

INTRODUCTION: OBSERVING THE RULE OF LAW IN THE EUROPEAN UNION - SELECTED ISSUES

With the ratification of the founding Treaties of the European Communities and the subsequent Treaties which define today's European Union, a new legal order has been created which is distinct both from national law and public international law. In one of its most celebrated early judgments the Court of Justice of the European Communities (ECJ) pointed out that by contrast with ordinary international treaties, the EEC Treaty [now EC Treaty] has created its own legal system which has become an integral part of the legal systems of the Member States and which their courts are bound to apply. A central characteristic of this autonomous legal order is that not only Member States are its subjects, but also their nationals. European law imposes obligations on individuals and confers upon them rights which become, as the ECJ has put it, part of their legal heritage. Mainly through the development of the doctrines of supremacy and direct effect of Community law, arguably the two most important constitutional cornerstones of today's supranational legal order, a complex multidimensional system of governance has emerged, in which both Member States and the European Union act in a law-making and executive capacity. Ensuring the democratic legitimacy and legality of the exercise of power, as well as the protection of the rights of individuals, in such a system is much more complex than in a state context.

The concept of the 'rule of law' is anything but well-defined, despite its wide acceptance and application. Indeed, while practicing lawyers, judges and legal scholars make regular reference to the concept, its actual scope and implications in today's legal systems is rather vague. Different approaches have been identified in the relevant literature which categorize the several and sometimes rather diverse elements into formal, substantive and functional definitions of the rule of law.¹ In search of a quantification of the phrase 'rule of law' Lord Bingham, former Lord Chief Justice of England and Wales, has suggested that the core of the rule of law should be

¹ For a short but informative overview see e.g., World Bank, 'The Rule of Law as a Goal of Development Policy' at <http://go.worldbank.org/DZETJ85MD0> (accessed 7 December 2008).

... that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts.²

He identifies a number of elements which are useful in further defining the scope of the rule of law: accessibility, intelligibility and predictability of the law; limiting the exercise of discretion in questions of legal right and liability in favor of the application of law; non-discriminatory contents and application of the law; adequate protection of fundamental rights; right of unimpeded access to a court; exercise of state power within boundaries of law and possibility of effective judicial review; fair and transparent adjudicative procedures; observance of obligations in international law. Summarizing these elements it may be observed that the rule of law amounts to ‘... a system that attempts to protect the rights of citizens from arbitrary and abusive use of government power.’³

These elements of a legal system combine a formal with a functional approach to the rule of law, in that they do not only describe certain characteristics of the law or the legal system, whose presence or absence can be objectively observed and whose presence is considered desirable, but also allows for an assessment of how well a legal system performs certain functions which are believed to form a prerequisite for the rule of law. Prominently absent from Lord Bingham’s definition are elements more closely linked to the notion of democratic government. Indeed, the question whether democracy or democratic government forms an essential element of the theoretical concept of the rule of law remains subject of debates. However, in the constitutional reality of the European Union and its Member States, the exercise of power is closely linked to the concepts of parliamentary democracy, the separation of powers, as well as responsible government. In this context the judiciary plays a particularly important role. As was observed by Lord Hope of Craighead in the famous opinion of the House of the Lords of Appeal in the cause *Jackson and others (Appellants) v. Her Majesty’s Attorney General* concerning the legal validity of the British Fox Hunting Act 2004: ‘The rule of law enforced by the courts is the

² The Rt. Hon Lord Bingham of Cornhill KG, House of Lords, *Sixth Sir David Williams Lecture: The Rule of Law* (2006) *University of Cambridge, Centre for Public Law* available at <http://www.cpl.law.cam.ac.uk/past_activities/the_rt_hon_lord_bingham_the_rule_of_law.php> (accessed 7 December 2008).

³ H. Yu and A. Guernsey, ‘What is the Rule of Law’ *University of Iowa Center for International Finance and Development*, available at <http://www.uiowa.edu/ifde/book/faq/Rule_of_Law.shtml> (accessed 7 December 2008).

ultimate controlling factor on which our constitution is based.⁴

The importance of the rule of law in the European Union as a quasi-constitutional principle was recently highlighted by the ECJ in joined cases *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and European Commission*, where the Court had to decide, among other things, whether it was competent to review the legality of a Community Regulation which gave effect to an instrument of international law, i.e. the United Nations Financial Sanction Regime in the fight against terrorism. Answering this question in the affirmative, the ECJ emphasized that

... 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.⁵

Focusing on different relevant topics linked to the rule of law in the European Union, the contributions to the present issue of the *Erasmus Law Review* highlight both the ambiguity and broad scope of this notion, as well as its exceptional place in the European legal order; the application of the rule of law concept to a new, supranational legal order arguably being a contributing factor in this regard. In his contribution Dimitry Kochenov critically analyses the application of the rule of law as a supranational, Community legal construct, rather than a notion borrowed from the legal systems of the Member States. The author builds the case for the adoption of a substantive approach to the rule of law in the European context, emancipated from the different approaches in legal theory in the Member States, and rising above the level of a purely procedural safeguard. Interestingly, it is precisely these procedural safeguards which form the background to the contribution by Rachid Abdullah Khan and Gareth Davies. They pose the rather provocative question, whether one of the most important areas of European law, i.e. competition law and namely the law on mergers, can and should be referred to as *law* in the first place. Based on an analysis of merger control exercised in the European Union, the authors offer evidence for the assessment that actual practice points towards a policy of 'non-legal competition-regulation' that may not be fully subject to the rule of law. Finally, Wim Voermans' paper focuses on the longstanding issue of quality of European legislation. Indeed, poor legislation poses a serious challenge to the rule of law, as it may result in ineffectiveness, non-

⁴ *Jackson and others (Appellants) v. Her Majesty's Attorney General concerning the legal validity of the British Fox Hunting Act 2004* [2005] United Kingdom House of Lords Decisions 56 at para. 107.

⁵ Joined cases C-402/05P and C-415/05P, *Yassin Abdullah Kadi and Al Barakaat International Foundation* [2008] ECR I-nyp21 at para. 281.

compliance and market distortions. Against this background, the author critically analysis the scope and effectiveness of policies and instruments that have been put in place on the European level to improve the quality of European legislation. In this context it is emphasized that the outcome of an assessment of these efforts depends largely on the definition of the basic functions of European legislative instruments and the standards derived from it.

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