggested in the above sections of this chapter.

In general, there is a familiar trend within these circumstances: constitutional arrangements regulating the connection between one legal system (a country) and a supranational order lay down a kind of pre-commitment: as it has been particularly evident in the central-eastern European States involved in the EU enlargement, such a pre-commitment to the EU norms and values is expected to work in the same way as a Constitution on the whole does: that is, by defending ourselves domestically even from our own changes of opinion, majorities, and contingent political oscillations. In this sense, the constitutional domestic *acquis* providing for a commitment to European (or international) law turns to be “a means of locking in policies”⁵¹. The expression was also used to explain how new European democracies entered into international treaties with a view to pre-committing themselves (domestically) to protecting, or in other words, “locking in” human rights.⁵²

On the other hand, it is to be noted, that differently from the case of International law, Member States in the EU have no room for choosing which varied forms of allegiance and what interfacial rules of validity, direct effect, incorporation and the like should channel their external commitments *vis à vis* the supranational order, and they cannot make use of interfacial devices that allow them, say, to postpone incorporation (think of the UK Human Rights Act , 1998), or limit it to those only issues capable of easier appropriation.

The reflexive nature of the EU *RoL* problem is located in this context, one that necessarily has to revolve around some continuity of meaning between the two levels at which the RoL applies. Tensions concerning the RoL in the two level scene might certainly stem from gross infringement and violation, but they can as well originate from an oblique use of the concept and an unshared understanding of it.

⁵⁰ Cf. my comments on the U.S. Supreme Court “(this is the RoL in this jurisdiction”) decision *Hamdan v Rumsfeld* (2006): cf. G. Palombella, *The Rule of Law beyond the State: Failures, Promises and theory*, supra at note 13.

⁵¹ T. Ginsburg, ‘Locking in Democracy: Constitutions, Commitment, and International Law’, *New York University Journal of International Law & Politics* (2006), 38, 707–60, at 757.

⁵² According to Andrew Moravcsik, the origins of the European Convention on Human Rights lie in “self-interested efforts by newly established (or re-established) democracies to employ international commitments to consolidate democracy, ‘locking in’ the domestic political status quo against their non-democratic opponents.” (‘The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe’, in *International Organizations*, (2000), 54, 217–52, at pp. 243–4).

It should be pointed out that, to a certain extent, the authority to scrutinize and order compliance with the RoL to a member country, is not founded upon the internal democratic nature of the EU (although it could well be highly supportive), but before that, on the credibility of the EU as a RoL actor (as I submitted *supra*).

5.2. Now, however generated, those tensions, all the more if not solved by calling upon the authority and credibility of the EU, are inevitably facing a democratic caveat, one difficult to manage since precisely the EU is seen today in a ‘democratic default’⁵³ (the up to date version of the democratic deficit). Notably, paradoxes are stressed arising from the effect of RoL stringency in conjunction with democratic weakness in the EU: in other words, the RoL “has the paradoxical effect of objectifying [the individual] him or her – an object of laws over which one has no effective democratic control. [...] the RoL underpins, supports and legitimates a highly problematic decisional process”⁵⁴. While substantively the RoL in the EU works by supporting individual economic rights (“in some measure at the expense of democratic legitimation”), procedurally this is reinforced through the “genius” of the Preliminary Reference, allowing individuals to resort to the EU in order to contrast against domestic decision making⁵⁵.

These comments upon the paradoxes of the *combined effect* of RoL effectivity and political/democratic deficit are (a) underpinned by the general idea of RoL as a principle requiring obedience to law and to Courts’ decisions. Moreover, they presuppose the conviction that, being the RoL revolving around legality and compliance, (b) it cannot stand on sheer coercion, but needs a *political* culture, that is, a sound democracy to sustain it. Within this line of reasoning, are pointed out the scarce democratic credentials of the EU in asking for States to respect RoL values.

Despite the intuitive soundness of this narrative, some further considerations are however in order.

Let us ask whether, in principle, democracy can definitely solve a RoL problem. In some views, this holds true, simply because the RoL is just a consequence, it all depends on whether a poliarchic⁵⁶ society or a republican⁵⁷ polity are established. Legal features add nothing decisive, they are the

⁵³ G. Majone, ‘From Regulatory State to a Democratic Default’, in *Journal of Common Market Studies*, 2014, 52, 6, pp. 1216–1223.

⁵⁴ Weiler in Carlos Closa, Dimitry Kochenov and J.H.H. Weiler ‘Reinforcing RoL Oversight in the European Union’, *RSCAS 2014/25 WP*, p.28.

⁵⁵ *Ibidem*, p. 29: “Preliminary Reference always posits an individual vindicating a personal, private interest against the national public good.”

⁵⁶ S Holmes writes: “the degree of justice or injustice depends on who wields power and for what ends” (‘Lineages of the Rule of Law’, in J. Maravall A. Przeworski, (eds.), *Democracy and the Rule of Law*, CUP, Cambridge 2003, p. 51. I am *not* meaning here that Weiler’s considerations, resumed *supra*, maintain this view, nor that they assume the ancillary or merely consequential nature of the RoL.

⁵⁷ Likewise, it is remarkable that even in Philip Pettit (‘Law and Liberty’ in S. Besson and J.L.Marti (eds), *Legal Republicanism*, Oxford: Oxford University Press, 2009) the reason for legislation to be non dominating (as a *fil rouge* with Pettit’s republican theory) is not traced back to the existence of some law or legal device which accomplishes its own separate task. On the contrary it is directly derived from the transformation of law into a faithful instrument of

epiphenomenon. This amounts to saying that the service of a RoL bears no specially legal quality, nor a distinctive normative resilience even in the fading of other non legal determinants, since it derives as an automatic result out of the political sovereignty and its organizational structure. Accordingly, the sovereign is bridled (RoL) if he is organized through ultimately *political* constraints, otherwise the RoL would simply mean to be under a law that he can change for the worse at his whim (the Hobbesian paradox); the RoL is still in his hands instead of being, as I have submitted, a balance of dual sided legality, a limitation of the *rule-making* by another positive law that the holder of ruling power cannot overwrite. In such a view, a RoL ideal means a political culture, *not* a distinct culture of *legality* that places jurisgenerative authority in more sources than just sovereignty (whoever holds it). Here the circle comes to close with that kind of (illusory) RoL that can be used to provide legitimation, lip service, and enhance the good or the bad, whatsoever, that a political fabric can afford. The accordingly better suited RoL notion can actually end up into a matter of procedural regularity, judicial review, obedience.

Although Weiler's caveat implies the relative autonomy of the RoL from political democracy, nonetheless it is itself likely to presuppose this latter RoL conception, one that, among the rest, tuned as an individualistic resource, can trigger anti-democratic consequences. This explains the mentioned perverse effect allegedly generated by the combination between democracy failure and legal-RoL efficiency.

As I submit, no doubt about democracy deficit, nonetheless, there is no gain in overlooking the potential of a different, sound and mature conception of the RoL, since what should be contrasted against, in the first place, is the chronic downplaying of its normative ideal, a downplaying that proves to be the best means to allow for a RoL reduction to merely instrumental shield of power.

Moreover, and back to the democratic problem itself, how far is it true that whatever RoL notion in a two level system (and elsewhere) can justify itself and its viability only under the condition that it has got some democratic basis? This assumption might be seen as implied in the concern as regards the imposition to a member state of RoL compliance from an undemocratic European Union: "Those living in glass houses should be careful when throwing stones"⁵⁸.

In my view, the caveat would first be better apposite with reference -and as one addressed- to the *RoL deficiencies* of the EU itself, as recalled supra. As to the 'democratic' ones, the answer, if we scratch the surface, might be less certain. Let me make this point.

Needless to say, insofar as democracy and the RoL can support and mutually strengthen each other, they are both desirable and largely compatible. Nonetheless, the RoL asks for some law to face, limit,

(Contd.) _____

societal ruling. Once the ruling power is democratic in the recommended sense, then this turns out to be fortunate and produce good law.

⁵⁸ Weiler in Carlos Closa, Dimitry Kochenov and J.H.H. Weiler 'Reinforcing RoL Oversight in the European Union', *RSCAS 2014/25 WP*, p. 29

and counterbalance the holding of jurisgenerative power, regardless of its political forms, structures, and of those who wield it. Accordingly, the RoL is endowed, as well, with a conceptual independence from democracy. It applies to and confronts any form of power and government.

Now, what would a full EU democracy do? First, and of itself it shall make political accountability real: a member country, for instance, would have its say in making or changing the responsible representatives in the government of the EU. Second, that would make the EU an entity at least in part politically homologous with the democratic standards of, say, a federal State, or differently put, would make the EU building's walls to be seen by the peoples from an *internal* point of view. If those living in the house should throw a stone, they would throw it to themselves. To buy the metaphor, making the political individual a subject not an object, and realizing a democratic union conceived of as a true common weal, would activate the democratic reflexivity (governing-governed). This could not simply reinforce the glass into an infrangible one, it would make a real difference within the building: turning a gross violation occurring in one country, into one felt as occurring in the very same EU polity. This said, the structure of a two levels system, that numbers among the features of the EU uniqueness, would not disappear. The question of artt. 2 & 7 TEU would nonetheless remain, because the potential occurrences of RoL infringement are located in that other nature of the EU (composite) order where the dialectic between the inside and the outside, the distinction Member state/ the EU re-surface, due to the much valued *unitas in pluralitate*. It is especially in this point that the mentioned "legal non-domination" and balance, quintessentially featuring in the RoL organisation of legality, would provide a relevant service. The RoL should be cooperatively improved so to reflect a transitive criterion between the two levels, and multiple orders, whose legally ostensible arguments are equally required of supranational and national actors, so to connect homogeneously unity and differences intersecting the whole system, more than a top-down authoritative integration among legalities.

Of no less importance, a fully democratic *control* over the EU establishment and decision making by (perhaps some) Member State (s) does not imply in principle either a better RoL quality *in the EU* or a minor political resistance by a State against the potential intention of the supranational institutions to raise a RoL issue towards it. It is unpredictable if it might be always better or worse.

At this point, the issue of the EU as a credible *RoL actor in its own sphere* would come again to the forefront, since we know so far that even democratic organizations as much as democratic States can show deep deficiencies in their RoL records. And not just in principle.

6. By way of conclusion

The moral is that caring about the quality of legality, and the RoL in the EU has to be the first concern in times when definition import and use of the RoL are rather opportunistic, exposed to double standards and easily objectionable. In such circumstances, it can well be presumed that the fight for definitions is itself a matter of power and imposition. But it may be otherwise. The RoL ideal requires

institutional settings that actually can depend on time and context: but they must have in common the coherence with the normative objective that the ideal evokes. As it concerns *the law*, not directly power or social organization, it regards the adequacy of legal institutions to prevent *the law* from turning itself into a sheer tool, a manageable servant to political monopoly and instrumentalism, at home and abroad, in Member States and the Union. The RoL rests on a resilient normative structure, one that is often overlooked by scholarly debates, that embodies the “duality of law”, institutional equilibrium, to be conceived as relevant features bearing on a distinctive *legal* plane. From this point on, the tensions in a two level system should first be coped with by developing a shared awareness of the core matter of the RoL, fostering consistency, and banning double standards.

Without displacing the debate about which devices to activate for the RoL oversight to be reinforced, a further comment is in order: as we have seen, to defend the RoL is not like getting to repair a single rule, or a single right, although this is to be implied. The RoL is the entire picture, seen through the lens of the quality of legality. If a Member State is faced with the charge of infringing art. 2 TEU, formally one single ‘norm’, it cannot just respond by fixing some of its own ‘rules’, but, in so doing, it has to revise its legal system rationale, and rebalance it differently. It cannot either be a question that one strict legal syllogism can channel through single cases. To this regard, the experience of the ECtHR can show instance on the reverse side: when the Court has had to adjudicate some individual rights (a well circumscribed and defined issue compared to the RoL), whose violation by a Member State appeared repeatedly as the surface of a much deeper construction within the country, the systemic nature of the problem led the Court itself to starting a dialogue, step by step, something like a trial and error progress⁵⁹. Although matters of human rights are different from RoL wider questions, it is worth reminding how the Court handled the issue with clarity and firmly but at the same time with patient ‘political’ sensibility. In my view, and *mutatis mutandis*, the example can be of help, as a start, for our European institutions to understand a RoL problem as that which always calls to the question of *how to become the one who can cast the first stone*, and how to cure something in principle overflowing the capacities of techno-administrative governance and strictly judicial weapons.

⁵⁹ Examples of ongoing refinements and dialogued assessments come from the practice of the ECtHR, for instance, in the instructive saga of Polish rent-control cases concerning property rights under rent control legislation, that involved an ongoing process of moves and dialogues among the Polish Constitutional Court, the ECtHR and the Parliament: On which L. Garlicki, “Cooperation of courts: The role of supranational jurisdictions in Europe”, *International Journal of Constitutional Law*, 6, 2008, pp. 514 ff. Lech Garlicki considered the communication among courts, both horizontally and vertically, which is an essential aspect of rights protection, in a ‘triangle of cooperation’, to be carefully cherished: “there is always a potential for collisions, and then the triangle of cooperation may degenerate into a ‘Bermuda triangle’ in which individual rights and liberties might simply disappear” (Ibidem, p. 512).

Author contacts:

Gianluigi Palombella

Scuola Superiore Sant'Anna,

Istituto DIRPOLIS

Piazza Martiri della Libertà, 33- PISA

Email: g.palombella@sssup.it